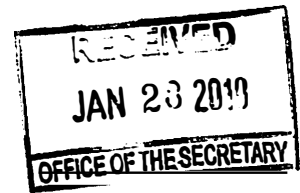




UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
NEW YORK REGIONAL OFFICE
BROOKFIELD PLACE, 200 VESEY STREET, SUITE 400
NEW YORK, NEW YORK 10281-1022



WRITER'S DIRECT DIAL LINE
(212) 336-0589

December 27, 2018

Via UPS Overnight Delivery

Brent Fields, Secretary
Office of the Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Mail Stop 1090
Washington D.C. 20549

**Re: In the Matter of Lawrence E. Penn, III,
Admin. Proc. File No. 3-18288**

Dear Mr. Fields:

Please find enclosed an original and three copies of (1) the Division of Enforcement's Reply in Further Support of its Motion for Summary Disposition Against Respondent. Although the enclosed is due on December 31, 2018, we are filing and serving early given the expectation that the current lapse in appropriations will continue through the due date.

Respectfully submitted,

Howard Fischer / KEW

Howard A. Fischer
Senior Trial Counsel

cc: Hon. James E. Grimes (by Email)
Lawrence E. Penn (by Email)

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-18288

<p>In the Matter of</p> <p style="text-align:center">LAWRENCE E. PENN, III,</p> <p>Respondent.</p>

REPLY MEMORANDUM OF LAW IN SUPPORT OF
THE DIVISION OF ENFORCEMENT'S MOTION FOR SUMMARY DISPOSITION

The Division of Enforcement ("Division") respectfully submits that nothing in the December 17, 2018 Opposition of Respondent Lawrence E. Penn, III ("Penn Opp.") to the Division's Motion for Summary Disposition prevents the entry of summary disposition under Rule 250 of the Commission's Rule of Practice. Consequently, the Division requests that an Order be entered forthwith, permanently barring Respondent Lawrence E. Penn, III ("Penn") from associating with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

As set forth in the Division's memorandum in support of the Motion for Summary Disposition ("Mem."), the required predicates under Sections 203(d) and (f) of the Investment Advisers Act of 1940 for the entry of summary disposition under Rule of Practice 250 is a showing that the person sought to be barred was associated with an investment adviser, and that the person was either convicted of certain felonies or was the subject of an injunction in connection with the purchase or sale of any security. Penn does not contest that he was associated with an investment adviser or that he was the subject of both an applicable felony

conviction and an injunction from engaging in relevant conduct. The sole question on the Division's motion is whether a full associational bar is in the public interest, which, as discussed in the Mem., it is. The full associational bar is in the public interest because Penn's conduct was egregious, recurrent, and involved a high level of scienter. Moreover, Penn has not recognized the wrongful nature of the underlying conduct and has made no assurance against future violations; thus, there is a likelihood for future violations if the full associational bar is not granted.

Penn contends that he was the victim of a broad conspiracy by various law enforcement officials in several branches of government, both state and federal, to infringe upon his rights.

~~Thus, he asserts, the proceedings that led to his conviction by plea agreement, and subsequently~~
to the entry of an injunction against him in the civil proceeding, were tainted. Notably, however, Penn makes no attempt to refute the predicate events that justify permanent bars in this matter. And, other than a passing reference to the public interest, Penn does not explain why bars should not be imposed here and does not analyze the relevant factors that must be considered in determining whether to enter the requested relief.¹ Instead, he focuses his fire on the purported deficiencies of the criminal and civil proceedings. But in this respect, Penn is firing blanks. Even if Penn's claims were not speculative and fantastical, they would be irrelevant because the law is crystal clear: the pendency of an appeal or other challenge to the legitimacy of the predicate conviction or injunction does not preclude the imposition of relief in a Commission administrative proceeding.

¹ As the Division set out in the Memorandum of Law in Support of its Motion for Summary Disposition, the Commission considers six factors when considering whether the particular sanction of a bar is appropriate: the egregiousness of the underlying actions; the isolated or recurrent nature of those actions; the degree of scienter involved; any recognition of the wrongful nature of the underlying conduct; the sincerity of any assurance against future violations; and the likelihood that current circumstances present opportunities for future violations. See the Division's Memo, at 7-8, citing *In the Matter of Edgar R. Page and Page One Financial Inc.*, IA Rel. No. 4400, 2016 WL3030845, at *5 (Comm'n Op. May 27, 2016).

