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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

Administrative Proceeding
File No. 3-15215

In the Matter of

JAMES S. TAGLIAFERRI,

Respondent.

DIVISION OF ENFORCEMENT'S MEMORANDUM OF LAW IN OPPOSITION TO THE APPEAL OF RESPONDENT JAMES S. TAGLIAFERRI

DIVISION OF ENFORCEMENT
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Dated: July 12, 2016

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Pursuant to the Order of the Securities and Exchange Commission ("Commission') Granting Petition for Review and Scheduling Briefs, dated May 12, 2016, the Division of Enforcement ("Division") respectfully submits this memorandum of law in opposition to the appeal of Respondent James S. Tagliaferri ("Respondent" or "Tagliaferri") from the Initial Decision issued March 23, 2016.

PRELIMINARY STATEMENT

After a multi-week criminal trial in the Southern District of New York, Respondent, an investment adviser, was convicted of fraud in violation of both Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Section 206 of the Investment Advisers Act of 1940 ("Advisers Act"), wire fraud and violations of the Travel Act. In May of this year, the Second Circuit affirmed his convictions. Respondent is currently serving a 72 month sentence and is subject to a $20 million restitution order.

Now Respondent challenges the permanent industry bars and the penny stock bar imposed by the ALJ in this follow-on proceeding. He argues primarily that (1) the Law Judge improperly foreclosed his ability to challenge the Order Instituting Proceedings ("OIP") by applying collateral estoppel (Respondent Petition at 1-2)[1]; (2) improperly denied him a hearing to address his degree of culpability (id. at 5); and deprived him of due process by failing to ensure that the Division's complete investigative file was delivered to him. (Id. at 2-4.) These challenges are without merit.

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[1] "Respondent Petition" refers to the Respondent's Petition for Review of Court's Initial Decision Dated March 23, 2016 and Motion to Correct Manifest Errors of Fact, dated March 31, 2016.

PROCEDURAL BACKGROUND

A. Tagliaferri's Convictions for Investment Adviser Fraud and Securities Fraud, His Sentencing and the Resolution of His Appeal

On February 21, 2013, the United States Attorney's Office for the Southern District unsealed a criminal indictment charging Respondent with various felonies arising out of his four-year scheme to defraud his advisory clients. As subsequently superseded on April 8, 2014, the Indictment charged Tagliaferri with one count of investment adviser fraud and one count of securities fraud, as well as five counts of wire fraud and seven counts of Travel Act violations. United States v. Tagliaferri, 13 Cr. 115 (RA) (S.D.N.Y.) (the "Criminal Action"). (Declaration of Nancy A. Brown, executed October 15, 2015 ("Brown Decl."), Ex. A (the Superseding Indictment).)

The Superseding Indictment alleged that from 2007 until 2011, Tagliaferri provided investment advisory services to clients through an entity called TAG Virgin Islands, Inc., and its successor, TAG Virgin Islands, LLC (together "TAG"), which was registered as an investment adviser with the Commission.[2] (Brown Decl., Ex. A ¶ 2.) Pursuant to discretion that clients provided to TAG in their investment advisory agreements, Tagliaferri effected the withdrawal of client funds from client accounts to make investments on behalf of his clients. (Id. ¶ 10.)

The Superseding Indictment alleged that without his clients' knowledge or consent, Tagliaferri accepted at least $1.5 million in undisclosed payments from a company, International Equine Acquisitions Holdings, Inc. ("IEAH"),[3] in exchange for investing approximately $40

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[2] The Superseding Indictment alleges that from 2007 through and including 2010, Tagliaferri acted as an investment adviser with respect to TAG clients. (Brown Decl., Ex. A ¶ 49.) According to FINRA's CRD database, from 2003 until 2008, Tagliaferri was registered as an investment adviser in the state of Connecticut. (Brown Decl., Ex. N (CRD registration summary for Tagliaferri).)

[3] The Superseding Indictment refers to IEAH as "Company 1."

million of client funds in securities issued by IEAH, and accepted approximately $1.75 million in undisclosed compensation, plus stock, in exchange for investing approximately $80 million of his clients' funds in securities issued by entities affiliated with Jason Galanis, an associate of Tagliaferri's,[4] including Fund.com.[5] (Brown Decl., Ex. A ¶¶ 13-31.) In addition, the Superseding Indictment alleged that Tagliaferri used client funds for his own benefit, including to pay redemptions to other clients, and to make payments on behalf of companies with which Tagliaferri was affiliated. (Id. ¶¶ 32-45.) The Superseding Indictment also alleged that Tagliaferri created false and fictitious securities that were placed in client accounts, which purported to reflect that UMS Partners Fund II, L.P. ("UMS")[6] had borrowed certain funds from TAG, but would pay TAG's clients a portion of the funds that it owed to TAG. (Id. ¶¶ 46-48.)

Following a jury trial in the Criminal Action, on July 24, 2014, Tagliaferri was found guilty on (1) one count of investment adviser fraud (Section 206 of the Advisers Act); (2) one count of securities fraud (Section 10(b) of the Exchange Act, and Rule 10b-5 thereunder); (3) four counts of wire fraud; and (4) six counts of Travel Act violations.[7] (Brown Decl. ¶ 5; Ex. D

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[4] The Superseding Indictment refers to Galanis as "Associate 1." (Brown Decl., Ex. A ¶ 22.) The Commission has since twice charged Galanis with various violations of the securities laws—once including violations arising out of his dealings with Respondent. See Brown Decl., Ex. C (Complaint filed September 24, 2015, in SEC v. Jason Galanis, et al., No. 15 Civ. 7547 (VSB) (S.D.N.Y.) ¶¶ 72-73.) See also SEC v. Archer, et al., No. 16 Civ. 3505 (WHP) (S.D.N.Y.), Dkt. Entry 1 (Complaint), ¶¶ 4, 5, 44-81 (alleging Galanis bribery of separate investment advisory firm in different scheme).

