UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-22250

In the Matter of

CHOICE ADVISORS, LLC
AND MATTHIAS O'MEARA

Respondents

RESPONSE TO DIVISION OF ENFORCEMENT'S MOTION FOR SUMMARY DISPOSITION

OS Received 02/21/2025

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Respondents Choice Advisors, LLC ("Choice") and Matthias O'Meara ("Mr. O'Meara"), through counsel, Jones & Keller, P.C., state as follows for their answer to the *Division of Enforcement's Motion for Summary Disposition* (the "Motion"):

I. INTRODUCTION

Hundreds of "follow-on" administrative prosecutions are initiated by the SEC each year. In the overwhelming majority of these cases, a bar or suspension is a *fait accompli*.[1] This is due, in no small part, to the fact that the ultimate adjudicators of follow-on actions are the SEC Commissioners themselves. Although an initial decision may be rendered one of the SEC's hand-picked administrative law judges ("ALJs"), no jury or independent Article III judge is involved and many of the ordinary rules of evidence are inapplicable. The SEC seeks in this instance to resolve its enforcement action by summary disposition, depriving Respondents of not only a jury trial but even the non-jury evidentiary hearing ostensibly required by both the Securities Exchange Act of 1934, 15 U.S.C.A. § 78o-4(c) and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 554(b)(1), 554(c)(2), 556. *See generally* Alexander Platt, *Is Administrative Summary Judgment Unlawful?*, 44 HARV. J.L. & PUB. POL'Y 239, 251-59 (2021); Alexander Platt, *Unstacking the Deck: Administrative Summary Judgment and Political Control*, 34 Yale J. on

[1] SEC imposes a bar or suspension in all follow-on prosecutions except the small handful in which SEC is unable to locate and serve the respondent or where the predicate court injunction or criminal conviction is vacated. Urska Velikonja, *Reporting Agency Performance: Behind the SEC's Enforcement Statistics*, 101 CORNELL L. REV. 901, 963, 967 (2016); accord *In re Maher F. Kara*, SEC Initial Decision Rel. No. 979, 2016 WL 1019197, at *7 (Mar. 15, 2016) ("[f]rom 1995 to [March 2016], there have been over forty-six litigated follow-on proceedings based on antifraud injunctions or convictions in which the Commission issued opinions, and all of the respondents were barred—forty-three unqualified bars and three bars with the right to reapply after five years"). As recently noted by one Supreme Court Justice, "[e]ven the 1972 Miami Dolphins would envy that type of record." *Axon Enter., Inc. v. FTC and SEC v. Cochran*, 598 U.S. 175 (2023), at 197 n.1 (Thomas, J., concurring) (quoting Ninth Circuit opinion below in that case)."

Reg. 439, 461-69 (2017) (noting with disapproval SEC's routine and increasing reliance on summary disposition to adjudicate follow-on cases since 2002). Additionally, adjudication of these proceedings by an ALJ will constitute a violation of Article II due to the multiple layers of removal restrictions within 5 U.S.C. § 7521.

Furthermore, even if it were appropriate to resolve this action by summary disposition, SEC cannot demonstrate that it is in the public interest to bar Mr. O'Meara or censure Choice under the factors laid out in *Steadman v. SEC*. 603 F.2d 1126 (5th Cir. 1979). Respondents lack the necessary scienter for such penalties, have taken responsibility for any violations, and have taken every reasonable precaution to ensure future violations do not occur. Finally, the violations asserted are not egregious, especially in the context of actions against similarly situated respondents who have faced penalties far lighter than bar or censure.

II. STATEMENT OF FACTS

A. Mr. O'Meara's Prior Securities Industry Experience

Mr. O'Meara's first registration as a securities professional came in December 2008 when he passed his Series 7, General Securities Representative Examination, and joined the firm B.C. Ziegler and Company. After leaving Ziegler in February 2013, Mr. O'Meara joined Wells Fargo as a Vice President of Government and nonprofit banking. He left Wells Fargo and joined BB&T Securities, LLC on July 1, 2014, where he was employed until May 15, 2018. While working at BB&T, he took and passed the Series 53, Municipal Securities Principal Examination, in September 2014, and the Series 50, Municipal Advisor Representative Qualification Examination, in July 2017. Mr. O'Meara formed Choice in May 2018, and while at Choice he passed the Series 54 Municipal Advisor Principal Qualifications Exam in March 2021. Prior to this action, Mr. O'Meara has had no regulatory complaints made against him and none since. He has never had a client complaint made against him. See Ex. A.

