

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

ADMINISTRATIVE PROCEEDING
File No. 3-20839

In the Matter of

JUSTIN WALLACE HERMAN

Respondent.

DIVISION OF ENFORCEMENT'S
MOTION FOR ENTRY OF DEFAULT
AND REMEDIAL SANCTIONS AND
SUPPORTING MEMORANDUM OF LAW

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. PROCEDURAL HISTORY..... 1

 A. The Jury in the Criminal Action Found Herman Guilty 1

 B. The Order Instituting Proceedings 3

II. ARGUMENT 4

 A. The Allegations of the OIP Should Be Deemed True..... 4

 B. The Commission Should Impose Permanent Bars Against Respondent 5

 C. An Associational Bar and Penny Stock Bar Are in the Public Interest..... 6

III. CONCLUSION 9

TABLE OF AUTHORITIES

Cases

<i>Arthur Lipper Corp.</i> , 46 S.E.C. 78 (1975)	6
<i>Christopher A. Lowry</i> , 55 S.E.C. 1133 (2002), <i>aff'd</i> , 340 F.3d 501 (8th Cir. 2003)	6
<i>Conrad A. Coggeshall</i> , Exchange Act Release No. 97474, Advisers Act Release No. 6306, 2023 WL 343398 (May 10, 2023).....	2
<i>In the Matter of Gunderson</i> , Exchange Act Release No. 61234, 2009 SEC LEXIS 4322 (Dec. 23, 2009).....	7
<i>James E. Franklin</i> , Exchange Act Rel. No. 56649 (Oct. 12, 2007), 91 S.E.C. Docket 2708, 2007 WL 2974200, <i>petition for review denied</i> , 285 F. App'x 761 (D.C. Cir. 2008)	7
<i>Jonathan D. Havey, CPA</i> , Initial Dec. Rel. No. 959, 2016 SEC LEXIS 522 (Feb. 11, 2016).....	8
<i>Justin Wallace Herman</i> , Exchange Act Release No. 34-100161, 2024 WL 2275336 (May 17, 2024)	4
<i>Justin Wallace Herman</i> , Exchange Act Release No. 34-99107, 2023 WL 8527148 (Dec. 7, 2023).....	1
<i>Justin Wallace Herman</i> , Exchange Act Release No. 94833, 2022 WL 1306666 (May 2, 2022)	3, 5
<i>Justin Wallace Herman</i> , Exchange Act Release No. 98333, 2023 WL 5830497 (Sept. 8, 2023).....	4
<i>Kimm Hannan</i> , Advisers Act Rel. No. 5906, 2021 WL 5161855 (Nov. 5, 2021)	8
<i>Marshall E. Melton</i> , Exchange Act Release No. 48228, 2003 SEC LEXIS 1767 (July 25, 2003).....	6
<i>Montford & Co.</i> , Advisers Act Release No. 3829, 2014 SEC LEXIS 1529 (May 2, 2014), <i>pet. denied</i> , 793 F.3d 76 (D.C. Cir. 2015)	7
<i>Oscar Ferrer Rivera</i> , Advisers Act Rel. No. 5759, 2021 WL 2593642 (June 24, 2021).....	8
<i>Peter J. Eichler, Jr.</i> , Initial Dec. Rel. No. 1032, 2016 WL 4035559 (July 8, 2016).....	7

<i>Richard C. Spangler, Inc.</i> , 46 S.E.C. 238 (1976).....	6
<i>Robert Burton</i> , Initial Dec. Rel. No. 1014, 2016 WL 3030850 (May 27, 2016).....	7
<i>SEC v. Blatt</i> , 583 F.2d 1325 (5th Cir. 1978).....	6
<i>Steadman v. SEC</i> , 603 F.2d 1126 (5th Cir. 1979).....	6
<i>Tzemach David Netzer Korem</i> , Exchange Act Rel. No. 70044, 2013 WL 3864511 (July 26, 2013).....	8
<i>Tzemach David Netzer Korem</i> , Exchange Act Release No. 70044, 2013 SEC LEXIS 2155 (July 26, 2013).....	5
<u>Statutes</u>	
15 U.S.C. §§ 78o(b)(4)(C).....	6
15 U.S.C. §§ 78o(6)(A)(iii).....	6
15 U.S.C. § 80b-3(e)(4).....	6
<u>Regulations</u>	
17 C.F.R. § 201.155(a).....	5
17 C.F.R. § 201.220(f).....	5

