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INTRODUCTION

Pursuant to Rule 250 of the Securities and Exchange Commission's Rules of Practice, the Division of Enforcement ("Division") respectfully submits this memorandum of law, and the Declarations of Kevin P. McGrath and John Graubard and exhibits attached thereto, in support of its motion for summary disposition against Respondent Daniel Gallagher. The Division seeks an Order barring Gallagher from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical ratings agency, pursuant to Exchange Act Section 15(b)(6)(A)(ii), based on his criminal conviction, after a jury trial, on one count of securities fraud and two counts of wire fraud in a parallel criminal case, United States v. Daniel Gallagher, 11-CR-806 (E.D.N.Y.) (LDW), on April 9, 2012.¹

As reflected in the Amended Order Instituting Proceedings ("OIP") in this matter, the Division alleges that Gallagher raised at least \$427,000 for a company he formed, Nano Acquisitions Group, LLC ("NAG"), based on false representations, including that the monies would be used to acquire and develop certain nanotechnology assets of a bankrupt company, Nanodynamics, Inc., and that no fees or salaries would be paid to the management or employees of the company until at least \$1 million had been raised. The OIP alleges that, instead of using those monies as represented, Gallagher misappropriated nearly all of the monies he raised for his personal use. The OIP charges Gallagher with willful violations of Section 17(a) of the Securities Act of 1933 (Securities Act) [15 U.S.C. § 77q(a)(2)], and Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. § 78j(b)] and Rule 10b-5

¹ The Division reserves its right to request a hearing and/or briefing schedule at the appropriate time with respect to the remaining relief requested in the OIP, a cease-and-desist order, disgorgement and prejudgment interest, and is currently re-evaluating whether to continue to pursue this relief in view of the court's guidance in the December 5, 2013 prehearing conference.

thereunder [17 C.F.R. § 240.10b-5]. Additionally, the OIP sets forth Gallagher's criminal conviction as another basis for the relief requested herein.

PROCEDURAL HISTORY

On November 16, 2011, the Commission issued the OIP, which alleged that, from October 2009 through July 2010, Gallagher conducted a fraudulent offering of securities of NAG, misappropriating approximately 92% of the \$427,000 he had raised from twelve investors. The OIP charged Gallagher with willfully violating Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, sought appropriate remedial sanctions pursuant to Exchange Act Section 15(b)(6), along with disgorgement and prejudgment interest, civil penalties, and a cease-and-desist order.

On December 2, 2011, the Court stayed this case at the request of the Office of the United States Attorney for the Eastern District of New York ("USAO") pending the outcome of a parallel case against Gallagher being prosecuted by the USAO. On December 1, 2011, the USAO had filed an Indictment, United States v. Gallagher, 11-CR-806 (E.D.N.Y.)(LDW), charging Gallagher with criminal conduct virtually identical to that set forth in the OIP.

On May 22, 2013, following Gallagher's conviction in the criminal case on one count of securities fraud and two counts of wire fraud, the Court lifted the stay in this case, and granted the Division leave "to request the Commission to amend the OIP to add or substitute the conviction as the basis for proceeding." The Division filed a motion to amend the original OIP

to add Gallagher's conviction as a separate basis for imposing the requested relief on May 31, 2013.² On September 3, 2013, the Commission granted the Division's motion in all respects.

On October 18, 2013, the Commission issued the Amended Order Instituting Proceedings, which was subsequently served on Gallagher. Gallagher did not file a formal answer to the original OIP or the amended OIP. He has, however, filed numerous letters in which he, inter alia, denies any wrongdoing, including one dated October 21, 2013 that the Court deemed an answer. See Transcript of December 5, 2013 pre-hearing teleconference in this matter, attached as Ex. H to the Declaration of Kevin P. McGrath, dated January 9, 2014, at 4.³ At a pre-hearing conference on December 5, 2013, the Court gave the Division leave to file a motion for summary disposition by January 10, 2014.

STATEMENT OF FACTS

I. RESPONDENT

A. Gallagher's Association with Broker-Dealers

Gallagher has been a participant in the securities industry since 1990 and previously held Series 7 and Series 63 licenses. See Ex. A, FINRA BrokerCheck Report for Gallagher, at 3. In May 2001, Gallagher became a registered representative and controlling shareholder of Vision Securities, Inc., a registered broker-dealer. He was associated with Vision Securities from May 2001 until January 2010. Ex. A at 1; 4. Effective December 12, 2012, Gallagher was barred by FINRA from association with a member firm, for among other misconduct, violating NASD Membership and Registration Rules ("NASD Rules") 1021(a) and 2110 by acting as an

² The Division also sought and received permission to withdraw its original request for civil penalties, given that Gallagher had received a 31-month prison term and a three-year term of supervised release.

