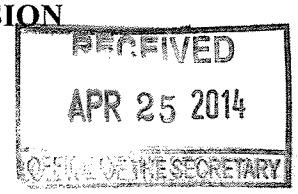
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



ADMINISTRATIVE PROCEEDING
File No. 3-15691

In the Matter of

JAMES A. RATHGEBER,

Respondent.

MOTION FOR SUMMARY DISPOSITION

The Division of Enforcement ("Division"), by counsel, pursuant to Commission Rules of Practice 154 and 250, respectfully moves the Court for an order of summary disposition against Respondent James A. Rathgeber ("Respondent" or "Rathgeber") 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.

The Division seeks this relief on the grounds that there is no genuine issue of a material fact and that pursuant to Section 15(b)(6) of the Securities Exchange Act of 1934 ("Exchange Act"), and on the basis of the factors and reasons set forth in the Division's Brief in Support of Motion for Summary Disposition, the Division is entitled to such relief as a matter of law. In support of its motion, the Division submits the below brief.

BRIEF IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION

I. Introduction

On January 27, 2014, the Commission issued an Order Instituting Proceedings ("OIP") against Respondent pursuant to Section 15(b) of the Exchange Act. Respondent filed an Answer to the OIP on March 5, 2014 ("Answer," attached as Exhibit ("Ex.") 1 to the Declaration of Michelle L. Ramos in Support of the Division's Motion for Summary Disposition ("Ramos Decl.")).[1] A pre-hearing status conference was held on March 19, 2014, at which time the Division was given leave to file its Motion for Summary Disposition no later than April 25, 2014.

II. Statement of Facts

From March 1994 to April 2008, Rathgeber was a registered representative associated with Joseph Stevens & Co., Inc. ("Joseph Stevens"). OIP at II.A.1; Web CRD printout of Respondent's Employment History, attached as Ramos Decl. Ex. 2. On August 1, 2011, before the New York Supreme Court in *People v. James Rathgeber*, Case No. 02394-2009, Respondent pleaded guilty to six felony counts, including three counts of securities fraud in violation of New York General Business Law § 352-c(5), one count of grand larceny in the third degree in violation of New York Penal Law § 155.35, and two counts of grand larceny in the second degree in violation of New York Penal Law § 155.40(1). On December 2, 2011, Respondent was sentenced in that proceeding to five years of probation and ordered to pay $279,056.05 in restitution. OIP at II.B.2; Certified Copy

[1] The Division asks that pursuant to Rule 323 of the Commission's Rules of Practice, the Court take official notice of this and other pleadings or filings referred to in this brief and/or filed as exhibits to the Ramos Decl.

of Certificate of Disposition, attached as Ramos Decl. Ex. 3; Certified Copy of December 2, 2011 Sentencing Transcript, attached as Ramos Decl. Ex. 4..

The securities fraud counts to which Respondent pleaded guilty alleged, among other things, that between January 2001 and December 2005, Respondent intentionally engaged in a scheme at Joseph Stevens with the intent to defraud at least ten persons by false and fraudulent pretenses, representations, and promises and so obtained property from at least one such person while engaged in inducing and promoting the issuance, distribution, exchange, sale, negotiation, and purchase of securities. The counts of grand larceny to which Respondent pleaded guilty alleged, among other things, that between March 2003 and November 2005, Respondent stole money in excess of $100,000 from a number of individuals. OIP at II.B.3; Certified Copy of Indictment, attached as Ramos Decl. Ex. 5; Copy of Factual Allocation of James Rathgeber, attached as Ramos Decl. Ex. 6.[2] At the time of his criminal conduct, Respondent was associated with Joseph Stevens, which, at the time of Respondent's association, was a broker dealer registered with the Commission.[3] OIP at II.A.1. As part of his guilty plea, Respondent admitted, among other things, that he:

- Was aware of and participated in firm-wide schemes in order to generate excessive and undisclosed commissions in stocks;
- Routinely used a pattern of fraudulent trading techniques and schemes to generate extra money in the form of excessive and hidden commissions;
- Intentionally engaged in a scheme constituting a systematic ongoing course of conduct with intent to defraud at least ten persons and to obtain property from at least ten persons by false and fraudulent pretenses, representations and promises;

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[2] The Division hereby notes that the Factual Allocation is not a filed document in New York State court, and hence, a certified copy cannot be obtained. However, Respondent signed the Factual Allocution on August 1, 2011 prior to pleading guilty to six felony counts, and admitted at his plea hearing to the truth and contents of the Factual Allocution. *See* Certified Copy of August 1, 2011 Plea Hearing Transcript, attached as Ramos Decl. Ex. 7.

[3] Joseph Stevens has since ceased to be registered with the Commission.

- Committed the crime of securities fraud by convincing customers to buy shares of certain stocks without regard to whether such purchases were good investments, for the purpose of receiving extra undisclosed commissions;

- Marked customer orders as "Not Held" without the knowledge or consent of customers, for the purpose of delaying execution until an artificially inflated price was achieved;

- Committed the crime of grand larceny by stealing money from customers when selling them stocks at artificially inflated prices;

- Stole over $400,000 from more than twenty customers from January 2001 through December 2005; and

- Was aware that Joseph Stevens' owners and Compliance Department used a system to track the brokers' extra commissions using "gross credits" within the internal records at the firm.

See generally Factual Allocution, Ramos Decl. Ex. 6; Certified Copy of August 1, 2011 Plea Hearing Transcript, attached as Ramos Decl. Ex. 7.

III. Argument

A. Standards Applicable to the Division's Summary Disposition Motion

Rule 250(a) of the Commission's Rules of Practice permits a party to move "for summary disposition of any or all allegations of the order instituting proceedings" before hearing with leave of the hearing officer. 17 C.F.R. § 201.250(a). Rule 250(b) provides that a hearing officer may grant a motion for summary disposition if there is no genuine issue with regard to any material fact and the party making the motion is entitled to summary disposition as a matter of law. 17 C.F.R. § 201.250(b); *see Michael Puorro*, Initial Decision Rel. No. 253, 2004 SEC LEXIS 1348, at *3 (June 28, 2004) (citing 17 C.F.R. § 201.250); *Garcis, U.S.A.*, Exchange Act Rel. No. 38495 (Apr. 10, 1997) (granting motion for summary disposition).

As one Administrative Law Judge explained,

> By analogy to Rule 56 of the Federal Rules of Civil Procedure, a factual dispute between the parties will not defeat a motion for

> summary disposition unless it is both genuine and material. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). Once the moving party has carried its burden, 'its opponent must do more than simply show that there is some metaphysical doubt as to the material facts.' *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The opposing party must set forth specific facts showing a genuine issue for a hearing and may not rest upon the mere allegations or denials of its pleadings. At the summary disposition stage, the hearing officer's function is not to weigh the evidence and determine the truth of the matter, but rather to determine whether there is a genuine issue for resolution at a hearing. *See Anderson*, 477 U.S. at 249.

Edward Becker, Initial Decision Rel. No. 252, 2004 SEC LEXIS 1135, at *5 (June 3, 2004).

B. No Genuine Issue of Material Fact Exists in This Matter and the Division is Entitled to Summary Disposition as a Matter of Law

This administrative proceeding was instituted pursuant to Section 15(b)(6) of the Exchange Act based on Respondent's criminal felony convictions for securities fraud and grand larceny. Section 15(b)(6) of the Exchange Act provides, in relevant part, that the Commission may censure, place limitations on, suspend, or bar from association 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 a penny stock, any person who has been convicted within the previous ten years of, among other things, "any felony or misdemeanor . . . which the Commission finds . . . involves the purchase or sale of any security . . . or involves the larceny . . . of funds, or securities" and who was associated with a broker or dealer at the time of the alleged misconduct, if the Commission finds that such a sanction is in the public interest. Section 3(a)(18) of the Exchange Act provides that the term "person associated with a broker or dealer" includes "any employee of such broker or dealer."