B. Mr. O'Meara's Diligence Amid SEC Registration Obstacles

Mr. O'Meara and Ms. Permenter engaged Kline, Alvarado & Veio, LLC, a law firm which specializes in municipal securities law, to assist in formation, SEC and MSRB registration, and municipal advisor regulatory compliance in April 2018. Ex. A; Ex. B, 21:13-17. The scope of the representation included the preparation of the MSRB and SEC filings, the operating agreement for Choice, the engagement letters for Choice clients, and the municipal advisory compliance protocol. Ex. B 20:24 – 21:12. Paul Wisor, who had previously been registered as a Municipal Advisor himself, was the attorney assigned to the representation. Ex. B 11:2-12. Mr. Wisor's expectation was that once he submitted registration materials to the SEC, the approval process would take a couple of weeks. Ex. B 25:15-26:6. Respondents shared this expectation because both Mr. O'Meara and Ms. Permenter had passed the Series 50, Municipal Advisor Representative Qualification Examination in 2017 and had been registered as municipal adviser representatives with BB&T.

Mr. Wisor encountered multiple delays with the SEC registration system. Mr. Wisor never believed that Mr. O'Meara failed to provide information for the application process, or that these delays were attributable to Mr. O'Meara or Ms. Permenter or their qualifications. Ex. B 29:8-30:6; 30:18 – 31:9; 87:23 – 88:18. By September 2018, the registration process still had not been completed, and Mr. Wisor quit the Kline firm without providing notice to Respondents. Ex. A, 5:3-6. Mr. O'Meara learned of Mr. Wisor's departure from another attorney at the Kline firm several days after Wisor's departure. Frustrated with the delays and failures, Respondents hired a consulting firm, Alternative Regulation Solutions ("ARS"), for their experience with the municipal advisor registration process. ARS prepared an application for Respondents on September 18, 2018, and Mr. O'Meara and Choice were approved within three weeks as originally anticipated. Ex. A, 5:17-11.

C. Understanding of Fee-Splitting Rules and Lack of Guidance

Respondents understand and did not dispute the district court's ruling on the fee-splitting rule. For purposes of remedies, though, it is important to point out the novel, first impression nature of this issue. See Ex. C, SEC Press Release (ECF No. 13-1). Neither the SEC nor the MSRB provided any guidance on the issue of fee-splitting as articulated in MSRB Rule G-42 despite the requests for clarification during the rulemaking comment period. Ex. A, 5:12-13.

Mr. Wisor reviewed the draft Choice engagement agreement with Bella Mente, on a template he had provided Respondents, and he was aware of Mr. O'Meara's prior relationship with BB&T. Ex. A, 4:15-22. Mr. O'Meara understood the fee-splitting rule to prohibit the Respondents' receipt of any of the BB&T underwriting fee, and to prohibit the Respondents' payment of a portion of their advisory fee to the underwriter. Since those circumstances did not occur, Mr. O'Meara did not understand that the negotiation for reduced underwriting fees was fee-splitting and needed to be disclosed as such. Ex. A, 5:12-16. Mr. Wisor shared this view: "I just wanted to make sure that Mr. O'Meara was not getting paid twice, once from - - in an underwriter capacity and once as a municipal advisor . . ." Ex B, 139:18-22.[2]

Mr. O'Meara's disclosure of the relationship between the fees to be charged by BB&T and by Choice (made in writing though not in an engagement letter and not characterized as fee-splitting) was not intended to deceive Bella Mente. All facts concerning the compensation paid to BB&T and to Choice were disclosed to Bella Mente in writing, and Bella Mente was made aware by Mr. O'Meara that the reduction in BB&T's initially proposed fees was made to accommodate for Choice's fees. The district court confirmed this fact in its denial of the SEC's motion for

[2] This view was consistent with the only published relevant decision at the time. *See In the Matter of Cent. States Cap. Markets, LLC*, S.E.C. Release No. 4352, 2016 WL 1019133 (March 14, 2016) (90% of the underwriting fee received by the broker-dealer was paid to the municipal adviser).

summary judgment for Respondents' failure to disclose the fee-splitting arrangement with BB&T (as to claims two, six, and seven). Ex. D, Order (ECF No. 89, p. 24).

Mr. Wisor did not believe that Mr. O'Meara's proposed work through Choice with existing BB&T clients created a conflict:

> Q And did you ever learn anything that led you to believe that such conflicts would exist with respect to Choice and a client that was also served or had been served by BB&T?
>
> A No. We discussed that there was a transition between BB&T and Choice Advisors, but there was never anything that came to my attention that led me to believe that there was a conflict with respect to Choice's representation of those clients.

Ex. B, 89:17-90:12. Mr. Wisor reviewed the engagement letter with Bella Mente. He of course knew of Choice and Mr. O'Meara's registration status and did not recommend that the pending registration status should be included.