³ All references to "Ex." are to exhibits attached to the McGrath Declaration.

unregistered principal; and NASD Rule 2110 by circumventing heightened supervision that had been imposed on him by New York, New Jersey, Maryland and FINRA. Exhibit A at 8-14. Gallagher's appeal was denied on January 14, 2013. Ex. A at 12.

B. Gallagher's History of Customer Complaints and Disciplinary Actions

Gallagher has an extensive history of customer complaints and disciplinary actions. Between 1994 and 2001, seven customer arbitrations, all alleging sales practices violations, were filed against Gallagher. They resulted in settlements or awards to customers of over \$1,000,000. Because of these complaints, the states of Georgia, Illinois, New York, New Jersey and Maryland fined, suspended and/or imposed conditions of heightened supervision on Gallagher. Ex. A at 15; 22; 27-28.

In addition to the most recent FINRA sanction described above, Gallagher has been sanctioned three times by the NASD. In 1997, NASD alleged that Gallagher committed sales practice violations. Gallagher settled the action, was fined \$15,000 and censured and suspended in all capacities for six months. Ex. A at 22-27. In January 2005, Vision Securities and Gallagher were charged with violating net capital rules. Gallagher and Vision Securities settled that action and were fined \$7,500.00 (\$5,000.00 of which was joint and several). Ex. A at 20-21. In July 2007, Gallagher was suspended for failing to pay an arbitration award owed to a customer. Ex. A at 18-19. The suspension was lifted after Gallagher satisfied the award.

Finally, Gallagher has been subject to a prior Commission enforcement action. On July 20, 2009, after a one week civil jury trial, Gallagher was found liable, along with co-defendant Christopher Castaldo, for aiding and abetting Vision Securities' violations of the broker licensing requirements (Section 15(b)(7) of the Exchange Act (15 U.S.C. § 78o(b)(7)) and Rule 15b7-1 thereunder (17 C.F.R. § 240.15b7-1)), for his role in permitting Castaldo to act as an unlicensed

broker of Nanodynamics securities while associated with Vision Securities. Gallagher, and Vision Securities, of which Gallagher was chairman, secretary, and sole director at the time, were held jointly and severally liable for disgorgement and prejudgment interest totaling \$155,718.23 and a civil penalty of \$24,000.00. The court did not impose the injunctive relief requested by the Commission against Gallagher in that case, concluding that “the likelihood of recidivism is low.” Ex. B, Memorandum Order and Final Judgment, dated August 19, 2009, in SEC v. Castaldo.⁸

II. Gallagher’s Criminal Conviction

In April 2013, in United States v. Gallagher, Gallagher was convicted of one count of securities fraud (Count One), in violation of in violation of Title 15, U.S.C., Sections 78j(b) and 78ff and two counts of wire fraud (Counts Three and Six), in violation of Title 18, U.S.C. Sections 1343 and 2. Exs. E and F. Count One charged that, between September 2009 and October 2011, Gallagher engaged in securities fraud and devised a scheme and artifice to defraud the investors in NAG and Watt, and to obtain money from them, by means of materially false and fraudulent pretenses, representations and promises. Ex. E at ¶¶ 14-15.

The counts on which Gallagher was convicted charged, inter alia, the following. Gallagher raised slightly more than \$300,000 in NAG from eleven investors for the alleged purpose of purchasing assets from the Nanodynamics bankruptcy. Id. at ¶¶ 4-6. NAG’s offering materials, which Gallagher participated in drafting, represented that no fees or salaries would be

⁸ At a previous hearing, the court had expressed concerns that imposing an injunction could result in Gallagher and his co-defendant being barred or suspended from participating in the securities industry, thereby hindering their ability to pay their fines and penalties. Ex. C, Transcript of July 31, 2009 Hearing in SEC v. Castaldo at 12-14. To date, Gallagher has not paid any of the monies he owes pursuant to this judgment and has ignored numerous communications from the SEC, and has twice failed to appear for depositions, relating to this debt. Declaration of John Graubard, dated January 8, 2014.

