UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-20795

In the Matter of

LAURENCE G. ALLEN,

Respondent.

DIVISION OF ENFORCEMENT'S MOTION FOR SUMMARY DISPOSITION

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Pursuant to Rule 250(b) of the Rules of Practice of the Securities and Exchange Commission ("Commission"), the Division of Enforcement ("Division") respectfully submits this motion for summary disposition against Respondent Laurence G. Allen ("Allen" or "Respondent").

PRELIMINARY STATEMENT

In this follow-on proceeding, the Division seeks industry and penny-stock bars against Allen, an investment adviser, based on permanent injunctions issued against him in *New York Attorney General v. Laurence G. Allen, et al.*, Index No. 452378/2019 (N.Y. Sup. Ct.) ("*NYAG v. Allen*"). The New York Attorney General ("NYAG") brought that civil enforcement proceeding against Allen in 2019 in the Supreme Court of New York (New York's trial-level court). Following a bench trial, the New York court found that Allen had violated, among other things, the securities fraud provisions of New York's Martin Act by "fraudulently" making material misrepresentations and omissions to the limited partners of ACP X, LP ("ACPX")—a private equity fund whose investment advisor, ACP Investment Group, LLC ("ACP"), Allen controlled and managed. On the basis of these findings, the court enjoined Allen from taking certain actions regarding ACPX and, more generally, from "[v]iolating [the Martin Act], and from engaging in fraudulent, deceptive and illegal acts, and further employing any device, scheme or artifice to defraud or to obtain money or property by means of false pretense, representation or promise." *Id.* at 14-15. On October 21, 2021, the New York Appellate Division affirmed the trial court's findings and rulings. *NYAG v. Allen*, 198 A.D.3d 531, 156 N.Y.S.3d 171 (N.Y. App. Div. 1st Dept. 2021). On April 26, 2022, the New York Court of Appeals (New York's highest court) dismissed Allen's subsequent appeal on jurisdictional grounds. *NYAG v. Allen*, 2022 N.Y. Slip Op. 64949, 2022 WL 1221596 (N.Y. Apr. 26, 2022).

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Pursuant to Section 15(b)(6) of the Securities Exchange Act of 1934 ("Exchange Act"), and Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act"), the Division seeks industry and penny-stock bars against Allen based on the permanent injunctions issued against him in *NYAG v. Allen*. In Commission follow-on proceedings such as this—where a court of competent jurisdiction has found the respondent committed securities fraud and has enjoined the respondent from such conduct—the Commission repeatedly has ruled that, absent unusual mitigating circumstances, the respondent must be barred from the securities industry. No such unusual circumstances exist here, and the Commission should therefore bar Allen based on the permanent injunctions and findings against him in *NYAG v. Allen*.

In his Answer to the OIP, Allen asserts that the New York court injunctions do not warrant such relief because the NYAG's Martin Act claims did not require proof of Allen's scienter. Respondent is mistaken for at least two reasons. First, in analogous Commission enforcement actions, federal district courts have issued injunctions against future violations of non-scienter provisions—such as Sections 5, 17(a)(2), and 17(a)(3) of the Securities Act of 1933 ("Securities Act") and Advisers Act Section 206(2)—and such injunctions have formed the basis for follow-on Commission proceedings such as this one. Second, regardless of the NYAG's burden of proof, the *NYAG v. Allen* trial court found (and the Appellate Division affirmed) that Allen repeatedly acted "fraudulently" and otherwise egregiously. Thus, the mere fact that the NYAG was not required to prove Allen's scienter does not diminish the egregiousness of his securities law violations (as found by those courts), which warrants industry and penny-stock bars.

Respondent further asserts that the New York injunctions are insufficient because they do not enjoin him from acting as an investment advisor. Respondent misconstrues the basis for this

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and similar Commission follow-on proceedings. Allen's Martin Act injunction enjoins him from future Martin Act violations, including "engaging in fraudulent, deceptive and illegal acts, and further employing any device, scheme or artifice to defraud or to obtain money or property by means of false pretense, representation or promise." Thus, the Martin Act injunction is closely analogous to the typical injunctions against future violations of securities law provisions that the Commission obtains in its enforcement actions and upon which it routinely institutes follow-on proceedings such as this one. And the New York court's additional injunctions against Allen—which limit his use and investment of ACPX funds—are a sufficient independent predicate for this proceeding and for the Commission to issue industry and penny-stock bars against Allen (particularly given the egregiousness of Allen's conduct).

Allen's remaining arguments in his Answer, although couched as "mitigating factors," amount merely to impermissible collateral attacks on the New York trial court's findings and conclusions; indeed, Allen ignores the Appellate Division's affirmance. It is well established that the Commission does not consider such collateral attacks in follow-on proceedings, and no reason exists here to depart from that rule. The Commission should defer to the findings and rulings of the trial and appellate courts in *NYAG v. Allen*. Those courts received and reviewed all of the evidence in that case—not just the evidence that Allen might selectively now cite—and they heard and rejected the very same arguments that Allen attempts now to re-litigate before the Commission. The New York courts, not the Commission, are the proper fora for consideration of the merits of the NYAG's claims against Allen.[1]

[1] The same holds true for the proposed *amicus curiae* brief of the ACPX Limited Partners Advisory Committee ("LPAC"), which amounts to a collateral attack on the New York trial and appellate courts' decisions in *NYAG v. Allen*. On May 13, 2022, the Commission denied the LPAC's motion as "premature," without prejudice to its re-filing at an appropriate time. The Division reserves its right to respond to any such re-submitted *amicus* brief, if necessary.

STATEMENT OF UNDISPUTED FACTS

Unless otherwise noted, the following undisputed facts are from the record in *NYAG v. Allen*, and all citations are to the record in that case.