The disclosure issues found by the district court regarding the simultaneous employment by Mr. O'Meara with BB&T and Choice are violations that are neither scienter based nor intended to deceive the two charter schools involved here. The dual service by Mr. O'Meara of BB&T and Choice, as found by the district court (Ex. D, p. 23), consisted of no more than 7 days. Mr. O'Meara gave his notice to BB&T on May 1, 2018, and his last day of employment was May 15, 2018. He had expected to end his employment at BB&T on the day of his resignation, but his manager requested that he maintain his employment for another two weeks to ease transition. Mr. O'Meara sent an engagement agreement to Bella Mente on behalf of Choice on May 8, 2018, at the request of Bella Mente, to accommodate its scheduled board meeting. He sent a similar engagement agreement to Liberty Tree Academy on May 15, 2018. Both schools were aware that Mr. O'Meara had been employed by BB&T and subsequently by Choice. Ex. D

Declaration Burt Hands (ECF 65-5, ¶¶ 5-6); Ex. F, 19:23-20-1. And, both schools were advised by Mr. O'Meara that they need not retain Choice. Ex. A.

D. The Clients Benefitted from the Successful Bond Offerings

The SEC's portrayal of Respondents' participation in the Liberty Tree Academy and Bella Mente bond offerings as malicious and deceptive mischaracterizes the actual interactions between Respondents and these charter schools. These transactions were speculative due to the borrowers being unknown to the marketplace. Mr. O'Meara's expertise was integral to achieving the schools' goals, as no one at BB&T knew their finances, operations, or objectives as well as he did. Ex. A, 7:6-16; Ex. E ¶ 10. Bella Mente saved over $400,000 in reduced real estate expenses in the first year after the bond and has already saved $2 million since the bond, with a total projected saving of $15 million over the bond repayment period. Ex. A, 7:6-16. Liberty Tree Academy could not have opened or become the successful charter school it has, without the initial financing obtained through the bond offering Mr. O'Meara oversaw. Ex. D ¶ 10-11; Ex. A, 7:6-16.

E. The Findings in the District Court Case

The claims on which the SEC prevailed on summary judgment were:

- Section 15B(a)(1)(b) (third claim)
- MSRB Rule A-12 (fourth claim)
- MSRB Rule G-42 (engaging in a prohibited fee-splitting agreement, conflicts of interest) (sixth claim)
- Section 15B(c)(1) (fiduciary duty, conflicts) (Second and seventh claim)
- MSRB Rule G-17 (fifth claim)

The district court denied summary judgment sought by the SEC on its second, sixth and seventh claims to the extent those claims relied upon allegations that Respondents failed to disclose the fee-splitting agreement with BB&T. The district court also denied summary judgment as to the Plaintiff's first claim, Section 15B(a)(5) (engaging in fraudulent, deceptive, or manipulative act) and Eighth claim (aiding and abetting Choice's registration violation). These latter claims have been dismissed. Therefore, the district court granted summary judgment on either strict liability claims or claims requiring proof of negligence – neither constituting a finding of scienter.

III. ARGUMENT

A. The Imposition of a Permanent Bar against Mr. O'Meara or Censure against Choice by Summary Disposition is a Violation of Respondents' Constitutional Rights.

As explained more fully below, the resolution of the SEC's claims against Respondents by summary disposition would deprive them of their right to due process of law under the Fifth Amendment to the U.S. Constitution, violate Articles II and III of the Constitution and the separation of powers, violate Respondents' rights under the Fifth and Seventh Amendments to have a jury decide their fate, and violate well-established principles of *res judicata*.

1. Summary Disposition Violates Respondents' Due Process Rights.

"The Fifth Amendment to the U.S. Constitution guarantees in relevant part that "No person shall be … deprived of life, liberty, or property, without due process of law." "A fair trial in a fair tribunal is the basic requirement of due process," *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009 (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)), as well as an "inexorable safeguard" of individual liberty. *Ohio Bell Tel. Co. v. Pub. Utils. Comm'n of Ohio*, 301 U.S. 292, 304 (1937) (quoting *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 73 (1936)). This means not only actual fairness but the appearance of fairness. "Every procedure

which would offer a possible temptation to the average man as a judge to forget the burdens of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused denies the latter due process of law." *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)."

