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 OPPOSITION TO RESPONDENT LAURENCE G. ALLEN'S MOTION FOR SUMMARY DISPOSITION

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The Division of Enforcement ("Division") of the Securities and Exchange Commission ("Commission") respectfully submits this brief in opposition to the motion for summary disposition filed by Respondent Laurence G. Allen ("Allen Motion"). For the reasons set forth below and in the Division's own motion for summary disposition, filed June 3, 2022 ("June 3 Division Motion"), the Division respectfully requests that the Commission deny Allen's Motion and, instead, grant the Division's summary disposition motion.

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 *NYAG v. Allen.*[1] As explained in detail in the June 3 Division Motion, and as Allen does not dispute, Allen has been enjoined by a court of competent jurisdiction (the New York Supreme Court) from, among other things, future violations of the Martin Act, New York's statute aimed at curbing securities fraud—a remedy closely analogous to federal court injunctions upon which the Commission repeatedly has instituted follow-on administrative proceedings such as this one. Allen nonetheless asserts that the Commission lacks jurisdiction to institute this proceeding and, in any event, should not take remedial action against him based on the *NYAG v. Allen* Court's injunctions. More specifically, Allen challenges jurisdiction on the grounds that: (1) this proceeding arises from state court injunctions; and (2) the Division is "estopped" from arguing otherwise due to statements it made in prior, unrelated Commission follow-on proceedings involving solely federal court injunctions. Allen further asserts that the Division's requested relief would not be in the public interest because: (1) the NYAG's claims against Allen were non-scienter claims; (2) the New York Martin Act injunction at issue "merely" prohibits Allen

[1] All short forms herein are the same as those in the June 3 Division Motion.

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from committing future Martin Act violations; (3) any remedial action would violate Allen's Constitutional rights of due process and equal protection; (4) Allen's illegal conduct allegedly did not harm investors; and (5) the *NYAG v. Allen* Court erred in holding Allen liable for Martin Act violations.

The June 3 Division Motion disposes of most of Allen's arguments, and the remainder are equally meritless. To the extent the Division already has addressed Allen's arguments, the Division respectfully refers the Commission to the June 3 Division Motion. The Division further responds below to any additional Allen arguments that the June 3 Division Motion does not fully address.

ARGUMENT

I. The Commission Has Authority to Institute this Proceeding.

At pages 15-20 of the June 3 Division Motion, the Division explains why the Commission has jurisdiction to consider remedial action against Allen based on the injunctions against him in *NYAG v. Allen*. Allen essentially argues that the Commission lacks jurisdiction because this proceeding arises from state court injunctions, and that those injunctions are "merely" against future violations of non-scienter provisions of New York law (including the Martin Act). Directly contrary to Allen's arguments, the Commission repeatedly has considered and ordered remedial action—including the strongest remedial action—against respondents enjoined by federal courts from future violations of non-scienter provisions of the federal securities laws. *See* June 3 Division Motion at 17-19. Allen asserts that the Commission should treat him differently because a state court, rather than a federal court, issued the injunctions that form the basis for this follow-on proceeding. Contrary to his arguments, nothing in either the Exchange Act, Advisers Act, legal precedent, or past Commission or Division practice requires

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or otherwise supports such an arbitrary result. To the contrary, such a result would contravene the plain language and purpose of the Exchange Act and Advisers Act provisions that authorize the Commission to institute this proceeding.

Contrary to Allen's strained statutory interpretations, both Exchange Act Section 15(b)(6) (coupled with Section 15(b)(4)(C)) and Advisers Act Section 203(f) (coupled with Section 203(e)(4)) broadly authorize the Commission to consider remedial action against an associated person who has been enjoined by "*any court* of competent jurisdiction" (emphasis added). Those provisions brook no exception for state court injunctions, either express or implied; nor does any reason exist for such an exception. To the contrary, had Congress intended to limit the Commission's follow-on jurisdiction solely to federal court injunctions (as Allen asserts), it would not have employed such broad language. Moreover, Commission follow-on proceedings play a crucial role in regulating the securities industry nationally, as this proceeding illustrates. The Commission's exercise of its broad national authority is particularly important where, as here, a state court has found a respondent liable for securities violations under state law but might choose to defer to federal regulators regarding additional appropriate remedies. And that is precisely what happened here. Contrary to Allen's misleading summary of the New York trial court record, the *NYAG v. Allen* Court expressly *deferred* to "FINRA and other regulators" regarding whether "to bar Allen from the securities industry":

> The Court further declines the [NYAG's] request to bar Allen from the securities industry. The various entities that Allen controls are all highly regulated by FINRA and other regulators which are better suited than the Court to address the future status of those entities and Allen's future role in those entities.

