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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

SECURITIES AND EXCHANGE COMMISSION,	)	
Plaintiff,	)	**No. 20-cv-2104**
v.	)	**Hon. Michael A. Shipp**
JOHN D. FIERRO and JDF CAPITAL, INC.,	)	**Motion Day: February 7, 2022**
Defendants.	)	

PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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Pursuant to Rule 56(a) of the Federal Rules of Civil Procedure and Local Rule 56.1, Plaintiff, United States Securities and Exchange Commission (the "Commission" or "SEC"), respectfully requests that the Court enter summary judgment in favor of the SEC and against defendants John D. Fierro and JDF Capital, Inc. ("Defendants") on (1) the SEC's claim that Defendants operated as unregistered securities dealers in violation of Section 15(a)(1) of the Securities Exchange Act of 1934 ("Exchange Act"), and (2) Defendants' affirmative defenses.[1] Additionally, the SEC requests that the Court enter summary judgment in its favor and find that Fierro is a controlling person of JDF Capital, Inc. under Exchange Act Section 20(a) [15 U.S.C. § 78t(a)] and that Fierro is therefore liable for JDF's violations of Exchange Act Section 15(a)(1).

INTRODUCTION

The securities laws require those who buy and sell securities as part of a "regular business" to register with the SEC as a securities dealer or associate with a registered dealer. Failing to properly register or associate results in a strict liability violation of the dealer registration provisions of the Exchange Act. The Complaint charges both Defendants with acting as unregistered securities dealers in violation

[1] The SEC has filed herewith Plaintiff's Statement of Material Facts ("SMF") pursuant to local civil rule 56.1.

of Section 15(a)(1) of the Exchange Act. *See* 15 U.S.C. § 78o. The undisputed facts here establish that neither of the Defendants registered as a dealer, or properly associated with a registered dealer, even though they operated a business through which they bought securities in the form of convertible notes from penny stock companies, converted those notes into shares of stock at a substantial discount to the prevailing market price, and sold those newly issued shares into the market during the Relevant Period of January 2015 through November 2017.

Toward that end, it is undisputed that Defendants were engaged in the business of buying and selling securities during the Relevant Period and that they: (1) maintained an office; (2) hired an employee and contractors to help operate their securities business; (3) advertised the business through a website and direct solicitations at industry conferences; and (4) paid commissions to contractors to solicit microcap companies to sell Defendants convertible notes. Defendants have admitted that during the Relevant Period: (1) they bought convertible notes from more than 20 penny stock issuers and sold almost 6.5 billion newly issued shares of the issuers' stock into the public market; and (2) their proceeds and profits from this practice were more than $5.3 million and $2.3 million from just the ten highest grossing stocks.[2]

[2] As discussed below, these are the proceeds and profits Defendants have *admitted* to and are more than sufficient to establish their liability as unregistered

This case is ripe for summary judgment because there are no genuine issues of material fact as to liability,[3] and the Court should find as a matter of law that Defendants' business of buying and selling securities rendered them "dealers" within the plain language of Section 3(a)(5)(A) of the Exchange Act. *See* 15 U.S.C. § 78c(a)(5)(A). "[A]ny person engaged in the business of buying and selling securities . . . for such person's own account through a broker or otherwise" "as a part of a regular business" must register as a dealer with the SEC or, in the case of a natural person, associate with a registered dealer. 15 U.S.C. §§ 78c(a)(5)(A) & (B), 78o(a)(1). Under this clear and unambiguous statutory language, as well as case law interpreting it, the undisputed facts show that Defendants bought and sold securities for their own account through a lucrative regular business and thus were dealers.

Defendants have asserted a number of affirmative defenses to the SEC's strict liability claim, all of which fail as a matter of law, or relate only to the form of relief to be granted, which the Court would decide only after liability is

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dealers. However, Defendants' own documents and deposition testimony show that their proceeds and gains were substantially higher.

[3] If the Court grants the SEC's motion for summary judgment, the SEC will respectfully request that the Court set a briefing schedule to decide the appropriate remedies.

established.[4] Defendants' Second Affirmative Defense—a purported Due Process violation—posits that they did not have "fair notice" that their conduct was unlawful. This defense fails as a matter of law because they cannot even articulate—let alone establish—a claim, and because the statute is clear and its meaning well established by case law from both federal courts and the Commission. Defendants' Third Affirmative Defense of "estoppel" fails as a matter of law because estoppel is not a legally cognizable defense against the SEC's claims, and because their assertions—*i.e.*, that the SEC's claims are inconsistent with its previous guidance—are simply wrong.

Defendants' Fourth, Fifth, Sixth and Seventh affirmative defenses are not relevant to liability because they relate solely to remedies, such as injunctive relief, disgorgement, penalties and a penny stock bar. If Defendants are found liable, the Court will address remedies at a later date.

UNDISPUTED FACTS

The Relevant Period for the SEC's Complaint is January 2015 through November 2017. Statement of Material Facts ¶ 1 (hereinafter "SMF").

[4] In its order denying Defendants' motion to dismiss, this Court squarely rejected Defendants' First Affirmative Defense, which asserts that the Complaint fails to state a claim for relief. *SEC v. John D. Fierro and JDF Capital, Inc.*, 2020 WL 7481773 (D.N.J. Dec. 18, 2020) at *4 ("The Court, accordingly finds, the SEC pled sufficient facts to state a claim under Section 15(a).").