A Respondent Cannot Challenge the Legitimacy of an Earlier Proceeding

Penn's numerous and speculative attacks on both the civil and criminal proceedings are beside the point.² Where, as here, the facts have been determined in an earlier judicial proceeding, a respondent cannot relitigate those issues that were addressed in that previous civil proceeding. *See Peter J. Eichler, Jr.*, Initial Decision Rel. No. 1032, 2016 WL 4035559, at *2 (July 8, 2016) ("It is well established that the Commission does not permit a respondent to relitigate issues that were addressed in a previous civil proceeding against the respondent, whether resolved by summary judgment, by consent, or after a trial.") (collecting cases).³

Nor can Penn relitigate or collaterally attack the validity of his criminal conviction before this tribunal. *Gregory Bartko*, Initial Decision Rel. No. 467, 2012 WL 3578907 at *2 (Aug. 21, 2012) ("The findings and conclusions made in the underlying action are immune from attack in a follow-on administrative proceeding. The Commission does not permit a respondent to relitigate issues that were addressed in a previous proceeding against the respondent."), *aff'd*, Exchange Act Rel. No. 71666 (Mar. 7, 2014), *petition granted in part and denied in part sub nom. Bartko v. S.E.C.*, 845 F.3d 1217 (D.C. Cir. 2017) (internal citations omitted); *Jose P. Zollino*, Exchange Act Rel. No. 55107, 2007 WL 98919, at *4 (Jan. 16, 2007) (a party may not challenge a criminal conviction in subsequent administrative proceeding); *William F. Lincoln*, Exchange Act Rel. No. 39629, 1998 WL 80228, at *2 (Feb. 9, 1998) (in proceedings based on a criminal conviction, a

² Among other things, Penn claims that he "was not provided adequate time to provide an amended answer to the SEC complaint." (Penn. Opp. 22.) That is simply not true; to the contrary, Penn was provided with almost five months to submit his answer despite having repeatedly flouted Court deadlines. At first, Penn simply refused to put in a formal Answer (see Docket Entry 122) and the Court had to advise Penn that his response deadline had initially been set in December of 2015, and he was reminded of this in four separate Orders. *See* Court Order of February 26, 2016 (Docket Entry 123). As the docket in the civil proceeding reflects, Penn then put in multiple answers, including on February 27, 2016 (Docket Entry 124); March 18, 2016 (Docket Entry 129); and April 8, 2016 (Docket Entry 134).

³ *Accord Robert Burton*, Initial Decision Rel. No. 1014, 2016 WL 3030850, *2 (May 27, 2016); *James E. Franklin*, Exchange Act Rel. No. 56649, 2007 WL 2974200, at *4 & n.13 (Oct. 12, 2007) (citing cases), *petition for review denied*, 285 Fed. App'x 761 (D.C. Cir. 2008).

respondent “is collaterally estopped from attacking here the merits of the criminal proceeding against him”).

The Pendency of An Appeal Does Not Preclude Summary Disposition

Nor is the potential pendency of an appeal any obstacle to the grant of the relief sought by the Division. The pendency of an appeal of the criminal matter is irrelevant, since once a criminal conviction is entered, a bar is appropriate. *See Elliott v. SEC*, 36 F.3d 86, 87 (11th Cir. 1994) (“Nothing in the statute’s language prevents a bar [from being] entered if a criminal conviction is on appeal.”); *Hunt v. Liberty Lobby, Inc.*, 707 F.2d 1493, 1497 (D.C. Cir. 1983) (“Under well-settled federal law, the pendency of an appeal does not diminish the *res judicata* effect of a judgment rendered by a federal court.”).

Moreover, there is no criminal appeal pending. While Penn tortures New York criminal procedure to claim that “the merits of the criminal conviction have not been heard on the merits” (Penn Opp. 7), he has exhausted his appeals in New York; the New York Court of Appeals of the State of New York (the highest court in New York) denied Penn’s appeal almost a year ago. *See People v. Penn*, 2018 WL 943259 (Ct. App. Jan. 31, 2018) (denying leave to appeal). Penn’s claim that “[c]urrently, the New York Supreme Court Appellate Division First Department is reconsidering hearing the case on the merits on federal grounds” (*Id.*) lacks any citation to evidence and flies in the face of logic.

The potential for an appeal of the civil proceeding also provides Penn no relief. *Stephan Von Hase*, Exchange Act Release No. 1061, 2016 WL 4942318, at *2 (Sept. 16, 2016) (“pendency of an appeal does not preclude the Commission from action based on an injunction”)

(citing cases); *James E. Franklin*, Exchange Act Rel. No. 56649, 2007 WL 2974200, at *4 (Oct. 12, 2007).⁴

In the unlikely event that both of the predicate events for the Division's requested relief were to be vacated by the appropriate state and/or federal courts, Penn could petition the Commission to vacate the bar imposed in this proceeding. *See, e.g., Richard L. Goble*, Exch. Act Rel. No. 68651, 2013 WL 150557 (Jan. 14, 2013) (dismissing follow-on administrative proceeding after court of appeals, while petition for review was pending before Commission, vacated injunction that was basis for OIP); *Kenneth E. Mahaffy, Jr.*, Exch. Act Rel. No. 68462, 2012 WL 6608201 (Dec. 18, 2012) (vacating bar issued in follow-on administrative proceeding where court of appeals, after Commission had issued bar order, vacated criminal conviction that was basis for proceeding). Unless and until such an event occurs, however, the only question before the Commission is what remedies will best protect investors, given the existence of these predicate events.