[5] The Superseding Indictment calls Fund.com, "Company 2," and alleges that at all times relevant to the Indictment, it was quoted on the OTC Markets Group, or Pink Sheets. (Brown Decl., Ex. A ¶ 5; Ex. B (Amended OIP) ¶ 3 (identifying Fud.com).)

[6] The Superseding Indictment calls UMS, "Company 3."

[7] Counts Eight through Ten and Count Eleven encompass transactions alleged to have violated the Travel Act, 18 U.S.C. § 1952. (Brown Decl., Ex. A ¶¶ 54-55.) The Indictment charged Tagliaferri with using the instrumentalities of interstate commerce to distribute the proceeds of and carry out an unlawful activity – receipt of a commercial bribe under New York law—based on his undisclosed receipt of fees for using his clients' funds to purchase notes in

(Criminal Action Judgment).) On February 13, 2015, after a hearing, the Criminal Action Court sentenced Tagliaferri to 72 months in prison, with a three year period of supervised release, and ordered him to forfeit $2,500,000 and certain real property he owned. (Brown Decl., Ex. D (Criminal Action Judgment); Ex. E (Transcript of Hearing on Sentencing, held February 13, 2015 ("Sentencing Tr.") at 82-84; Ex. F (Forfeiture Order).) In an opinion and order, dated October 17, 2014, the Criminal Action Court denied Tagliaferri's Motion for Judgment of Acquittal. (Brown Decl., Ex. G (Acquittal Motion Op.).)

On July 2, 2015, Tagliaferri was ordered to pay $20,887,196.53 in restitution. (Brown Decl., Ex. H (Restitution Order).)

On May 4, 2016, the Second Circuit affirmed Tagliaferri's judgment of conviction in all respects. See United States v. Tagliaferri, 820 F.3d 568 (2d Cir. 2016).

B. The Commission's OIP and the Procedural History of the Case

On February 21, 2013—the same date the criminal indictment against Tagliaferri was unsealed—the Commission issued the OIP against Tagliaferri, charging him with violations of Sections 17(a)(1) and (3) of the Securities Act of 1933 ("Securities Act"), Sections 10(b) and 15(a) of the Exchange Act, and Rules 10b-5(a) and (c) thereunder, and Sections 206(1), (2) and (3) of the Advisers Act. (Brown Decl., Ex. I (Original OIP) ¶¶ 25-28.) On March 11, 2013, the Hearing Officer stayed the proceeding, pending resolution of the parallel Criminal Action. (Order Staying Proceeding, dated March 11, 2013.) After entry of the Criminal Action Judgment, the Hearing Officer lifted the stay on June 1, 2015. (Order Lifting Stay, dated June 1, 2015.)

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certain entities associated with either Galanis (Counts Eight through Ten) or IEAH (Count Eleven). (Id.; see also Brown Decl., Ex. G (Order entered October 17, 2014 denying Respondent's Motion for a judgment of acquittal ("Acquittal Motion Op."), at 17.)

On July 16, 2015, the Division moved the Commission to amend the OIP to (1) add allegations regarding Tagliaferri's criminal conviction as an independent basis for imposing sanctions against Tagliaferri; (2) remove the OIP's request to determine whether civil money penalties would be appropriate in the public interest, in light of the sentence of imprisonment and supervised release imposed on Tagliaferri in the Criminal Action; and (3) remove the OIP's request to determine whether disgorgement would be appropriate in the public interest, in light of the more than $20 million in restitution that Tagliaferri has been ordered to pay in the Criminal Action. (Division's Motion to Amend the OIP, dated July 16, 2015.) On July 31, 2015, Respondent opposed the Division's Motion. On September 2, 2015, the Commission granted the Division's motion to amend. (Order Granting Motion to Amend Order Instituting Proceedings, Exchange Act Release No. 75820 (Sept. 2, 2015).) The Amended OIP directed the Hearing Officer to determine whether the allegations of the Amended OIP were true and what, if any, remedial action was appropriate in the public interest against Tagliaferri pursuant to Section 15(b) of the Exchange Act, Section 203(f) of the Advisers Act, and Section 9(b) of the Investment Company Act of 1940 ("Investment Company Act"). (Brown Decl., Ex. B, III.)

On September 14, 2015, the Secretary's Office served Tagliaferri with the Commission's Order granting the Division's Motion to Amend the OIP. (Brown Decl., ¶ 12; Ex. M (Tagliaferri September 9, 2015 acknowledgement of receipt of Commission's Order).) On September 23, 2015, the Hearing Officer granted the parties leave to file Motions for Summary Disposition, set a briefing schedule for those Motions, and set a deadline for Tagliaferri to answer the Amended OIP. (Order on Procedural Schedule, dated September 23, 2015.)

Pursuant to the September 23, 2015 Scheduling Order, Respondent answered the Amended OIP on October 13, 2015 in a pleading he titled "Respondent's Answer to Division of

Enforcement's Amended OIP and Comments Related to Summary Disposition." In his Answer, Tagliaferri did not contest the fact that he was criminally convicted of securities and investment adviser fraud, or the Travel Act violations.