A. Defendants' Business

Fierro resides in Freehold, New Jersey. SMF ¶ 2. He conducted business through his wholly-owned corporation JDF Capital, Inc. SMF ¶ 4. Fierro received all of the profits of JDF. *Id*. JDF maintained an office in Freehold, New Jersey. SMF ¶ 5. JDF had one employee (Donna Principe). SMF ¶ 7. Fierro also employed at least three independent contractors during the Relevant Period to help with JDF's securities business. SMF ¶ 9.

B. Defendants Were Not Registered as Dealers or Associated with A Registered Dealer

At no time has Fierro or JDF ever registered with the SEC as a dealer or associated with a registered dealer. SMF ¶ 6.

C. Defendants' Regular Business Relies Upon Purchasing Convertible Notes, Converting the Notes to Shares of Stock, and Selling the Newly Issued Shares of Company Stock Into the Public Market

Fierro's and JDF's business model is to engage in the business of buying and selling securities for Defendants' own account. SMF ¶ 10. Defendants purchased securities known as convertible notes from penny stock issuers throughout the period January 2015 through November 2017. SMF ¶ 11. Fierro negotiated the terms of the convertible notes and signed contracts with the issuers to memorialize their terms. SMF ¶ 12. The convertible notes were contracts in which the issuer of the note promised to pay JDF (the holder of the note) a designated sum of principal and interest within a designated time frame. SMF ¶

13. As their name suggests, the convertible notes granted JDF the option to demand that sums owed under the notes be paid in the form of the issuer's stock (known as "converting the note"). SMF ¶ 15.

Defendants held convertible notes for at least 6 months before converting them to stock in order to comply with SEC Rule 144, which creates a procedure for selling otherwise restricted securities. SMF ¶ 16. Most of Defendants' profits came from converting the notes to stock and then selling that stock. SMF ¶¶ 18-19.

The convertible notes that JDF bought from the issuers entitled Defendants to receive issuer stock at a substantial discount from the prevailing market price. SMF ¶ 20. Each note provided for a specified discount, which generally ranged between 35 and 50 percent less than the lowest closing price for the stock during the 10 to 25 trading days preceding the conversion request. SMF ¶ 21.

JDF deposited stock converted from notes into one of its 15 brokerage accounts at BMA Securities, Alpine Securities, Schwab, TD Ameritrade, JH Darbie, Vertical Group, COR Clearing, Kovak Securities, Interactive Brokers, Martinez Aimes, Legend Securities, Glendale Securities, and Wilson, Davis. SMF ¶ 22. Fierro, who was authorized to trade in JDF's accounts, generally sold the stock immediately after conversion either personally, or through an employee acting under his supervision, and thereby locked in his gains. SMF ¶ 24.

D. Defendants Held Themselves Out to the Public As Being in the Business of Buying and Selling Securities

Fierro maintained a website, jdfcap.com, where he advertised JDF's convertible note business. SMF ¶ 39. Fierro testified that one purpose of the JDF website was to obtain new clients. SMF ¶¶ 44-45. JDF advertised on its website that it provided "Direct Capital Investment," which it described by stating: "We structure transactions that are both equity and convertible into equity to help finance growth. We have closed convertible preferred stock, preferred stock and common stock offerings to date." SMF ¶ 43. JDF's website included an interactive form that issuers could complete to start the process of selling JDF a convertible note. SMF ¶ 46.

Fierro hired independent contractors who worked on commission to solicit potential issuer clients to sell JDF convertible notes. SMF ¶ 48. These independent contractors included Marshall Pickett, Will Arzenis, and Robert Fierro. SMF ¶ 49. Defendants provided scripts for these independent contractors to use when they called or emailed issuers. SMF ¶ 50. These independent contractors located issuers who sold convertible notes to JDF. SMF ¶ 52.

Fierro attended, and JDF sometimes sponsored, microcap industry conferences at which he solicited issuers to sell JDF convertible notes. SMF ¶ 53. JDF employee Donna Principe and the company's independent contractors also attended some of these conferences on behalf of JDF to solicit issuers. SMF ¶ 54.

At the conferences, Fierro, and sometimes Ms. Principe, would occupy a booth or a table at which JDF displayed a banner advertising the business. SMF ¶¶ 56-57. They would also distribute pamphlets and pens branded with the words "JDF Capital." SMF ¶¶ 57-58.

E. The Volume and Profit From Defendants' Convertible Note Business Was Substantial

Defendants have admitted many of the allegations that the SEC made in its Complaint, including that: (1) during the Relevant Period, Defendants purchased convertible notes from more than 20 different penny stock issuers (SMF ¶ 29); (2) Defendants converted these notes into stock and sold almost 6.5 billion newly issued shares into the public market (SMF ¶ 30); (3) for the ten highest grossing stocks during this period, Defendants converted $3,069,981 of principal, interest, and "Original Issue Discount"[5] due under convertible notes into discounted shares of newly issued stock, and they sold approximately 5.7 billion shares into the market (SMF ¶ 31); (4) Defendants reaped gross proceeds from these sales of $5,395,076 and gains of $2,325,095 (SMF ¶ 32).

