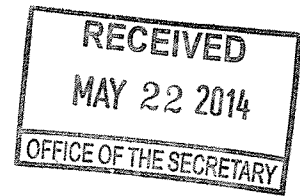


UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



ADMINISTRATIVE PROCEEDING
File No. 3-15691

In the Matter of

JAMES A. RATHGEBER,

Respondent.

**DIVISION OF ENFORCEMENT'S BRIEF IN REPLY ON ITS MOTION FOR
SUMMARY DISPOSITION**

The Division of Enforcement filed a Motion for Summary Disposition with this Court on April 25, 2014, respectfully moving the Court for an order of summary disposition against Respondent James A. Rathgeber ("Rathgeber" or "Respondent") containing the following relief:

barring Respondent from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization; and barring him from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent, or other person who engages 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.

Rathgeber filed an Opposition to the Motion for Summary Disposition ("Opposition") on May 14, 2014. Nowhere in his Opposition does Rathgeber dispute the underlying factual allegations: namely, that he pleaded guilty in 2011 to three counts of securities fraud, one count of grand

larceny in the third degree, and two counts of grand larceny in the second degree, and that at the time of the misconduct for which he pleaded guilty, Rathgeber was associated with Joseph Stevens & Co., Inc. (“Joseph Stevens”), which was a broker-dealer registered with the Commission. Because Rathgeber fails to offer any evidence that raises a genuine issue of material fact, the Division is entitled to summary disposition. *See Lorsin, Inc.*, Initial Decision Rel. No. 250, 2004 SEC LEXIS 961, at *4 (May 11, 2004) quoting *SEC v. Lybrand*, 200 F. Supp. 2d 384, 391 (S.D.N.Y. 2002) (quoting *Ying Jing Gan v. City of New York*, 996 F.2d 522, 532 (2d Cir. 1993)) (“A non-moving party must produce evidence in the record and ‘may not rely simply on conclusory statements or on contentions that the affidavits supporting the motion are not credible.’”); *see also Johnson v. Southwestern Bell Tel. Co.*, 819 F. Supp. 578, 582 (E.D. Tex. 1993), *aff’d*, 22 F.3d 1094 (5th Cir. 1993) (“The evidence produced to defeat a properly supported motion for summary judgment must adduce affirmative evidence. Naked assertions of an actual dispute unsupported by facts will not suffice, . . . the nonmovant cannot rely upon argument alone to defeat a properly supported motion for summary judgment.”); *Jersey Central Power & Light Co. v. Township of Lacey*, 772 F.2d 1103, 1109-10 (3rd Cir. 1985) (“Legal memoranda and oral argument are not evidence and cannot by themselves create a factual dispute sufficient to defeat a summary judgment motion.”).

In addition to failing to raise a genuine issue of material fact in his Opposition, Rathgeber also fails to demonstrate that the imposition of collateral and penny stock bars would not be warranted under an analysis of the factors identified by the Commission in *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff’d on other grounds*, 450 U.S. 91 (1981). Rather, Rathgeber relies on repeating several assertions first raised in his Answer to the Order Instituting Proceedings in this matter. The principal points raised by Rathgeber are that: (1) all of his trades

were approved by the Compliance Department at Joseph Stevens; (2) character letters were written on his behalf by some of the Joseph Stevens victims; (3) he pleaded guilty in part to avoid risking going to prison; (4) he was a victim of his surroundings at the time; and (5) is now a victim of the Division's "rubber stamp" decision to seek to bar him from the securities industry, characterizing himself as David to the SEC's Goliath.

While Rathgeber does state in his Opposition that "I do realize now and at the time of my sentencing in December of 2011 that what I did was in fact wrong and I am truly sorry and give my word that nothing like that will ever happen again," such assurances are offset by his frequent characterization of himself as a victim of unfortunate circumstances here. Rathgeber portrays himself in his Opposition as falling "victim to the fact he was surrounded by people [saying] 'This is the way we do things and it's okay because at best it might be a problem with REGULATORY but it's not criminal.'" However, this portrayal again fails to address what Rathgeber admitted in his Factual Allocution: that the Compliance Department was not just aware of, but involved in, the criminal scheme; that he participated in this firm-wide scheme for the purpose of generating undisclosed and excessive commissions; that he convinced customers to purchase certain stocks without regard to whether such purchases were good investments; and that customer orders were delayed without their knowledge or consent. *See generally* Factual Allocution.

Further, while Rathgeber is aware that twenty other Joseph Stevens defendants are now subject to a Commission Order imposing a permanent securities bar, he does not distinguish his specific factual circumstances from those cases, nor does he address the statements made by the Judge in his New York state criminal case that "Frankly, you were not among the least culpable people who were involved in this case. Among the brokers, you were among the more culpable."


The total value of the trades in which you were involved in which these undisclosed credits were received by you and the Firm exceeded \$25 million . . . it's a barometer of the level of your activity, or your criminal and larcenous and fraudulent activity.” Sentencing Transcript, p. 19.

Despite his repeated attempts to portray himself in his various filings as a victim, first of his colleagues and the prevailing culture at Joseph Stevens, then of the judicial system, and now of the SEC, Respondent made a choice to engage in criminal conduct and profit thereby, got caught and then made a choice to plead guilty to those crimes. He should not now be permitted to escape the consequences of that criminal behavior by shifting the blame onto others.

For the reasons set forth above, and in its initial papers, the Division respectfully requests that the Administrative Law Judge grant the Division’s Motion for Summary Disposition and permanently bar Rathgeber from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization; and bar him from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent, or other person who engages 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.

Dated: May 22, 2014

Respectfully submitted,


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