On October 15, 2015, and also pursuant to the September 23, 2015 Scheduling Order, the Division filed its Motion for Summary Disposition pursuant to Rule of Practice 250(a), 17 C.F.R. § 201.250(a), seeking the imposition of permanent collateral bars pursuant to Section 15(b) of the Exchange Act, 203(f) of the Advisers Act, and Section 9(b) of the Investment Company Act. By Orders dated October 30, 2015, the Law Judge amended the Scheduling Order to direct the Division to supplement its briefing to demonstrate the facts supporting its claim that Tagliaferri had violated Exchange Act Section 15(a)(1) by acting as an unregistered broker in receiving compensation for the securities transactions he effected for his clients—a claim not charged in the Criminal Action. After receiving briefing from the parties, the Law Judge issued his Initial Decision in this matter on March 23, 2016 ("ID"), granting the Division's Motion for Summary Disposition. (ID at 1, 13.) The Law Judge concluded that Respondent's criminal conviction arose out of the conduct of business as a broker or investment adviser, providing the prerequisites required by Exchange Act Section 15(b), Advisers Act Section 203(f), and Investment Company Act Section 9(b) for the imposition of a bar. (ID at 8-12.) And, after an analysis of the appropriate factors, the Hearing Officer found that imposition of permanent industry bars, and a penny stock bar, against Respondent would further the public interest. (ID at 12-16.)[8]

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[8] Specifically, the Hearing Officer imposed bars from associating with an investment adviser, broker, dealer, municipal securities dealer, or transfer agent pursuant to Section 203(f) of the Advisers Act and Section 15(b)(6) of the Exchange Act; permanently barred Respondent from participating in an offering of penny stock pursuant to Section 15(b)(6) of the Exchange Act; and permanently prohibited him from serving or acting as an employee, officer, director,

Respondent filed a Petition for Review of Court's Initial Decision Dated March 23, 2016 and Motion to Correct Manifest Errors of Fact, on March 31, 2016. By Order dated April 21, 2016, the Hearing Officer denied Tagliaferri's Motion to Correct Manifest Errors of Fact.

C. The Division's Compliance with Its Rule 230 Obligations

After the Hearing Officer lifted the stay of the proceedings by Order dated June 1, 2015, the Division wrote to Respondent on June 4, 2015 (prior to his incarceration), and told him that the entire file was available for his inspection and copying at the Division's New York Offices. (Declaration of Nancy A. Brown, executed November 19, 2015 ("Brown Nov. Decl."), Ex. C.) The Division further advised that the file had been maintained in Concordance format, and offered Tagliaferri the use of a laptop, pre-programmed with Concordance software so that he could navigate the production and tag what he wished to have copied. (Id.) On June 4, 2015, Respondent informed the Division that he declined to come to its offices and asked that the files be converted to .pdf format and produced to him on disc. (Id., Ex. D.)

The Division responded the next day, June 5, 2015 (Brown Nov. Decl., Ex. E), and informed Respondent that it would convert its file into the format he requested, but warned that the Division's IT staff was estimating that the conversion would take approximately two weeks. (Id.) The Division re-extended its invitation to Respondent to come to its offices to review the production while the files were being converted, since it had "understood that [he] wished to review the documents as soon as possible." (Id.)[9]

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member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter pursuant to Section 9(b) of the Investment Company Act. (ID at 1, 16-18.)

[9] Respondent's bail order permitted him to travel between the District of Connecticut and the Southern District of New York. The Division's New York office is located in the Southern District of New York. (Declaration of Nancy A. Brown, executed January 14, 2016 ("Brown

The Division immediately turned to the conversion process to meet Respondent's request. By July 2, 2015, the Division had provided Respondent with three productions in his chosen format, amounting to roughly one half of the investigative file. (Brown Nov. Decl. ¶ 8.) Conversion to .pdf format had been complicated by the production's significant number of lengthy Excel spread sheets (some numbering in the thousands of "pages") produced by TAG's custodian, State Street Bank, which are apparently time-consuming to "print" to .pdf. (Id.)

On July 6, 2015, Respondent surrendered to begin his sentence of incarceration. The Division urged Tagliaferri to find out what the prison's rules were for receipt of electronic materials so that it could continue producing its file in his preferred format. (Brown Nov. Decl. ¶ 10.) On August 24, 2015, Tagliaferri finally reported that he would not be able to receive any electronic media, and asked the Division to identify what the file consisted of. (Id., Ex. F.) The Division responded by email on August 27, 2015 with a list of the producing parties, and offered to print (to the extent the files were not extensive) the files by the producing parties he selected. (Id., Ex. G.) The Division also asked Tagliaferri to find out how many documents he could receive at one time and how many he could store. (Id.) When Tagliaferri was unable to obtain a definitive response from prison officials, on August 31, 2015, he suggested that the Division begin sending 100 documents at a time. (Id., Ex. H.) He did not prioritize by producing party, or give any indication of which producing party might be of interest to him. Thereafter, the Division's IT staff estimated the page number of the entire production at almost 2 million pages, consisting of more than 268,000 documents, and obtained a vendor's estimate of the cost of printing the one-half of the production that Respondent had not yet received at over $50,000. As

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Jan. Decl."), Ex. D) (Order entered July 25, 2014 in the Criminal Action setting Tagliaferri's conditions of release).

a result, the Division wrote to Tagliaferri on September 3, 2015, and explained that production of the remaining investigative file would be "prohibitively costly." (Id. ¶ 13 and Ex. I.) Given the situation, the Division proposed that Respondent designate someone on the outside who could accept the production in electronic form, work with him to find documents in which he was interested, and print them for him. (Id.) Tagliaferri rejected that proposal. He did not offer to assume the costs of copying the documents himself. (Id.)