In support of this motion, Dr. Carmen Taveras summarized voluminous materials in the record including Defendants' brokerage statements and trade blotters from their brokerage firms. SMF ¶ 33. Using data in these voluminous

[5] This was a fee equal to 10% of the face value of the note that the issuer would have to pay JDF when repaying the note. SMF ¶ 14.

documents, she added up the amount of stock that Defendants sold from convertible notes, the resulting proceeds, Defendants' costs of purchasing these notes, and Defendants' gains. SMF ¶¶ 33-34. Dr. Taveras's summary declaration and the two attached exhibits describe her summary assignment and demonstrate that: (1) during the Relevant Period, Defendants sold a total of more than 10.56 billion shares of stock converted from notes for more than $8.53 million in gross proceeds, SMF ¶ 34.a; (2) Defendants' costs for these notes were approximately $3.73 million, SMF ¶ 34.b; (3) Defendants' gains from these sales were approximately $4.80 million, SMF ¶ 34.c; (4) Defendants converted 64 notes (which JDF bought from 25 different issuers) on 301 separate occasions, SMF ¶ 34.d; (5) the median discount in these conversions against the prevailing market price of the stock was 42%, SMF ¶ 34.e; and (6) Defendants sold the resulting stock in more than 1,000 sales transactions. SMF ¶ 34.f.

F. The Stock That Defendants Distributed to the Public From Convertible Notes Was Newly Issued and Came Directly From Defendants' Issuer Clients

The stock that Defendants converted from convertible notes and sold in the market was newly issued by the issuer companies that sold the notes to Defendants. SMF ¶ 36. Defendants obtained nearly all of the stock that they sold in their business directly from the issuers, through note conversions, and not from purchases in the secondary market. SMF ¶ 37; *see also* SMF Ex. 12 at ¶ 15

(Taveras Declaration: "the trading data shows that 98.8% of JDF's stock sale proceeds involved stock that was converted from notes").

G. Defendants Used the Means and Instruments of Transportation and Communication in Interstate Commerce and of the Mails

In connection with the Defendants' convertible notes business, Fierro and JDF's employees or independent contractors regularly used the means and instruments of transportation and communication in interstate commerce and of the mails. SMF ¶ 35 ("Fierro and an employee of JDF used the telephone, email and text messages to place the orders to sell stock converted from notes.").

ARGUMENT

A. Governing Law

1. Summary Judgment Standard

Pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, the Court should enter summary judgment where, as here, the movant demonstrates that there is no genuine issue of material fact and that it is entitled to a judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Some degree of factual dispute is expected, but to successfully counter a motion for summary judgment the factual dispute must be material and genuine. *Anderson*, 477 U.S. at 248. On a motion for summary judgment, the evidence and the factual inferences arising from the evidence are construed in the light most favorable to

the non-moving party. *Big Apple BMW, Inc. v. BMW of North America, Inc.*, 974 F.2d 1358, 1363 (3d Cir. 1992).

The party opposing the motion for summary judgment, however, may not simply rest upon mere allegations or denials of the pleadings and factual statements made in support of the motion. *Celotex*, 477 U.S. at 322-323; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). "[A] party opposing a properly supported motion for summary judgment may not rest upon the mere allegations or denials of his pleading . . . must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 248-49 (internal quotation marks omitted). "The mere existence of a scintilla of evidence in support of the [non-movant's] position will be insufficient; there must be evidence on which the jury could reasonably find for [that party]." *Id.* at 252.

2. The Exchange Act and Case Law Make Clear What a Dealer Is and Require that Dealers Register with the SEC

In interpreting any statute, courts begin with the plain language of the statute itself. *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990). "[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004) (internal quotation marks and citations omitted).

Section 15(a)(1) of the Exchange Act makes it unlawful for anyone who

is a dealer to use the mails or interstate commerce to engage in or attempt to induce the purchase or sale of securities unless the person is registered with the SEC as a dealer or associated with a registered dealer.[6] 15 U.S.C. § 78o(a)(1). Those who buy and sell securities for their own account as part of a regular business are dealers under Section 15(a)(1) and are subject to the registration requirements in Section 15(b). 15 U.S.C. §§ 78c(a)(5)(A) & (B), 78o(a)(1) & (b). These provisions are an essential part of securities regulation. *See Roth v. SEC*, 22 F.3d 1108, 1109 (D.C. Cir. 1994) ("The broker-dealer registration requirement serves as the 'keystone of the entire system of broker-dealer regulation.'") (citation omitted). Consistent with its broad regulatory objectives, Section 15(a)(1) does not require a showing of scienter to establish a violation, and is a strict liability offense. *SEC v. Merchant Capital*, 311 Fed. Appx. 250, 252 (11th Cir. 2009). A violation of Section 15(a)(1) is established

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[6] Section 15(a)(1) provides:

> It shall be unlawful for any broker or dealer which is either a person other than a natural person or a natural person not associated with a broker or dealer which is a person other than a natural person (other than such a broker or dealer whose business is exclusively intrastate and who does not make use of any facility of a national securities exchange) to make use of the mails or any means or instrumentality of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) unless such broker or dealer is registered in accordance with subsection (b) of this section.

by showing the Defendants functioned as "dealers" as the term is defined in the Exchange Act regardless of the Defendants' intent.

Section 3(a)(5)(A) of the Exchange Act defines "dealer" as "any person engaged in the business of buying and selling securities . . . for such person's own account through a broker or otherwise." 15 U.S.C. § 78c(a)(5)(A). Section 3(a)(5)(B) provides an exception for persons "not engaged in the business of dealing." 15 U.S.C. § 78c(a)(5)(B). That section provides that persons are not dealers if they buy and sell securities for their own account "*not as a part of a regular business*."[7] *Id.* (emphasis added).