Pursuant to Securities and Exchange Commission (“SEC”) Rules of Practice 155(a) and 220(f), the Division of Enforcement (“Division”) respectfully moves for an order finding Respondent Justin Wallace Herman (“Herman” or “Respondent”) in default and imposing remedial sanctions.

Herman has not answered the Order Instituting Administrative Proceedings (the “OIP”) against him, nor responded to the Commission’s Renewed Order to Show Cause why he should not be deemed to be in default. *See Justin Wallace Herman*, Exchange Act Release No. 34-99107, 2023 WL 8527148 (Dec. 7, 2023).

Accordingly, as discussed below, the Commission should: (1) grant this Motion for Default; (2) permanently bar Herman from association with any investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization; and (3) permanently bar Herman from participating in an offering of penny stock, including engaging in activities with a broker, dealer, or issuer for purposes of issuing, trading, or inducing or attempting to induce the purchase or sale of any penny stock, pursuant to Section 15(b) of the Securities and Exchange Act of 1934 (“Exchange Act”).

I. PROCEDURAL HISTORY

A. The Jury in the Criminal Action Found Herman Guilty

On October 8, 2021, in the *United States v. Mitchell, et al.*, No. 2:19 cr. 26 (D. Wyo. Oct. 8, 2021) (the “Criminal Action”), a jury found Herman guilty as to multiple fraud counts of the indictment, including Conspiracy to Commit Securities Fraud in violation of 18 U.S.C. §371 and Securities Fraud and Aiding and Abetting Securities Fraud in violation of 15 U.S.C. §§ 78j(b) and 78ff and 18 U.S.C. §2. *See* Indictment at 7-17, attached as Ex. 1, Verdict Form at

2, attached as Ex. 2.¹

The following facts as alleged in Herman’s Indictment and recited by the subsequent Tenth Circuit appellate decision are relevant in this proceeding:

- From at least November 25, 2014 through approximately May 17, 2016, Herman conspired with Robert William Mitchell (“Mitchell”) to commit securities fraud through a scheme to “pump and dump” NuTech Energy Resources, Inc. (“NERG”) stock by acquiring control of its free-trading shares, artificially inflating the market price by causing false and misleading information about NERG to be released to the public, and selling NERG stock to unwitting investors at the artificially inflated price. *See* Indictment, ¶¶ 25-28; Appellate Decision, p.3.
- In furtherance of the conspiracy, Mitchell and Herman paid an attorney to create false and misleading attorney-opinion letters used to acquire free-trading shares of NERG, used nominees to hold NERG shares in order to disguise their ownership, created and disseminated false and misleading information about NERG to the public, and sold NERG shares to unwitting investors at artificially inflated prices. *See* Indictment, ¶¶ 29-66; Appellate Decision, pp.3-4.

