

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

Admin. Proc. File No. 3-20597

<p>In the Matter of</p> <p>THOMAS J. POWELL</p>
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DIVISION OF ENFORCEMENT’S
MOTION TO STRIKE

The Division of Enforcement (“Division”) moves under SEC Rule 154 to strike new arguments raised for the first time in Thomas J. Powell’s reply brief in support of his Application to Vacate or Consent to Associate (“Reply”). For the first time in his Reply, Powell asked the Commission to vacate his administrative bars retroactively—*nunc pro tunc*—to avoid a bad actor bar and waiver requirement. Reply at 17. As this request was not raised before the Division’s responsive brief was due, the Division was unable to address the merits of that request. Powell’s late request is untimely, and the Commission should deem that argument as waived and strike the relevant portions of his Reply.

The Commission has consistently refused to entertain new arguments raised for the first time in a reply brief. *See In re Ustocktrade Sec., Inc.*, 2022 WL 3273500 at *2, Exchange Act Release No. 95464 (Aug. 10, 2022); *In re Robbi J. Jones*, 2021

WL 396767 at *3 n.17, Exchange Act Release No. 91045 (Feb. 2, 2021); *In re Equitec Proprietary Markets, LLC*, 2022 WL 2103962 at *10, Exchange Act Release No. 95083 (June 10, 2022); *In re Michael Clark*, 2021 WL 3210138 at *4, Exchange Act Release No. 92521 (July 29, 2021); *In the Matter of Timothy S. Dembski*, 2017 WL 1103685 at *8, Securities Act Release No. 10326 (Mar. 24, 2017); *In re Anthony Fields*, 2015 WL 728005 at *19, Securities Act Release No. 9727 (Feb. 20, 2015); *see also* SEC Rule 450(b) (“Reply briefs shall be confined to matters in opposition briefs of other parties; except as otherwise determined by the Commission in its discretion, any argument raised for the first time in a reply brief shall be deemed to have been waived.”).

New arguments introduced in a reply brief without any “explanation for why they could not have” been raised earlier are deemed waived to prevent unfairly “sandbagging” the other party. *In re Robbi J. Jones*, 2021 WL 396767 at *3 n.17, (citing *New York Rehab. Care Mgmt., LLC v. N.L.R.B.*, 506 F.3d 1070, 1076 (D.C. Cir. 2007) and collecting cases).

There is no good reason here for the Commission to consider Respondent’s untimely arguments. Powell could have raised this *nunc pro tunc* argument in his original Application. On January 19, 2024, Powell submitted an “Application To Vacate Bar or For Consent to Associate/Participate,” asking the Commission to vacate certain administrative bars in their entirety, or in the alternative, to grant permission to associate with Resolute Capital Advisors LLC and consent to

participate in unspecified offerings of penny stocks. Powell Application, at 1, 6, 7.¹ Neither the Application nor of any its attachments asked the Commission to vacate the administrative bars retroactively to avoid a bad actor bar. *See generally* Application. Powell also could have supplemented his Application and raised this new argument at any point before the Commission ordered briefing nearly a year later on April 7, 2025. Even after the Commission ordered additional briefing, Respondent’s counsel was in contact with undersigned counsel via emails, phone calls, and a letter. At no point did Respondent’s counsel tell the Division that Powell planned to raise this new argument. Nor did Respondent seek permission to do so from the Commission.

Instead, Powell waited to introduce this new *nunc pro tunc* argument in his Reply—only after the Division of Enforcement filed its brief. By waiting to raise this argument, Powell unfairly deprived the Division of its ability to address the merits of those arguments in its brief.

For these reasons, the Commission should strike the portions of Powell’s Reply that request relief beyond what he requested in his original Application and deem waived any request to vacate administrative bars *nunc pro tunc*.²

¹ As the Division noted in its response brief, Powell’s Application does not appear to seek to vacate the investment company prohibition or seek consent to associate for purposes of the investment company prohibition separately ordered against him pursuant to Section 9(b) of the Investment Company Act of 1940. *See* Powell Application. Powell’s Reply did not clarify or otherwise ask the Commission to vacate this administrative bar.

² If the Commission is inclined to consider Powell’s new arguments, it should reject them because Powell has not provided any basis to retroactively vacate the administrative bars he agreed to as part of this settled resolution. When he

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that pursuant to Rule 150, this response brief was electronically served on counsel for Applicant, Nicolas Morgan on June 12, 2025 at nicolas.morgan@icanlaw.org

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submitted his offer of settlement, Powell was represented by sophisticated counsel and was fully aware that Regulation D Rule 506(d)'s "bad actor" disqualification would apply absent a waiver. *See* Reply at 18 (explaining that Powell submitted a waiver to avoid the consequences of the "bad actor" disqualification prior to settling—the waiver was not granted). The Division of Enforcement is prepared to submit a sur-reply, with the Commission's approval, if the Commission would like additional argument on these issues.