ARGUMENT

I. THE LAW JUDGE APPROPRIATELY FOUND THAT TAGLIAFERRI ACTED AS AN UNREGISTERED BROKER

The Law Judge properly determined that Tagliaferri had acted as an unregistered broker in accepting transaction-based compensation from Galanis and IEAH for his clients' purchase of the Galanis-entities' and IEAH securities. In so ruling, the Law Judge appropriately relied on the findings of Jury that Tagliaferri had violated the Travel Act by engaging in commercial bribery under New York state law through his acceptance of kickbacks, and the Criminal Action Court's conclusions that the Jury could have determined that Tagliaferri accepted those kickbacks in connection with the purchases of securities by his clients. For these reasons, collateral estoppel was appropriately applied in this case to conclude that Tagliaferri had acted as an unregistered broker under Exchange Act 15(a) even though that precise charge was not among those for which he was criminally convicted.

The Law Judge concluded that Tagliaferri's criminal conviction satisfied the first prerequisite of associational and penny stock bars under Section 15(b) because he was convicted of securities fraud, and the conviction "arose out of the conduct of the business of a broker." (ID

at 9.)[10] While the Criminal Action did not charge Tagliaferri with violating Exchange Act Section 15(a), long-standing principles of collateral estoppel were appropriately applied below to determine that facts necessary to his criminal conviction precluded him from arguing that he did not act as a broker in accepting transaction-based compensation, or bribes, from Galanis and IEAH for selling their securities to his clients.

A. Arranging for the Purchase of Securities, Including Selecting the Purchasers, and Negotiating the Transaction, and Receiving Transaction-Based Compensation for Those Acts, Constitutes Acting as a Broker under Exchange Act Section 15(a)

The Exchange Act defines "broker" as one who "engaged in the business of effecting transactions in securities for the account of others." Exchange Act Section 3(a)(4)(A). Courts have looked at several factors to determine whether a respondent is engaged in the business of effecting transactions in securities "for the account of others," including whether he

> 1) is an employee of the issuer; 2) received commissions as opposed to a salary; 3) is selling, or previously sold, the securities of other issuers; 4) is involved in negotiations between the issuer and the investor; 5) makes valuations as to the merits of the investment or gives advice; and 6) is an active rather than passive finder of investors.

SEC v. Martino, 255 F. Supp. 2d 268, 283 (S.D.N.Y. 2003) (quoting SEC v. Hansen, No. 83 Civ. 3692, 1984 WL 2413, at *10 (S.D.N.Y. April 6, 1984)(citations omitted)); see also SEC v. Stratocomm Corp., 2 F. Supp. 3d 240, 262-63 (N.D.N.Y. 2014) (factors are "(1) solicitation of

[10] Tagliaferri does not challenge the finding below that his conviction met the statutory prerequisites for a collateral bar under Section 203(f) of the Advisers Act. (ID at 9.) Nor could he, given that he was convicted of investment adviser fraud arising out of his conduct while associated with an investment adviser. See Brown Decl., Ex. D (Criminal Act Judgment) (reflecting Jury verdict of guilty on Investment Advisor Fraud count). As a result, no further violation of Exchange Act 15(a) need be found to support the Initial Decision's imposition of collateral bars because that relief is available under Advisers Act Section 203(f) and Investment Company Act Section 9(b). The imposition of a penny stock bar pursuant to Exchange Act Section 15(b)(6) should also be affirmed, however, since the Criminal Action record, and facts necessary to the Jury's verdict, support the conclusion that Tagliaferri also acted as an unregistered broker in violation of Exchange Act 15(a).

investors to purchase securities; (2) involvement in negotiations between the issuer and the investor; (3) receipt of transaction based compensation" and holding defendant liable as an unregistered broker because his bonus was tied to the amount of money he raised for the issuer) (citations omitted); accord In the Matter of David F. Bandimere, Rel. No. 33-9972, 2015 WL 6575665, at *7-8 (S.E.C. Oct. 29, 2015) (citing these factors and noting that "no one factor is dispositive"). Courts have also considered whether the respondent "analyzes the financial needs of an issue; . . . recommends or designs financing methods; . . . discusses the details of securities transactions; and . . . makes investment recommendations." SEC v. U.S. Pension Trust Corp., No. 07-22570-Civ, 2010 WL 3894082, at *21 (S.D. Fla. Sept. 30, 2010)(citations omitted).

If a respondent engages in the business of effecting transactions in securities for the account of others—and is unregistered or is not associated with a registered broker at the time he does so—the Commission has the authority to impose a permanent industry and penny stock bar. In the Matter of Daniel Imperato, Rel. No. 34-74596, 2015 WL 1389046, at *1, 4 (S.E.C. Mar. 27, 2015).

B. The Law Judge Correctly Determined that the Jury Had Found that Tagliaferri Had Negotiated the Terms of the Securities Sales to His Clients, Selected Which Clients Would Purchase the Securities, and Accepted Transaction-Based Compensation for Selling Securities to His Clients

In the Criminal Action, the Jury heard evidence that Tagliaferri solicited investments in more than one issuer, including IEAH, Drexel Holdings, Life Investment Holding Co., LLC, Equities Media Acquisitions, and Pacific Rim Assurance. (Brown Decl., Ex. G (Acquittal Motion Op.) at 2-3 (citing GX 17-A; GX 1696); Brown Nov. Decl., Ex. A (GX 2014); Ex. B (Tr. at 331-33).) He actively exercised his discretion over his client accounts to find buyers of the IEAH and Galanis-related entity notes, and thus was an active finder of investors. (Brown Nov.