These situations apply to Respondent because 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. At the time of the misconduct for which he pleaded guilty, Respondent was associated with Joseph Stevens, which was a broker-dealer registered with the Commission.

Respondent filed an Answer with this Court on March 5, 2014. That Answer focuses largely on what Respondent describes as the unfairness of the Commission's pursuit of an industry bar against Respondent, but does not raise any genuine issue of material fact regarding the details of his criminal conviction or his association with a registered broker-dealer at the time of his criminal conduct. Given that the Respondent does not contest the factual allegations of the OIP, the imposition of collateral and penny stock bars is warranted provided such sanctions are in the public interest.

C. The Relief Sought by the Division Is Appropriate and in the Public Interest

When considering whether a sanction serves the public interest, the Commission considers the factors identified in *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds,* 450 U.S. 91 (1981): the egregiousness of the respondent's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the respondent's recognition of the wrongful nature of his or her conduct, the sincerity of the respondent's assurances against future violations, and the likelihood that the respondent's occupation will present opportunities for future violations.

An industry-wide bar, preventing Respondent from participating in the securities industry and from participating in any penny stock offering, is in the public interest and would protect the public for the following reasons. ***First***, Respondent's criminal conduct was egregious, violating basic antifraud principles essential to the securities industry, including the obligation to deal fairly with investors, to provide accurate and non-misleading information to clients, and to present clients with investments that are suitable to them. As noted above, Respondent

intentionally defrauded more than twenty of his customers throughout a four-year period by purposefully recommending certain securities to those customers without regard to whether such purchases would be good investments, and delaying execution of his customers' orders to artificially inflate the purchase price, thereby generating extra, undisclosed commissions. Further, the Judge in Respondent's New York State criminal case noted, "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, Ramos Decl. Ex. 4.

Second, Respondent's conduct was not a brief occurrence but rather recurrent – he admitted participating in a firm-wide criminal scheme that spanned over four years and led to him pleading guilty to six separate felony counts and being ordered to pay $279,056.05 in restitution. During the period of his criminal conduct, Respondent fraudulently obtained property in excess of $50,000 from at least two customers, and admitted to stealing more than $400,000 overall from more than twenty of his customers between January 2001 and December 2005 by repeatedly engaging in a firm-wide scheme to earn excessive commissions and trading prices through false and fraudulent pretenses, representations, and promises while engaged in the distribution, purchase, and sale of various securities. Factual Allocution, para. 5, 7, and 14, Ramos Decl. Ex. 6.

Third, Respondent acted with scienter in committing these crimes. He admitted that he intentionally schemed with others at Joseph Stevens to purposefully delay customer orders until an artificially inflated price could be reached to benefit Respondent and others. Factual

Allocution, para. 8-10, 12, Ramos Decl. Ex. 6. Respondent also admitted to knowingly concealing material information from an investor by recommending the purchase of certain stocks without telling the investor that the firm was engaged in trading techniques designed to manipulate the prices of those stocks and without telling the investor that the orders would be delayed to his detriment. Factual Allocution, para. 14, Ramos Decl. Ex. 6. Additionally, Respondent knew that others at Joseph Stevens engaged in manipulative practices, and knew that Joseph Stevens intentionally concealed the excessive commissions it generated from its customers. *See generally* Plea Hearing Transcript, Ramos Decl. Ex. 7. As noted, the Judge in his state criminal proceeding called his conduct "criminal and larcenous and fraudulent."

Fourth, Respondent's recent statements call into question his recognition of the wrongful nature of his conduct. Despite earlier admitting, in his Factual Allocution, that he committed the crimes of securities fraud and grand larceny, Respondent, in his Answer, now attempts to deflect any real recognition of the wrongful nature of his criminal conduct, stating that he pleaded guilty on the advice of his counsel, and that every trade that was documented in his indictment was reviewed by the Joseph Stevens Compliance Department. His recent statements fail to address what he admitted in his Factual Allocution: that the Compliance Department was not just aware of, but involved in, the criminal scheme. Factual Allocution, para. 15-16, Ramos Decl. Ex. 6.