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(Ex. 2 at 16.)[2] Allen argues that the Commission exists to "enforce and administer the federal securities laws" (not state law) (Allen Motion at 7), but enforcing the federal securities laws is precisely what the Division is asking the Commission to do here. Pursuant to the Exchange Act and Advisers Act, the Commission should bar Allen from the securities industry for having engaged in egregious securities violations, as found by a "court of competent jurisdiction"—the New York Supreme Court—and as affirmed on appeal by another "court of competent jurisdiction"—the New York Appellate Division.

Allen cites no authority to support his strained, narrow reading of Sections 15(b)(6) and 203(f). The cases and Division briefs that Allen cites (Allen Motion at 8-12) are inapposite, as they do not involve state-court injunctions and are silent regarding that issue. That those Courts and Division briefs might refer solely to federal violations and court orders is only natural, as only federal court injunctions or convictions were at issue in those cases. *E.g.*, *Bartko v. SEC*, 845 F.3d 1217, 1221-22 (D.C. Cir. 2017); *Gibson v. SEC*, 561 F.3d 548, 550-51 (6th Cir. 2009). Nothing in those cases or Division briefs, however, suggests or implies any intent to curtail the broader authority that Congress unambiguously granted the Commission to bring follow-on proceedings based on injunctions issued by "any court of competent jurisdiction," including state courts. *See Zunni v. Doe*, 550 U.S. 81, 93 (2007) ("Under this Court's precedents, if the intent of Congress is clear and unambiguously expressed by the statutory language at issue, that would be the end of our [statutory construction] analysis").

Thus, Allen's related argument—that the Division is somehow "estopped" by its assertions in prior, unrelated follow-on proceedings that involved only federal court injunctions—also fails.

[2] "Ex." refers to the exhibits attached to the June 3, 2022 Declaration of Rhonda L. Jung, which the Division filed in support of the June 3 Division Motion.

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As a threshold matter, the Division cannot be estopped unless the Division's "later position is clearly inconsistent with its earlier position." *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) (internal quotation marks omitted). As explained above, the Division has never taken a contrary position on the issue; it has never taken the position that follow-on proceedings apply solely to federal court injunctions, as opposed to state court injunctions. Moreover, it follows, the Division has never "persuaded a court to accept" such an argument—a second element of "judicial estoppel" that Allen cannot satisfy. *See id.*

Allen further erroneously asserts that follow-on proceedings based solely on state court injunctive action are "virtually unprecedented." (Allen Motion at 12-14.) As Allen himself notes, the Commission has instituted other follow-on proceedings based on state court injunctions, including as recently as 2022. *See 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); *George Bussanich, Jr.*, Initial Decision Rel. No. 967 (February 29, 2016) (initial decision based on defaulted Respondent); R*obert Burton,* Initial Decision Rel. No. 1014 (May 27, 2016) (follow-on proceeding instituted based on both federal and state court injunctions); *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). In any event, even if no such precedent existed, follow-on proceedings arising from state court injunctions are plainly within the Commission's jurisdiction, as explained above and in the June 3 Division Motion.

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

Allen asserts that the Commission should not impose penny-stock and industry bars against Allen because this proceeding is based on a Martin Act injunction which, according to Allen, is "merely an 'obey-the-law' provision which imposes no duties on Allen other than his existing duty to follow the law, and is of the type that has been described by some courts as 'unenforceable'" (Allen Motion at 16). As Allen's own research shows, however, the Commission routinely institutes follow-on administrative proceedings based on the very "obey-the-law" injunctions that Allen disparages. (Exhibit C to Declaration of John C. Wells in Support of Respondent's Motion for Summary Disposition.) Allen cites no authority contravening this common Commission practice, and the Division is aware of none.