Decl., Ex. A (GX 2014; GX 17-A).)[11] As evidenced by his communications with Jared Galanis (Jason Galanis' brother and attorney) and Iavaronne (IEAH co-president), he analyzed the financial needs of an issue, and appears to have been involved in the design of the transactions, both with Jared Galanis and IEAH. (E.g., id. (GX 607, 655, 656, 658, 1202; GX 134).)

Tagliaferri also received transaction-based compensation. Courts have called the receipt of transaction-based compensation one of the "hallmarks of being a broker-dealer." SEC v. Helms, No. A-13-CV-01036 ML, 2015 WL 6438872, at *3 (W.D. Tex. Oct. 20, 2015) (quotation omitted); see also SEC v. Rabinovich & Assocs., LP, No. 07 Civ. 10547 (GEL), 2008 WL 4937360, at *5 (S.D.N.Y. Nov. 18, 2008) (finding investment adviser liable under Section 15(a) for acting as an unregistered broker in selling investment company interests to the public on which he earned commissions); accord Bandimere, 2015 WL 6575665, at *8 & n.45 ("The receipt of transaction-based compensation in connection with the types of activities described above is often an indication that the recipient of that compensation is engaged in the business of effecting transactions in securities.") (citing Order Exempting the Federal Reserve Bank of New York, Maiden Lane LLC, et al. from Broker-Dealer Registration, Exchange Act Rel. No. 61884, 2010 WL 1419216, at *2 (Apr. 9, 2010)). In Bandimere, the Commission held that the respondent had acted as an unregistered broker, at least in part because "his compensation was based on the dollar amount of the original investment transactions (i.e., the amount he collected

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[11] See also id., Ex. B (Tr. 177-78 (Investor Susan Temkin testifying about the 1920 Bel Air LLC mortgage note and IEAH note purchased for her account); Tr. 536 (Investor Ronald Gordon testifying about the IEAH notes purchased for his account); Tr. 821-25 (Investor Steven Goldin testifying about the Stanwich Absolute Return, Equities Media, 1920 Bel Air LLC and Geomas notes purchased for his account); Tr. 1090-91; 1101-03; 1109-11 (Investor Donald Handal testifying about the IEAH, Equities Media, Stanwich, Geomas and 1920 Bel Air notes purchased for his and other family members' accounts); Tr. 1195 (Investor Walter Unger testifying about the IEAH note purchased for his account).)

from investors to purchase [the securities])." Id. Here, as in Bandimere, the evidence showed that Tagliaferri received a percentage of the money he transferred from his clients' accounts to these issuers. (Brown Decl., Ex. G (Acquittal Motion Op. at 2-3 (citing GX 400-A; Tr. at 889-90; 664; 848 (IEAH); Brown Nov. Decl., Ex. A (GX 17-A; GX 1696; Ex. B (Tr. at 331-33 (Galanis-related entities)).) Tagliaferri, himself, referred to certain of the fees as "finders fees," or "referral fees," conceding the relationship between the transactions and the compensation he received. (Id., Ex. A (GX 5004); Ex. B (Tr. 2108-09; 2316-17).)

C. Tagliaferri Is Collaterally Estopped from Arguing Against the Facts Supporting His Conviction of Securities Fraud and Violating the Travel Act

Below, Tagliaferri offered several arguments that disputed the facts supporting his convictions[12]: that the IEAH notes were not securities and that the fees he received were not compensation for the sale of securities. (ID at 11.) But Tagliaferri's arguments are all precluded by collateral estoppel.

The Commission has repeatedly held that collateral estoppel bars a respondent from contesting the "factual and procedural issues actually litigated and necessary to the district court's decision." Imperato, at *4 & n.23, (citing In the Matter of Sherwin Brown, IA Rel. No. 3217, 2011 WL 2433279, at *4 (June 17, 2011)).[13] In this case, Tagliaferri was convicted of

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[12] On appeal, Tagliaferri argues that because the Indictment included no charge that he had acted as an unregistered broker, "any sanctions pertaining to Respondent's alleged 'unregistered broker-dealer' activities should be removed." (Respondent's Petition for Review of Court's Initial Decision Dated March 23, 2016, dated June 8, 2016 ("Respondent's Appeal Br.") at 4.)

[13] See In the Matter of Ross Mandell, Rel. No. 34-71668, 2014 WL 907416, at *5 n. 14 and 24 (S.E.C. March 7, 2014) (collateral estoppel appropriately applied to preclude relitigation of facts found by District Court in Order Denying Motions for Acquittal), vacated in part, Rel. No. 34-77935, 2016 WL 3030883 (S.E.C. May 26, 2016); see also In the Matter of Michael C. Pattison, CPA, Rel. No. 34-67900, 2012 WL 4320146, at *1, 4 (S.E.C. Sept. 20, 2012) (relying on District Court's findings in order on motion for judgment as a matter of law and a new trial.). Here, the Law Judge appropriately relied on the facts found in the Criminal Action Court's