The relevant statute is unambiguous, and case law has applied it to describe what constitutes operating a business of being a dealer. The Eleventh Circuit (in one of the few decisions of a Court of Appeals to address this question) has held that being in the "business" of a dealer means operating "[a] commercial enterprise carried on *for profit*, a particular occupation or employment habitually engaged in for *livelihood* or *gain*." *SEC v. Big Apple Consulting USA, Inc.*, 783 F.3d 786, 809

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[7] Section 3(a)(5)(B) provides:

> *Exception for Person Not Engage In the Business of Dealing.* The term "dealer" does not include a person that buys or sells securities (not including security-based swaps, other than security-based swaps with or for persons that are not eligible contract participants) for such person's own account, either individually or in a fiduciary capacity, but not as a part of a regular business.

(11th Cir. 2015) (emphasis in original).[8]

SEC v. Almagarby, 479 F. Supp. 3d 1266, 1279 (S.D. Fla. Aug. 17, 2020), is instructive and strikingly similar to this case. In *Almagarby*, the court granted summary judgment in a Section 15(a)(1) case for failure to register as a dealer where the defendants operated a business of buying aged corporate debt from creditors, negotiated with the corporate debtors to obtain convertible notes as repayment of the debts, converted them into discounted stock, and sold the newly issued stock into the public market. *Id*. at 1267. The court quoted *Big Apple*'s holding that "the centerpiece to [the definition of dealer] is the word 'business'" and noted that, under *Big Apple*, "where a company's business model is based entirely on the purchase and sale of securities, that fact constitutes conclusive proof that the company is a dealer." *Id.* at 1272 (internal quotation marks omitted).

[8] Although the Eleventh Circuit in *Big Apple*, 783 F.3d at 809, was construing the definition of "dealer" for purposes of registering securities under Section 5 of the Securities Act of 1933 [15 U.S.C. § 77e] ("Securities Act"), its analysis is applicable to cases (like this one) which involve registration of dealers under Section 15(a)(1) of the Exchange Act. *See SEC v. Keener,* 1:20-cv-21254-BLOOM/Louis, 2020 WL 4736205, at *5 n.2 (S.D. Fla. Aug. 14, 2020) (rejecting defendant's contention that *Big Apple* does not apply to a dealer that purchases convertible notes and sells the resulting stock). Indeed, the definitions of "dealer" under the Securities Act [Section 2(a)(12), 15 U.S.C. § 77b(a)(12)] and under the Exchange Act [Section 3(a)(5)(A), 15 U.S.C. § 78c(a)(5)(A)] both focus on whether the person is "in the business" of transacting in securities. The *Big Apple* court found that "the definition of dealers in 15 U.S.C. § 77b(a)(12) and 15 U.S.C. § 78c(a)(5)(A) are very similar," and therefore can be analyzed in the same way. 783 F.3d at 809 n.11.

Here, just like in *Big Apple* and *Almagarby*, it is undisputed that JDF's business model "is based entirely on the purchase and sale of securities." *See* SMF ¶ 10.

Other cases hold that the frequency and regularity with which a person or entity buys and sells securities is indicative of whether they are engaged in the securities business as a dealer. *See Eastside Church of Christ v. National Plan, Inc.*, 391 F.2d 357, 362 (5th Cir. 1968) (defendant was a dealer because it purchased many church bonds for its own account as a part of a regular business and sold some of them); *SEC v. River North Equity, LLC, et.al.*, 415 F. Supp. 3d 853, 858 (N.D. Ill. Dec. 4, 2019) (courts construing the term dealer generally require a "certain regularity of participation in securities transactions"); *accord Fierro,* 2020 WL 7481773, at *4.

Courts have found defendants to be unregistered dealers where, as here, they made profits not from buying stock in the market and selling only after market prices increased (like a trader), but rather from buying newly issued stock directly from the issuer and then reselling it at a marked-up price, as underwriters do. *See, e.g., River North*, 415 F. Supp. 3d at 858-59 (finding it "particularly significant that … like an underwriter, River North … purchased stocks at a discounted price directly from numerous issuers…(instead of purchasing stocks already in the marketplace, like a trader) … and turned a profit not from selling only after market prices increased (like a trader), but rather from quickly reselling at a marked-up

price") (citing *Gordon Wesley Sodorff, Jr.*, 50 S.E.C. 1249, 1992 WL 224082, at *5 (Sep. 2, 1992) ("Unlike an investor or trader, Sodorff's profits did not result from appreciation in the value of the securities, but rather from his markup over the price he paid.")); *Almagarby*, 479 F. Supp. 3d at 1272 ("It is undisputed that Defendants purchased securities from Issuers at deep discounts and sold them back on the market for profit").

As noted above, Section 15(a)(1) does not require a showing of scienter to establish a violation—violators are strictly liable for failing to register as dealers. *See SEC v. Cooper*, 142 F. Supp. 3d 302, 318 (D. N.J. Nov. 5, 2015); *SEC v. Martino*, 255 F. Supp. 2d 268, 283 (S.D.N.Y. April 2, 2003); *Merchant Capital*, 311 Fed. Appx. at 252 (Section 15(a)(1) imposes strict liability). Simply put, the SEC need only show that a defendant *functioned* as a "dealer" as the term is defined in the Exchange Act, regardless of the person's intent, to establish a violation.

B. The Undisputed Facts Show That Defendants Operated As Dealers in Securities, Were Not Registered or Associated with a Registered Dealer, and Thus Violated Section 15(a)(1)

As noted above, the plain language of the statute demonstrates that the Defendants were required to register as dealers with the SEC as a matter of law. The undisputed facts demonstrate that: (1) Defendants' regular business was to acquire and sell securities for a profit; and (2) Defendants' made significant profits

during the Relevant Period from purchasing convertible notes from issuers, converting the notes to shares of deeply discounted microcap stock, and selling them for a profit.