Allen further asserts that sanctions against Allen are inappropriate because the Martin Act did not require the NYAG to prove Allen's scienter, and that the *NYAG v. Allen* court allegedly found no scienter. (Allen Opp. at 27-28.) First, as explained at pages 17-19 of the June 3 Division Motion, federal courts repeatedly have enjoined defendants from future violations of non-scienter securities violations, and the Commission repeatedly has instituted follow-on proceedings based on such injunctions (and has imposed strong sanctions against such respondents, where justified). Thus, the Commission should treat Allen in the same manner as other respondents who have been enjoined from violating non-scienter securities law provisions; it should impose remedies commensurate with Allen's violations—in this case his egregious Martin Act violations, as found and affirmed by the New York trial and appellate courts.

Allen further incorrectly asserts that the *NYAG v. Allen* Court found "no evidence of [his] scienter." (Allen Motion at 27-28). To the contrary, as detailed at pages 4-13 of the June 3 Division Motion, both the New York trial and appellate courts repeatedly emphasized the

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egregiousness of Allen's Martin Act violations and, thus, at least implicitly found that Allen acted with some degree of fraudulent intent—whether recklessness or knowing. And, as we note at pages 17-18 of the June 3 Division Motion, such scienter findings are not unusual when courts consider non-scienter securities law violations—particularly regarding the appropriate relief, at which time courts are free to consider the defendant's mental state, among other factors. Thus, in considering relief in non-scienter SEC cases, courts have looked beyond liability elements to examine the degree of a defendant's intent to violate the law. *See, e.g.*, *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. 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"). As detailed at pages 5-13 of the June 3 Division Motion, both the *NYAG v. Allen* trial and appellate courts appear to have engaged in such an analysis—notwithstanding that the Martin Act does not require a scienter finding—repeatedly finding and affirming that Allen engaged in egregious fraudulent conduct.

Allen further erroneously asserts that any Commission remedial relief against him would violate his Constitutional due process or equal protection rights—due to alleged "vagueness" in the SEC's enabling legislation. Allen is incorrect as a matter of law. Such a vagueness challenge—based on alleged arbitrary and discriminatory Commission enforcement—fails if either:

> (1) . . . a statute as a general matter provides sufficiently clear standards to eliminate the risk of arbitrary enforcement or (2) . . .even in the absence of

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> such standards, the conduct at issue falls within the core of the statute's prohibition, so that the enforcement before the court was not the result of the unfettered latitude that law enforcement officers and factfinders might have in other, hypothetical applications of the statute.

Copeland v. Vance, 893 F.3d 101, 119 (2d Cir. 2018) (*quoting Farrell v. Burke*, 449 F.3d 470, 494 (2d Cir. 2006)). Here, the language of Sections 15(b)(6), 15(b)(4)(C), 203(f) and 203(e)(4)—concerning injunctions entered by "any court of competent jurisdiction"—is clear and unambiguous and would give a person of ordinary intelligence fair notice that the Commission may consider imposing a sanction if they are enjoined from future violations of a state anti-fraud statute while associated with a registered entity. Thus, no risk of arbitrary enforcement exists, and the Commission's instituting this proceeding was in no way arbitrary. To the contrary, as noted above, the Commission previously has instituted follow-on proceedings based on state court injunctions, and nothing about this proceeding is arbitrary or discriminatory, as Allen's misconduct falls squarely within the core of conduct that these statutes are designed to redress.[3]

Allen also alleges, apparently as a mitigating factor, that there is "no evidence that any investor suffered any actual damage based on anything that Mr. Allen was alleged to have done" in the *NYAG v. Allen* case (Allen Motion at 28). Even if true, a lack of significant harm to investors is

[3] The cases Allen cites at pages 17-18 of his motion are inapplicable. In *Willowbrook v. Olech*, 528 U.S. 562, 565 (2000), the court found a due process violation where the Complaint alleged that "the Village intentionally demanded a 33–foot easement as a condition of connecting her property to the municipal water supply where the Village required only a 15–foot easement from other similarly situated property owners…. [and] the Village's demand was "irrational and wholly arbitrary." Here, as explained above, the Division is not treating Allen differently than others similarly situated, nor is this proceeding irrational or arbitrary. Allen's reliance on *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239 (2012) is equally unavailing. The Supreme Court in that case found a due process violation because the government agency at issue had abruptly changed its prior interpretation of the indecency rules of the Communications Act. *Id.* at 254-55. Here, by contrast, the Commission has not altered its prior understanding that Exchange Act Section 15(b)(6) and Advisers Act Section 203(f) apply to state court injunctions.

