

**UNITED STATES OF AMERICA**  
**Before the**  
**SECURITIES AND EXCHANGE COMMISSION**

**ADMINISTRATIVE PROCEEDING**  
**File No. 3-9599**

**In the Matter of**

**JOHN GARDNER BLACK and**  
**DEVON CAPITAL MANAGEMENT**

**DIVISION OF ENFORCEMENT'S RESPONSE IN**  
**OPPOSITION TO FOUR PETITIONS SEEKING RELIEF**

The Division of Enforcement (“Division”) hereby files this Response in Opposition to Four Petitions Seeking Relief filed by John Gardner Black (“Black”) in September 2013, May 2015, June 2018, and April 2025 (“the Requests”), on his own behalf and on behalf of Devon Capital Management (“Devon”).

In support of this Response, the Division offers the accompanying Brief and supporting attachments.

July 1, 2025

Respectfully submitted,

DIVISION OF ENFORCEMENT

*/s/ Judson T. Mihok*

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**In the Matter of**

**JOHN GARDNER BLACK and**  
**DEVON CAPITAL**  
**MANAGEMENT**

**DIVISION OF ENFORCEMENT'S BRIEF IN SUPPORT OF ITS**  
**RESPONSE IN OPPOSITION TO FOUR PETITIONS SEEKING RELIEF**

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Black filed four Requests seeking relief from the Commission’s Order entered on May 4, 1998, and modified in an Order entered on April 13, 2010, under the Advisers Act. Collectively, those Orders revoked Devon’s registration with the Commission as an investment adviser, and barred Black from association with any investment adviser or investment company (the “Administrative Order(s)”). *In the Matter of John Gardner Black and Devon Capital Management, Inc.*, Release No. 1720, 3015 (File No. 3-9599) (May 4, 1998), (April 13, 2010). See [www.sec.gov/litigation/admin/3-9599.htm](http://www.sec.gov/litigation/admin/3-9599.htm).

Black failed to serve any of the Requests on the Division, as required by Commission Rule of Practice 150. 17 C.F.R. § 201.150. However, in a Briefing Order filed June 4, 2025, the Commission ordered the Division to file a brief setting forth its position regarding the Requests by July 7, 2025. Because Black’s Requests are collaterally estopped, and his positions have been repeatedly denied by numerous Courts, and lack any merit, the Division opposes all of the Requests, and they should be denied.

## **FACTS AND PROCEDURAL HISTORY**

### **I. Nature of the Case**

#### **A. The Underlying Case**

The Complaint, filed in September of 1997, alleged that Black, Devon, and Financial Management Sciences, Inc. (“FMS”) violated Section 17(a) of the Securities Act of 1933 (“Securities Act”) (15 U.S.C. § 77q(a)), and Section 10(b) (15 U.S.C. § 78j(b)) of the Exchange Act and Rule 10b-5 (17 C.F.R. § 240.10b-5) thereunder. Further, it alleged that Black and Devon violated sections 206(1), 206(2), and 206(4) of the Investment Advisers Act of 1940 (“Advisers Act”) (15 U.S.C. § 80b-6(1), 80b-6(2) and 80b-6(4)) and Rule 206(4)-2 (17 C.F.R. § 275.206(4)-2) thereunder.

The Complaint alleged that Black owned and controlled Devon, a registered investment adviser engaged in the investment of proceeds of municipal bond offerings on behalf of school districts in Pennsylvania. *SEC v. Black et al.*, 97 cv 2257, Doc. No. 1 (Complaint) at ¶¶ 1-3, a copy of which is attached as Attachment A. Devon invested \$233 million that it managed on behalf of school districts in Collateralized Investment Agreements (“CIAs”) that were issued by FMS, another entity controlled by Black. *Id.* at ¶¶ 2,14, 18, 21. In promotional materials, Devon (and Black) represented to clients that the CIAs were an investment that paid a specific rate of return over a fixed period which were fully protected or collateralized by a pool of securities equalling the amount of the client’s principal investment. *Id.* at ¶ 3, 22. But Defendants did not keep the collateral secure. Instead, they suffered at least \$50 million in trading losses in the accounts that held the collateral securities. Consequently, the value of the collateral for the CIAs was much less than 100% of the monies invested. *Id.* at ¶ 30. Defendants attempted to conceal the shortfall by overvaluing by almost \$70 million a security that FMS held as collateral (*Id.* at ¶¶ 33-34) while reporting to clients that their investments were fully collateralized, as required by the CIA and state law. *Id.* at ¶¶ 31, 35. Black also provided false statements reporting an inflated value for the collateral to school districts for their auditors’ use. *Id.* at ¶ 39. Black attracted new investor clients by concealing trading losses in the collateral accounts, and used their funds to meet obligations towards existing clients, resulting in the immediate dilution of the new clients’ investments. *Id.* at ¶¶ 22, 30, 36-41. Black also misappropriated clients’ funds to benefit himself and the other defendants. *Id.* at ¶¶ 42-45. The losses, almost exclusively born by school districts in Pennsylvania, exceeded \$71 million. *Id.* at ¶ 3.