There is No Basis for a Stay

Penn also styles his December 17 filing as a "motion to stay," which must be denied. In the first place, the SEC Rules of Practice do not contain any provisions allowing a Respondent to stay proceedings seeking imposition of associational bars based on the pendency of appeals of civil or criminal cases. All of the cases Penn cites involve federal court decisions staying the application of a state court decision that applied federal law incorrectly. Here, Penn's argument

⁴ Penn asserts that the Second Circuit "has already determined that the *SEC v. Penn* is not deemed a case with a final judgment and is premature for appeal," (Penn Opp. 15) citing a stipulation between Penn and the Commission dated March 4, 2017. This now outdated stipulation in no way contradicts the fact that both a criminal conviction and injunction have, in fact, been issued.

Penn also argues that collateral estoppel is not appropriate because the issues were not fully and fairly litigated in the criminal and civil actions. (Penn Opp. 18). However, he cites no decision by the Commission, or by any administrative law judge, that suggests that a guilty plea, or a civil injunction based in part on that plea, can be ignored based on nothing more than the Respondent's assertion—rejected by the state courts in which the plea was taken—that he should not have been charged.

is that the state court applied its own law incorrectly—a problem that, if it existed, would not be within the power of this administrative court to rectify. Penn’s bizarre argument that the state court, by deciding against him, somehow violated Penn’s rights under the Fifth, Eighth and Fourteenth Amendments to the U.S. Constitution can be considered, if at all, only by a federal court.⁵ Secondly, as noted above, the criminal case has concluded. Consequently, Penn cannot credibly assert that there is a likelihood that his criminal conviction, which provides a basis for the associational bars, will be reversed during the pendency of a stay. Finally, because the pendency or potential for any appeal in his civil case does not prevent an order barring Penn, it cannot be the basis for any stay of the instant proceeding.

⁵ Penn appears to argue that the Appellate Division erred when it held that Penn, by pleading guilty, “automatically forfeited appellate review of his claim that he was an owner of the stolen property and thus could not be guilty of larceny.” He argues that his objection to the application of the statute was somehow constitutional in nature, and that he therefore was entitled to appeal despite his voluntary plea. (*See* Penn Opp. At 15-16).

Even assuming that his argument is correct, however, Penn was not injured by the Appellate Division’s alleged misapplication of constitutional law. The Appellate Division did consider his appeal on the merits, holding in the alternative that “the record before us establishes that, unlike the situation in *People v. Zinke*...defendant adopted a form of business organization whereby he held no ownership interest in the stolen money at the time of the theft.” (Declaration of Karen E. Willenken dated November 27, 2018, Ex. 8). Penn’s claim that the SEC and DA’s office staff members somehow used what they allegedly *knew* to be a trumped-up charge to coerce him into pleading guilty is, as the Appellate Division’s opinion makes clear, entirely fanciful.

CONCLUSION

Based upon his criminal conviction and the injunction entered against him, and pursuant to the public interest, bars should be entered as against Respondent Lawrence E. Penn, III permanently barring him from associating with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

Dated: New York, NY
December 27, 2018

Howard Fischer / KEW

Howard Fischer, Esq.
Thomas P. Smith, Esq.
Karen E. Willenken, Esq.
Katherine S. Bromberg, Esq.
New York Regional Office
Securities and Exchange Commission
200 Vesey Street, Suite 400
New York, NY 10281
Tel.: (212) 336-0589
FischerH@SEC.gov

Attorneys for the Division of Enforcement

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-18288

In the Matter of

LAWRENCE E. PENN, III,

Respondent.

Certificate of Service

I hereby certify that I served the Division of Enforcement's Reply Memorandum of Law ~~in Support of its Motion for Summary Disposition, dated December 27, 2018 (the "Reply"), on~~ the below persons by the means indicated:

Lawrence E. Penn, III
[REDACTED]
Suite [REDACTED]
New York, NY [REDACTED]
[REDACTED]@gmail.com
(By Email)

Brent Fields, Secretary
Office of the Secretary
U.S. Securities and Exchange Commission
100 F. Street, N.E.
Washington, D.C. 20549-2557
(By UPS (original and three copies))

The Honorable James E. Grimes
Administrative Law Judge
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-2557
alj@sec.gov
(By Email)



Karen E. Willenken
Senior Counsel