I. The *NYAG v. Allen* Enforcement Action

On December 4, 2019, the NYAG filed *NYAG v. Allen* against Allen and certain entities he controlled, including ACP, ACPX, and NYPPEX Holdings, LLC ("NYPPEX"). *See NYAG v. Allen, et al.*, Index No. 452378/2019, at 1-2 (N.Y. Sup. Ct. Feb. 4, 2020 Order) (Ex. 1[2]) (hereinafter, "*NYAG v. Allen I*").[3]

According to the trial court in *NYAG v. Allen*, ACPX "is a limited partnership formed in 2004 with over 75 limited partners," "capitalized with approximately $17 million," and "established for the purpose of acquiring a diversified portfolio of distressed private equity limited partnership interests." *NYAG v. Allen, et al.*, Index No. 452378/2019, at 2-3 (N.Y. Sup. Ct. Feb. 26, 2021 Order) (hereinafter "*NYAG v. Allen II"*) (Ex. 2 at 2-3). ACP "is the investment advisor to ACPX," and Allen "is the managing principal of [ACP]." *Id.* at 2. "[ACP] owns 100% of. . . ACP Partners X, LLC, which is the general partner of ACPX." *Id.* "Allen is the managing member and managing principal of the General Partner." *Id.* "NYPPEX Holdings, LLC ('NYPPEX') is the parent company and 100% owner of [ACP] and. . . NYPPEX, LLC, a registered broker-dealer." *Id.* "Allen is the CEO and managing member of NYPPEX and the majority shareholder of NYPPEX." *Id.*

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[2] "Ex." refers to the exhibits attached to the Declaration of Rhonda L. Jung, which the Division submits concurrently herewith in support of this motion.

[3] The trial court docket for *NYAG v. Allen* (Index No. 452378/2019), is available on-line at: https://iapps.courts.state.ny.us/nyscef/CaseSearch.

The NYAG's Complaint alleged that, in their solicitation of investors for, and management of, the ACPX fund, Allen and his above entities made numerous material misrepresentations and omissions to the fund's limited partners, in violation of the securities anti-fraud provisions of New York's Martin Act (NY General Business Law § 352, *et seq.*); the anti-fraud provisions of New York Executive Law § 63(12); and New York common law of fraud and breach of fiduciary duty. *NYAG v. Allen*, 198 A.D.3d 531, 531, 156 N.Y.S.3d 171 (N.Y. App. Div. 1st Dept. 2021) (Ex. 3); *NYAG v. Allen I*, at 1 (Ex. 1 at 1); *NYAG v. Allen II,* at 1-2 (Ex. 2 at 1-2). According to the New York trial court, the "Martin Act prohibits fraudulent practices relating to the 'purchase, exchange, investment advice or sale of securities', GBL § 352." *NYAG v. Allen II*, at 11 (Ex. 2 at 11) (quoting NY GBL § 352).[4] The Court further noted that "Executive Law § 63(12) prohibits 'repeated fraudulent or illegal acts or . . . persistent fraud or illegality.'" *NYAG v. Allen II*, at 14 (Ex. 2 at 14).

II. The *NYAG v. Allen* Preliminary Injunction Hearing

The 2021 trial decision in *NYAG v. Allen* incorporates by reference the trial court's prior findings from its 2020 preliminary injunction hearing in that case. For this reason, we first describe the New York court's preliminary injunction decision in *NYAG v. Allen*.

Shortly after filing its Complaint, the NYAG sought a preliminary injunction to prevent Allen and his co-defendants "from accessing the remaining assets of" ACPX. *NYAG v. Allen I*, at 1 (Ex. 1 at 1). The court's February 4, 2020 decision granted the NYAG's request for preliminary injunctive relief and made numerous fact findings against Allen—which the court later incorporated into its February 26, 2021 post-trial findings and decision against Allen. *See NYAG v.*

[4] "The Martin Act, New York's blue sky law, prohibits various fraudulent and deceitful practices relative to securities. N.Y. Gen. Bus. Law Art. 23–A." *M & T Bank Corp. v. Lasalle Bank Nat. Ass'n*, 852 F.Supp.2d 324, 335 (W.D.N.Y. 2012) (further citing NY GBL § 352).

Allen I (Ex. 1); *NYAG v. Allen II*, at 2-5 (Ex. 2 at 2-5). Thus, in both its February 4, 2020 preliminary injunction Order and its February 26 post-trial decision, the Court found "a shocking level of self-dealing, breaches of fiduciary duty, misappropriation of enormous sums of ACP capital, and outright fraud," including that "ACP was essentially utilized as a piggy bank to fund a failing broker-dealer [NYPPEX], its failing parent, and Mr. Allen." *NYAG v. Allen I*, at 4 (Ex. 1 at 2-4); *NYAG v. Allen II*, at 3 (Ex. 2 at 3).

More specifically, the court found that Allen invested $6 million of ACPX cash in NYPPEX, and "[d]uring the period 2008 to 2018 Allen's total compensation from NYPPEX Holdings exceeded $6 million." *NYAG v. Allen I*, at 4 (Ex. 1 at 4). In this regard, the court found "fanciful" Allen's claim that APCX's $6 million investment in NYPEXX would "produce windfall profits for the ACP limited partners." The court based this finding in part on testimony from a former NYPPEX Treasurer that "every certification that he and Mr. Allen signed from 2013 to 2017, including certifications relating to the value of NYPPEX, was 'a lie.'" *NYAG v. Allen I*, at 3-4 (Ex. 1 at 3-4).

The court further found that Allen had secured passage of amendments to the ACPX limited partnership agreement—stating that Allen could "distribute to himself (and, perhaps, others) a total of $3,404,466.87 in carried interest"—through false statements to the ACPX limited partners "that the General Partner was entitled to 100% of his carried interest." *NYAG v. Allen I*, at 4-5 (Ex. 1 at 4-5); *NYAG v. Allen II*, at 4 (Ex. 2 at 4).