securities fraud, making a finding that his investments on behalf of clients were securities necessary to the verdict on that charge. See United States v. Tagliaferri, ECF No. 89 at 2767 (instructing Jury on the "in connection with" element of the securities fraud claim that it must find some "nexus or relation between the allegedly fraudulent conduct and the sale or purchase of securities"). In addition, Tagliaferri was convicted of six counts of violating the Travel Act, 18 U.S.C. §§ 1952(a)(1)(A) and 1952(a)(3)(A), which the Criminal Action Court instructed the Jury must be based on a finding that "Tagliaferri caused his clients to invest in certain securities in exchange for receiving undisclosed payments." (Id. at 2791-92; see also Brown Decl., Ex. G (Acquittal Motion Op.) at 17 ("Each of [the Travel Act] charges were premised on Tagliaferri's use of the instrumentalities of interstate commerce to distribute the proceeds of and carry out an unlawful activity – receipt of a commercial bribe under New York Law – based on his undisclosed receipt of fees for placing his clients' funds in certain entities.").)[14] As the Criminal Action Court concluded in its decision denying Tagliaferri's Motion for Acquittal, "ample evidence support[ed the] finding that the fees Tagliaferri received were in exchange for his investment of his clients' funds into IEAH and the Galanis entities." (Brown Decl., Ex. G (Acquittal Motion Op.) at 2-3, 7 (citing excerpts of the transcript from Tagliaferri's criminal trial as well as government exhibits introduced at trial).)

Opinion on Tagliaferri's Motion for Acquittal. See ID at 6, n.5 ("These facts are drawn primarily from the district court's order denying Tagliaferri's motion for acquittal.")

[14] In addition, the Jury found that at least one of the Travel Act violations involved Tagliaferri's purchase of Fund.com common stock on his clients' behalf, in exchange for a $450,000 kickback from Galanis. See Brown Decl., Ex. G (Acquittal Motion Op.) at 19-21 (describing the evidence supporting the Jury's verdict that Tagliaferri received over $450,000 in kickbacks related to using his clients' funds to purchase over $2 million in Fund.com common stock and notes in a Galanis-related company.)

II. RESPONDENT IDENTIFIED NO SPECIFIC WITNESSES OR EVIDENCE THAT RAISED A GENUINE ISSUE OF MATERIAL FACT NECESSITATING A HEARING IN THIS MATTER

Tagliaferri identified no witnesses or evidence that raised a genuine issue of material fact as to his culpability or otherwise that would have warranted a hearing in this matter. Instead, he merely offered (1) a list of witnesses without any identification of the substance of their proffered testimony, or even the disputed issues as to which their testimony would be relevant; and (2) evidence as to facts and issues already litigated in the Criminal Action as to which his offer was precluded under the principles of collateral estoppel.

The Commission has repeatedly held that follow-on proceedings are appropriate for summary disposition. In the Matter of Gary M. Kornman, Rel. No. 34-59403, 2009 WL 367635, at *10 (S.E.C. Feb.13, 2009), pet. denied, 592 F.3d 173 (D.C. Cir. 2010) (collecting cases); see also Imperato, 2015 WL 1389046, at *6. The circumstances in which summary disposition in a follow-on proceeding involving fraud is not appropriate "will be rare," and are typically reserved for situations in which a respondent may present "genuine issues with respect to facts that could mitigate his or her misconduct." In the Matter of John S. Brownson, Rel. No. 34-46161, 2002 WL 1438186 at *2 n.12 (S.E.C. July 3, 2002), pet. denied, 66 F. App'x 687 (9th Cir. 2003). No such issues are present here.

A. Tagliaferri Must Have Done More than List Witnesses Whom He Would Call to Defeat the Division's Motion for Summary Disposition

Tagliaferri's list of potential witnesses he planned to call at a hearing did not carry his burden to defeat summary disposition. Once the Division has shown that it has satisfied the criteria for summary disposition, the burden shifts to the respondent "to produce documents, affidavits, or some other evidence to demonstrate that there was a genuine and material factual dispute that the law judge could not resolve without a hearing." In the Matter of Mark Feathers,

Rel. No. 34-73634, 2014 WL 6449870, at *3 (S.E.C. Nov. 18, 2014). Where the respondent "fails to identify any specific evidence or additional facts to be adduced" at a hearing "that would create a genuine issue of material fact," summary disposition is appropriate. In the Matter of Conrad P. Seghers, IA Rel. No. 2656, 2007 WL 2790633, at *4 (S.E.C. Sept. 26, 2007), pet. den., 548 F.3d 129 (D.C. Cir. 2008).

Here, in his Opposition to the Division's Motion for Summary Disposition, dated November 6, 2015 ("Respondent's Opp."), Tagliaferri provided no evidence at all. Instead, he incorporated a list of witnesses he had submitted in his Answer, dated October 13, 2015, at 3. (Respondent's Opp. at 3.) Neither in his Opposition, nor at any other time, did Respondent identify the topics on which any of them would testify, nor what issue of material fact any of them would address.

Without identifying what the proposed witnesses would speak to, let alone providing the evidence that raises a genuine issue of material fact regarding mitigating factors the Hearing Officer should have considered, Respondent did not satisfy his burden to defeat the Division's summary disposition motion.

B. The Evidence Respondent Did Specify Related Solely to Matters Already Litigated in His Criminal Trial and As to Which Collateral Estoppel Precluded Respondent's Argument

In opposition to the Division's Supplemental Briefing, Respondent did furnish his own declaration by which he submitted two other declarations, a letter written by an attorney to the Criminal Action Court, and swore to various facts "in support of my Opposition the SEC's Division of Enforcement's Supplemental brief, its Motion for Summary Disposition and to correct the misstatements stated in the Declaration of [the Division's attorney]." (Declaration of James S. Tagliaferri, executed December 22, 2015 ("Tagliaferri December Decl.") ¶ 2.) None of the proffered evidence created a genuine issue of material fact.