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not, on its own, a sufficient reason for the Commission to refrain from taking remedial action against Allen, particularly where, as here, his Martin Act violations were repeated and otherwise egregious (as found by the New York court). *See Seghers v. SEC*, 548 F. 3d 129, 136 (D.C. Cir. 2008) ("The SEC did not abuse its discretion in permanently barring [Respondent] from associating with any investment advisor," notwithstanding "the affidavits of investors maintaining that [Respondent] did not defraud them").

Allen also claims that he "poses no present danger or risk to the public, and that a sanction will do nothing to protect investors and markets going forward." (Allen Motion at 29.) Yet, the administrative record—including the New York courts' findings of Allen's egregious Martin Act violations—suggests otherwise. As explained at pages 13-15 and 22-23 of the June 3 Division Motion, in May 2021, FINRA instituted a disciplinary proceeding against Allen for additional alleged fraudulent conduct in violation of the federal securities laws, allegations that post-date the conduct at issue in *NYAG v. Allen*.

In addition, in a recent private Connecticut state court action against Allen alleging "vexatious litigation," the court made disparaging comments regarding Allen. After finding in favor of the plaintiffs after a trial, and awarding damages against Allen, the Connecticut court granted plaintiff's motion to terminate a stay of the Court's rulings—which had been entered pending Allen's appeal of the trial decision. *See Kazemi v. Allen*, Superior Court, Judicial District of Stamford-Norwalk, CV-186038094S, 2021 WL 2404367, *1 (May 19, 2021). In its May 19, 2021 decision terminating the stay, the Court noted that, during earlier proceedings in the case, "Defendants" (including Allen) had "deceived the court" regarding certain related matters, and that Allen had "testified falsely." *Id.*, at *2. Thus, contrary to Allen's claims in this proceeding, his continued willingness to stretch the truth regarding his business dealings further supports the

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Division's request for the imposition of permanent penny-stock and industry bars against him in this proceeding.

Allen's remaining arguments—that the *NYAG v. Allen* court allegedly applied the wrong State's law (Allen Opp. at 19-20); and that that court "viewed the evidence in the wrong context and simply got the case wrong" (*id.* at 23 and 23-27)—constitute impermissible collateral attacks on the *NYAG v. Allen* trial and appellate courts' rulings against him. As we explain at pages 24-25 of the June 3 Division Motion, such collateral attacks are not permitted in Commission 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."). While Allen is correct that the Commission may consider the "facts and circumstances" of the *NYAG v. Allen* trial and appellate courts' findings and rulings, it is well-established that the Commission cannot second-guess those courts' ultimate findings and rulings, which is what Allen is asking the Commission to do here. Any such analysis would be precisely what the principle of collateral estoppel is designed to prevent.[4] *See id.*

[4] The same holds true for the arguments of the proposed *amicus curiae*, the ACPX Limited Partners Advisory Committee ("LPAC"). The LPAC's arguments essentially attack the substance of the *NYAG v. Allen* trial court's findings and rulings and, thus, likewise constitute impermissible collateral attacks which the Commission should not consider. To the the extent the LPAC asserts that certain limited partners oppose the *NYAG v. Allen* action, the Division addresses such arguments at pages of 23-24 of the June 3 Division Motion.

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CONCLUSION

For the foregoing reasons, and those set forth in the June 3, 2022 motion, the Division respectfully requests that the Commission deny Respondent's motion and, instead, grant the relief requested in the Division's June 3, 2022 summary disposition motion.

Respectfully submitted,

Dated: July 8, 2022
New York, N.Y.

/s/ *Jack Kaufman*

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CERTIFICATE OF SERVICE

I, Jack Kaufman, hereby certify that, on July 8, 2022, I caused a copy of the foregoing DIVISION OF ENFORCEMENT'S OPPOSITION TO RESPONDENT LAURENCE G. ALLEN'S MOTION FOR SUMMARY DISPOSITION to be sent by email to Respondent's counsel, John K. Wells, at wellsj@gtlaw.com.

/s/ *Jack Kaufman*
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