## B. Defendants Consented to Settlements

Without admitting or denying the allegations in the complaint, Black, Devon, and FMS consented to the entry of an Order of Permanent Injunction (Reserving the Issues of Payment of Disgorgement and Civil Penalties) (the “Order of Permanent Injunction”), and the United States District Court for the Western District of Pennsylvania (“district court”) entered an Order thereon on December 16, 1997. *SEC v. Black et al.*, 97 cv 2257, Doc. Nos. 151-154.

Black subsequently consented to entry of an Order of Disgorgement and Civil Penalties (the “Relief Order”), which was entered by the district court on April 29, 1998. *SEC v. Black et al.*, 97 cv 2257, Doc. Nos. 275, 278. The Relief Order ordered Black to disgorge \$3,632,031, pay prejudgment interest of \$326,883, and pay a civil penalty of \$500,000.<sup>1</sup> *Id.* Black was represented by counsel when he consented to entry of these two orders. *SEC v. Black et al.*, 97 cv 2257, Doc. No. 124 (Notice of Appearance entered 11/14/97). The district court case was closed on January 19, 1999. *SEC v. Black et al.*, 97 cv 2257, Doc. No. 351.

Related to these proceedings, on May 4, 1998, Black consented to the entry of a Settled Order in the Administrative Proceeding before the Commission. The Commission entered an Order under the Advisers Act revoking Devon’s registration with the Commission as an investment adviser, and barring Black from association with any broker, dealer, municipal securities dealer, investment adviser or investment company (the “Administrative Order”). *In the Matter of John Gardner Black and Devon Capital Management, Inc.*, Release No. 1720 (File No. 3-9599) (May 4, 1998)). See [www.sec.gov/litigation/admin/3-9599.htm](http://www.sec.gov/litigation/admin/3-9599.htm).

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<sup>1</sup> According to a check of the SEC’s records, as of June 6, 2025, a total of \$5,897.45 had been collected.

C. Black Pled Guilty in the Related Criminal Case

A related criminal case was filed in district court in June of 1999. See *United States v. Black*, 99-cr-00203 (W.D.P.a. June 18, 1999) On January 24, 2000, Black pled guilty to twenty-one counts of securities fraud, three counts of mail fraud, and two counts of falsifying documents. *Id.* at Doc. No. 51, 52. And on April 14, 2000, Black was sentenced to 41 months in prison, followed by three years of supervised release, and ordered to pay \$61,300,000 in restitution. *Id.* at Doc. No. 60.

D. Challenges to the Underlying Settled Matters

Ten years after the initial settlements, and his guilty pleas, in May of 2009, Black filed a “Petition to Set Aside Administrative Proceedings 3-9599.” In an Order Denying in Part and Granting in Part Petition to Set Aside Bar Order dated April 13, 2010, the Commission vacated Black’s bars against association with a broker, dealer, or municipal securities dealer in light of recent federal court and Commission decisions concerning collateral bars. *In the Matter of John Gardner Black and Devon Capital Management*, Release No. 3015, (File No. 3-9599) (April 13, 2010) (“April 2010 Order”).

The Commission rejected the balance of Black’s petition, including his contention that if the Commission had used the Financial Accounting Standards Board’s (“FASB”) valuation method, it would have “supported the valuations supplied to clients in monthly statements”; the Commission held that Black was collaterally estopped from raising such claims. April 2010 Order at 3, 4-5. The Commission maintained the portions of the Administrative Order barring Black from association with an investment adviser or investment company, noting the lack of “any evidence that Black, who exhibits no remorse for his actions, has learned from his misconduct or is

unlikely to engage in future misconduct if permitted to re-enter the industry.” April 2010 Order at 7.

Black sought reconsideration of the Commission’s April 2010 Order, and the Commission entered an Order Denying Reconsideration on June 18, 2010. *In the Matter of John Gardner Black*, Advisers Act Rel. No. 3040 (File No. 3-9599) (June 18, 2010) (“June 2010 Order”). The Commission found no merit in Black’s claims that the Commission lacked jurisdiction to issue the Settled Order as the Advisers Act “expressly provides for administrative proceedings (and the imposition of sanctions)”; nor was there any evidence that Black was deceived into settling the administrative proceedings. June 2010 Order at 4. And again, the Commission found that Black consented to the federal court injunction, and thus was collaterally estopped from challenging the basis for the sanctions imposed. *Id.* at 4-5.