Respondent's December 22, 2015 Declaration disputes a host of facts: (1) that the notes purchased by TAG clients were securities (e.g., Tagliaferri December Decl. ¶¶ 4, 7 and Ex. A); (2) that certain transactions were ever consummated (e.g., id. ¶¶ 10, 16); (3) that witnesses called to testify at the Criminal Action Trial testified truthfully (e.g., id. ¶ 15); and (4) that Respondent received any fees in connection with the sale of notes or stock to his clients (e.g., id. ¶¶ 5, 8, 11, 12, 14). But none of those facts is one Respondent can dispute because each was litigated in the Criminal Action and each was necessary to the verdict. (ID at 11 and n.18.) See Seghers, 2007 WL 2790633, at *5 (rejecting respondent's argument that the facts he offered warranted a full hearing because most of them simply attacked the District Court's findings in the injunctive proceeding, and were therefore barred by collateral estoppel, and the rest were not disputed by the Division).

Also unavailing is Tagliaferri's proffer that he received advice of counsel blessing the transactions by which he purchased IEAH and Galanis-related notes for his clients. (Tagliaferri December Decl. ¶¶ 9, 13 ("In all cases related to investments in IEAH and Galanis-related securities, 'TAG VI' and Respondent placed 'good-faith' reliance on outside counsel . . . and in-house counsel . . . for advice on disclosure to clients.") First, Respondent has already admitted that he would be unable to establish an advice of counsel defense because, as he told the Criminal Action Judge, he could not establish that "he sought specific legal advice on any particular legal counsel." (Brown Jan. Decl., Ex. A (Tr. at 83).) Indeed, the Criminal Action Court instructed the Jury that Tagliaferri was not asserting that defense, but invited the Jury to "consider defendant's assertions regarding the involvement of attorneys in determining whether defendant acted with the requisite intent." (DE 89 at 2801.) The Jury therefore can be assumed to have considered Tagliaferri's "presence of counsel" defense and rejected its mitigating impact

on his scienter in light of its verdict that he had committed securities fraud, investment adviser fraud, and had committed six violations of the Travel Act. To that extent, then, Tagliaferri may not relitigate the advice or presence of counsel issue in this follow-on proceeding; its lack of mitigating effect has already been determined against him.[15]

Second, advice of counsel is irrelevant to a finding that Tagliaferri violated Section 15(a) by acting as an unregistered broker. Respondent claims that he relied on counsel for "advice on disclosure to clients." (Tagliaferri December Decl. ¶ 13.) But lack of disclosure is not an element of a Section 15(a) violation. If Tagliaferri was acting as a broker in selling his clients IEAH or Galanis-related notes, and receiving transaction-based compensation for those investments from the issuers, he is liable under Section 15(a) whether he disclosed those fees or not.

Nor is scienter an element of a Section 15(a) violation. In the Matter of David B. Havanich, Jr., Rel. No. ID-935, 2016 WL 25746, at *5 (Jan. 4, 2016) ("Scienter is not required to establish a violation of this provision.") (citing SEC v. Montana, 464 F. Supp. 2d 772, 785 (S.D. Ind. 2006). Therefore, any reliance Tagliaferri placed on advice from any counsel would be irrelevant to whether he violated Section 15(a) because the defense works only to mitigate a respondent's scienter, and, as illustrated above, Tagliaferri is precluded from relitigating even its mitigating effect.

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[15] In addition, as the Law Judge found (ID at 12), Tagliaferri made no sufficient showing of an advice of counsel defense in opposition to the Division's motion. He offered nothing to show that (1) he made complete disclosure to counsel; (2) he sought advice on the legality of the intended conduct; (3) he received advice that the intended conduct was legal; and (4) he relied in good faith on counsel's advice. In the Matter of Rodney R. Schoemann, Rel. No. 33-9076, 2009 WL 3413043, at *12 (S.E.C. Oct. 23, 2009), aff'd, 398 F. App'x 603 (D.C. Cir. 2010).

III. THE LAW JUDGE CORRECTLY DETERMINED THAT THE PUBLIC INTEREST WARRANTED INDUSTRY BARS IN THIS CASE

On appeal, Tagliaferri raises no other objections to the Hearing Officer's Initial Decision determinations on the Steadman[16] factors. As the Hearing Officer concluded, the public interest warranted full industry bars because (1) Tagliaferri's misconduct was egregious and recurrent (ID at 13-14); (2) he acted with a high degree of scienter, sufficient to criminally convict him of securities fraud and investment adviser fraud (ID at 14-15); and (3) his assurances against future violations and recognition of wrongful conduct were insufficient to render a bar unnecessary. (ID at 15-16.) As the Law Judge concluded, "[a] full and permanent industry bar, as opposed to a more limited bar or suspension, 'will prevent [Tagliaferri] from putting investors at further risk and serve as a deterrent to others from engaging in similar misconduct.'" (ID at 16 (quoting In the Matter of Montford & Co, IA Rel. No. 3829, 2014 WL 1744130, at *20 (S.E.C. May 2, 2014), pet. den., 793 F.3d 76 (D.C. Cir. 2015).) Accordingly, the Hearing Officer permanently barred Tagliaferri from associating with an investment adviser, broker, dealer, municipal securities dealer, or transfer agent pursuant to Section 203(f) of the Advisers Act and Section 15(b)(6) of the Exchange Act; permanently barred him from participating in an offering of penny stock pursuant to Section 15(b)(6) of the Exchange Act; and permanently prohibited him from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or

[16] Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981).

affiliated person of such investment adviser, depositor, or principal underwriter pursuant to Section 9(b) of the Investment Company Act.[17]

IV. THE DIVISION SATISFIED ITS RULE 230 OBLIGATIONS

The Division satisfied its obligations to make its investigative file available to Respondent for his inspection and copying within the requisite seven days. Rule of Practice 230(d). Rule 230 requires merely that the Division "make available for inspection and copying by any party documents obtained the Division prior to the institution of proceedings." The Division did so as of June 4, 2015, three days after it was ordered to make the file available, and more than a month before Respondent was due to surrender for his jail term. However, Respondent refused to travel to the Division's New York office and called its offer to provide him with a laptop for his review there a "condition[] . . . not acceptable" to him. (Brown Nov. Decl., Ex. D.)