paid to the management of employees of the company until at least \$1 million had been raised. *Id.* at ¶ 4. By January 2010, most of Nanodynamics assets were sold to another entity. Gallagher falsely told the NAG investors in or about May 2010 that NAG had spent approximately \$300,000 to date on business purposes and that NAG's shares would be replaced by shares in Watt Fuel Cell Corporation ("Watt"), which would develop its own fuel cell technology. *Id.* at ¶ 6. Beginning in June, 2010, Gallagher began soliciting new investments in Watt and NAG. Between June 2010 and October 2011, Gallagher received more than \$190,000 from investors. *Id.* at ¶ 7. Of the approximately \$493,000 he raised from thirteen investors between October 2009 and September 2011, Gallagher stole approximately \$439,000, or 89%, in cash withdrawals. Gallagher covered up his scheme by misleading investors about how NAG and Watt were using their funds. *Id.* at ¶ 8.

Count Three was based on a May 27, 2010 email from Gallagher to investors about the expenditure of NAG's funds and Count Six was based on a May 4, 2011 wire transfer of \$15,000 from an investor to NAG. *Id.* at ¶ 16.

ARGUMENT

Rule 250(a) of the Commission's Rules of Practice permits a party, with leave of the hearing officer, to move for summary disposition of any or all the OIP's allegations. Rule 250 expressly provides that a motion for summary disposition should be granted if there is "no genuine issue with regard to any material fact and the party making the motion is entitled to a summary disposition as a matter of law." Summary disposition is particularly appropriate in a follow-on proceeding such as this one.⁹

⁹ See, e.g., Gordon A. Driver, Initial Decision Release No. 432, 2011 SEC LEXIS 3271, at *5 (Sept. 22, 2011) (noting Commission approval of use of summary disposition

No genuine issue of material fact exists regarding the appropriateness of the Division's requested relief. Gallagher's conviction and association with a broker-dealer during the period of the conduct underlying the conviction is a matter of public record, and the public interest clearly requires the imposition of the sanction – a permanent collateral bar – the Division seeks.¹⁰

I. GALLAGHER'S CRIMINAL CONVICTION ESTABLISHES THE BASIS FOR ADMINISTRATIVE RELIEF.

Under Exchange Act Section 15(b)(6)(A)(ii), the Commission is authorized to bar any person from associating with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization and from participating in any offering of a penny stock if such person was convicted, within ten years of the commencement of the proceeding, of a felony involving the purchase or sale of a security, and, at the time of the alleged misconduct, was associated with a broker or dealer. On April 9, 2012, Gallagher was convicted, by a jury verdict, of one count of securities fraud and two counts of wire fraud.¹¹ Count One of the indictment charged Gallagher with engaging in a fraudulent

procedure in "cases such as this one where the respondent has been enjoined or convicted"); Jeffrey L. Gibson, Exchange Act Release No. 57266, 2008 SEC LEXIS 236, at *20-21 & n. 24 (Feb. 4, 2008) (collecting cases), pet. for rev. den., Gibson v. SEC, 561 F.3d 548 (6th Cir. 2009) (summary disposition granted and broker-dealer and investment adviser associational bars issued based on entry of injunctions).

¹⁰ As noted above, the Division is continuing to evaluate the propriety of the other relief requested in the OIP (disgorgement, prejudgment interest, and a cease-and-desist order).

¹¹ For the purpose of Section 15(b)(6)(A)(ii), a jury verdict constitutes a "criminal conviction." See Alexander Smith, 1946 SEC LEXIS 228, at *18 (Feb. 5, 1946) ("Section 15 (b) was drafted to enable the Commission to consider whether a person whose honesty and integrity have been seriously impugned should be barred from the securities business. . . . In this context it is clear that when there has been a verdict or plea of guilt or a plea of *nolo contendere* accepted by the Court, there is the 'conviction' contemplated by the statute as the starting point for an inquiry into the fitness of the person involved to engage in the securities business.").

scheme by which, between October 2009 and September 2011, he raised approximately \$493,000 from thirteen investors and stole approximately \$439,000, or about 89% of the invested funds. Ex. E at ¶ 4. For part of the time of the alleged misconduct, Gallagher was associated with a broker dealer. Specifically, from May 2001 until January 2010, Gallagher was a representative of Visions Securities, a registered broker-dealer. Ex. A at 1; 4.