Based on these and related findings, the court granted the NYAG's request to preliminarily enjoin Allen (and his co-defendants) from:

1. Taking any action pursuant to the Seventh Amendment to the Amended and Restated Agreement of the Limited Partnership Agreement of ACP X, LP;

2. Making distributions from ACP X, LP, except to limited partners of ACP X, LP on a pro-rata basis to their limited partnership interest in ACP X, LP, which distributions must first be approved by the Court;

3. Making any investments, extending any loans or lines of credit or entering into any agreements on behalf of ACP X, LP to or with Laurence G. Allen, NYPPEX Holdings, LLC, ACP Partners X, LLC, or any other entity in which Allen directly or indirectly exercises control or has an ownership interest;

4. Facilitating, allowing or participating in the purchase, sale or transfer of any limited partnership interest in ACP X, LP;

5. Making any payments or distributions from ACP X, LP, ACP Investment Group, LLC or ACP Partners X, LLC, to Defendants, Relief Defendants, Tyler Allen, Michelle Allen, and/or LGA Investments Family Limited Partnership;

6. Withdrawing, converting, transferring, selling or otherwise disposing of funds and assets held by ACP Investment Group, LLC, ACP X, LP, and ACP Partners X, LLC, wherever they may be situated, for purposes other than that provided for in Paragraph 2, *supra*;

7. Violating Article 23-A of the GBL [the Martin Act], and from engaging in fraudulent, deceptive and illegal acts, and further employing any device, scheme or artifice to defraud or to obtain money or property by means of false pretense, representation or promise.

NYAG v. Allen I, at 5-6 (Ex. 1 at 5-6).

III. The *NYAG v. Allen* Trial and the Post-Trial Decision Against Allen

From January 11-14, 2021, the court held a bench trial on the full merits of the NYAG's claims against Allen, and the parties "stipulated that the entire record of the preliminary injunction hearing would be deemed part of the trial record of the plenary trial." *NYAG v. Allen II*, at 4 (Ex. 2 at 4). According to the court, at the trial, "[d]irect testimony was submitted by affidavit, and each affiant whose testimony was considered by the Court was subjected to cross-examination." *Id.* "Fourteen witnesses testified at the four-day plenary trial, including some of the witnesses who had testified at the preliminary injunction hearing, including Robert Zimmel

(the former corporate treasurer of NYPPEX), Allen, and defendants' expert witnesses who were ostensibly called to express opinions on the value of NYPPEX." *Id.*

In its February 26, 2021 post-trial decision, the court started by reemphasizing and incorporating its findings from the preliminary injunction hearing:

> [T]he four days of trial testimony confirmed all of the facts established at the preliminary injunction hearing. In short, nothing in the four days of trial in any way undercuts the factual findings made by the Court after the five days of testimony that supported the issuance of the February 4, 2020 preliminary injunction order.

Id. at 4-5.

The court further found that Allen had repeatedly violated the Martin Act and summarized its findings as follows:

> The Court finds that the [NYAG] has proven by a preponderance of the evidence that Defendants: (1) made frequent, material misrepresentations and misleading omissions in communications to the limited partners of ACPX; (2) fraudulently caused ACPX to make oversized investments in NYPPEX; (3) gave false and misleading investment advice to ACPX to purchase NYPPEX stock; (4) made false and misleading reports on the value ACPX's interest in NYPPEX to the limited partners and caused ACPX to purchase NYPPEX stock at a wildly inflated prices; (5) made false and misleading statements concerning the wind-down of ACPX; (6) concealed the merger of NYPPEX and ACPX's Investment Advisor to the ACPX limited partners; (7) fraudulently took carried interest to which they were not entitled, pursuant to amendments to the limited partnership agreement that were procured by means of material misrepresentations; and (8) fraudulently caused ACPX to cover significant NYPPEX operating expenses, without fairly disclosing any of these wrongdoings to ACPX's investors.

Id. at 11.

The court also supplemented its earlier preliminary injunction hearing findings regarding Allen's investment of $6 million of ACP funds in NYPPEX:

> [T]he testimonial and documentary evidence adduced during nine days of testimony in this case established that, through a maze of entities owned and /or controlled by defendant Allen, a significant portion of the capital contributed to the ACPX limited partnership was substantially diverted by a hopelessly conflicted Allen toward funding NYPPEX – the broker-dealer entity controlled by

> Allen. NYPPEX, in turn, utilized these funds to pay Allen exorbitant NYPPEX annual salaries totaling approximately $6 million, as well as to pay the salaries of his staff. ACPX capital was also used to pay NYPPEX operating expenses. NYPPEX itself is not, as Allen claims, a technology startup with either a present or potential centi-million dollar valuation. Rather, based upon the Court's assessment of the credibility of witnesses and a review of relevant documents, NYPPEX is, and always has been, a failing broker-dealer that has a $44,000 software package purchased from a third-party vendor that supposedly allows NYPPEX to execute secondary market trades of private equity interests. ACPX's investment in NYPPEX is in no way consistent with the investment thesis contained in the ACPX Private Placement Memorandum and in the ACPX Limited Partnership Agreement.

Id. at 5. In this regard, the court further found that Allen and his co-defendants provided "fraudulent investment advice to ACPX":

> Moreover, the OAG's claims are not just about misrepresentations, but are also about defendants' independent fraudulent conduct (unrelated to any specific representation). For example, defendants provided fraudulent investment advice to ACPX by advising ACPX to invest in NYPPEX, Allen's failing broker-dealer. In addition, defendants caused NYPPEX to merge with the Investment Advisor in a clear conflict of interest pursuant to which ACPX's investment advisor was directing ACPX to, in essence, invest in itself.

Id. at 7.

The court also expanded on its earlier findings that Allen had fraudulently invested ACPX funds in NYPPEX during the "wind-down" of ACPX:

> Allen fraudulently caused ACPX to purchase equity in NYPPEX in each of 2014, 2015, 2016, and 2017-18, including a $1 million investment on August 29, 2016, and a $1 million convertible note in December 2017. These investments were contrary to defendant Allen's repeated statements that ACPX was in 'wind-down' mode, and that any new investments would be for specific, limited purposes, such as to meet capital calls.
>
> . . .
>
> The 2017 merger of ACPX's investment advisor with NYPPEX Holdings, which was never disclosed to the ACPX Limited Partners, resulted in Allen - wearing his investment advisor hat - directing ACPX capital into NYPPEX with no independent controls. In the latter connection, Zimmel, whose testimony the Court credited, testified that he and others working for Allen blindly signed each and every 'certification' Allen required to effect transfers from ACPX to

> NYPPEX. These certifications are required to confirm that duly constituted committees have signed off on the appropriateness of investments.

