

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

In the Matter of :
: INITIAL DECISION
DANIEL J. GALLAGHER : July 31, 2014

APPEARANCES: Kevin P. McGrath for the Division of Enforcement,
Securities and Exchange Commission

Respondent Daniel J. Gallagher, pro se

BEFORE: Carol Fox Foelak, Administrative Law Judge

SUMMARY

This Initial Decision bars Daniel J. Gallagher (Gallagher) from the securities industry. He was previously convicted of securities fraud and wire fraud.

I. INTRODUCTION

A. Procedural Background

The Securities and Exchange Commission (Commission) instituted this proceeding with an Amended Order Instituting Proceedings (OIP) on October 18, 2013, pursuant to Section 8A of the Securities Act of 1933 (Securities Act) and Sections 15(b) and 21C of the Securities Exchange Act of 1934 (Exchange Act). The OIP alleges that Gallagher violated the antifraud provisions of the securities laws and was convicted of securities fraud and wire fraud in United States v. Gallagher, 2:11-cr-806 (E.D.N.Y. Apr. 23, 2013), appeal docketed, No. 13-1956 (2d Cir. May 17, 2013). The Division of Enforcement (Division) filed a motion for summary disposition, pursuant to 17 C.F.R. § 201.250(a), in accordance with leave granted. Daniel J. Gallagher, Admin. Proc. Rulings Release No. 1084, 2013 SEC LEXIS 3825 (A.L.J. Dec. 5, 2013). The parties timely filed their responsive pleadings.¹

¹ The filing dates for Gallagher's opposition and the Division's reply were postponed several times. Daniel J. Gallagher, Admin. Proc. Rulings Release Nos. 1250, 2014 SEC LEXIS 590 (A.L.J. Feb. 19, 2014); 1347, 2014 SEC LEXIS 1130 (A.L.J. Mar. 28, 2014); 1427, 2014 SEC LEXIS 1614 (A.L.J. May 9, 2014); 1513, 2014 SEC LEXIS 2035 (A.L.J. June 11, 2014). This was to allow Gallagher sufficient time to review the Division's investigative file, in light of

This Initial Decision is based on the pleadings and Gallagher's Answer to the OIP. There is no genuine issue with regard to any fact that is material to this proceeding. All material facts that concern the activities for which Gallagher was convicted were decided against him in the criminal case on which this proceeding is based. Any other facts in his pleadings have been taken as true, pursuant to 17 C.F.R. § 201.250(a). All arguments and proposed findings and conclusions that are inconsistent with this decision were considered and rejected.

B. Allegations and Arguments of the Parties

The OIP alleges that Gallagher was convicted of securities fraud, in violation of 15 U.S.C. § 78j(b), and of wire fraud, in violation of 18 U.S.C. § 1343, in United States v. Gallagher. The Division urges that he be barred from the securities industry. Gallagher opposes this.

C. Procedural Issues

1. Official Notice

Official notice pursuant to 17 C.F.R. § 201.323 is taken of the docket report and the courts' orders in United States v. Gallagher and in SEC v. Castaldo, 08-cv-8397 (S.D.N.Y.), in which Gallagher was a defendant; of the Commission's public official records; and of Financial Industry Regulatory Authority, Inc. (FINRA), records, as well. See Joseph S. Amundsen, Exchange Act Release No. 69406, 2013 SEC LEXIS 1148, at *2 n.1 (Apr. 18, 2013).

2. Exhibit Admitted into Evidence

The following item included in support of the Division's Motion for Summary Disposition, at Exhibit A is admitted as Division Exhibit A: FINRA "BrokerCheck Report" concerning Gallagher (Div. Ex. A).

3. Collateral Estoppel

It is well established that the Commission does not permit criminal convictions to be collaterally attacked in its administrative proceedings. See Ira William Scott, 53 S.E.C. 862, 866 (1998); William F. Lincoln, 53 S.E.C. 452, 455-56 (1998).² If Gallagher is successful in

logistical difficulties associated with his incarceration. See Byron S. Rainer, Exchange Act Release No. 59040 (Dec. 2, 2008), 94 SEC Docket 12093; José P. Zollino, 58 S.E.C. 388, 394 (2005).