II. A PERMANENT INDUSTRY AND PENNY STOCK BAR AGAINST GALLAGHER IS APPROPRIATE IN THE PUBLIC INTEREST.

A. Collateral Bars Are Appropriate Even Though Some of the Alleged Misconduct Pre-Dates Dodd-Frank.

The Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), effective as of July 22, 2010, amended Section 15(b)(6)(A) to empower the Commission to suspend or bar a person from association with an investment adviser, municipal securities dealer, municipal advisor, transfer agent, or Nationally Recognized Statistical Ratings Organization ("NRSRO"), in addition to its previously conferred powers to bar a person from association with a broker, dealer and from participating in an offering of penny stock. Because these additional "collateral bars" constitute prospective relief only, and are clearly in the public interest, they should be granted here even if some of the wrongdoing pre-dated Dodd-Frank.¹²

¹² The Commission has determined that sanctioning a respondent for pre-Dodd-Frank wrongdoing is not impermissibly retroactive, but rather provides prospective relief from harm to investors and the markets. See, e.g., John W. Lawton, Advisers Act Release No. 3513, (Dec. 13, 2012),; see also, Alfred Clay Ludlum, III, Advisers Act Release No. 3628 2013, WL 3479060, at *6 (July 11, 2013); Johnny Clifton, Securities Act Release No. 9417, 21013 WL 3487076, at *13 (July 12, 2013); Tzemach David Netzer Korem, Exchange Act Release No. 70044, 2013 WL 3864511, at *7 (July 26, 2013). Moreover, Gallagher's conviction occurred after the effective date of Dodd-Frank.

B. It is in the Public Interest to Bar Gallagher.

In considering whether it is in the public interest to impose an associational bar, the Commission considers the egregiousness of respondent's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the respondent's assurances against future violations, the respondent's recognition of the wrongful nature of his conduct, and the likelihood that the respondent's occupation will present opportunities for future violations. Eric Butler, Exchange Act Release No. 65204, 2011 SEC LEXIS 3002 (Aug. 26, 2011) at *13-14 & n. 21 (citing Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981)). The inquiry is a "flexible one, and no one factor is dispositive." Id. at *14 & n. 22 (quoting David Henry Disraeli, Exchange Act. Rel. No. 57027, 2007 SEC LEXIS 3015, at *61 (Dec. 21, 2007), pet. denied, Disraeli v. SEC, 334 F. App'x 334 (D.C. Cir. 2009)).

Moreover, 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, e.g. Adam Harrington, Initial Decision Release No. 484, 2013 WL 1655690 at 4. (April 17, 2013); Evelyn Litwok, Initial Decision Release No. 426, 2011 WL 3345861, at *4-5 (August 4, 2011), subsequently dismissed because of reversal and vacating and remand of criminal convictions, Evelyn Litwok, Advisers Act Release No. 3838, 2012 WL 3027914 (July 25, 2012). The Commission has made clear that "absent 'extraordinary mitigating circumstances,' an individual who has been convicted cannot be permitted to remain in the securities industry." Frederick W. Wall, Exchange Act Release No. 52467, 2005 SEC LEXIS 2380 (September 19, 2005) at *14 & n. 16 (quoting John S. Brownson, Exchange Act Release No. 46161, 2002 WL 143186, at *2

(July 3, 2002), pet. denied, Brownson v. SEC, 66 F. App'x 687 (9th Cir. 2009); see also Butler, 2011 SEC LEXIS 3002, at *18 & n. 27).

On the record in this matter, all of the Steadman factors weigh in favor of barring Gallagher from association with all of the industry groups specified under Section 15(b)(6) and from participating in the offering of any penny stock. Indeed, in sentencing Gallagher, Judge Wechsler recognized the danger he poses to the investing public, finding with respect to the need for a prison term for Gallagher:

[Gallagher]'s a violator. He violated this crime under the SEC, he lied to his people that love him that he wouldn't spend any of the money until he collected a million dollars. 493,000 disappeared, not having anything to do with their advantage. It turned out to [sic] stock probably is good, there's no question about it, but he's not. We then give him a break and he's back on drugs. I know he has a drug and alcohol problem but he's also a menace to society because he's bright and capable.

...
... I will direct as part of the supervised release he is not to engage in securities [as a] salesman, assistant or in any other way. He's dangerous. He doesn't even realize to this day what he did was wrong. The fact that he turns out to be right doesn't make it right. He defrauded people. He will do it again.

Ex. G at 22-23.

