UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
ADMINISTRATIVE PROCEEDING
File No. 3-21790

IN THE MATTER OF

ERIC CHRISTOPHER CANNON,

RESPONDENT.

RESPONDENT ERIC CHRISTOPHER CANNON'S REPLY IN SUPPORT OT RENEWED MOTION FOR AN ORDER STAYING OR DISMISSING THE AMENDED ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS

OS Received 06/03/2024

I. Introduction

Respondent Eric Christopher Cannon ("Mr. Cannon") respectfully submits this reply memorandum in response to the Division of Enforcement's ("Division") May 3, 2024, opposition to Mr. Cannon's Motion for Order Staying or Dismissing the March 27, 2024, Amended Order Instituting Administrative Proceedings (the "Amended OIP") issued by the Securities and Exchange Commission ("SEC" or "Commission").

II. A Limited Stay is Warranted and Would Not Harm the Public Interest

Regarding Mr. Cannon's request for a limited stay or postponement of this proceeding until the earlier of August 1, 2024, or resolution of a pending motion to stay in Mr. Cannon's appeal in the 9th Circuit Court of Appeals, the Division has little to say by way of opposition. The Division does not dispute that (1) this proceeding was initiated seven months ago, (2) fact discovery has not closed, and (3) no evidentiary hearings have been held. Similarly, the Division does not attempt to distinguish other administrative proceedings that have been stayed for a far longer period than the limited stay requested by Mr. Cannon. (*Joshua Abrahams*, Exchange Act Release No. 98122 (August 14, 2023); *Jason Jianxun Tang*, Securities Act Release No. 97246 (April 4, 2023).

Further, the Division makes no effort even to suggest that the limited stay requested by Mr. Cannon would in any way prejudice the Commission or harm the public interest. Such an effort would be surprising considering the Division's and the Commission's prior actions in this action and in the underlying district court action. For its part, the Division previously stipulated with Mr. Cannon that this proceeding should be stayed "until 30 days after the earlier of the Supreme Court's decision in *Jarkesy* or July 24, 2024." *See* November 14, 2023, Joint Stipulation to Stay Proceedings. Similarly, in the nearly nine years since 2015 when the district

court denied the Commission's request for a preliminary injunction against Mr. Cannon, the Commission has never renewed its request to the district court or appealed the district court's denial. Against that background, neither the Commission nor the Division can credibly claim that a stay of less than two months duration would imperil the public interest.

Given the preliminary status of this proceeding, the other, far longer stays currently in effect in other proceedings, and the limited duration of the requested stay, the Commission should grant Mr. Cannon's requested stay. Nothing the Division puts forth in its opposition or elsewhere suggests otherwise. In fact, in the case relied upon by the Division in its opposition, the D.C. Circuit Court of Appeals (over the Commission's opposition) entered an order staying the entry of sanctions in a follow-on administrative proceeding after the Commission had denied such a stay. *Blinder, Robinson Co., Inc. v. SEC*, 837 F.2d 1099, 1103 (D.C. Cir. 1988) ("this court, over the opposition of the SEC, entered an order staying the entry of sanctions") (cited for other purposes by the Division in its opposition to renewed motion to stay at 2).

III. The Commission Should Dismiss this Proceeding

The Division's opposition to Mr. Cannon's request for dismissal of this proceeding fares no better than its opposition to the limited stay request.

The Commission has been litigating in federal court against Mr. Cannon since 2015 and continues as his litigation adversary to this day. At the same time, in this proceeding, the Division has asked its employer, the Commission, to determine whether it is in the public interest to bar Mr. Cannon from certain types of professional conduct based on an injunction that is the subject of the same adversarial proceedings between Mr. Cannon and the Commission in the ongoing federal court action. In 2016, the Supreme Court set forth an objective standard to determine violations of due process where the accuser is also the adjudicator: "The Court asks

not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias." *Williams v Pennsylvania*, 579 U.S. __, 136 S. Ct. 1899 (2016) (forbidding a person from being both an accuser and adjudicator in the same case).

Rather than address the modern Supreme Court objective test set forth in *Williams* in 2016, the Division relies entirely on the 26-year-old opinion in *Blinder* from 1988, which in turn relies entirely on a half-century old Supreme Court opinion. *Blinder v. SEC*, 837 F.2d 1099, 1104 (D.C. Cir. 1988) (*citing Withrow v. Larkin*, 421 U.S. 35(1975)). The Division cites no authority suggesting that an administrative proceeding by the Commission against a person while the Commission is simultaneously litigating in court against that same person meets the Supreme Court's objective test laid out in *Williams*. Regardless of whether the Commission "harbors an actual, subjective bias" against Mr. Cannon, "there is an unconstitutional 'potential for bias'" when, as here, the Commission "serves as both accuser and adjudicator." *Williams* at 1905. As the Supreme Court held, "This objective risk of bias is reflected in the due process maxim that 'no man can be a judge in his own case and no man is permitted to try cases where he has an interest.'" *Id*. (internal citations omitted). The overwhelming *potential* for bias against Mr. Cannon from the Commission sitting both as his litigation opponent and his adjudicator in this proceeding violates Mr. Cannon's due process rights.

The due process violation here is more egregious because the Commission could have pursued, but elected not to pursue, injunctive relief in federal court restricting Mr. Cannon's professional conduct. In other words, giving up its dual roles as accuser and adjudicator in this proceeding would not have left the Commission without a forum to seek the remedies it now belatedly seeks.