¹ Under Rule 323, the Commission may take notice of the record in the district court action. *See* 17 C.F.R. § 201.323. *Conrad A. Coggeshall*, Exchange Act Release No. 97474, Advisers Act Release No. 6306, 2023 WL 343398, at *2, n.6 (May 10, 2023) (relying on Commission filings in the district court docket). Here, the Division respectfully requests that specific judicial notice be taken of the following exhibits to this motion:

- Exhibit 1 – Superseding Indictment (“Indictment”) in *United States of America v. Robert William Mitchell, et al.*, ECF Doc. No. 28 (D. Wyoming, May 24, 2019);
- Exhibit 2 – Courtroom Minutes Jury Trial – Day 14 (“Verdict Form”), *United States of America v. Robert William Mitchell, et al.*, ECF Doc. No. 373 (D. Wyoming, Oct. 8, 2021); and
- Exhibit 3 – Order and Judgment (“Appellate Decision”), *United States of America v. Justin Wallace Herman*, Appellate Case No. 22-8057, ECF Doc. No. 565-1 (10th Cir., Oct. 18, 2023).

- Herman furthered the conspiracy using the means and instrumentalities of interstate commerce. *See* Indictment, ¶ 36, 68; Appellate Decision, pp. __. ²

On October 18, 2023, the Tenth Circuit Court of Appeals upheld the jury's verdict against Herman. *See* Appellate Decision, attached as Ex. 3. According to the Bureau of Prisons' website, Herman is currently serving a term of imprisonment at Morgantown FCP in West Virginia.

B. The Order Instituting Proceedings

On May 2, 2022, the Commission issued the OIP pursuant to Section 15(b) of the Exchange Act. *See* OIP, *Justin Wallace Herman*, Exchange Act Release No. 94833, 2022 WL 1306666 (May 2, 2022). The OIP alleges that Herman, from 1995 through 2003, was a registered representative and last associated with Wilbanks Securities, a broker-dealer registered with the Commission. *Id.*, Section II, ¶ 1. Herman also participated in the offering of NERG, which is a penny stock. *Id.*

The OIP further alleges that Herman was convicted of conspiracy to commit securities fraud relating to NERG in the Criminal Action, as discussed above. *See* OIP, Section II, ¶ 2. As alleged in the OIP, these charges include, among other things, allegations that he defrauded investors through a conspiracy that involved acquiring control of NERG and its free-trading shares. *Id.*, Section II, ¶ 3. The OIP also alleges that by virtue of the conspiracy, Herman artificially inflated the market price of and demand for NERG common stock by causing false and misleading information about NERG to be released to the public. *Id.* He also engaged in manipulative trading of NERG shares and sold NERG stock to unwitting investors at the artificially inflated price. *Id.*

² Herman is also a defendant in *SEC v. Herman, et al.*, No. 7:22-cv-00027- DLB-EBA (E.D. Ky) in which the Commission alleges that he and his co-defendants engaged in a scheme to obtain shares of a shell company ("PYTG"), inflate the company's share price, and then dump shares at artificially inflated prices. Herman has defaulted in that case. The undersigned understands that the Division staff handling SL-02789 intend to submit an action memo with recommendations regarding a disgorgement demand to make in a to-be-filed motion for a default judgment.

Accordingly, the Commission instituted the OIP to determine the truth of the allegations and what, if any remedial action is appropriate and in the public interest pursuant to Section 15(b) of the Exchange Act. *See* OIP, Section III.

C. Respondent’s Failure to Answer the OIP or Respond to the Renewed Order

On March 2, 2023, the Commission issued an order directing Herman to show cause why this proceeding should not be determined against him. However, the Commission later determined that the OIP may not have been properly served on Herman, and, on September 8, 2023, issued an order discharging the order to show cause. *See Justin Wallace Herman*, Exchange Act Release No. 98333, 2023 WL 5830497 (Sept. 8, 2023).

On November 3, 2023, the Division filed a Status Report appending a process server’s declaration, which established that service of the OIP was made on Herman by personal service on October 17, 2023, pursuant to Rule 141(a)(2)(i) of the Commission’s Rules of Practice [17 C.F.R. § 201.141(a)(2)(i)]. On December 7, 2023, the Commission issued its Renewed Order to Show Cause, by January 22, 2024, why Herman should not have this proceeding determined against him. *See supra*. On May 17, 2024, the Commission issued an Order Directing Status Report from the Division of Enforcement by June 17, 2024. *See Justin Wallace Herman*, Exchange Act Release No. 34-100161, 2024 WL 2275336 (May 17, 2024). The Division is filing its Status Report concurrently with the present Motion for Default.