Black filed a petition for review (not joined in by Devon) of the Commission’s April 2010 order in the U.S. Court of Appeals for the District of Columbia Circuit *Black v. SEC*, 462 F. App’x 6 (D.C. Cir. 2012), a copy of which is attached as Attachment B. On appeal, Black challenged the valuation under the FASB guidance, and also contended that Defendants’ issuance of CIAs was in compliance with the 1993 IRS arbitrage regulations. Pet. Br. filed Jan. 20, 2011 at 14, a copy of which is Attached as Attachment C. The D.C. Circuit Court of Appeals agreed with the Commission that Black had offered no support for his valuation claim, and held, “In the absence of evidence to support Black’s claim about the FASB standard, and in light of the overwhelming weight of the other factors, it was not arbitrary, capricious, or an abuse of discretion for the Commission to refuse to vacate the bar.” *Black*, 462 F. App’x at 8; Att. B. The Court rejected the appeal.

On February 28, 2012, Black sought panel rehearing, but the D.C. Circuit Court of Appeals denied his request on March 5, 2012.

On February 26, 2013, Black returned to the Commission's Administrative Proceeding to file a "Petition to Set Aside Administrative Bar Order." *In the Matter of John Gardner Black and Devon Capital Management*, Release No. 70318, (File No. 3-9599) (September 4, 2013) ("September 2013 Order"). In the Petition, Black alleged that a valuation of the CIA (this one based on FMS's tax returns) showed it was greater than the cost to the clients, that the Commission was aware of this and did not disclose it to the district court (which called into question the Commission's impartiality), and that there was no public harm.<sup>2</sup> September 2013 Order at 5. The Commission, citing its prior Order, and strong interest in the finality of decisions, denied the petition, finding that it did not present any compelling circumstances justifying the relief sought. September 2013 Order at 7-9.

Shortly thereafter, Black filed the Petition to Reconsider Order of September 4, 2013, the first of the four Requests now under consideration.

## **II. Additional Rulings Denying Requested Relief**

In addition to the petitions for relief, and petitions to reconsider, the appeal to the D.C. Circuit Court of Appeals, and the request for panel rehearing regarding the Administrative Order entered by the Commission, Black has also worn a path seeking relief in the district court, to the Third Circuit Court of Appeals, and the United States Court of Federal Claims by regurgitating the same claims over and over and over again.<sup>3</sup>

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<sup>2</sup> Black raised a number of other factual claims, in conclusory fashion, including the "Arbitrage Regulations" claim, which the Commission took note of, and then dispatched via a footnote. September 2013 Order at 5, n. 18.

<sup>3</sup> The summary of challenges mounted by Black that follows does not include the many challenges to the criminal case filed in the district court, and decisions by the Third Circuit Court of Appeals pertaining to the criminal case, all of which denied the relief based on many of the same claims raised by the Requests under consideration.

Since “choosing to settle” the Commission’s case, marked by the filing of the Relief Order on April 29, 1998 in the district court, Black has repeatedly sought to unwind that agreement and Relief Order in every conceivable way. In 2001, Black filed two motions for relief under FRCP 60(b), which were denied; then sought reconsideration, which was also denied. See, *SEC v. Black et al.*, 97 cv 2257 (WDPA), Doc. No. 383 (filed 4/6/01) denied in Order Doc. No. 386 (filed 4/30/01); Doc. No. 386 (filed 4/30/01), denied in Order Doc. No. 389 (filed 5/9/01); motion for reconsideration Doc. No. 390 (filed 5/25/01), denied in Order entered 5/30/01.

Undeterred, Black followed with a new motion for relief under FRCP 60(b) on June 18, 2001, which was promptly denied by the Court on June 22, 2001. Doc. 393. In December of 2001, notices of withdrawal of consents and motions to dismiss and vacate followed (Doc. Nos. 394, 396, 398, 402-404). The relief requested was denied in Orders entered by the district court on January 23, 2002, and January 31, 2002, respectively. Black filed a motion requesting findings of fact and conclusions of law on February 7, 2002, which was denied by the district court that same day. Doc. No. 411. Black sought reconsideration of those denials on February 20, 2002, and that request was denied by the district court on February 25, 2002. Doc. No. 412.

In December of 2006, Black renewed his effort with a motion to set aside orders entered in the case, which was promptly denied by the district court. Doc. Nos. 432, 433. Black appealed that ruling to the Third Circuit Court of Appeals, alleging that the SEC failed to disclose that his practices were in accord with IRS Regulation 26 C.F.R. § 1.148-5(d), and that the market value of the CIA was never misrepresented to investors. *SEC v. Black et al.*, 262 Fed. Appx. 360, 362 (3d Cir. 2008), a copy of which is attached as Attachment D. The Third Circuit held that the district court had properly denied the motion. Black petitioned for panel rehearing, but was denied.