1. Defendants' Regular Business Was to Acquire and Sell Securities for Profit

The undisputed facts establish that Defendants engaged in "[a] commercial enterprise carried on *for profit*" to buy and sell securities as part of a regular business. *See Big Apple*, 783 F.3d at 809. The "sheer volume" of Defendants' convertible notes business, as well as the significant profits that it generated, establish that they were dealers. *See Almagarby*, 479 F. Supp. 3d at 1272. Defendants *admit* that from just their ten highest grossing stocks, they sold approximately 5.7 billion shares of stock from convertible notes during the period of January 1, 2015 through November 30, 2017. SMF ¶ 31. They also admit that these sales resulted in approximately $5.4 million in proceeds and approximately $2.3 million in profits. SMF ¶ 32. These admitted—and thereby undisputed—share volumes, proceeds and profits are more than adequate for the Court to find, as a matter of law, that they were unregistered dealers in violation of Exchange Act Section 15(a)(1).

Moreover, Defendants' own documents (which presumably they do not dispute) demonstrate that the sheer volume of their overall business was even greater. SMF ¶¶ 33-34 & Ex. 12 (Taveras Declaration). Indeed, summing the

share volumes and proceeds of JDF's entire convertible notes business during the Relevant Period results in more than 10.56 billion shares of stock from convertible notes during the period of January 1, 2015 through November 30, 2017. *Id*. at ¶ 34.a. The sum of these sales generated more than $8.53 million in proceeds and between $4.80 million in gains. *Id*. at ¶¶ 34.a & b. Whether the Court considers only the share volumes, proceeds and profits to which Defendants have expressly *admitted*, or the even larger volumes, proceeds and profits summarized in Dr. Taveras's summary declaration, the result is the same: Defendants were unquestionably engaged in the regular business of buying convertible notes and selling discounted shares of stock from them.

As this Court noted in denying Defendants' motion to dismiss, the "primary indicia in determining that a person has 'engaged in the business' within the meaning of the term 'dealer' is that the level of participation in purchasing and selling securities involves more than a few isolated transactions." *Fierro,* 2020 WL 7481773, at *4 (quoting *Keener*, 2020 WL 4736205, at *4, which quoted *Sodorff,* 1992 WL 224082, at *4-5) (internal quotation marks omitted). Notably, in granting summary judgment on behalf of the SEC, the court in *Almagarby* found the defendants were acting as unregistered dealers where their proceeds were considerably less than those the Defendants admit to here. 479 F. Supp. 3d at 1272 (finding that "the sheer volume of the number of deals and the large sums of profit

Defendants generated—no fewer than 962 sales of shares and more than $2.8 million in proceeds—gives credence to the proposition that Defendants were engaged in the 'business' of buying and selling securities") (citing *SEC v. Ridenour*, 913 F.2d 515, 517 (8th Cir. 1990) (defendant "was a dealer because his 'high level of activity ... made him more than an active investor'")).

This case is even stronger than the facts in *Big Apple*, in which the Eleventh Circuit held that "where a company's business model is based entirely on the purchase and sale of securities, that fact constitutes conclusive proof that the company is a dealer." 783 F.3d at 809-810. On a day-to-day basis, the defendant in *Big Apple* "provided investor relations and public relations services to microcap companies." *Big Apple,* 783 F.3d at 790. The Eleventh Circuit found this investor/public relations firm was a dealer because it received payment in the form of discounted stock directly from the issuer, which it then sold in the public market. *Id*. at 809-10. By contrast, Defendants' entire business model here and their day-to-day operations focused almost entirely upon finding issuer clients that were offering securities (convertible notes) for sale, buying those notes, converting them to stock, and then selling the newly issued stock in the public market. *See* SMF ¶ 10 & Exhibit 12 at ¶ 15; *see also SEC v. Offill*, Case No. 3:07-CV-1643-D, 2012 WL 246061, at *8-9 (N.D. Tex. Jan. 26, 2012) (granting summary judgment on a Section 15(a)(1) claim for failure to register and holding that the defendant

"bought and sold securities as part of his regular business, making him a dealer under 15 U.S.C. § 78c(a)(5)").

There were other indicia that Defendants were operating a regular business. It is undisputed that they maintained an office in Freehold, New Jersey from which Fierro supervised an employee and independent contractors working for the business. SMF ¶¶ 5, 7, 9. As many regular businesses do, Defendants advertised, promoted, and continued to develop their business. They did so through various means that were all designed to solicit issuer clients to sell JDF convertible notes. For instance, Defendants operated a website through which they advertised their convertible notes business. SMF ¶ 39. Further, Defendants hired independent contractors to find and solicit issuers to sell them convertible notes and paid them success-based compensation, including commissions, tied to the size of convertible notes these independent contractors obtained for JDF. SMF ¶¶ 48, 52. Defendants also sponsored, and Fierro and his employee and independent contractors attended, third-party conferences at which they advertised JDF's convertible note business and solicited issuers in person to sell JDF convertible notes. SMF ¶¶ 53-58.