1. Gallagher's Conduct Was Egregious

The egregious nature of Gallagher's conduct is established by his criminal conviction on securities fraud and wire fraud. Tzemach David Netzer Korem, Initial Decision Release No. 427, 2011 SEC LEXIS 2717, at *14 (Aug. 5, 2011) (finding that respondent's conviction for conspiracy to commit securities fraud indicated both egregiousness and a high degree of scienter). Gallagher's conviction was based on his embezzlement and conversion to his own use of nearly all of the nearly \$500,000 he raised from investors. Ex. E at ¶8.

2. Gallagher's Infractions Were Repeated

Gallagher's misconduct was not isolated. Indeed, he has repeatedly been found to have violated the securities laws. The counts of the indictment under which he was convicted charged him with defrauding thirteen investors over a two-year period, between September 2009 and October 2011. Compare David G. Ghysels., Exchange Act Release No. 62937, 2010 SEC LEXIS 3079, at *10 (Sept. 20, 2010) (finding 40-day participation in scheme "extended participation"). Moreover, over his decades' long career in the securities industry, Gallagher has been found liable on numerous occasions for violating federal, state or self-regulatory organization laws, rules and regulations. See supra at pp. 3-5. In 2012, for example, he was found by FINRA to have circumvented heightened supervision requirements that had previously been imposed on him. In 2009, he was found to have aided and abetted violations of the broker licensing requirements (Exchange Act Section 15(b)(7) and Rule 15b7-1 thereunder). See SEC v. Christopher Castaldo et al. 08-CIV-8397 (S.D.N.Y.) (JSR), Exhibit B. In 2005, he and Vision Securities were found by the NASD to have violated the net capital rules. Ex. A at 20-22. And in the 1990s, Gallagher was sanctioned by the NASD and authorities in five states for sales practice violations. Ex. A. at 15; 18-27.

3. Gallagher Has Expressed No Remorse and Has Offered No Assurance against Future Violations.

Gallagher has expressed no remorse whatsoever for his actions and has offered no assurance that he will not engage in future violations. To the contrary, in his numerous letters to

this Court, Gallagher continues to claim he has done nothing wrong, despite the overwhelming evidence to the contrary and his criminal conviction.¹³

Even worse, he continues to lie about his actions and mislead this Court. At the prehearing conference held on December 5, 2013, Gallagher falsely claimed he had been “in this business 25 years and having owned a firm for over a decade without a single customer complaint lodged against me and my firm.” Ex. H at 6:4-7. When confronted with the 2009 judgment the Commission had obtained against him in SEC v. Castaldo, Gallagher not only minimized the nature of that judgment, Id. at 15:25; 16:1-11, but yet again lied, saying “if there was one issue in front of a district judge and for 25 years doing business. ... I don’t have a single complaint in ten years. You want to talk about history. That’s history.” Id. at 16:19-25. In fact, as shown by the history set forth above, Gallagher has had numerous complaints lodged against him over the past ten years.

It is clear from Gallagher’s disciplinary history and his conduct in this action that he has no concern for the law, the truth, or the impact of his actions on investors, customers, friends or business associates. Despite repeated findings by numerous tribunals that Gallagher has violated the securities laws, Gallagher accepts absolutely no responsibility for his actions, but instead blames the prosecutorial and regulatory agencies that have held him to account. Gallagher’s failure to accept responsibility for his wrongdoing "rais[es] serious concerns about the likelihood that [he] will commit future violations," and makes a bar all the more necessary to protect the

¹³ See, e.g., letters from Gallagher dated June 14, 2013, October 21, 2013, and November 11, 2013.

public. Ghysels, 2010 SEC LEXIS 3079, at *11. Nothing short of a permanent bar will prevent future violations by Gallagher.¹⁴

CONCLUSION

For the foregoing reasons, the Division has proven by more than a preponderance of the evidence that it is appropriate and in the public interest to bar Gallagher from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical ratings agency, and from participation in an offering of penny stock.

Dated: New York, New York
January 10, 2014

DIVISION OF ENFORCEMENT

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¹⁴ Although Gallagher is prohibited, as a condition of his supervised release, from engaging in employment that involves securities or soliciting funds from investors, that prohibition lapses after his three-year term of supervised release ends and would not prevent him from seeking association with brokers, dealers, investment advisers, or any of the other entities for which the Division seeks collateral bars. Similarly, although his securities licenses have lapsed, absent a permanent bar, Gallagher is free to retake the examinations and, once his term of supervised release ends, seek to return to the securities industry, a field in which he has participated for more than twenty years.