Not satisfied with the relief he was getting with the Commission, the district court, the D.C. Circuit Court of Appeals, or the Third Circuit, Black instituted an action with the Court of Federal Claims. In December of 2007, Black asserted a takings claim seeking to recover the value of Devon and FMS because the SEC relied on an incorrect market value of the CIAs which effectuated a taking of property without justification. *Black v. United States*, 84 Fed. Cl. 439, 443 (2008), a copy of which is attached as Attachment E.

The Court of Federal Claims noted that the main issue concerned the value of the CIA, which Black had raised three separate times in the criminal case, and three more times in the Commission's case, with both the district court and the Third Circuit. *Id.* at 452. Ultimately, the Court of Claims denied the relief sought on several grounds, including statute of limitations, that the claim amounted to a collateral attack of the prior district court and Third Circuit rulings, and that the Court of Claims lacked jurisdiction. *Id.* at 452-54.

Dispatched by the Court of Claims, Black returned to the district court. After another series of motions to set aside/dismiss/vacate (Doc. Nos. 440, filed 8/13/10; 444 filed 9/20/10; 446, 447 filed 5/2/13; 467 filed 7/25/13; and 472 filed 3/9/21), and orders denying same (respectively, Doc. Nos. 443 filed 9/2/10; 445 filed 9/24/10; 456 filed 5/28/13; 469 filed 8/12/13<sup>4</sup>; and 475 filed 4/13/21), Black again appealed to the Third Circuit Court of Appeals.

The Third Circuit again denied Black's appeal. *SEC v. Black*, 2022 WL 2355432 (3d Cir. 2022), a copy of which is attached as Attachment F. Black's appeal again contested the valuation of the CIA, and alleged the case was not settled and no final judgment was entered. *Id.* at \*1. The Third Circuit rejected these claims, holding that a final judgment was entered, and that Black had

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<sup>4</sup> Due to the relentless filing of meritless motions, with the entry of this Order, the district court took the extraordinary step of noting, "The SEC shall not be required to respond to any other motions filed by Mr. Black until ordered by the Court who shall first review the motions to determine if they are frivolous, repetitive, and/or vexatious." Doc. No. 469, filed 8/12/13.

settled over twenty years ago, so he could not “now reopen the matter and litigate the merits” of his claim regarding valuation. *Id.* at \*1, 2.

### **THE FOUR REQUESTS AT ISSUE**

With that background, we return to consider the four Requests pending before the Commission.

#### A. September 2013 “Petition to Reconsider Order of September 4, 2013”<sup>5</sup>

In September of 2013, Black sought reconsideration of the Commission’s Order Denying Petition to Set Aside Administrative Bar Order entered September 4, 2013 (“Commission’s September 4, 2013 Order”). In that Request, Black alleged that the September 4, 2013 Order did not address “the most important element of Petitioners (sic) request ...” and noted six areas of concern/requests for relief<sup>6</sup>:

1. “How can the Commission allege the clients were defrauded when there is no record that any client purchased or sold the CIA [“Collateralized Investment Agreement”] at other than fair value?” (*Sept. ’13 Pet. Recon.* at 1) (hereinafter “Request A1”)
2. “How can the Commission bar Petitioners from the investment advisory industry with no evidence that the advice given by Petitioner was wrong?” (*Id.*) (hereinafter “Request A2”)
3. “What was the value of the CIA, determined by the Commission on September 26, 1997, using a reasonable expectation of profits, as required by legal precedent?” (*Id.*) (hereinafter “Request A3”)
  - a. “Public hearings should be held to determine the fair value of the CIA.” (*Id.* at 7)
4. The prior proceedings were under the Exchange Act, but the industry bar imposed in 1998 was under the Advisers Act, so the Commission lacked authority to deny his petition. (*Id.* at 2) (hereinafter “Request A4”)
5. The Commission’s Order Denying Petition to Set Aside Administrative Bar Order issued September 4, 2013 “must be reconsidered and withdrawn because it is arbitrary and capricious, issued for the benefit of the Commission rather than in the public interest.” (*Id.* at 7) (hereinafter “Request A5”)

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<sup>5</sup> Commission Rule of Practice 470(b), 17 C.F.R. § 201.470(b), provides that “[n]o response to a motion for reconsideration shall be filed unless requested by the Commission.” Prior to the Commission’s June 4, 2025 Briefing Order, the Division of Enforcement was not able to find a request by the Commission for a response from the Division of Enforcement.

<sup>6</sup> It is challenging to catalog all of the issues raised in many of Black’s filings. The September of 2013 Request also includes details regarding valuation (*Id.* at 3), and the Commission’s lack of impartiality (apparently related, at least in part, to a full audit conducted by the Commission in August of 1997) (*Id.* at 4-6), but these claims all appear to focus on the valuation issue(s) summarized in points 1 and 3.