But because the Commission failed to pursue all available injunctive relief in federal court, the doctrine of *res judicata* precludes it from doing so here. The Division does not contest that two out of the three elements for *res judicata* are met: the parties in the federal court action and in this proceeding are the same, and a final judgment on the merits was entered in the federal court action. *Jones v. SEC*, 115 F.3d 1173, 1178 (4th Cir. 1997) ("To successfully assert a res judicata defense, a party must establish: "(1) a final judgment on the merits in a prior suit, (2) an identity of the cause of action in both the earlier and the later suit, and (3) an identity of parties or their privies in the two suits."). Thus, the only *res judicata* element the Division contends is missing here is the "identity of the cause of action" in this proceeding and the federal court action. However, as the Commission itself has recognized, the second res judicata prong turns not on the label applied to the cause of action but on whether the "claim for relief that was available in a prior suit between parties or their privies, whether or not the claim was actually litigated.'" *Gary M. Kornman*, Exchange Act Release No. 59403, 2009 SEC LEXIS 367, at *55(Feb. 13, 2009) (citing *Jones*, 115 F.3d at 1178), *petition denied*, 592 F.3d 173 (D.C. Cir. 2010). The relief sought by the Division in this proceeding could have been obtained by the Commission in federal court. The Commission's failure to seek such relief in federal court precludes the Commission from imposing similar relief here.

In the starkest example of the relief sought against Mr. Cannon, the Division concedes that it could have sought a penny stock bar in federal court but failed to do so. Opp'n at 3. In fact, the Commission regularly seeks such penny stock bars in federal court. *See, e.g. SEC v. Almagarby, et. al*, 479 F.Supp.3d 1266, 1273–74 (2020) (*overturned in part by SEC v. Almagarby*, No. 21-13755 (11th Cir. 2024) (not approving of district court enjoining "a defendant from participating in otherwise lawful behavior when that defendant had not already

exhibited his unlikeliness to comply with the law going forward"). However, the Division goes on to incorrectly state (without authority) that "while district courts are granted the authority to prohibit persons from participating in the offering of a penny stock pursuant to Section 21(d)(6) of the Exchange Act, nothing prevents the Division from seeking such a bar in this proceeding rather than in the district court." The reason the Division fails to cite any authority in support of this bald assertion is that there is none.[1] What prevents the Division from seeking such relief here is the well-established doctrine of *res judicata*.

As to the other types of professional conduct limitations sought by the Division, the Division incorrectly states that "the Commission—*not the district court*—may order an associational bar." Opp'n at 3 (emphasis added). To be sure, Section 15(b)(6)(A) of the Securities Exchange Act of 1934 ("Exchange Act") provides the Commission with the ability to issue administrative bars of the sort sought here. But that provision is not exclusive and does not prevent federal district courts from imposing similar bars. Section 27 of the Exchange Act, 15 U.S.C. § 78a, et seq., grants federal district courts (and not the Commission) *exclusive* jurisdiction "of all suits in equity and actions at law brought to enforce *any* liability or duty created by [the Exchange Act] or the *rules or regulations thereunder*." § 78aa(a) (emphasis

[1] The Division's citation to *Blinder* in opposition to Mr. Cannon's *res judicata* argument misses the mark. The court in Blinder does not address *res judicata*, and, to the extent the Division relies on *Blinder*'s due process holdings as precluding a *res judicata* defense, *Blinder* is out of date and must be reconsidered (as discussed above) in light of the Supreme Court's holding in *Williams*. The two Commission opinions cited by the Division are equally unavailing and easily distinguished from this proceeding. *Tzemach David Netzer Korem*, Release No. 70044 at *9 (July 26, 2013), involved a consent judgment in federal court in which the respondent explicitly contemplated further adjudicatory proceedings. And in *Michael T. Studer*, Exchange Act Release No. 50411, 2004 SEC LEXIS 2135 (Sept. 24. 2004), the only authority other than the Commission's own orders cited in support of the Commission's conclusory *res judicata* statement is *Blinder*, which, as discussed, does not address *res judicata*.

added). The SEC has long sought from federal courts all manner of ancillary relief, injunctive and otherwise. *See, e.g., SEC v. Materia*, 745 F.2d 197, 200 (2d Cir. 1984) ("any form of ancillary relief may be granted where necessary and proper to effectuate the purposes of the statutory scheme"). The Division does not appear ready to concede that the Commission is precluded from seeking professional conduct limitations as part of its injunctive relief in federal district court. Because the Commission could have sought (but did not seek) in federal court the same types of restrictions on professional conduct sought here, *res judicata* precludes the Commission from imposing such professional conduct bars in this proceeding.

IV. Conclusion

For at least the foregoing reasons, the Commission should postpone or stay this proceeding until the earlier of August 1, 2024, or resolution of Mr. Cannon's motion to stay currently pending in the 9th Circuit Court of Appeals. Alternatively, the Commission should dismiss this proceeding entirely as it violates Mr. Cannon's Due Process rights and is barred by res judicata.

Dated: June 3, 2024

Respectfully submitted,

/s/ Nicolas Morgan

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CERTIFICATE OF SERVICE

In accordance with 17 C.F.R. §§ 201.150, 201.151, I certify that a copy of Respondent Eric Christopher Cannon's Reply in Support of Renewed Motion For An Order Staying or Dismissing the Amended Order Instituting Administrative Proceedings was served on the following on June 3, 2024, via the method indicated below:

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Dated: June 3, 2024

/s/ Nicolas Morgan
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