2. Defendants' Profits Came From Purchasing Deeply Discounted Stock Directly From Issuers and Promptly Reselling It

Another characteristic of Defendants' business that further demonstrates they operated as dealers is that their profits came not from buying stock in the open market and reselling it when prices increased, but rather from purchasing deeply

discounted stock directly from issuer clients and then promptly reselling it in the market. *See* SMF ¶¶ 36-37. Defendants admit that they generally profited from the difference between the discounted conversion price and the prevailing stock price upon conversion and sale. *See* SMF ¶¶ 18-19. This is similar to the business of the defendants that the courts found to be dealers in *Big Apple*, 783 F.3d at 809-10; *Almagarby*, 479 F. Supp. 3d at 1272; and *River North*, 415 F. Supp. 3d at 858-59 (denying motion to dismiss and finding it "particularly significant that … like an underwriter, River North: (1) purchased stocks at a discounted price directly from numerous issuers … (instead of purchasing stocks already in the marketplace, like a trader) and (2) turned a profit not from selling only after market prices increased (like a trader), but rather from quickly reselling at a marked-up price").[9]

3. Defendants Were Not Registered as Dealers or Associated with a Registered Dealer, and They Engaged in Securities Transactions in Interstate Commerce

It is undisputed that Defendants have never registered with the SEC as dealers. SMF ¶ 6. Nor were Defendants associated with entities that were registered with the SEC as dealers. *Id*. Likewise, it is undisputed that the

[9] Note that, unlike Defendants here, Almagarby did not have a place of business outside of his home and did not have any employees, yet that court still concluded that he was a dealer based largely upon the "sheer volume" of his business, including the profits he earned from selling newly issued shares into the public market. *See Almagarby*, 479 F. Supp. 3d at 1268.

Defendants used interstate commerce to engage in their trading activities.[10] Where, as here, the undisputed facts show that, under the plain language of the Exchange Act, Defendants were dealers who conducted securities transactions in interstate commerce without registering, summary judgment should be entered against them for violating Section 15(a)(1) of the Exchange Act.

C. Fierro Is Also Liable As the Control Person of JDF under Exchange Act Section 20(a)

Section 20(a) of the Exchange Act creates joint and several liability for any person who directly or indirectly controls any other person who violates the Exchange Act, "unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action." 15 U.S.C. § 78t(a). The SEC must establish both that (1) there was an underlying violation by JDF and (2) Fierro controlled JDF's actions. *See Fierro*, 2020 WL 748181773, at *4.

The SEC has shown above that, based on the undisputed facts in the record, JDF violated Exchange Act Section 15(a)(1) by operating as an unregistered dealer. Furthermore, in answering the Complaint, Fierro admitted that he controlled JDF's actions by being its sole owner and President, by controlling all

[10] Exchange Act Section 15(a)(1) [15 U.S.C. § 78o(a)(1)] requires that the transactions "make use of the mails or any means or instrumentality of interstate commerce." Here, it is not disputed that Defendants used the telephone, email and text messages to place the orders to sell stock converted from notes. SMF ¶ 35.

of its operations, and by receiving all of its profits. *See* SMF ¶ 4. Fierro cannot rely upon the exception to liability under Section 20(a) because he admittedly directly caused the acts constituting JDF's violation. *See* SMF ¶¶ 11, 12. Fierro is thus also liable under Section 20(a) of the Exchange Act, in addition to his direct liability under Exchange Act Section 15(a)(1) discussed above in Section B of the Argument. *See SEC v. J.W. Barclay & Co., Inc., et al.*, 442 F.3d 834, 837, 845 (3d Cir. 2006) (affirming district court order finding 68% owner of broker-dealer, which committed non-scienter-based violations of the Exchange Act, liable as a control person under Exchange Act Section 20(a)).

D. Defendants' Second and Third Affirmative Defenses Fail as a Matter of Law, and Summary Judgment Should Be Entered Against Defendants on Them

1. Defendants' Due Process or Fair Notice Defense (Second Affirmative Defense) Is Invalid as a Matter of Law

Defendants' Second Affirmative Defense is that "Defendants had no fair notice that their conduct was/could be unlawful. As such, Plaintiff's claims are barred by due process." DE 21, Affirmative Defense 2. Specifically, Defendants claimed in their motion to dismiss that "the allegations in the Commission's Complaint against JDF Capital and Fierro are a stark contradiction to the Commission's prior guidance, and violate the due process requirement of reasonable notice." DE 13 at 12. This argument fails as a matter of law, and therefore the Court should enter summary judgment against Defendants on their

Second Affirmative Defense.[11]

a. Defendants' Challenge To The Language of the Dealer Registration Statute Fails

Defendants claim that they were denied "fair notice" and had no way to know that their conduct was illegal or that they were required to register as dealers pursuant to Section 15(a)(1) of the Exchange Act. A "fair notice" claim necessarily challenges the language of a statute on the basis of vagueness. *See Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972). "[T]o sustain such a challenge, the complainant must prove that the enactment is vague not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all. Such a provision simply has *no* core." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.7 (1982) (internal quotation marks and citations omitted) (emphasis in original).

If Defendants now contend that Exchange Act Section 15(a)(1) or the definition of dealer in Section 3(a)(5) are unconstitutionally vague—an argument that they declined to make in their motion to dismiss, as the Court noted—that

[11] A constitutional fair notice challenge to a statute is a legal question to be decided by the Court, not a jury. *United States v. Bryant*, 556 F. Supp. 2d 378, 447-48 (D. N.J. June 5, 2008) (citing *United States v. Paradies*, 98 F.3d 1266, 1284 (11th Cir. 1996)). Thus, the Court may decide Defendants' challenges to the dealer registration statute pursuant to the SEC's motion for summary judgment.

argument fails. *See Fierro*, 2020 WL 7481773, at *5. A statute is void for vagueness only (1) if it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute" or (2) if "it encourages arbitrary and erratic arrests and convictions." *Papachristou,* 405 U.S. at 162 (internal quotation marks omitted).