Id. at 11-12.[5]

Regarding Allen's "fraudulently taking carried interest" from ACPX, the court found that Allen had procured from the ACPX limited partners amendments to the limited partnership agreement—thus ostensibly permitting him to withdraw "carried interest"—by misrepresenting his right to do so to the limited partners:

> Following those amendments and the Fifth Amendment in 2017, Allen distributed to himself and the related defendants approximately $3.4 million in carried interest, including over $1.6 million on May 2, 2017. . . . Allen's appropriation of $3.4 of carried interest was procured by the fraudulent representation to ACPX investors that Allen was always entitled to carried interest when in reality the controlling provisions of the Private Placement Memorandum and the original Limited Partnership Agreement provide that the ACPX general partner - Allen - was not entitled to receive carried interest until the Limited Partners had received a return of their capital and a preferred 8% return on their investment.

Id. at 13.

The court concluded by reiterating its earlier finding that "Allen used ACPX as his private piggy bank" and by summarizing the trial evidence as follows:

> In sum, the Court finds: the testimony of defendants' valuation experts to be based on incredible assumptions supplied by Allen that bear no relationship to reality; the testimony by the defendants' experts about the general provisions of private equity funds is irrelevant; Zimmel's testimony about defendants' various defalcations is entirely credible; and the defendants' other witnesses were either incompetent to offer the testimony they offered or, in Mr. Allen's case, unworthy of belief.

Id. at 14.

Turning to relief, the court converted to permanent injunctions the seven enumerated preliminary injunctions it had issued in February 2020. *Id.* at 14-15. The court further ordered

[5] The trial court further found that Allen's fraudulent conduct regarding ACPX and NYPPEX concerned "the 'purchase' of securities" and "investment advice" under the Martin Act. *Id.*

defendants "to disgorge the fraudulent investment of limited partners' funds into NYPPEX" (totaling $3,712,438.87), plus the "fraudulent payment of $3,404,466.87 in carried interest from ACPX to its general partner that was distributed to Allen and others" and "$755,000 in additional fraudulent transfers from ACPX to NYPPEX (via ACP Investment Group) in 2018." *Id.* at 15. Finally, the court appointed a "provisional receiver" to "liquidate ACPX's remaining assets," apparently subject to the parties' ability to "agree on the appropriate allocation of those assets." *Id.* at 15.

IV. The New York Appellate Division's Affirmance of the Trial Court Decision

Allen appealed the trial court decision to the New York Appellate Division, New York's first-level appeals court. On October 21, 2021, the Appellate Division unanimously affirmed the trial court's decision. *NYAG v. Allen*, 198 A.D.3d 531, 531, 156 N.Y.S.3d 171, at *1 (N.Y. App. Div. 1st Dept. 2021) (Ex. 3). The Appellate Division expressly affirmed the trial court's findings and rulings under the Martin Act that Allen:

> employed a 'device, scheme or artifice to defraud . . . in the . . . exchange . . . [or] sale' of securities by using artificially high valuations of Holdings in the Partnership's reports to the limited partners, which affected the stated value of each partner's capital account; and the value of the capital account would have been a factor influencing a limited partner's decision to take an early withdrawal pursuant to the Third, Fourth, and Fifth Amendments to the partnership agreement in 2013, 2015, and 2017.

Id. at 532-33 (Martin Act citations omitted).

The Appellate Division further ruled that the trial court's "finding of fraud was not against the weight of the evidence" and provided, as an "example," the trial court's findings regarding Allen's fraudulent "appropriation of carried interest":

> For example, the [trial] court found, 'Allen's appropriation of $3.4 million of carried interest was procured by the fraudulent representation to [Partnership] investors that [he] was always entitled to carried interest.' Defendants cannot seriously dispute this finding. Indeed, their answer admitted that as of December

> 4, 2019, 'the General Partner [defendant ACP Partners X, LLC, of which Mr. Allen is the managing principal] ha[d] not distributed all of the Limited Partners' contributed capital, and ha[d] made no distribution toward the preferred return'; hence, the General Partner was not entitled to take carried interest in 2013, 2015, and 2017.

Id. at 533.

The Appellate Division further noted that Allen took carried interest against the advice of his then-counsel, who had "told [Defendants] that they were still in the first stage of the 'waterfall' (priority of distributions) and that they could not take carried interest until the third stage." *Id.*

Finally, the Appellate Division considered the testimony of certain limited partners whom Allen called to testify: "The fact that some limited partners may have testified that they were not deceived is not consequential, as the Attorney General in a Martin Act case does not have to show reliance." *Id.*

The Appellate Division further affirmed the trial court's findings that "Allen's statement in July 2015 regarding the investments that the Partnership would make during the wind-down period" involved "persistent fraud or illegality in the carrying on, conducting or transaction of business" under New York Executive Law § 63 (12). *Id.*

The Appellate Division also rejected Allen's claims "that the trial was so unfair as to require reversal," noting that the "trial court's evidentiary rulings were provident exercises of discretion":

> Defendants' claim that the trial was so unfair as to require reversal—in part because of the change in the way that the testimony was used by the court from the preliminary injunction hearing to the trial—is unavailing. Defendants failed to show how this modification . . . disrupted [their] trial strategy or otherwise caused [them] any undue prejudice, and therefore they were not deprived of a fair trial.
>
> The trial court's evidentiary rulings were provident exercises of discretion. Thus, the court properly refused to allow one of defendants' experts to testify on

> redirect as to matters that were outside the scope of his direct testimony. The court also properly refused to allow defendants to use a document that they had not previously disclosed. We note that, although the court did not allow defendants to use the spreadsheet, it did allow Mr. Allen to testify at length about the returns to the limited partners. Thus, defendants were not prejudiced by the absence of a spreadsheet detailing the returns for each limited partner. Additionally, the letter from the Financial Industry Regulatory Authority was properly used to attack the credibility of a statement that Allen had made in his direct testimony affidavit.