6. “[T]he settlement the Commission deceived Petitioners into signing must be set aside.” (*Id.* at 7) (hereinafter “Request A6”)

B. May 2015 “Petition to Withdraw Complaint”

In May of 2015, Black petitioned the Commission to withdraw the Complaint which had been filed in district court nearly eighteen years earlier. In support, Black alleged:

1. The Commission withheld exculpatory evidence, specifically an audit that showed the CIA was valued at \$266 million. (*May ’15 Pet. Withdraw* at 1) (hereinafter “Request B1”)
2. The CIAs were issued at fair value, so there was no violation of the Advisers Act. (*Id.* at 4) (hereinafter “Request B2”)
3. Since the Commission withheld this valuation information while entering into a settlement Black (and Devon and FMS), the industry bars should be vacated. (*Id.*) (hereinafter “Request B3”)

C. June 2018 “Request for Relief”

In June of 2018, Black filed a Request for the Commission to reimburse losses incurred by its clients. Specifically, Black alleged:

1. The CIA was “worth approximately \$200 million when the Commission concealed from the court: (1) the CIA was sold before January 1, 1995; (2) that a reasonable expectation of profits resulted in the \$200 million valuation; and, (3) the value represented in monthly statements was \$181 million.” (*June ’18 Request* at 5) (hereinafter “Request C1”)
2. The Commission failed to inform the court that, based on the valuation of the CIA, there was no violation of the Advisers Act or any fraud committed. (*Id.*) (hereinafter “Request C2”)
3. The Commission should compensate clients for the value of their investments as of September 1997, remove the industry bars and reinstate Devon and Black as investment advisers, and restore FMS to its pre-Complaint financial position. (*Id.*) (hereinafter “Request C3”)

D. April 2025 “Petition for Withdrawal of Complaint”

Most recently, Black filed a Petition for Withdrawal of Complaint and alleged:

1. In September of 1997, when the Complaint was filed by the Commission, Defendants were subject to Arbitrage Regulations issued by the Internal Revenue Service (“IRS”) in 1993, and not to Securities Regulations. (*Apr. ’25 Petition* at 2) (hereinafter “Request D1”)

2. Under Fed. R. Civ. P. 54(b), no final judgment has been entered because Defendants will not agree that they defrauded their clients.<sup>7</sup> (*Id.*) (hereinafter “Request D2”)

### ARGUMENT

As detailed below, the Requests suffer from numerous fatal defects. First, there are threshold flaws with the Requests that would prevent this Commission from even ruling on certain challenges. Next, the Requests are barred by collateral estoppel, and nearly all of the arguments raised should be barred by *res judicata*. And finally, even to the extent the Requests could be read as simply seeking modifications of remedies, they cannot meet that standard. Quite simply, the Commission should deny each of the requests for multiple reasons.

#### A. All Four Requests Should Be Denied Due to Threshold Problems

Initially, it is worth noting that, notwithstanding extraordinary relief sought by the Requests, and the seemingly endless attacks on his own settlement, two of the requests can be denied with little need for further explanation. The May 2015 “Petition to Withdraw Complaint” and the April 2025 “Petition to Withdraw Complaint” on their face plainly request relief that is simply not available in this forum, as the Commission cannot direct the withdrawal of the Complaint filed in district court in 1997, and on which Consents and Final Judgments were entered a quarter century ago. The only order currently and properly at issue here are the Administrative Order entered by the Commission, as modified per the Commission’s April 2010 Order, which Black consented to in May of 1998. Those Orders collectively, (1) revoked Devon’s registration as an investment adviser; and (2) barred Black from association with any investment adviser or investment company.

The relief sought is limited to rescinding that Administrative Order, in whole or in part, and not withdrawal of the Complaint filed in district court in 1997, or monetary compensation or any

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<sup>7</sup> Yet again, this allegation is tied to the valuation of the CIA/securities.

other relief sought.<sup>8</sup> But even so limited, the Commission should not disturb either of part of the Administrative Order. The Order was justified and appropriate, and the result of Defendants' own consent to settle the matter.

As the Commission noted in its June 2010 Order Denying Reconsideration:

Reconsideration is an extraordinary remedy designed to correct manifest errors in law or fact or permit the introduction of newly discovered evidence. Motions for reconsideration are not to be used to reiterate arguments previously made or to cite authorities previously available. Citing, *The Rockies Fund*, Securities Exchange Act Rel. No. 56344 (Aug. 31, 2007), 91 SEC Docket 1418, 1420 (denying reconsideration).

June 2010 Order at 3, n. 8, 9.