The language of Exchange Act Sections 3(a)(5)(A) and 15(a)(1) is clear and unambiguous, and Defendants can point to no case holding otherwise. The operative terms in those sections—"buying and selling securities," "business," and "own account"—are common, everyday terms that clearly give a "person of ordinary intelligence" fair notice that they may be a dealer and required to register with the SEC. Certainly, based upon these clear terms, Defendants have not and cannot establish that the statute itself fails to provide fair notice or contains "no standard of conduct or rule at all." *See FTC v. Wyndham Worldwide Corp.*, 799 F.3d 236, 250 (3d Cir. 2015). "Condemned to the use of words, we can never expect mathematical certainty from our language," and so the Supreme Court has upheld a challenged statute when its text is "marked by flexibility and reasonable breadth, rather than meticulous specificity." *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972) (internal quotation marks omitted).

Defendants cannot show that the dealer registration statute itself is vague, ambiguous, or lacks clarity. In addressing Defendants' due process and "fair

notice" claim at the motion to dismiss stage—that they had no way to know their conduct was unlawful—this Court noted that "the definition of dealer under Section 3(a)(5) [of the Exchange Act] is broad and the Complaint suggests that Defendants are not amateur investors." *Fierro*, 2020 WL 7481773, at *5. Section 15(a)(1) of the Exchange Act has been law for decades and the SEC has applied it throughout that time.[12]

b. The SEC Is Not Required to Interpret the Statutes It Enforces

Defendants have alleged that the SEC failed to provide adequate guidance to the market (DE 13 at 12) with respect to the dealer registration statute, suggesting that the SEC has a duty to interpret the statutes it enforces. This claim too is without merit. When challenging an agency's enforcement action on due process grounds with respect to a federal statute, Defendants must establish that the language of the statute itself did not provide fair notice. "The relevant question is not whether [defendant] had fair notice of the [agency's] interpretation of the statute, but whether [the defendant] had fair notice of what the statute itself

[12] *See Big Apple,* 783 F.3d at 809-10; *Eastside Church*, 391 F.3d at 362; *Ridenour*, 913 F.2d 515; *Offill*, 2012 WL 246061; *Sodorff*, 1992 WL 224082; *see also Ironridge Global Partners, LLC*, Exchange Act Rel. No. 81443, 2017 WL 3588037 (2017) (settled action for failure to register pursuant to Section 15(a)(1) where buying and selling billions of shares in connection with financing services for microcap issuers); *IBC Funds, LLC*, Exchange Act Rel. No. 77195, 2016 WL 683557 (2016) (settled action for violating Section 15(a)(1) by operating as a dealer and failing to register).

requires." *Wyndham*, 799 F.3d at 253-54. "As a necessary consequence, [defendant] is only entitled to notice of the meaning of the statute and not to the agency's interpretation of the statute." *Id*. at 255. Here, Defendants were "not entitled to know with ascertainable certainty the [SEC's] interpretation of what practices required" registration pursuant to Section 15(a)(1) of the Exchange Act, but rather they were entitled to know only what the plain language of the statute required. *See id*. "The court not the agency is the ultimate arbiter of the statute's meaning." *Id*. at 251; *see also U.S. v. House*, 684 F.3d 1173, 1207 (11th Cir. 2012). In short, the Court should reject any argument that the SEC was required to or failed to provide guidance with respect to the dealer registration statute. In any event, as discussed below, SEC staff did provide guidance, but Defendants admittedly never consulted it. *See* SMF ¶ 59.

Relatedly, an agency is not required to interpret every provision of a statute through rulemaking before pursuing litigation. *See SEC v. Chenery Corp*., 332 U.S. 194, 202-03 (1947) ("the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency"). Here, where the terms of the statute are clear and the courts have applied the plain wording of the statute, any claim Defendants may make that the agency was required to do more before bringing this action must fail.

c. The SEC's Website, Which Defendants Failed to Consult, Provides Notice of Who Might Be a Dealer

Staff of the SEC's Division of Trading and Markets provides the public guidance about who might be operating as a dealer on the Commission's website, but Fierro never even consulted it. *See Guide to Broker-Dealer Registration*, U.S. Securities and Exchange Commission, Division of Trading and Markets, April 2008, https://www.sec.gov/reportspubs/investor-publications/divisionsmarketregbdguidehtm.htm (hereinafter "Guide"); SMF ¶ 59. The Guide covers the statutory dealer framework in an effort to aid those who may be required to register.[13] The Guide specifically identifies activities that could require a participant to register as a dealer, Guide at 5, and Defendants unquestionably engaged in some of them.

For example, the Guide asks: "Do you advertise or otherwise let others know that you are in the business of buying and selling securities?" As the Court noted in ruling on Defendants' motion to dismiss, "the SEC alleges that Fierro held himself out as willing to buy or sell securities by operating a website that

[13] The Guide, while a useful resource for those in the securities industry, does not purport to supplant the plain language of the Exchange Act defining "dealer." In fact, the SEC Guide specifically warns readers in bold-face type "CAUTION – MAKE SURE YOU FOLLOW ALL LAWS AND RULES," advises them that the SEC cannot act as the reader's attorney, and states that the reader may wish to consult an attorney with respect to whether they are required to register as dealers. Guide, at 3.

advertised his business to issuers, hiring employees to solicit issuers, and sponsoring conferences in which he solicited penny stock issuers in person." *Fierro*, 2020 WL 7481773, at *4. Nothing has changed since the Court wrote those words, except that it now has undisputed facts before it with greater detail about how Defendants held themselves out to the public as being in the business of buying and selling securities.[14] SMF ¶¶ 39-58. As the court in *Keener* explained, a "yes" answer as to any one question in the Guide indicates that one may be required to register as a dealer. *Keener*, 2020 WL 4736205, at *4; *see also River North*, 415 F. Supp. 3d at 857 (as to dealer factors generally, "the presence of even a single factor may be enough" to qualify as a dealer).