II. ARGUMENT

A. The Allegations of the OIP Should Be Deemed True

Rule 220(f) of the SEC Rules of Practice provides that if a “respondent fails to file an answer...within the time provided, such person may be deemed in default pursuant to Rule 155(a).” 17 C.F.R. § 201.220(f). Relatedly, SEC Rule of Practice 180(c) allows the

Commission to “decide the particular claim(s) a issue against [a] person” who fails “to make a filing required under these Rules of Practice.” 17 C.F.R. §§ 201.180(c). The OIP informed Herman that a failure to file an answer could result in deeming him in default and determining the proceedings against him. *Herman*, 2022 WL 1306666, at *3.

Furthermore, as stated above, on December 7, 2023, the Commission ordered Herman to show cause, by January 22, 2024, why he should not be deemed to be in default. Herman has not responded to that Order or the OIP, and therefore the Division moves for findings and remedies by default. Because Herman has failed to “answer...or otherwise defend the proceeding,” the Commission should enter a default judgment against him, as is contemplated by the Rules of Practice. *See* Rules 155(a), 180(c), and 220(f). Under Rule 155(a), the allegations of the OIP may be deemed true and determination of the proceedings may proceed upon consideration of the record, including the OIP. *Id.*

B. The Commission Should Impose Permanent Bars Against Respondent

Based on the record here and in the Criminal Action, the Division respectfully requests that sanctions be imposed against Herman. Section 15(b) of the Exchange Act authorizes the Commission to order associational and penny stock bars on any person who has been convicted of a specified offense if such bars would be in the public interest. 15 U.S.C. §§ 78o(b)(4)(C), (6)(A)(iii); *Tzemach David Netzer Korem*, Exchange Act Release No. 70044, 2013 SEC LEXIS 2155, at *32 (July 26, 2013) (holding that it is “well established that [the Commission is] authorized to sanction an associated person of an unregistered broker-dealer or investment adviser in a follow-on administrative proceeding”). Here, Herman has been convicted of Conspiracy to Commit Securities Fraud in violation of 18 U.S.C. §371 and Securities Fraud and Aiding and Abetting Securities Fraud in violation of 15 U.S.C. §§ 78j(b) and 78ff and 18 U.S.C.

§2. *See* Indictment at 7-17, Verdict Form at 2. These are offenses encompassed by Exchange Act Section 15(b)(4)(B). Accordingly, the Division requests that Herman be permanently barred from association with any investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, and from participating in penny stock offerings. These sanctions are expressly permitted and appropriate under Section 15(b).

C. **An Associational Bar and Penny Stock Bar Are in the Public Interest**

In assessing whether associational and penny stock bars are in the public interest, the Commission considers several 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)). Additionally, the Commission considers the age of the violation and the degree of harm to investors and the marketplace resulting from the violation. *Marshall E. Melton*, Exchange Act Release No. 48228, 2003 SEC LEXIS 1767, at *5-6 (July 25, 2003).

The Commission has often emphasized, however, that 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). Moreover, 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). Here, the *Steadman* factors weigh in favor of an associational

industry bar.

Herman committed fraud with scienter and the egregiousness of his actions is not in dispute. Nor is the recurrent nature of his violations. As discussed above, a jury found that Herman conspired to orchestrate a pump and dump scheme for over one and a half years to induce unwitting investors to purchase NERG, a penny stock, at artificially inflated prices in order to unjustly enrich himself and his co-conspirators. *See supra*. The Tenth Circuit Court of Appeal upheld the jury's verdict. *See supra*. Currently, Herman is serving a term of imprisonment on account of his egregious fraudulent conduct.