The Supreme Court thoroughly considered the nature of bias in an adjudicator in *Williams v. Pennsylvania*:

> Due process guarantees "an absence of actual bias" on the part of a judge. *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955). Bias is easy to attribute to others and difficult to discern in oneself. To establish an enforceable and workable framework, the Court's precedents apply an objective standard that, in the usual case, avoids having to determine whether actual bias is present. 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.' " *Caperton*, 556 U.S., at 881, 129 S.Ct. 2252. Of particular relevance to the instant case, the Court has determined that an unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case. *See Murchison*, 349 U.S., at 136–137, 75 S.Ct. 623. This objective risk of bias is reflected in the due process maxim that "no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. The due process guarantee that "no man can be a judge in his own case" would have little substance if it did not disqualify a former prosecutor from sitting in judgment of a prosecution in which he or she had made a critical decision. *Id*.

Williams v. Pennsylvania, 579 U.S. 1, 8–9, 136 S. Ct. 1899, 1905–06, 195 L. Ed. 2d 132 (2016). In *Williams*, the Court was concerned that an adjudicator's "own personal knowledge and impression" of a case "acquired through his or her role [as a litigant] may carry far more weight… than the parties' arguments…" *Id*. Such concerns are present here, given the still pending appeal against the findings in the district court case as well as the overlap between the attorneys leading the prosecution of the follow-on action and prior litigation. That bias cannot be cleansed by mere assignment of the matter to an SEC-employed ALJ, whose decision can be overturned by the SEC in any event.

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This follow-on action constitutes a violation of Mr. Omeara's Fifth Amendment right to due process of law. *Contra Blinder, Robinson & Co. v. SEC*, 837 F.2d 1099, 1104-08 (D.C. Cir. 1988). An ALJ assigned to superintend and initially adjudicate the follow-on prosecution against Mr. O'Meara is not an Article III judge and is not an independent or neutral adjudicator. Like SEC's staff prosecutors, ALJs are a paid employee-agent of the SEC, and thus subservient to the SEC commissioners. While the ALJ is charged with issuing an initial decision in the follow-on prosecution, the SEC retains the final say. If the SEC, acting through its commissioners, disagrees with the ALJ's initial decision, SEC can reverse that decision, modify it, set it aside, or remand it for further proceedings, and in its place the SEC can "make any findings or conclusions that in its judgment are proper and on the basis of the record." *See* 17 C.F.R. § 201.411. Thus, even assuming the ALJ could, against natural human instinct, resist being influenced by their employer, the SEC's assignment of the case to the ALJ for initial adjudication removes none of the obvious institutional bias that saturates SEC's follow-on action against Mr. O'Meara.

2. Adjudication of these Proceedings by an ALJ Violates Articles II and III of the Constitution and the Separation of Powers Doctrine.

The SEC's ALJ assigned to superintend and adjudicate SEC's follow-on prosecution against Respondents is an executive-branch "officer" of the United States. *Lucia v. SEC*, 585 U.S. 237 (2018). An executive-branch officer must be subject to control by the President, including removal from office if the President so desires, because the President is constitutionally required to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. However, an SEC ALJ enjoys multiple layers of tenure protection and thus is not controlled or removable by the President. The ALJ operates well beyond presidential control, because the President cannot remove the ALJ from office at will. Indeed, not even the SEC commissioners

(who claim to enjoy their own for-cause tenure protection against removal by the President) can remove the ALJ without cause, because the ALJ is a civil servant who can be fired only for good cause as determined by the Merit Systems Protection Board (MSPB), 5 U.S.C. § 7521(a), whose members themselves can be removed by the President only for good cause, 5 U.S.C. § 1202(d). SEC's commissioners, who themselves claim for-cause removal protection, cannot remove the ALJ without the approval of MSPB, and the President thus would need to convince both SEC and MSPB to remove the ALJ if he desired to remove him from office. These multiple layers of tenure protection violate Article II of the United States Constitution.

3. Summary Disposition Violates Respondents' Fifth and Seventh Amendment Rights to a Jury Trial.

The right to trial by jury is "of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right" has always been and "should be scrutinized with the utmost care." *See Sec. & Exch. Comm'n v. Jarkesy*, 603 U.S. 109, 110, 144 S. Ct. 2117, 2120, 219 L. Ed. 2d 650 (2024) (quoting *Dimick v. Schiedt*, 293 U.S. 474, 486, 55 S.Ct. 296, 79 L.Ed. 603). The Seventh Amendment guarantees that in "[s]uits at common law ... the right of trial by jury shall be preserved." This right is not limited to the "common-law forms of action recognized" when the Seventh Amendment was ratified. *See Jarkesy*, 603 U.S. at 110 (quoting *Curtis v. Loeth*er, 415 U.S. 189, 193, 94 S.Ct. 1005, 39 L.Ed.2d 260). It "embrace[s] all suits which are not of equity or admiralty jurisdiction, whatever may be the peculiar form which they may assume." *See Jarkesy*, 603 U.S. at 110 (quoting *Parsons v. Bedford*, 3 Pet. 433, 28 U.S. 447, 7 L.Ed. 732. That includes statutory claims that are "legal in nature." *See Jarkesy*, 603 U.S. at 110 (quoting *Granfinanciera, S. A. v. Nordberg*, 492 U.S. 33, 109 S.Ct. 2782, 106 L.Ed.2d 26). Matters concerning private rights may not be removed from