The September 2013 “Petition to Reconsider Order of September 4, 2013” does not meet this rigorous standard, and should be denied on that basis alone. The May 2015 “Petition to Withdraw Complaint” and the April 2025 “Petition to Withdraw Complaint” on their face plainly request relief that is simply not available as the Commission cannot direct the withdrawal of the Complaint filed in district court in 1997, and on which Consents and Final Judgments were entered a quarter century ago. And the June 2018 “Request for Relief” asks the Commission to find that it is “responsible for reimbursing the losses incurred” by the Clients, relief that is simply not available in the context of an Administrative Proceeding, and also included FMS in that request, an entity not even named in the AP. So those should be denied for that reason, as well.

**B. The Requests are Barred by Collateral Estoppel**

There is at least one more fundamental, threshold problem with the Requests. As the Commission, the district court, the D.C. Circuit Court of Appeals, the Third Circuit Court of Appeals, and the Court of Claims have all held, these claims are barred by collateral estoppel.

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<sup>8</sup> See Request B May 2015 Petition to Withdraw Complaint, Request C3—relief sought included compensating clients, and restoring FMS to its pre-Complaint financial position, and Request D April 2025 Petition to Withdraw Complaint.

Defendants consented to certain relief, and are not in a position to challenge the imposition of that relief later. See, April 2010 Order at 5; September 2013 Order at 7, FN 21 (citing 17 C.F.R. § 202.5(e); see also *Marshall E. Melton*, Securities Exchange Act Rel. No. 48228, 2003 SEC LEXIS 1767, at \*28-29 (July 25, 2003) (reaffirming policy); *Samuel O. Forson*, Exchange Act Rel. No. 38853, 1997 SEC LEXIS 1507, at \*3 (July 21, 1997) (“[H]aving consented to the entry of an injunction based on [certain] allegations, Forson may not question them now in an action based on that injunction.” (citation omitted))).

As the Commission noted in its April 2010 Order, the Commission has “a ‘strong interest’ in the finality of our settlement orders.” April 2010 Order at 4 and FN 10, citing *Kenneth W. Haver, CPA*, Securities Exchange Act Rel. No. 54824 (Nov. 28, 2006), 89 SEC Docket 1237; “Public policy considerations favor the expeditious disposition of litigation, and a respondent cannot be permitted to [follow] one course of action and, upon an unfavorable [result], to try another course of action.” *Id.* at 1240 n.1 (quoting with indicated alterations *David T. Fleischman*, 43 S.E.C. 518, 522 (1967) (finding that “the failure of a respondent to testify and adduce available evidence to meet the charges against him . . . does not entitle him to have the proceedings reopened after the issuance of an adverse decision”)); see also, June 2010 Order at 4-5, n. 12.).

Appellate courts have found that “[i]f sanctioned parties easily are able to reopen consent decrees years later, the SEC would have little incentive to enter into such agreements. There would always remain open the possibility of litigation on the merits at some time in the distant future when memories have faded and records have been destroyed.” *Haver*, 89 SEC Docket at 1241 (quoting *Miller v. SEC*, 998 F.2d 62, 65 (2d Cir. 1993) (affirming Commission order denying a petition to set aside a censure imposed with respondent’s consent)). The Commission has

recently reiterated, and emphasized this strong interest, and the compelling or extraordinary circumstances Black would need to show to justify modification of a settled order. *In the Matter of Certain Off-channel Communications Settled Orders*, SEC Docket (CCH) 1128544 at \*2 (“The Commission and courts have long emphasized the “strong interest” in maintaining the finality of settlements. Parties generally therefore must demonstrate “compelling” or “extraordinary” circumstances to modify a settled order.”).

Black has not made that showing. The Requests are all barred by collateral estoppel. The settled order should not be disturbed.

C. The Arguments Raised in the Requests Have Already Been Considered and Rejected

Breaking down the substantive arguments in the Requests, there are six general albeit related claims raised by Black. Consideration of each in turn shows that all have been considered and rejected by the Commission, the district court, Courts of Appeal, and the Court of Claims. Applying notions of *res judicata*, the Requests should be rejected again, for this reason as well.

1. Allegation of Improper Valuation.

The underlying theme of all of these Requests regards the valuation of the CIA. But specifically, the Requests collectively raise an issue regarding valuation seven separate times. See, Requests A1, A2, A3, B1, B2, C1, and C2.

The Commission, and several other Courts, have repeatedly rejected Black’s alternative theories of valuation of the CIA, whether allegedly tethered to a new method to determine valuation referencing the Financial Accounting Standards Board (“FASB”) [See, April 2010 Order at 3; June 2010 Order at 3; *Black*, 462 Fed. Appx. at 7-8 (Att. B); *Black*, 84 Fed. Cl. at 444 (Att. E)]; FMS’s tax returns done by PriceWaterhouseCoopers [See, September 2013 Order at 5]; or that the CIA was valued at \$269 million as determined by applying principles of fair market value [See,

*Black*, 84 Fed. Cl. at 444 (Att. E)]. As has been repeatedly held, Black’s evolving theories on valuation are meritless and raised in conclusory fashion without evidentiary support. Black raises no new evidence or law that could overcome these prior decisions. These arguments should be rejected again.