Where, as here, facts have been litigated and determined in an earlier judicial proceeding, those facts may not be revisited in a subsequent administrative proceeding. *See Peter J. Eichler, Jr.*, Initial Dec. Rel. No. 1032, 2016 WL 4035559 (July 8, 2016) (“It is well-established that the Commission does not permit a respondent to relitigate issues that were addressed in a previous civil proceeding against the respondent, whether resolved by summary judgment, by consent, or after a trial”) (collecting cases) (emphasis added); accord *Robert Burton*, Initial Dec. Rel. No. 1014, 2016 WL 3030850 (May 27, 2016); *James E. Franklin*, Exchange Act Rel. No. 56649 (Oct. 12, 2007), 91 S.E.C. Docket 2708, 2713 & n.13, 2007 WL 2974200, petition for review denied, 285 F. App'x 761 (D.C. Cir. 2008); *In the Matter of Gunderson*, Exchange Act Release No. 61234, 2009 SEC LEXIS 4322 *15-16 (Dec. 23, 2009). These factors, coupled with the impact on the public at large, demonstrates that an associational bar is necessary. Such a bar “will prevent [Respondent] from putting investors at further risk.” *Montford & Co.*, Advisers Act Release No. 3829, 2014 SEC LEXIS 1529, at *86-87 (May 2, 2014), pet. denied, 793 F.3d 76 (D.C. Cir. 2015).

The remaining *Steadman* factors also favor a permanent bar. Herman has provided no assurance against future violations and lacks any apparent recognition of his wrongful conduct. Indeed, Herman has failed to respond to this OIP. The “absence of recognition by [a respondent] of the wrongful nature of his conduct” favors a permanent bar. *Jonathan D. Havey, CPA*, Initial Dec. Rel. No. 959, 2016 SEC LEXIS 522, at *11 (Feb. 11, 2016) (granting permanent bar on motion for summary disposition in follow-on proceeding to criminal conviction); *see also Kimm Hannan*, Advisers Act Rel. No. 5906, at 4, 2021 WL 5161855, *3 (Nov. 5, 2021) (“Because Hannan failed to answer the OIP or respond to the order to show cause or to the Division’s motion, he has made no assurances to us that he will not commit future violations or that he recognizes the wrongful nature of his conduct.”); *Oscar Ferrer Rivera*, Advisers Act Rel. No. 5759, at 6, 2021 WL 2593642, *4 (June 24, 2021) (“Although his guilty plea indicates that Ferrer might have some appreciation for the wrongfulness of his conduct, it does not outweigh the evidence that he poses a risk to the investing public.”). While “[c]ourts have held that the existence of a past violation, without more, is not a sufficient basis for imposing a bar . . . the existence of a violation raises an inference that it will be repeated.” *Tzemach David Netzer Korem*, Exchange Act Rel. No. 70044, at 10 n.50, 2013 WL 3864511, at n.50 (July 26, 2013) (quotation and alternations omitted). In this case, Herman has offered no evidence to rebut that inference.

Finally, although Herman is currently imprisoned, unless he is barred from the securities industry he will, in the future, have the chance to again harm investors. *Hannan*, Advisers Act Rel. No. 5906, at 4, 2021 WL 5161855, *3 (“Although Hannan is currently incarcerated, absent a bar, he would have the opportunity to re-enter the securities industry and commit further violations upon his release.”).

III. CONCLUSION

For the foregoing reasons, the Division of Enforcement respectfully requests that the Commission grant this Motion for Entry of Default and permanently bar Herman from association with any investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, and from participating in an offering of penny stock, including engaging in activities with a broker, dealer, or issuer for purposes of issuing, trading, or inducing or attempting to induce the purchase or sale of any penny stock.

Dated: June 17, 2024

Respectfully submitted,

/s/ Duane K. Thompson

Duane K. Thompson
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549
Tel: (202) 551-7159
thompsond@sec
.gov
Counsel for Division of Enforcement