Article III courts and these traditional legal claims or forms of legal relief cannot instead be relegated to an administrative tribunal. *See Jarkesy*, 603 U.S. at 110.[3]

The form of relief sought by the SEC is legal in nature "as it is designed to punish or deter the wrongdoer rather than solely to restore the status quo." *Jarkesy*, 603 U.S. at 123 (quotation marks omitted). The implementation of a bar under *Steadman* is predicated on considerations such as "culpability, deterrence, and [risk of] recidivism." *See Id.* Furthermore, "showing that a victim suffered harm is not even required" to impart the requested penalty. *See Id*. at 124. Additionally, the close relationship between the misconduct alleged and preexisting common law legal claims suggests the bar sought by the SEC is legal in nature and thus requires adjudication by an Article III court. *See Id*. at 125. Through its administrative follow-on prosecution of Mr. O'Meara, the SEC seeks to deprive him of his private liberty and private property rights to pursue his chosen profession and his chosen means of livelihood. Government can constitutionally do so only after affording Mr. O'Meara a trial through which the predicate findings of disputed fact are decided by a jury of his peers, not by the government's own self-interested officials and employees. See *Jarkesy*, 144 S. Ct. at 127.

4. Summary Disposition Would Deprive Respondents of their Right to an Evidentiary Hearing under the Exchange Act and the APA.

The SEC seeks in this instance to resolve its enforcement action by summary disposition This would deprive Respondents of not only a jury trial but even the non-jury evidentiary hearing ostensibly required by both the Securities Exchange Act of 1934, 15 U.S.C.A. § 78o-4(c) and the Administrative Procedure Act, 5 U.S.C. §§ 554(b)(1), 5 U.S.C. §§ 554(c)(2), 556. *See generally* Alexander Platt, *Is Administrative Summary Judgment Unlawful?*, 44 HARV. J.L. &

[3] By adjudicating and ultimately deciding its own case against Mr. O'Meara, the SEC is usurping the judicial power of the United States and purporting to relocate and vest it in an independent agency of the executive branch, thereby violating Article III of the constitution and the constitutional separation of powers.

PUB. POL'Y 239, 251-59 (2021); Alexander Platt, *Unstacking the Deck: Administrative Summary Judgment and Political Contro*l, 34 Yale J. on Reg. 439, 461-69 (2017) (noting with disapproval SEC's routine and increasing reliance on summary disposition to adjudicate follow-on cases since 2002).

5. The Imposition of a Bar or Censure is Inconsistent with the Principle of *Res Judicata*.

Although SEC could have requested that the district court judgment include an order barring, suspending, or enjoining Mr. O'Meara from participating in all or part of the securities industry, it did not seek such relief, thereby forever forfeiting its right to do so under well-established principles of *res judicata*. Upon information and belief, SEC made that deliberate tactical decision based on its erroneous assumption that it could unilaterally impose such relief in its own follow-on administrative prosecution, thereby avoiding the need to prove to a neutral and independent Article III district court that such relief was necessary or appropriate. In the Southern District of California federal court case against Mr. O'Meara, in which the SEC had a full and fair opportunity to litigate on the merits, the SEC invoked the court's equitable powers by successfully demanding an injunction against Mr. O'Meara. The SEC could have requested that the injunction include a bar or suspension to restrict Mr. O'Meara from participating in the securities industry. See 15 U.S.C. §§ 78u(d)(1), 15 U.S.C. 78u(d)(5), 15 U.S.C. 80b-9(d). Instead, it made the deliberate tactical decision not to seek such relief. Having deliberately chosen not to seek such relief in the district court federal court action, well-established principles of *res judicata* forbid the SEC from splitting its claims and pursuing a second prosecution against Mr. O'Meara to obtain that relief now—especially a second prosecution in which SEC itself purports to serve as the final adjudicator.

B. The Public Interest Would Not Be Served by a Permanent Bar or Censure of Choice.

When determining whether the requested sanctions serve the public interest, an adjudicator should consider (1) the degree of scienter involved, (2) the isolated or recurrent nature of the infraction, (3) the respondent's recognition of the wrongful nature of his conduct, (4) the likelihood that the respondent's occupation will present opportunities for future violations, (5) the sincerity of the respondent's assurances against future violations, and (6) the egregiousness of the respondent's actions. *SEC v. Blatt*, 583 F.2d 1325, 1334, n. 29 (5th Cir. 1978) (citing *Steadman*, 603 F.2d 1126. In light of these factors, imposition of the requested sanctions would not serve the public interest.