Id. at 533-34 (internal citations and quotation marks omitted).

Finally, the Appellate Division rejected Allen's claim that "the preliminary injunction hearing testimony was inadmissible hearsay at trial," as the defendants had "agreed in a so-ordered stipulation that 'all testimony and exhibits introduced at the. . . hearing. . . shall become part of the trial record.'" *Id*. at 534.

V. The New York Court of Appeals' Dismissal of Allen's Appeal

After the New York Appellate Division affirmed the trial court's decision in *NYAG v. Allen*, Allen attempted a further appeal to the New York Court of Appeals, New York's highest court. On April 26, 2022, the New York Court of Appeals dismissed Allen's appeal on jurisdictional grounds, stating only that "the order appealed from does not finally determine the action within the meaning of the Constitution." *NYAG v. Allen*, 2022 N.Y. Slip Op. 64949, 2022 WL 1221596 (N.Y. Apr. 26, 2022) (Ex. 4).[6]

VI. FINRA's 2021 Disciplinary Proceeding Against Allen

By Complaint dated May 27, 2021, the Department of Enforcement of the Financial Industry Regulatory Authority ("FINRA") instituted a "Disciplinary Proceeding" against Allen

[6] Counsel for Allen has informed the Division that, upon obtaining a final order from the *NYAG v. Allen* trial court, Allen intends to re-apply to the New York Court of Appeals for leave to appeal to that court.

before FINRA's Office of Hearing Officers, alleging in part securities fraud claims against Allen arising from conduct that post-dates Allen's fraudulent conduct found in *NYAG v. Allen.* The FINRA Complaint alleges that, in March 2019—after the NYAG obtained an *ex parte* order preliminarily enjoining Allen from investing ACPX funds in NYPPEX[7]—Allen fraudulently sought alternative funding for NYPPEX, in violation of Securities Act Section 17(a)(1):

> Allen devised and orchestrated an aggressive sales campaign to raise $10 million through the sale of securities in NYPPEX Holdings. While soliciting these investments, NYPPEX and Allen intentionally or recklessly made a series of material misrepresentations and omissions of material fact to prospective investors concerning, among other things, NYPPEX Holdings' valuation, its financial condition, and its management team. NYPPEX and Allen also failed to disclose to prospective investors ongoing investigation into fraudulent activity and the [New York Court] Order that preliminarily enjoined both of them.

Ex. 6 (FINRA Complaint) at 2-3.

The FINRA Complaint further alleges that Allen made false and misleading assertions on NYPPEX's website regarding FINRA's investigation of Allen and NYPPEX and its relationship to the NYAG allegations against Allen:

> NYPPEX and Allen made false or misleading statements on the firm's website about FINRA's 2018 examination of NYPPEX. The website statements included assertions that the NYAG's allegations were in 'conflict' with facts concluded by FINRA and that FINRA had found no violations during its examination. In fact, FINRA's 2018 examination had resulted in an informal disciplinary action based on findings that NYPPEX had violated multiple FINRA rules and provisions of the Securities Exchange Act of 1934 (Exchange Act). Moreover, nothing about FINRA's exam findings conflicted with the NYAG's allegations. The website also contained statements about Allen's and others' so-called 'exemplary regulatory compliance' that were false or at least exaggerated, and which impermissibly implied FINRA's endorsement.

Id. at 3.

[7] In December 2018, prior to filing *NYAG v. Allen*, the NYAG obtained an *ex parte* order from the New York Supreme Court preliminarily enjoining Allen from, among other things, investing ACPX funds (in NYPPEX and otherwise). *See* Ex. 5 (Dec. 28, 2018 *ex parte* order in *In the Matter of the Inquiry by NYAG*, Index No. 452346/2018 (N.Y. Sup. Ct. Dec. 28, 2018)).

FINRA's disciplinary proceeding against Allen remains pending.

ARGUMENT

The New York court's Martin Act injunction and the additional permanent injunctions that that court issued against Respondent Allen—coupled with its findings of Allen's varied and egregious fraudulent conduct—amply support the institution of this follow-on proceeding and the imposition of industry and penny-stock bars against Allen. Allen's contrary arguments, in his Answer to the OIP, are unfounded in law and otherwise constitute impermissible collateral attacks on the New York trial and appellate courts' findings and rulings in *NYAG v. Allen*.

I. The Commission Has Jurisdiction to Consider Remedial Action Against Allen.

As a preliminary matter, the Commission possesses the requisite statutory authority to consider remedial actions against Allen, under Exchange Act Section 15(b)(6) and Advisers Act Section 203(f).

Exchange Act Section 15(b)(6)(A)(iii) permits the Commission to consider remedial actions against:

> any person who is associated,. . . or, at the time of the alleged misconduct, who was associated. . .with a broker or dealer. . . if the Commission finds. . . that such [remedial action] is in the public interest and that such person. . .is enjoined from any action, conduct, or practice specified in [Exchange Act Section 15(b)(4)].

15 U.S.C. § 78o(b)(6)(A)(iii).

Exchange Act Section 15(b)(4)(C), in turn, authorizes the Commission to consider remedial action against such associated person who:

> is permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction from acting as an investment adviser, underwriter, broker, dealer. . . or from engaging in or continuing any conduct or practice in connection with any such activity, or in connection with the purchase or sale of any security.