Fifth, the Respondent fails to present any factors that would otherwise mitigate the seriousness of his fraudulent criminal conduct. Twenty individuals aside from Respondent were prosecuted by New York State for related misconduct that occurred at Joseph Stevens. Of those, only five received lesser sentences than what Respondent received, and thirteen others received a similar sentence. All twenty of those individuals are now subject to a Commission Order imposing a permanent securities bar. *See, e.g. John Moraitis*, Initial Decision Release No. 557

(Jan. 30, 2014); *Mark Steven Berg,* Exchange Act Release No. 70640 (Oct. 9, 2013); *Steven Scarcella*, Exchange Act Release No. 70576 (Sept. 30, 2013). Respondent has not presented any facts distinguishing his conduct from that of similarly situated Joseph Stevens defendants.

Sixth, while Respondent expressed in his Answer and during the parties' March 19, 2014 pre-hearing conference that he no longer works in the securities industry and does not intend to reenter the industry, he also stated "I just want the opportunity, if in the future, I wanted to do some consulting work, I could do some consulting work." Transcript of March 19, 2014 Pre-Hearing Conference Call, attached as Ramos Decl. Ex. 8. Respondent also points to the fact that the Judge in his New York State criminal case granted him a Certificate of Relief from Disabilities, and argues that the Certificate "would have allowed me to actually get back into the business." Answer at page 2. In fact, the judge stated that "this case has forever changed the career pursuits in which [Rathgeber] might engage," and that the Certificate of Relief from Civil Disabilities "should help [Rathgeber] obtain employment and otherwise participate in society." Sentencing Transcript, p. 21, Ramos Decl. Ex. 4.

The Commission has noted, in an opinion reviewing the National Association of Securities Dealers' denial of an application by a convicted felon to become associated with a member firm, that the New York statute governing such certificates does not "in any way prevent any judicial, administrative, licensing or other body, board, or authority from relying upon the conviction specified therein as the basis for the exercise of its discretionary power to suspend, revoke, refuse to issue or refuse to renew any license, permit or other authority or privilege." *Application of Patrick Joseph O'Connor*, AP File No. 3-8449, Release No. 34-35857 (1995) (quoting Correction Law Section 701, Article 23, Chapter 43 of McKinney's Consolidated Laws of New York); *see also People v. Honeckman,* 125 Misc.2d 1000, 1003, 480 N.Y.S.2d 829, 833

(1984) ("Thrust of Article 23 is the elimination of automatic bans to employment which are imposed solely as a result of a conviction without regard to whether the offense bears any relation to the character and fitness of the individual involved.")." ***Finally***, there is a real likelihood that, absent a collateral bar, the Respondent will have opportunities for future violations. At age 50, Respondent presumably still has many working years ahead of him. He has experience in, and knowledge of, the securities industry. He held Series 7 and 24 licenses and passed the Series 3 and 63 examinations. Web CRD printout of Respondent's Employment History, Ramos Decl. Ex. 2. It is entirely possible that Respondent may seek to re-enter the securities industry in the absence of a bar preventing him from doing so.

In sum, a full industry-wide bar against Respondent is appropriate and in the public interest in order to "ensure honest securities markets, [and] thereby promot[e] investor confidence." *United States v. O'Hagan*, 521 U.S. 642,658 (1997). A collateral bar in this case would further serve as a "prospective remedy to 'protect investors against fraud and . . . promote ethical standards of honesty and fair dealing" in the securities markets." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 195 (1976).

III. Conclusion

There is no genuine issue of material fact in this matter. The factual allegations in the OIP are not in dispute. Moreover, for the reasons set forth above, the imposition of collateral and penny-stock bars are supported by the *Steadman* factors and would be in the public interest. Accordingly, the Division respectfully requests that the court grant its Motion for Summary Disposition in this matter and issue an Initial Decision imposing such bars on Respondent.

Dated: April 25, 2014

Respectfully submitted,

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