1. Respondents Did Not Possess the Necessary Scienter.

None of the violations found by the district court required proof of scienter and the district court has found none. Mr. O'Meara's engagement of the Kline law firm, its review of Choice's compliance with various regulatory requirements, including a review of Choice's engagement agreements, shows that Mr. O'Meara exercised good faith in his efforts to comply with the law. The retention of counsel, even while not establishing a formal advice of counsel defense, constitutes good faith and is inconsistent with an intent to defraud. *See U.S. v. Bush*, 626 F.3d 527, 523 (9th Cir. 2010). Here, Mr. O'Meara retained who he believed to be appropriate counsel to expeditiously obtain registration, advise on municipal advisor legal compliance, and review the engagement agreements—he acted in good faith.

2. Respondents' Infractions Were Isolated in Nature.

The violations found by the district court on summary judgment relate to two transactions that occurred during the transition by Mr. O'Meara from BB&T to Choice. The violations arose under circumstances that have not existed since: Choice and Mr. O'Meara have been registered with the SEC for more than five years, there have been no clients for Choice and Mr. O'Meara that were clients Mr. O'Meara previously served while with an underwriter, and all engagement

agreements and other compliance obligations have been vetted by expert municipal advisor counsel and consultants. Ex. A, 5:27-6:6. Neither Defendant has previously or since been accused of any securities violations. When that is the case, it is construed in favor of the Defendant. See *SEC v. Fehn*, 97 F.3d 1276, 1295 (9th Cir. 1997); *SEC v. Mapp*, 2018 WL 3570920, at *6 (E.D. Tex. July 25, 2018)("the record does not reveal [defendant's wrongdoing] to be such a pervasive characteristic of [his] method of doing business as to indicate that he will continue to violate the securities laws unless an injunction is issued"); *SEC v. Snyder*, No. CIVAH-03-04658, 2006 WL 6508273, *9 (S.D. Tex. Aug. 22, 2006); cf. *In the Matter of Funding the Gap, LLC and Irene P. Carroll* (AP 3-20072) (No injunction, no bar and no disgorgement for engaging in twelve financings over a five-year period).

3. Respondents Have Recognized the Wrongful Nature of their Actions.

Contrary to the SEC's argument that Mr. O'Meara has failed to acknowledge his violations, Mr. O'Meara acknowledges his conduct and the errors that led to litigation. He admitted to operating his company without proper registration, stating that this oversight causes him "shame beyond [his] capabilities of expression." Ex. A, 3:10. He conceded that his initial engagement letters failed to disclose critical information and that he misunderstood key regulatory requirements, such as the fee-splitting rule. Ex. A, 4:17-20. Mr. O'Meara further expressed his regret and embarrassment over these violations, recognizing their seriousness. Ex. A, 5:25-26.

Mr. O'Meara's assurances of compliance with all statutory and regulatory requirements of municipal advisors are sincere. Ex. A, generally. He has proactively rectified his mistakes, cooperated with the SEC, and enhanced his compliance practices. His recognition of the violations, both before and after the district court's ruling, is evident. Prior to receiving notification of the investigation in this matter, Mr. O'Meara corrected the deficiencies the district

court found regarding Choice's engagement agreements. In 2019, Mr. O'Meara engaged attorney David A. Sanchez to review all aspects of Choice's compliance with relevant SEC and MSRB regulations, including correcting deficiencies with Choice's engagement agreements.[4] Mr. O'Meara implemented all recommendations made by Mr. Sanchez. Ex. A, 6:21-7:5.

Mr. O'Meara did defend his actions concerning the fee-splitting claim based on his interpretation of the rule's prohibition, but he has not disputed the district court's contrary conclusion. He has not engaged in any similar conduct with any broker-dealer and the SEC has not identified or alleged otherwise. No client, issuer, or the SEC has alleged any violation over the nearly six years since Mr. O'Meara. transitioned from BB&T to Choice. Ex. A, 6:2-6.

4. There is No Demonstrated Likelihood of Future Violations by Respondents.

The "SEC ha[s] the burden of showing there was a reasonable likelihood ***of future*** violations of the securities laws." *Fehn*, 97 F.3d 1276 at 1295, citing *SEC v. Murphy*, 626 F.2d 633, 655 (9th Cir. 1980) (emphasis added). Mr. O'Meara has continued to engage as a municipal advisor with many clients during the intervening years, and there has been no indication of any violation of any securities law. Ex. A, 7:27-8:2. Since this litigation commenced, he passed the Series 54 Municipal Advisor Principal Qualifications Exam. Ex. A, 6:18-20.