² Similarly, the Commission does not permit a respondent to relitigate issues that were addressed in a previous civil proceeding against the respondent, whether resolved by consent, by summary judgment, or after a trial. See Jeffrey L. Gibson, Exchange Act Release No. 57266, 92 SEC Docket 2104, 2108 (Feb. 4, 2008) (injunction entered by consent), pet. den., 561 F.3d 548 (6th Cir. 2009); John Francis D'Acquisto, 53 S.E.C. 440, 441 n.1, 444 (1998) (injunction entered by summary judgment); James E. Franklin, Exchange Act Release No. 56649, 91 SEC Docket 2708, 2713 (Oct. 12, 2007) (injunction entered after trial), pet. den., 285 F. App'x 761 (D.C. Cir.

overturning his conviction, he can request the Commission to vacate any sanctions ordered in this proceeding (or to dismiss the proceeding, if it is still pending).³

II. FINDINGS OF FACT

Gallagher was convicted of securities fraud in violation of Section 10(b) of the Exchange Act and of wire fraud in violation of 18 U.S.C. § 1343. United States v. Gallagher. He was sentenced to thirty-one months of incarceration followed by five years of supervised release. United States v. Gallagher, ECF Nos. 90, 98. The court determined not to order restitution based on restitution calculations agreed upon by the parties. Id. at ECF Nos. 97, 98. The conduct that was the subject of United States v. Gallagher involved Vision Securities, Inc. (Vision), a broker-dealer with which Gallagher was associated; Nano Acquisition Group, LLC (Nano Acquisition), founded for the purpose of acquiring assets of NanoDynamics, Inc. (NanoDynamics), which had filed for bankruptcy; and Watt Fuel Cell Corporation, whose shares were to be provided to Nano Acquisition investors in exchange for their interest in that entity. Opposition, passim; United States v. Gallagher, ECF No. 5 at 1-5, ECF No. 90 at 1. The wrongdoing continued as late as May 27, 2010, and May 4, 2011. United States v. Gallagher, ECF No. 5 at 4-7, ECF No. 90 at 1.

Previously, in a civil action, Vision was found to have violated registration provisions, Exchange Act Section 15(b)(7) and Rule 15b7-1, with respect to NanoDynamics securities, and Gallagher was found to have aided and abetted Vision's violation; Gallagher and Vision were ordered, jointly and severally, to pay disgorgement of \$126,466.91 plus prejudgment interest and a civil penalty of \$24,000. SEC v. Castaldo, ECF Nos. 51, 63. The court denied the Commission's request for a permanent injunction against Gallagher and Vision, stating that "injunctive relief is uncalled for here, since the likelihood of recidivism is low" and that "given the amount of the disgorgement and the defendants' limited financial circumstances, imposing the maximum civil monetary penalty . . . would be excessive, but a modest fine is appropriate." SEC v. Castaldo, ECF No. 51 at 4.

2008); Demitrios Julius Shiva, 52 S.E.C. 1247, 1249 & nn.6-7 (1997). See also Marshall E. Melton, 56 S.E.C. 695, 697-700, 709-13 (2003).

³ See Jilaine H. Bauer, Esq., Securities Act Release No. 9464, 2013 SEC LEXIS 3132 (Oct. 8, 2013) (dismissing follow-on administrative proceeding after court of appeals, while petition for review was pending before Commission, reversed and remanded district court's judgment that was basis for OIP); Richard L. Goble, Exchange Act Release No. 68651, 2013 SEC LEXIS 129 (Jan. 14, 2013) (dismissing follow-on administrative proceeding after court of appeals, while petition for review was pending before Commission, vacated injunction that was basis for OIP); Evelyn Litwok, Investment Advisers Act of 1940 Release No. 3438, 2012 SEC LEXIS 2328 (July 25, 2012) (dismissing follow-on proceeding after court of appeals, while petition for review was pending before Commission, reversed certain convictions and vacated and remanded other convictions, all of which were basis for OIP), Kenneth E. Mahaffy, Jr., Exchange Act Release No. 68462, 2012 SEC LEXIS 4020 (Dec. 18, 2012) (vacating bar issued in follow-on administrative proceeding where court of appeals, after Commission had issued bar order, vacated criminal conviction that was basis for proceeding).

Gallagher has an extensive disciplinary history with FINRA. Div. Ex. A. However, as he points out, many of the incidents are far in the past. FINRA has put a “target on [his] back” and, for its own self-promotion, investigated Vision excessively, due to his long ago (early 1990s) association with Stratton Oakmont. Opposition at 3; see Div. Ex. A at 4.

While Gallagher disavows collaterally attacking his conviction, his opposition argues various reasons why United States v. Gallagher was wrongly decided.⁴ In addition to pointing to various mistakes in evaluating the evidence, Gallagher points to procedural defects in the trial, indicating that the jury, judge, and prosecutor laughed at any indication of righteous behavior by Gallagher.⁵ Opposition at 4. Gallagher also alleges that Commission staff engaged in questionable conduct at the trial of SEC v. Castaldo.⁶ Gallagher also alleges that Division counsel in this proceeding twists the truth and lies. However, the example of this behavior that he provides is an allegation in the OIP, at p. 3, that the offering materials of Nano Acquisition designated a single managing member, while as Gallagher points out, Section 3.01 of its Operating Agreement (Opposition, Ex. 1 at Operating Agreement at 3) can be read to authorize more than one managing member at a time.

Gallagher is working to turn his life around. Opposition at Exs. 3, 11. His future business model will include the utilization of former regulators and prosecutors to instruct and guide his decisions and actions. Opposition at 5. Gallagher has limited financial resources. Opposition at 5 and Ex. 12; United States v. Gallagher, ECF Nos. 97-98; SEC v. Castaldo, ECF No. 51 at 4.