2. Allegedly being Deceived into Signing the Consent.

Black alleged twice in these Requests that he was deceived into signing the Consent as he was not aware of the valuation of the CIA issue. See, Request A6, B3. Again, the valuation issue is a non-starter, as indicated supra, and noted by the Third Circuit. *Black*, 2022 WL 2355432 at \*1, Att. F. But moreover, this alleged “deception” argument has also been rejected. The Commission has already held that there was not “any basis for finding that Black was deceived into settling these administrative proceedings.” June 2010 Order at 4. The Request offers nothing new on this point, and this argument is meritless and must again be denied.

3. Argument that the Commission’s Order was Arbitrary and Capricious.

Black again, tied to the valuation issue, has questioned the Commission’s effort in instituting the civil action in the first place, and the Commission’s motives in not disclosing details he alleges the Commission knew regarding valuation. See, Request A5 at 3, 7: Commission lacked “objectivity and impartiality”, “arbitrary and capricious, issued for the benefit of the Commission rather than in the public interest.”); (September 2013 Order at 5, Commission failed to disclose valuation and “this alleged failure calls into question the Commission’s impartiality.”) Again, this claim has been repeatedly rejected. The Commission specifically held that these claims were barred by collateral estoppel. (Sept. 2013 Order at 7: “As we stated when considering Petitioners’ earlier petition, parties to a follow-on proceeding are ‘estopped from challenging before us the district court’s findings or, as here, the allegations made in the complaint in that proceeding.’”).

The Commission also considered factors related to the public interest, and found that Black presented no compelling circumstance(s) that would justify granting relief from the bar imposed. *Id.* at 7-8. The Request is meritless, and must be denied.

4. Claims that the Commission Lacked Authority, Subject Matter Jurisdiction.

Black questioned the authority of the Commission, as well as the Courts, to act, and cited to the notion that the prior proceedings were under the Securities Act and the Exchange Act, but that the Administrative Order was under the Advisers Act. See, Request A4. However, the “Second Cause of Action” in the Complaint was under the Advisers Act. Att. A at 13.

Black raised a similar claim in the 2008 appeal to the Third Circuit in which he asserted that the “judgment is void because the district court lacked subject matter jurisdiction” .... because “that the SEC failed to disclose that his practices were in accord with Internal Revenue Service regulation 26 C.F.R. § 1.148-5(d), and that the market value” ... of the CIA “was never misrepresented to its owners.” *Black*, 262 Fed. Appx. at 362, Att. D. The Third Circuit rejected all of those grounds and held that the district court clearly had subject matter jurisdiction, and that Black “did not state that the SEC’s alleged misconduct prevented him from fully and fairly presenting these issues in the case initially.” *Id.* at 363.

And the Commission squarely addressed this claim, and rejected it in its June 2010 Order: There is no basis for his claim that we lacked jurisdiction to issue the Settled Order. The Investment Advisers Act expressly provides for administrative proceedings (and the imposition of sanctions) against investment advisers and persons associated with them based on the entry of an injunction related to investment advisory activities, the situation presented here. 15 U.S.C. § 80b-3(e)(4).

June 2010 Order at 4, n. 10.

The Commission clearly had authority and subject matter jurisdiction, so the Request must be denied.

5. Claims relying on the IRS Arbitrage Regulations.

Black cited the IRS Arbitrage Regulations as a basis to somehow show that “Defendants were not subject to the Securities Regulation....” See Request D1. Black repeatedly cited to these Arbitrage Regulations regarding his valuation claim, *supra*, but seems to be citing to these Arbitrage Regulations in Request D1 for support that he complied with those regulations generally. See, September 2013 Order at 5, n. 18; *Black*, 262 Fed. Appx. at 362, Att. D.

However, as clearly articulated in the Complaint, and agreed to when the Consent was entered, Devon was an investment advisor, and Black was the sole owner and made all investment decisions for Devon, so both were subject to the Advisers Act, and the IRS Arbitrage Regulation clearly does nothing to alter that analysis. The Request is meritless and must be denied.

6. That no Final Judgment was entered or effective.

In a perfectly circular argument that defies logic, and ignores the no-admit, no-deny Consent he entered, as well as all prior rulings in the case by the Commission and various Courts, Black argues that he has not and will not agree that he defrauded any clients, and therefore, no final judgment has been entered. See, Request D2. Unfortunately for Defendants, it just does not work that way. And the Third Circuit has already indicated as much. *Black*, 2022 WL 2355432 at \*1, Att. F. The Request is meritless and must be denied.

