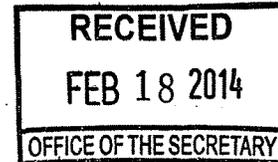


UNITED STATES OF AMERICA
Before The
SECURITIES AND EXCHANGE COMMISSION

Administrative Proceeding

File No. 3-~~13887~~ 14630

In The Matter Of
DANIEL GALLAGHER,
Respondent.



RESPONDENT'S MOTION TO DISMISS
THE DIVISION OF ENFORCEMENT'S
MOTION FOR SUMMARY DISPOSITION
AND INCORPORATED MEMORANDUM OF LAW

Comes now the Respondent and says:

1. According to the applicable Rules of Practice, the Division of Enforcement's (hereafter, "The Division") Motion for Summary Disposition is both premature and clearly exceeds the scope permitted by the Amended Order Instituting Proceedings, dated October 18, 2013.
2. For this reason, Respondent files this motion asking the Court to dismiss the Motion for Summary Disposition on these procedural grounds. Should the Court not grant this motion to dismiss, Respondent asks the Court for an extension of 90 days after receiving discovery from the Division (as required by 17 C.F.R. §201.230) in which to file his Response to the Motion for Summary Disposition. Respondent intends to vigorously oppose the Motion for Summary Disposition. However, for the reasons set forth hereinafter, Respondent is unable to respond

to the motion until the Division complies with its mandatory obligations under the Rules of Practice.

A. The Motion for Summary Disposition Is Premature Because Discovery Is Not Complete.

3. As set out in 17 C.F.R. §201.250(a), the Rules of Practice provide, in relevant part, as follows:

Motion for Summary Disposition

(a) After a respondent's answer has been filed and, in an enforcement or disciplinary proceeding, documents have been made available to that respondent for inspection pursuant to §201.230, [either party] may make a motion for summary disposition of any or all allegations of the order instituting proceedings..."

4. The Division filed the pending Motion for Summary Disposition before providing Respondent with the documents required by the Rules of Practice. To date, no documents have been provided. (See Exhibit A, Letter from counsel for the Division; see also Exhibit B, letter from Respondent notifying counsel that all documents will have to be in a paper form - rather than on a CD - due to Respondent's status as a federal inmate.)
5. Simply put, the Division seeks to obtain summary relief without complying with the relevant rules or even basic principles of due process.
6. The Respondent respectfully suggests that it would violate federal law, as well as Respondent's due process rights, to require him to respond to a Motion for Summary Disposition before being provided with the documents required by §201.230 -

§201.250(a).

B. The Motion for Summary Disposition Far Exceeds the Scope of the Amended Order Instituting Proceedings.

7. It is axiomatic that a motion for summary disposition may not exceed the scope of the underlying charging document.
8. Furthermore, the rule that authorizes summary disposition in this case clearly limits summary disposition to "...any and all allegations of the order instituting proceedings..."
9. The Division's motion exceeds the scope of the Amended Order Instituting Proceedings (hereafter the "AOIP") in two ways:
 - a. The Motion for Summary Disposition Alleges Material Facts Not Alleged In the AOIP.

The Division's Motion for Summary Disposition makes material allegations including, but not limited to the following, that were not contained within the AOIP:

- i. That some or all of Respondent's actions alleged in the AOIP were egregious.
- ii. That Respondent's violation of securities laws was not isolated, but was recurrent, and, as a consequence, the Court is asked to enter summary disposition based on Respondent's allegedly violating "federal, state [and] self-regulatory [bodies]." These allegations far exceed the violations alleged in the AOIP. Furthermore, the Motion for Summary Disposition asks the court to summarily dispose of Respondent's defenses based on events that took place decades before any event referenced in the

AOIP.

iii. For the first time, the Division alleges that any promise by Respondent not to violate securities laws in the future would be insincere and would not be kept.

Such speculative allegations appear nowhere in the AOIP.

iv. Nothing in the AOIP references the Division's new allegation that this Court should enter summary disposition specifically because of an absence in the record of expressions of remorse or assurances by the Respondent that he will refrain from future securities violations.

(The allegation as to lack of remorse is directly contradicted by the Division's own evidence. See Transcript of Sentencing Hearing, pp. 18-19).

v. The AOIP contains no allegations remotely equivalent to the claim in the Motion for Summary Disposition that Respondent "has no concern for the law, the truth, or the impact of his actions on investors, customers, friends or business associates." Such a vituperative indictment, far beyond the matters framed by the AOIP, demand at a minimum that Respondent be permitted due process in responding, such that it is highly improper to raise such matters for the first time in a motion for summary disposition.

vi. The Division's claims that Respondent "accepts absolutely no responsibility for his actions, but instead blames the prosecutorial and regulatory agencies that have held him to account" are, once again, raised for the

first time in the Motion for Summary Disposition.

(Respondent notes that this irresponsible allegation is directly contradicted by the Division's own evidence in support of summary disposition.) (See Transcript of Sentencing Hearing, Id.).

- b. The Motion for Summary Disposition Asks for Relief Far Exceeding That Stated in the AOIP.