The SEC's sole expressed concern is that Mr. O'Meara and Choice's continued participation as municipal advisors create the opportunity for future violations. ECF No. 90-1, p. 10. This concern cannot warrant an injunction. *See Steadman*, 967 F.2d 636, 648 (D.C. Cir. 1992) (vacating permanent injunction despite "some concern over future violations" based on the defendants continued business, and noting that a permanent injunction "should not be granted

[4] Mr. Sanchez was at the time with Norton Rose Fulbright US, LLP. He previously was an Attorney Fellow in the Office of Municipal Securities from 2010-2013 where he assisted in the MSRB rulemaking that are at issue in this case. Mr. Sanchez has since returned to the SEC as The Director of the Office of Municipal Securities.

lightly, especially when the conduct has ceased.") (quotation omitted). This concern is further mitigated by testimonials from industry professionals and former clients with significant experience in municipal securities, who vouch for Mr. O'Meara's character and professionalism. Ex. A, p. 12-23.

5. Respondents' Assurances against Future Violations are Sincere.

Courts often consider the consequences already suffered by a defendant, giving due consideration to additional consequences that may result from an injunction. In *SEC v. Westport Capital Mkts.*, LLC, 547 F. Supp. 3d 157, 166-67 (D. Conn. 2021), the court found that defendants acted with scienter, continuing the misconduct until the eve of litigation. But the court found the individual defendant "to be sincere when he discusses the dramatic impact that the SEC's enforcement action … [has] had on him, both financially and emotionally" and an injunction would likely end his career. *Id*. at 167-68. The court denied the injunction, concluding that "the severe consequences that defendants have already faced for their misconduct weigh against a finding that they are reasonably likely to violate the securities laws in the future." *Id*. at 167.

Similarly, in *SEC v. Ambassador Advisors, LLC*, No. 5:20-CV-02274-JMG, 2022 WL 4097327, at *5 (E.D. Pa. Sept. 7, 2022), the court found defendants, with scienter, failed to adequately disclose "their 12b-1 fee scheme" to thousands of clients over four years, and then failed to acknowledge their wrongful conduct after the jury verdict. The court denied an injunction because defendants assured against future violations and "granting a permanent injunction could have severe consequences for Respondents' reputations and livelihoods." *Id*. at *12-*13. The court concluded that a "permanent injunction would do little to protect the public and would instead venture into the territory of punishment." *Id*. at *13.

Here, as in *Westport* and *Ambassador*, a permanent bar would have a profoundly negative impact Mr. O'Meara's livelihood in addition to the dramatic effect the events have already had on Mr. O'Meara personally, financially, and professionally. "Indeed, when a court bans a defendant from his industry, it imposes what in the administrative context has been called the 'securities industry equivalent of capital punishment.'" *Sec. & Exch. Comm'n v. McDermott*, No. CV 19-4229-KSM, 2022 WL 16533556, at *6 (E.D. Pa. Oct. 28, 2022) (citing *Sec. & Exch. Comm'n v. Gentile*, 939 F.3d 549, 566 (3d Cir. 2019)). Because the SEC has insisted and continues to insist on a bar, the 'securities industry equivalent of capital punishment' for Mr. O'Meara, he has had no choice but to incur approximately $1.2 million in attorney fees and expenses to defend himself and his family's wellbeing. Ex. A, 8:27-28:7. There was no insurance to cover these costs. Since the litigation commenced, Mr. O'Meara's earnings have been almost entirely to defend this action. These costs have caused Mr. O'Meara to move his family from their home in Denver, downsize their dwelling to a duplex, change their city of residence and move their 11-year old son to a new school, and make significant lifestyle changes.

6. Respondents' Actions Were Not Egregious.

The remedies sought by the SEC are extreme compared to the municipal adviser cases it has settled.[5] The SEC's approval of the settlement with Choice principal Paula Permenter is notable in relation to this matter. Her conduct as found by the SEC is practically the same as that found by the district court against Mr. O'Meara and Choice:

- Section 15B(a)(1)(B).
- MSRB Rule A-12

[5] Enforcement Manual Dated 11.28.2017, Para. 6.2.7 Settlement Recommendations: . . . In doing so, the SEC should consider the settlement terms of other similar cases to identify prior precedent involving similar alleged misconduct and apply the factors outlined in Section 6.1 of the Manual.