III. CONCLUSIONS OF LAW

Gallagher has been convicted, within ten years of the commencement of this proceeding, of a felony or misdemeanor that “arises out of the conduct of the business of a broker [or] dealer” and “involves the violation of section . . . 1343 . . . of title 18, United States Code” within the meaning of Sections 15(b)(4)(B)(ii), (iv) and 15(b)(6)(A)(ii) of the Exchange Act.

⁴ For example, Tim Messer wrote a letter to the court supporting Gallagher, but “Messer was tripped-up by the prosecution and made to look stupid, leading the jury to not believe him.” Opposition at 3 and Ex. 10.

⁵ Gallagher’s means of challenging the validity of his conviction is through an appeal to the Court of Appeals for the Second Circuit, which he is pursuing. See Vladislav Steven Zubkis, 58 S.E.C. 1014, 1020-21 & n.19 (2005).

⁶ Any challenge to the propriety of the staff’s conduct should be brought before the court in which that case was heard. See Harold F. Harris, 58 S.E.C. 1118, 1131 (2006).

IV. SANCTION

As the Division requests, a collateral bar will be ordered. In light of the sanctions imposed in United States v. Gallagher, no further sanctions will be ordered in this proceeding.

A. Sanction Considerations

The Commission determines sanctions pursuant to a public interest standard. See 15 U.S.C. §§ 78o(b)(6). The Commission considers factors including:

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

Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979) (quoting SEC v. Blatt, 583 F.2d 1325, 1334 n.29 (5th Cir. 1978)). The Commission also considers the age of the violation and the degree of harm to investors and the marketplace resulting from the violation. Marshall E. Melton, 56 S.E.C. 695, 698 (2003). Additionally, the Commission considers the extent to which the sanction will have a deterrent effect. See Schield Mgmt. Co., 58 S.E.C. 1197, 1217-18 & n.46 (2006). The Commission considers fraud to be particularly serious. Marshall E. Melton, 56 S.E.C. at 710, 713. 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. See Richard C. Spangler, Inc., 46 S.E.C. 238, 252 (1976).

B. Sanctions

Gallagher's conduct was egregious and recurrent and involved a high degree of scienter. Additionally, he is a recidivist, having been adjudicated as having violated the securities laws on two occasions. His lack of recognition of the wrongful nature of his conduct goes beyond a vigorous defense of the charges. His decisions to turn his life around and to engage former regulators and prosecutors to guide his future business decisions are praiseworthy. However, his previous occupation, if he were allowed to continue it in the future, would present opportunities for future violations. Absent a bar, Gallagher could re-enter the financial industry. The violations are recent. The degree of direct financial harm to investors is not quantified in the record, but, as the Commission has often emphasized, the public interest determination extends beyond consideration of the particular investors affected by a respondent's conduct to the public-at-large, the welfare of investors as a class, and standards of conduct in the securities business generally. See Christopher A. Lowry, 55 S.E.C. 1133, 1145 (2002), aff'd, 340 F.3d 501 (8th Cir. 2003); Arthur Lipper Corp., 46 S.E.C. 78, 100 (1975), aff'd, 547 F.2d 171 (2d Cir. 1976). A bar is also necessary for the purpose of deterrence. Arthur Lipper Corp., 46 S.E.C. at 100. A conviction involving dishonesty requires a bar, and because of the Commission's obligation to ensure honest securities markets, an industry-wide bar is appropriate.

V. ORDER

IT IS ORDERED that, pursuant to Section 15(b) of the Securities Exchange Act of 1934 DANIEL J. GALLAGHER IS BARRED from associating with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization and from participating in an offering of penny stock.⁷

This Initial Decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice, 17 C.F.R. § 201.360. Pursuant to that Rule, a party may file a petition for review of this Initial Decision within twenty-one days after service of the Initial Decision. A party may also file a motion to correct a manifest error of fact within ten days of the Initial Decision, pursuant to Rule 111 of the Commission's Rules of Practice, 17 C.F.R. § 201.111. If a motion to correct a manifest error of fact is filed by a party, then that party shall have twenty-one days to file a petition for review from the date of the undersigned's order resolving such motion to correct a manifest error of fact. The Initial Decision will not become final until the Commission enters an order of finality. The Commission will enter an order of finality unless a party files a petition for review or a motion to correct a manifest error of fact or the Commission determines on its own initiative to review the Initial Decision as to a party. If any of these events occur, the Initial Decision shall not become final as to that party.

Carol Fox Foelak
Administrative Law Judge

⁷ Thus, he will be barred from acting as a promoter, finder, consultant, or agent; or otherwise engaging in activities with a broker, dealer, or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock, pursuant to Exchange Act Section 15(b)(6)(A), (C).