The Division's Motion for Summary Disposition seeks the following relief not stated or sought in the AOIP:

- i. There is no mention of a request for a lifetime associational ban in the AOIP.
- ii. There is no mention of a so-called "collateral ban" in the AOIP.
- iii. There is no mention or request for civil penalties in the AOIP.

10. Respondent acknowledges that as to all of the aforementioned factual allegations and prayers for relief, this Court may consider them, and Respondent's responses thereto, in the proper course of these proceedings. However, each of the allegations and prayers for relief should have been made in the AOIP. The Division's failure to include either the explosive factual allegations, or the broadest, most draconian requests for punishment in the AOIP, has limited the Respondent's ability to frame meaningful written responses (this Court has deemed certain of Respondent's letters as his Answer to the AOIP) and certainly foreclosed possible litigation strategies. To raise these matters for the first

time in a motion for summary disposition is plainly improper and violates both the letter and the spirit of the relevant procedural rules.

11. The rules governing the content of the order instituting these proceedings state, in relevant part:

(b) Content of Order. The order instituting proceedings shall:

(3) Contain a short and plain statement of the matters of fact and law to be considered and determined.

(4) State the nature of **any relief or action sought or taken.** (emphasis added).

12. The clear, mandatory requirements of this rule and its subparts comport with the fundamental principles of modern civil judicial proceedings. Like the Federal Rules of Civil Procedure, 17 C.F.R. §200, et seq., requires that a party seeking relief provide the respondent with clear notice as to what loss the respondent may suffer if the plaintiff persuades the tribunal of his or her right to relief. A plaintiff must also impart a clear understanding of what facts the plaintiff will argue entitle it to the relief sought. Respondent acknowledges that, until the filing of the Division's Motion for Summary Disposition, the Division had, in the AOIP, complied with these notice requirements.

13. With the filing of the Motion for Summary Disposition, the Division has crossed the line into unfair practice, arguably trying to "sandbag" Respondent, a pro se litigant. To grant summary disposition would violate Respondent's right to due process of law.

14. The Division's attorney has acknowledged the Division's

responsibility to "make available" certain documents designated by rule. In its letter to Respondent, dated eight days after the filing of the Motion for Summary Disposition, counsel attempted to shift responsibility for the obvious delay in "making available for inspection and copying" the investigative file, by noting that the "Division" "did not receive a request from [Respondent] to inspect or copy" the documents. (See Exhibit A). Not to put too fine of a point on it, but counsel surely has recognized that Respondent's status as a federal prisoner prevents him from "inspecting or copying" the Division's file. In this particular case, it is clearly the Division's responsibility to send copies of the documents to the Respondent at the facility where he is imprisoned; clearly, no other method of "inspection or copying" is available to Respondent at this time.

15. To add to the unusual nature of the Division's tactics, counsel for the Division has forwarded the documents to Respondent at Respondent's address inside a federal prison in a form that would require access to computer technology! (See Exhibit A: "[T]he enclosed CD contain[s]... portions of the investigative file in this matter. The password to access the files is [REDACTED] and is case sensitive. (emphasis added)).
16. It seems unlikely that a lawyer for the United States Securities and Exchange Commission would not realize that federal prisoners cannot receive compact discs, and do not have access to computers capable of reading compact discs or

employing case-sensitive passwords. In any event, the Federal Bureau of Prisons form attached to Exhibit A shows that the compact disc on which Mr. McGrath attempted to make the discovery materials available to Respondent was returned to counsel as unauthorized because it violated BOP mail regulations. As a result of Mr. McGrath's decision, Respondent has still not had access to the documents specified in 17 C.F.R. §201.230(a).

C. There Is No Present Risk to the Public

17. The Division asks the Court to summarily dispose of this case without complying with the requisite procedures that would permit summary disposition. Respondent asks the Court to take note of the Division's candid concession (in p. 13, footnote 14 of the Motion for Summary Disposition) that there is no present risk to the public because Respondent will be on court-supervised release for a period of three years following the completion of his sentence of incarceration.
18. The conditions of this supervised release prohibit Respondent from engaging in employment that involves securities or soliciting funds from investors. Even if this Court were to take no action, the public will not be exposed to any securities-related actions by Respondent for the remaining portion of his incarceration, plus at least another three years.

D. Conclusion

19. The Motion for Summary Disposition is premature, because the

Division has not meaningfully complied with 17 C.F.R. §201.230(a).

20. The Motion for Summary Disposition is improper because:

- a. The motion asks for relief far beyond the scope of the relief sought in the AOIP.
- b. The motion asks the Court to summarily dispose of the case based on new factual allegations not contained in the AOIP.

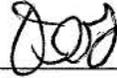
WHEREFORE, Respondent asks that this Court, for the reasons set forth hereinabove, enter an order as follows:

- A. Relieving the Respondent of the responsibility of filing a substantive response to the pending Motion for Summary Disposition until the Court resolves the procedural issues raised herein; and,
- B. Ordering the Division to send the Respondent by United States mail paper copies of all documents required by 17 C.F.R. §201.230(a); and,
- C. Once discovery is complete, affording the Division the choice of either:
 1. Further amending the AOIP to include all factual allegations and requests for relief contained within the Division's Motion for Summary Disposition; or
 2. Proceeding with the current AOIP, and limiting any request for summary disposition to only factual allegations made and relief requested within the current AOIP.
- D. Once discovery is complete, provide the Respondent a period of 90 days from completion of discovery to respond to any pending

motion for summary disposition.