2. Defendants' Estoppel Defense (Third Affirmative Defense) Is Insufficient as a Matter of Law

Defendants' Third Affirmative Defense states, "Plaintiff is estopped, in whole or in part, from asserting claims in its Complaint inconsistent with the Commission's prior published guidance and no-action letters." DE 21, Affirmative Defense 3. Defendants essentially argue that the SEC cannot enforce the law against them.

Defendants' argument is unavailing for several reasons, foremost because it

[14] Defendants cannot claim to be unaware of the advertising factor because they cited it to the Court in their motion to dismiss. *See Fierro*, 2020 WL 7481773, at n. 3.

is wholly foreclosed by controlling Third Circuit law. Indeed, the Third Circuit has specifically held that estoppel cannot be raised at all in SEC enforcement actions, stating that "the Commission may not waive the requirement of an act of Congress nor may the doctrine of estoppel be invoked against the Commission." *SEC v. Morgan, Lewis, and Bockius*, 209 F.2d 44, 49 (3d Cir. 1953). The Second Circuit and the Southern District of New York have ruled likewise. *SEC v. Culpepper*, 270 F.2d 241, 248 (2d Cir. 1959); *SEC v. Badian*, No. 06 Civ. 2621(LTS)(JLC), 2010 WL 1028256 at *2-3 (S.D.N.Y. March 11, 2010) (denying defendant's discovery requests, which would support his affirmative estoppel defense against the SEC, because it was not legally cognizable).[15]

Further, Defendants could not otherwise claim that the SEC may not pursue a lawsuit that raises new issues. "[I]t is well settled that the Government may not be estopped on the same terms as any other litigant." *Heckler v. Community Health Servs., Inc.,* 467 U.S. 51, 60 (1984); *see also* 15 U.S.C. § 78z (Section 26 of the Exchange Act states: "No action or failure to act by the Commission….shall be

[15] *See also SEC v. Rivlin,* No. 99–1455, 1999 WL 1455758, at *5 (D.D.C. Dec. 20, 1999) (citing *Culpepper* and granting SEC motion to strike defenses based on estoppel and waiver); *SEC v. Keating,* No. CV 91-6785 (SVW), 1992 WL 207918, at *3 (C.D. Cal. Jul. 23, 1992); *SEC v. Blavin,* 557 F. Supp. 1304, 1310 (E.D. Mich. 1983) ("[t]here is no estoppel against the SEC in enforcement actions. The Government cannot be estopped from bringing an action in the public interest simply because of alleged misconduct by one or more of its agents.") (citations omitted), *aff'd,* 760 F.2d 706 (6th Cir. 1985).

construed to mean that the particular authority has in any way passed upon the merits of or given approval to any security or any transaction….”). But Defendants’ position is factually wrong in any event.

For many years, the SEC has interpreted the dealer registration statute to encompass individuals and entities that, as a business, purchase large amounts of newly issued securities (sometimes at a discount) directly from the issuer and then subsequently sell the shares into the public market. *See Ridenour*, 913 F.2d 515; *Offill*, 2012 WL 246061; *Sodorff*, 1992 WL 224082; *see also Ironridge Global Partners,* 2017 WL 3588037; and *IBC Funds, LLC*, 2016 WL 683557.

For all of the foregoing reasons, summary judgment should be entered against Defendants on their Third Affirmative Defense.

E. Defendants’ Remaining Affirmative Defenses Cannot Overcome the SEC’s Claim Under Section 15(a)(1) of the Exchange Act

Defendants’ First and Eighth Affirmative Defenses assert that the Complaint fails to state a claim upon which relief can be granted. But in denying Defendants’ motion to dismiss, the Court already ruled against Defendants on these points, and the SEC has shown above that the undisputed facts establish that the SEC is entitled to judgment as a matter of law on its claim.

Defendants’ Fourth, Fifth, Sixth, and Seventh Affirmative Defenses are irrelevant to liability and, at most, relate solely to whether the SEC is entitled to various forms of relief including injunctive relief (Fourth Affirmative Defense),

disgorgement (Fifth), civil penalties (Sixth), and a penny-stock bar (Seventh). None of those constitutes a defense to liability, and therefore, these affirmative defenses cannot defeat the SEC's motion for summary judgment.

CONCLUSION

There is no genuine issue of material fact that Defendants were unregistered dealers and therefore violated Section 15(a)(1) of the Exchange Act. Accordingly, the SEC respectfully requests that the Court grant summary judgment in its favor and against Defendants. The SEC also respectfully requests that the Court grant summary judgment in its favor and against Defendants on their Second and Third Affirmative Defenses.

DATE: January 14, 2022 Respectfully submitted,

By:

/s/
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SECURITIES AND EXCHANGE COMMISSION

CERTIFICATE OF SERVICE

I hereby certify that on January 14, 2022, I filed Plaintiff's Memorandum in Support of Its Motion for Summary Judgment through the Court's CM/ECF system, which automatically sends notices to counsel of record in this case.

/s/
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