Indeed, the Division went beyond Rule 230's strictures. When Respondent asked that the Division convert its file to .pdf format and provide it to him on discs, the Division agreed to do so, but warned that the Division's IT staff was estimating that that process could take approximately two weeks.[18] Given its understanding that Tagliaferri wanted the file as soon as possible, the Division reiterated its offer to make a laptop available to him at its offices whenever

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[17] Consistent with the holding in Koch v. SEC, 793 F.3d 147, 158 (D.C. Cir. 2015), the Division did not seek to bar Tagliaferri from associating with a municipal advisor or a nationally recognized statistical rating organization because such bars were not available prior to the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Section 925(a), when much of Tagliaferri's misconduct occurred.

[18] The Division made clear that its estimate was just that, telling Tagliaferri that it was "informed by our IT staff that it can be available in approximately two weeks." (Brown Nov. Decl., Ex. E.) Respondent's efforts to suggest that the estimate was presented as a guarantee are unavailing, particularly in light of the fact that Tagliaferri never sought to take the Division up on its offer to come review the documents in their electronic form, even as his surrender date was approaching and the Division's estimate proved unrealistic.

it was convenient for Respondent to review the file. (Id., Ex. E.) At no time before his surrender date did Tagliaferri complain about the delay or tell the Division that, given the delay, he would come to review the documents in New York. When the Division encountered delays in the conversion, and Tagliaferri's imprisonment prohibited delivery of the documents in that format to him, the Division offered him a reasonable alternative—making the entire file available in his chosen format—to anyone he chose. But Tagliaferri rejected that alternative. Tagliaferri has no due process right to insist that the Division produce its file in the manner he demands or refuse to accept the Division's reasonable accommodations.

Now, Tagliaferri argues that the Division agreed to produce its documents "at such other place as the parties, in writing, may agree," and that the Division had therefore supplanted its Rule 230(e) obligation to produce the file at its own offices by agreement with Respondent to produce them elsewhere. Even if that were so, the Division complied with that agreement. Once Respondent had reported to prison, the Division offered to make the discs containing the converted files available to any third party he designated. (Brown Nov. Decl. ¶ 13.) See In the Matter of Joseph P. Galluzzi, Rel. No. 34-46405, 2002 WL 1941502, at *4 & n.27 (SEC Aug. 23, 2002) (acknowledging the Division's compliance with Rule 230 by providing incarcerated respondent's representative with access to its investigative file). Tagliaferri refused that offer as well.

Nor did Tagliaferri ever offer to pay for the hard copy documents he told the Division he wanted it to start sending him in batches of 100 documents each, as Rule 230(f) requires him to do. Rule of Practice 230(f) ("The respondent may obtain a photocopy of any documents made available for inspection. The respondent shall be responsible for the cost of photocopying.") While he now maintains that the Division is at fault because it never asked him to pay the costs

of duplicating the rest of the file, his argument is undermined by the claims of indigence he has made in other contexts. (See Respondent's December 22, 2015 Letter, enclosing Respondent's Opposition to Division of Enforcement's Supplemental Brief, dated December 22, 2015 (noting that Respondent was unable to furnish three copies of his submission as the Rules require because "I do not have the funds to make additional copies").)

In short, the Division complied with both the letter and the spirit of its obligations to make its investigative file available to Tagliaferri. That he insisted on a particular manner of production that proved impossible to satisfy does not alter that conclusion.

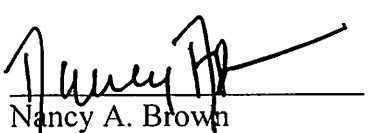
CONCLUSION

For the foregoing reasons, the Division respectfully requests that the Commission deny Respondent's appeal in its entirety.

Dated: New York, New York
July 12, 2016

Respectfully submitted,

DIVISION OF ENFORCEMENT

By: 

Nancy A. Brown
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Securities and Exchange Commission
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CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing Division's Memorandum of Law in Further Opposition to the Appeal of Respondent to be served on Respondent James Tagliaferri this 12th day of July 2016 by sending him a copy of the same to him by United States Postal Service Express Mail at the following address:

James S. Tagliaferri
Reg. No. 08900-094
FCI Beckley
Federal Correctional Institution, Satellite Camp
PO Box 350
Beaver, WV 25813

H. Gregory Baker

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
NEW YORK REGIONAL OFFICE
200 VESEY STREET
SUITE 400
NEW YORK, NY 10281-1022

NANCY A. BROWN
TELEPHONE: (212) 336-1023
EMAIL: brownn@sec.gov

July 12, 2016

Via UPS Overnight

Brent J. Fields
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-2557

Re: In the Matter of James S. Tagliaferri;
Admin. Proc. File No. 3-15215

Dear Mr. Fields:

We represent the Division of Enforcement in this matter.

Enclosed are the original and three copies of the Division's Memorandum of Law in Opposition to the Appeal of Respondent James S. Tagliaferri.

Respectfully submitted,

Nancy A. Brown

Enclosures

cc (w/encls.):
James S. Tagliaferri, Respondent (via USPS Express Mail)