E. Any further relief the Court finds just and proper.

Respectfully Submitted,



Daniel J. Gallagher





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

Kevin P. McGrath
(212) 336-0533

January 16, 2014

VIA US EXPRESS MAIL

Daniel J. Gallagher



Re: In the Matter of Daniel J. Gallagher
A.P. File No. 3-14630

Dear Mr. Gallagher:

We did not receive a request from you to inspect or copy the Division of Enforcement's investigative file in this matter, as is your right, either before this matter, including discovery, was stayed pending the outcome of your criminal case or after that stay was lifted.

Nevertheless, given your current incarceration, we are providing you with the enclosed CD containing the non-privileged portions of the investigative file in this matter. The password to access the files is [REDACTED] and it is case-sensitive.

Very truly yours,

A handwritten signature in black ink, appearing to read "Kevin P. McGrath".

Kevin P. McGrath
Senior Trial Counsel

TO: (Sender - See Return Address) KEVIN McGRATH Securities + Exchange Com. 200 VESEY ST., Suite 400 New York, NY 10284-1022		FROM: (Institution) FEDERAL CORRECTIONAL INSTITUTION [REDACTED]
INMATE'S NAME: GALLAGHER, DANIEL	REGISTER NUMBER: [REDACTED]	DATE: 1-21-14

Check all that apply:

Material Rejected and Returned	
Your correspondence has been examined and:	
<input type="checkbox"/>	You enclosed stamps or stamped items that cannot be given to the inmate.
<input type="checkbox"/>	You enclosed a negotiable instrument. Negotiable instruments are to be forwarded to the National Lockbox at the following address: Federal Bureau of Prisons - (INSERT INMATE NAME)- (INSERT INMATE REGISTER NUMBER) Post Office Box 474701 Des Moines, Iowa 50947-0001
<input type="checkbox"/>	You enclosed the following unauthorized material:
<input checked="" type="checkbox"/>	Stationary/Blank Greeting Cards
<input type="checkbox"/>	Plant Shavings
<input type="checkbox"/>	Sexually Explicit Personal Photos
<input checked="" type="checkbox"/>	Other (specify below)
<input type="checkbox"/>	The following material cannot be inspected without damage:
<input type="checkbox"/>	Electronic Musical Greeting Card
<input type="checkbox"/>	Padded Card
<input type="checkbox"/>	Double Faced Polaroid Photos
<input type="checkbox"/>	Other (specify below)
Your correspondence or letter has, however, been provided to the inmate with a copy of this notice.	

Package Refused and Returned	
The contents of your correspondence have NOT been examined, however it is being returned to you because:	
<input type="checkbox"/>	The inmate has failed to obtain an authorized BP-331, Authorization to Receive Package or Property.
<input type="checkbox"/>	The package has not been properly marked "Authorized by Bureau Policy" in accordance with Program Statement 5300.16, Mail Management Manual, or fails to reasonably indicate the package is authorized by Bureau policy.
<input type="checkbox"/>	The inmate recipient could not be identified due to missing, incorrect, or an illegible name and/or register number.

Specific Material Returned:

ONE COMPACT DISC.

S. WALKER

(Printed or Typed Name and Written Signature of Correctional Systems Officer)

January 30, 2014

Kevin P. McGrath
Securities & Exchange Commission
200 Vesey Street, Suite 400
New York, NY 10281-7022

Re: In The Matter of Daniel J. Gallagher
A.P. File No. 3-14630

Dear Mr. McGrath:

I received your letter dated January 16, 2014. However, there was no CD enclosed. I enclose for your file a copy of a Bureau of Prisons Form BP-A0328, addressed to you, indicating that the CD you sent with your letter has been returned to you. Unsurprisingly, BOP regulations do not permit inmates to receive any type of digital media, nor does any federal inmate have access to any device that would permit inspection of discovery materials in digital form.

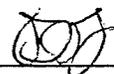
Given my current incarceration, I ask that you make all possible efforts to expedite delivery to me of hard (paper) copies of all documents due to me per 17 C.F.R. §201.230(a).

Be advised that I will ask the Court to delay consideration of the Division's pending Motion for Summary Disposition until discovery is complete. I believe this position finds support in 17 C.F.R. §201.250(a). Also be advised that I intend to seek discovery regarding the allegations of the Amended Order Instituting Proceedings, as well as the many new factual allegations set out in the summary disposition motion.

I trust we can both use best efforts to streamline this discovery process. Given my current incarceration, there are likely to be unavoidable delays not typically encountered in litigation. In order to facilitate communication, feel free to contact me by arranging a phone conference through my Correctional Counselor, Mr. Messer.

cc: The Hon. Carol Fox Foelak
Administrative Law Judge

Very Truly Yours,



Daniel J. Gallagher