15 U.S.C. § 78o(b)(4)(C).

At the time the *NYAG v. Allen* court issued the injunctions at issue against Allen, he was associated with NYPPEX, LLC, a registered broker-dealer. *See NYAG v. Allen II*, at 2 (Ex. 2 at 2). Furthermore, as explained above, the *NYAG v. Allen* Court permanently enjoined Allen from: (1) future violations of the securities anti-fraud provisions of the Martin Act, which "prohibits fraudulent practices relating to the 'purchase, exchange, investment advice or sale of securities'"; and (2) certain activities regarding the ACPX fund that were the subject of the *NYAG v. Allen* lawsuit—for example, investing ACPX funds in entities in which Allen holds an interest (such as NYPPEX). *Allen II* at 11, 14-15 (Ex. 2 at 11, 14-15). Thus, sufficient statutory predicates exist under Exchange Act Section 15(b)(6) and (b)(4) for the Commission to consider remedial sanctions against Allen. First, the New York court's Martin Act injunction enjoined Allen, while associated with a broker-dealer (NYPPEX, LLC), from "engaging in or continuing any conduct or practice" (Martin Act violations) "in connection with any such activity" (acting as an investment advisor), "or in connection with the purchase or sale of any security." In addition, the New York court's more specific injunctions further enjoined Allen from engaging in such conduct, as well as from "acting as an investment adviser"—at least as to the activities regarding ACPX specified in those additional injunctions.

Advisers Act Section 203(f), coupled with Section 203(e)(4), contain identical predicate language authorizing this follow-on proceeding—except that those provisions apply to any person "associated with . . . an investment advisor." Allen was (and is) associated with ACP, the investment adviser to ACPX. *Id.* at 2 (Ex. 2 at 2). Thus, the New York court's Martin Act and other injunctions likewise satisfy the Advisers Act Sections 203(f) and 203(e)(4) statutory predicate for this proceeding: namely, that Allen, while associated with an investment adviser

(ACP), was enjoined "from engaging in or continuing" certain conduct "in connection with" ACP "or in connection with the purchase or sale of any security."

In his Answer to the OIP, Allen concedes that "this follow-on proceeding is based on the entry of an injunction in a court of competent jurisdiction." (Allen Answer at 8.) Allen nonetheless asserts that this proceeding "is fundamentally different from virtually all similar actions and constitutes an improper application of [Exchange Act] Section 15(b). . .and [Advisers Act] Section 203(f)" because (1) it arises from state securities law violations that, Allen claims, are "fundamentally inconsistent with federal law on the same subject matter" (because the Martin Act does not contain a scienter requirement); and (2) prior Commission follow-on proceedings based on state court proceedings involved injunctions that barred the respondent entirely from participating in the securities industry. (*Id.* at 8-9.) For the following reasons, both of Allen's arguments are contrary to the above statutory language and Commission precedent.

First, contrary to Allen's argument, Allen's state law violations are closely analogous to federal securities law violations that the SEC routinely alleges in its enforcement actions and for which federal courts frequently have issued permanent injunctions. Like the Martin Act violations at issue here, violations of Securities Act Sections 17(a)(2) and (3) and Section 5, Exchange Act Section 15, and Advisers Act Section 206(2) do not require proof of a defendant's scienter, and federal courts have issued permanent injunctions enjoining defendants from future violations of these provisions in Commission enforcement actions based solely on prior violations of the provisions. *See SEC v. Almagarby*, 479 F.Supp.3d 1266, 1273-74 (S.D. Fla. 2020) (Section 15 injunction); *SEC v. Rashid*, No. 17-cv-8223 (PKC), 2020 WL 5658665, at *24-26 (S.D.N.Y. Sept. 23, 2020) (imposing Section 206(2) injunction despite defendant's insufficient scienter for Section 206(1) liability), *appeal filed*; *SEC v. Jankovic*, No. 15 Civ. 1248 (KPF), 2018 WL 301160, at *7-9

(S.D.N.Y. Jan. 4, 2018) (imposing Section 17(a)(2) & (3) injunctions where defendant committed repeated violations, did not adequately accept responsibility, and had continued opportunity for future violations); *SEC v. Bronson*, 246 F.Supp.3d 956, 973-75 (S.D.N.Y. 2017), *aff'd*, 756 F. App'x 38 (2d Cir. 2018) (imposing Section 5 injunction "where the court views the defendant's degree of culpability and continued protestations of innocence as indications that injunctive relief is warranted"); *SEC v. Offill*, No. 3:07-CV-1643-D, 2012 WL 1138622, at *4-5 (N.D. Tex. Apr. 5, 2012) (Sections 5 and 15(a) injunctions); *SEC v. Elliott*, No. 09 Civ. 7594 (KBF), 2012 WL 2161647, at *9-10 (S.D.N.Y. June 12, 2012) (imposing Section 5 injunction "[h]aving found that defendants were reckless and willfully blind . . . , that the violations were repeated and numerous, and that the most basic standards were not adhered to"); *SEC v. Alliance Transcription Servs.*, No. CV 08-1464-PHX-NVW, 2009 WL 5128565, at *7-9 (D. Ariz. Dec. 18, 2009) (imposing Section 5 injunctions against three defendants, without scienter showing, due to defendants' repeated violations, failure to acknowledge wrongfulness, and opportunity for future violations); *SEC v. Moran*, 944 F.Supp. 286, 294-95 (S.D.N.Y. 1996) (imposing Section 206(2) injunction due to defendant's activities that "all demonstrate a business practice indicating a lack of vigilance"); *cf. Byron G. Bogardt & Eric M. Banhazl*, Admin. Proc. File No. 3-9730, SEC Release No. ID-167, 2000 WL 708438, at *30-31 (Initial Decision June 1, 2000) (to obtain Section 17(a)(3) cease-and-desist order, Division must show more than respondent's negligence; it must satisfy *Steadman* balancing test).