The Requests are barred by collateral estoppel and *res judicata*. Even if the Commission reaches the merits of the Requests, they are as spurious today as they were when he first began raising them over twenty years ago. The Requests should be denied.

D. No other factors warrant a different outcome.

To the extent the Commission deems Black’s Requests as an effort to modify the sanctions imposed on him and Devon, the Commission should still deny the relief.

As stated by the Commission, citing *Haver*, 89 SEC Docket at 1240, factors relevant to a request to modify sanctions are:

the nature of the misconduct at issue in the underlying matter ... the time that has passed since issuance of the administrative bar; the compliance record of, and any regulatory interest in, the petitioner since issuance of the administrative bar; the age and securities industry experience of the petitioner, and the extent to which the Commission has granted prior relief from the administrative bar; whether the petitioner has identified verifiable, unanticipated consequences of the bar; the position and persuasiveness of the Division of Enforcement, as expressed in response to the petition for relief; and whether there exists any other circumstance that would cause the requested relief from the administrative bar to be inconsistent with the public interest or the protection of investors.

As the Commission noted, “In applying these factors, it is our general policy that bars should ‘remain in place in the usual case and be removed only in compelling circumstances.’” April 2010 Order at 6; *Haver*, 89 SEC Docket at 1240 n.9.

As the D.C. Court of Appeals noted, “The SEC will lift or modify a bar order when ‘it is consistent with the public interest and investor protection to permit the petitioner to function in the industry without the safeguards provided by the bar.’ *In re Ciro Cozzolino*, Exchange Act Release No. 49001, 2003 WL 23094746, at \*3, 2003 SEC LEXIS 3083, at \*12 (Dec. 29, 2003).” *Black*, 462 Fed. Appx. at 7, Att. B.

Black presented no compelling circumstances to justify relief from the Commission’s Order. See, September 2010 Order at 8.

As outlined above, the conduct underlying the Administrative Order and Relief Order was a very serious fraudulent scheme that lasted over two years, included efforts to deceive and a high degree of scienter, and resulted in losses of over \$71 million dollars. April 2010 Order at 7.

Throughout all of these filings and proceedings, Black has failed to identify any “verifiable, unanticipated consequences of the bar” which was originally imposed over a quarter of a century ago. In addition, Black has made very little progress in paying back the millions he agreed to and

was ordered to pay. And, as evidenced by Black's repeatedly filing these spurious petitions consuming precious Commission and judicial resources, he exhibits no remorse for his misconduct, and provides no assurances or basis for hoping that he is unlikely to engage in future misconduct. September 2010 Order at 8. The Commission should not disturb the Administrative Order and Relief Order.

**CONCLUSION**

For the reasons stated above, the Division requests that the Commission deny Petitioner's Four Requests.

July 1, 2025

Respectfully submitted,

DIVISION OF ENFORCEMENT

/s/ Judson T. Mihok

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**CERTIFICATE OF COMPLIANCE**

**In the Matter of John Gardner Black, A.P. File No. 2-9599**

I hereby certify that the attached Motion, Brief in Support, and Attachments uses 12-point Times New Roman font and contains 6,658 words.

Dated: July 1, 2025

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 1st day of July, 2025, under Commission Rules of Practice 150 and 151 (17 C.F.R. §§ 210.150 & 151), I served copies of the Division’s Response in Opposition to Four Petitions Seeking Relief, Brief in Support, Index of Attachments and Attachments thereto, on the Securities and Exchange Commission Office of the Secretary by electronic mail to:

apfilings@sec.gov  
secretarys-office@sec.gov

On this date, I also caused service of same on John Gardner Black by electronic mail and UPS service to:

[REDACTED]

John Gardner Black  
[REDACTED]

/s/ Judson T. Mihok \_\_\_\_\_  
Judson T. Mihok

**UNITED STATES OF AMERICA**  
**Before the**  
**SECURITIES AND EXCHANGE COMMISSION**

**ADMINISTRATIVE PROCEEDING**  
**File No. 3-9599**

**In the Matter of**

**JOHN GARDNER BLACK and**  
**DEVON CAPITAL**  
**MANAGEMENT**

**DIVISION'S INDEX OF ATTACHMENTS**

<b><u>Attachment</u></b>	<b><u>Description</u></b>
A	Complaint filed in <i>SEC v. John Gardner Black et al.</i>
B	<i>Black v. SEC</i> , 462 F. App'x. 6 (D.C. Cir. 2012)
C	Petitioner's Brief filed Jan. 20, 2011
D	<i>SEC v. Black et al.</i> , 262 Fed. App'x. 360 (3d Cir. 2008)
E	<i>Black v. United States</i> , 84 Fed. Cl. 439 (2008)
F	<i>SEC v. Black</i> , 2022 WL 2355432 (3d Cir. 2022)