- MSRB Rule G-42 (disclosure of conflicts, fee-splitting prohibition).
- Section 15B(c)(1)
- Permenter caused Choice' violations of Section 15B(a)(1)(B)

See Ex. F, Order Instituting Administrative and Cease-and-Desist Proceedings, Pursuant to Section 15B, Section 21C, and Rule 15Bc4-1 of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions and Cease-and-Desist Order. The SEC's approved remedy for Ms. Permenter was:

1) an undertaking regarding certain compliance measures;
2) a cease and desist order from committing or causing any violations;
3) censure; and
4) a civil money penalty of $26,000.

Against Mr. O'Meara, the district court has found the following violations:

- Section 15B(a)(1)(B) (third claim)
- MSRB Rule A-12 (fourth claim)
- MSRB Rule G-42 (engaging in a prohibited fee-splitting agreement,
- conflicts of interest) (sixth claim)
- Section 15B(c)(1) (fiduciary duty, conflicts) (Second and seventh claim)
- MSRB Rule G-17 (fifth claim)

Ex. C. Given the violations found against Ms. Permenter involving the same conduct the district court found against Mr. O'Meara, the SEC imposed upon Ms. Permenter no injunction, no bar, no suspension from registration, and no disgorgement.[6]

[6] The only violation found by the district court against Mr. O'Meara not included with the SEC's findings against Ms. Permenter is MSRB Rule G-17. In this case, the district court found Mr. O'Meara and Choice, based upon Respondents' stipulation, violated Rule G-17, failure to deal fairly with the clients, based upon their undisclosed unregistered conduct, fee-splitting, and failure to disclose employment with both underwriter and municipal adviser.

The SEC has sought far more lenient sanctions in other cases with very similar fact patterns. This similarity suggests neither the respondents in these other cases, nor Respondents in the instant case, displayed conduct that could be considered egregious. In *In the Matter of Funding the Gap, LLC and Irene P. Carroll* (AP 3-20072), Carroll provided municipal advice to ***twelve*** charter schools in connection with municipal bond offerings over ***five*** years. Carroll was never registered as a municipal advisor, nor did she attempt to register. The SEC settled wherein Carroll agreed to a cease-and-desist order and a $30,000 civil money penalty. There was no bar, no suspension, and no disgorgement of fees. Certainly, Carroll did not disclose her unregistered status or her non-compliance with certain MSRB rules requiring, among other things, her disclosure of her unregistered status.

Notably, one of Ms. Carroll's clients involved in her SEC action was Liberty Tree Academy. She in fact negotiated the fee received by Choice and her fee exceeded the fee received by Choice. Ex. A, 5:15-16. Ms. Carroll never passed the series 50 exam and never applied for registration. The SEC's settlement included a civil money penalty with no bar, no injunction, and no disgorgement.

In the Matter of Legacy Funding Services, LLC and Raymond Howard Sowell (AP 3-21059) involved unregistered municipal advisory activity for more than two years for three school clients. The SEC's settlement included a cease and desist order, a censure, and a civil money penalty. No bar, no injunction, and no disgorgement was imposed.

In the *Matter of Keygent LLC, Anthony Hsieh, and Chet Wang* (AP 3-17287) involved an undisclosed kickback scheme. The municipal advisor paid undisclosed referral fees to gain access to potential clients. The SEC found violations of MSRB Rule G-17, Section 15B(c)(1),

Ex. C, p. 25]. Each of the predicate facts for the Rule G-17 violation against Mr. O'Meara and Choice were also found by the SEC against Ms. Permenter contained in the other violations.

and Section 15B(a)(5). The SEC's settlement included a cease-and-desist order, a censure, and a civil money penalty. No suspension, no bar, and no disgorgement was imposed. These resolutions of similar cases are grossly inconsistent with the remedies sought against Respondents.

IV. CONCLUSION

For the forgoing reasons, Respondents Choice and Mr. O'Meara respectfully request the Commission deny the Division of Enforcement's Motion for Summary Disposition.

Respectfully submitted this 21st day of February, 2025.

s/ *Paul L. Vorndran*
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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-22250

In the Matter of

CHOICE ADVISORS, LLC
AND MATTHIAS O'MEARA

Respondents

RESPONDENTS' INDEX OF EXHIBITS

Exhibit	Description
A	Declaration of Matthias O'Meara (ECF No. 96-3)
B	Excerpts of Deposition Transcript of Paul Wisor (ECF No. 96-4)
C	Order (1) Granting in Part and Denying In Part Plaintiff's Motion for Partial Summary Judgment; and (2) Denying Defendants' Motion for Partial Summary Judgment (ECF No. 89)
D	Declaration of Burt Hands (ECF No. 65-5)
E	Excerpts of Deposition Transcript of Erin Feeley (ECF No. 96-5)
F	Order Instituting Proceedings against Paula Permenter (ECF No. 96-6)

OS Received 02/21/2025