Moreover, the Commission has instituted a number of follow-on proceedings, analogous to this one, based solely on district court injunctions against such non-scienter violations. *See David Howard Welch,* Admin. Proc. File No. 3-18807, SEC Release No. 34-92267, 2021 WL 2941483, at *1 (Commission Opinion June 25, 2021) (after respondent defaulted, imposing industry bar

based on Securities Act Section 5 and Exchange Act Sections 15 and 20 injunctions); *Marc Jay Bryant,* Admin. Proc. File No. 3-18808, SEC Release No. 34-91531, 2021 WL 1351206, at *1 (Commission Opinion Apr. 12, 2021) (same); *Joshua D. Mosshart*, Admin. Proc. File No. 3-18422, SEC Release No. ID-1408, 2021 WL 517422, at *1-2 (Initial Decision Feb. 11, 2021) (ordering twelve-month suspension from securities industry based on Section 5 injunction); *Mohammed Ali Rashid*, Admin. Proc. File No. 3-20139, SEC Release No. IA-5620, 2020 WL 6286294 (OIP Oct. 26, 2020) (proceeding instituted based on Section 206(2) injunction; Commission decision pending); *Julianne Chalmers*, Admin. Proc. File No. 3-15845, SEC Release No. 34-71969, 2014 WL 1494526 (OIP Apr. 7, 2014) (proceeding instituted based on Section 5 and Section 15 injunctions, but later dismissed due to Division's inability to locate and serve respondent); *Aaron Tsai*, Admin. Proc. File No. 3-13835, SEC Release No. ID-403, 2010 WL 3523187, at *1 (Initial Decision Sept. 10, 2010) (imposing bar from association with any broker or dealer based on Section 5 injunction and Exchange Act Section 13(d) and 16 injunctions).

Thus, contrary to Allen's argument, the Martin Act—although not requiring a scienter showing—is entirely consistent with those anti-fraud and other provisions of the federal securities laws that likewise do not contain a scienter requirement and that the Commission routinely enforces—both in federal district court and through Commission follow-on proceedings such as this. Moreover, as discussed in greater detail below, the *NYAG v. Allen* court found that Allen repeatedly engaged in "fraudulent" conduct. Thus, notwithstanding the lack of a Martin Act scienter requirement, the permanent injunctive relief that the New York court issued against Allen is entirely consistent with the analogous Commission enforcement precedent described above.

Martin's only other jurisdictional argument is the unremarkable assertion that the Commission has not previously instituted a follow-on proceeding based solely on a *state court* injunction against future violations of legal provisions or based solely on a *state court* injunction barring limited investment adviser activity.[8] (Answer at 8.) Even if so, the plain language of the Exchange Act and Advisers Act (cited above), however, authorizes the Commission to bring follow-on proceedings on either of those bases. Nothing in either of those Acts prevents the Commission from doing so, and Allen cites no authority to the contrary. Indeed, as discussed above, *NYAG v. Allen* court's Martin Act injunction against Allen is closely analogous to the very type of federal court injunctions upon which the Commission routinely institutes follow-on administrative proceedings, and no reason exists for the Commission to refrain from exercising its jurisdiction merely because this case rests on a state court, rather than a federal court, injunction.

For the foregoing reasons, the Commission is authorized to institute this proceeding pursuant to Exchange Act Section 15(b)(6) and Advisers Act Section 203(f)—based on both the Martin Act injunction and the specific conduct injunctions that the New York trial and appellate courts issued and affirmed in *NYAG v. Allen*.

[8] The Commission has instituted at least the following three follow-on proceedings based on state-court injunctions: *Robert H. Van Zandt*, Admin. Proc. File 3-20726, SEC Release No. 94477, 2022 WL 823507 (Commission Order Mar. 18, 2022) (settled follow-on proceeding based on state court industry bar); *Burgess Nathaniel Hallums*, Admin. Proc. File No. 3-16688, SEC Release No. 76450, 2015 WL 4238158 (July 14, 2015) (settled follow-on proceeding based on state-court injunction against future violations of certain laws and injunction against respondent's employment with a broker-dealer or investment adviser); *Edwin W. Shaw*, SEC Release No. 3988, 1947 WL 24470 (Aug. 29, 1947) (revoking respondent's dealer registration based in part on state court permanent injunction against selling securities).

II. Remedial Action Against Allen Is In the Public Interest.

In follow-on proceedings such as this, the Commission considers what remedial action is appropriate under Exchange Act Section 15(b)(6) [15 U.S.C. § 78o(b)(6)(A)] and Advisers Act Section 203(f) [15 U.S.C. § 80b-3(f)]. Pursuant to those provisions, the Division seeks Commission orders barring Allen "from being associated with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization" and, under Exchange Act Section 15(b)(6), "from participating in an offering of penny stock." 15 U.S.C. § 78o(b)(6)(A); 15 U.S.C. § 80b-3(f).

The Commission repeatedly has held that "severe" remedial sanctions, including industry and penny-stock bars, are in the public interest where, as here, a respondent has been enjoined from future violations of applicable securities law anti-fraud provisions:

> In proceedings based on an injunction, the Commission examines the facts and circumstances underlying the injunction in determining the public interest. An injunction, by its very nature, is predicated on conduct that … violate[s] laws, rules, or regulations. The Commission considers an antifraud injunction to be particularly serious. The public interest requires a severe sanction when a respondent's past misconduct involves fraud because opportunities for dishonesty recur constantly in the securities business.

Patrick G. Rooney, Admin. Proc. File No. 3-15671, SEC Release No. ID-638, 2014 WL 3588060, at *4 (Initial Decision Jan. 8, 2014) (imposing industry bar; internal citations and quotations omitted); *see Sean P. Finn*, Admin. Proc. File No. 3-17693, SEC Release No. ID-1396, 2020 WL 927453, *5-7 (Initial Decision Feb. 18, 2020) (imposing industry and penny-stock bars). Furthermore, as noted above, the Commission has imposed industry bars in follow-on proceedings based on non-fraud injunctions. *See Welch,* 2021 WL 2941483, at *1; *Bryant,* 2021 WL 1351206, at *1.

In making this determination, the Commission considers the "*Steadman* factors":

> the egregiousness of the [respondent's] actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the [respondent's] assurances against future violations, the [respondent's] recognition of the wrongful nature of his conduct, and the likelihood that the [respondent's] occupation will present opportunities for future violations

Rooney, 2014 WL 3588060, at *3-4. "The Commission also considers the age of the violation and the degree of harm to investors and the marketplace resulting from the violation," as well as "the extent to which the sanction will have a deterrent effect." *Id.* at *4. Application of these factors militates in favor of barring Allen from the securities industry, in light of the Martin Act and other permanent injunctions, and related findings that the New York court issued against him in *NYAG v. Allen*.

The *NYAG v. Allen* trial court found, and the Appellate Division affirmed, that Allen engaged in repeated, varied, and egregious fraudulent conduct while an investment adviser to APCX and while associated with NYPPEX, a broker-dealer. In its trial decision, the court repeatedly refers to Allen's conduct as "fraudulent" (even "shocking") and concludes that Allen used ACPX as his "personal piggy bank." Thus, Allen's conduct was both egregious and involved, at the least, a significant degree of scienter.

The remaining *Steadman* factors likewise support industry and penny-stock bars against Allen. Thus, for example, rather than recognizing the wrongful nature of his conduct—and despite having lost his appeal before the New York Appellate Division—Allen continues to maintain total lack of responsibility, and he refuses to admit any personal misconduct or even mistake. To the contrary, he spends the bulk of his Answer attacking the *NYAG v. Allen* decision.

Furthermore, Allen's continued association with ACP and NYPPEX will only present further opportunities for misconduct. Indeed, as described at pages 13-14 above, in 2021, FINRA instituted a disciplinary proceeding against Allen for additional alleged fraudulent conduct under

the federal securities laws, involving his subsequent attempts to raise $10 million for NYPPEX—claims separate from the NYAG's claims in *NYAG v. Allen*. Thus, Allen has demonstrated that he has continued opportunities to violate the federal securities laws.

Allen nonetheless claims in his Answer that mitigating factors render an industry bar inappropriate. Those alleged mitigating factors amount to: (1) the trial testimony of certain ACPX limited partners in support of Allen's arguments in the *NYAG v. Allen* action; and (2) a number of collateral attacks on the trial court's findings and rulings in *NYAG v. Allen*. Allen's arguments, however, cannot overcome the *NYAG v. Allen* court's fraud findings against him.

At the preliminary injunction hearing and trial in *NYAG v. Allen*, the court received testimony from two groups of ACPX limited partners, by both affidavit and live testimony: certain investors who supported Allen and opposed the NYAG action and, conversely, certain investors who were critical and/or distrustful of Allen and supported the NYAG lawsuit. Seven APCX limited partners testified in the NYAG's case. Thus, for example, Alex Khan—financial advisor to two ACPX limited partner entities that collectively invested $500,000 in ACPX—testified that, both prior to and after the NYAG's involvement, Khan became concerned (and raised concerns with Allen) regarding some of the same issues that later formed the basis for *NYAG v. Allen*. See Ex. 7 (Khan Affidavit ¶¶ 12-17). Limited partner David Burrows, who invested over $500,000 in ACPX, testified that, had he been aware that ACPX would prematurely pay Allen millions of dollars in "carried interest"—or that ACPX funds would be used to pay operating expenses of Allen's investment adviser firm or NYPPEX—he would not have invested in ACPX. Ex. 8 (Burrows Affidavit ¶¶ 25-26). In any event, the New York Appellate Division determined that "[t]he fact that some limited partners may have testified that they were not deceived is not consequential, as the Attorney General in a Martin Act case does

not have to show reliance" (just as the Commission would not be required to prove such reliance in an SEC fraud action). *NYAG v. Allen*, 198 A.D.3d at 583.

Allen's remaining arguments in his Answer, although couched as "mitigating factors," constitute impermissible collateral attacks on the findings and conclusions of the trial and appellate courts in *NYAG v. Allen*. Despite two unsuccessful evidentiary hearings before the New York trial court—and a unanimous decision by the New York Appellate Division affirming the trial court—Allen continues to attack virtually every aspect of the trial court's findings and rulings (and ignores the Appellate Division's affirmance). Thus, Allen complains that the New York trial court did not adequately consider: (1) the language of the ACPX offering and governing documents (Answer at 4-7, 11); (2) the testimony of the parties to those documents (*id.* at 5); (3) Allen's expert witness's testimony (*id.* at 7, n.5, 6); (4) Allen's alleged disclosure to the limited partners of his ACPX investments (*id.* at 12); and (5) Allen's alleged proper use of ACPX funds, including the payments of carried interest (*id.* at 12-13). All of these arguments, which Allen made to the New York courts, concern the merits of those court's findings and rulings and, thus, constitute inappropriate collateral attacks in this proceeding. The Commission has repeatedly ruled that such collateral attacks are not permitted in follow-on proceedings such as this. *Talman Harris & Victor Alfaya*, Admin Proc. File Nos. 3-17874 and 3-17875, SEC Release No. ID-1402, 2020 WL 5407727, at *2 (Initial Decision Sept. 2, 2020) ("It is well established that the Commission does not permit criminal convictions or civil injunctions to be collaterally attacked in its administrative proceedings."). Allen was represented by competent counsel in *NYAG v. Allen* (as the New York trial court noted), and he had every opportunity to make, and did make, these same arguments in *NYAG v. Allen*. For the detailed reasons stated in the New York trial and appellate courts' decisions (summarized above), those courts rejected

those arguments. Whether labeled "mitigating factors" or otherwise, Allen's attempts to re-litigate the New York case here are nothing more than improper collateral attacks. The Commission should treat them as such and not consider them in rendering its decision in this follow-on proceeding.

CONCLUSION

For the foregoing reasons, the Commission should consider remedial sanctions against Allen and bar him from the securities industry and from participating in penny-stock offerings.

Respectfully submitted,

Dated: June 3, 2022
New York, N.Y.

/s/ *Jack Kaufman*

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CERTIFICATE OF SERVICE

I, Jack Kaufman, hereby certify that, on June 3, 2022, I caused a copy of the foregoing to DIVISION OF ENFORCEMENT'S MOTION FOR SUMMARY DISPOSITION, and the accompanying Declaration of Rhonda L. Jung, to be sent by email to Respondent's counsel, John K. Wells, at wellsj@gtlaw.com.

/s/ *Jack Kaufman*
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