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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION **HARD COPY**

Administrative Proceeding
File No. 3-14630

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In the Matter of :
:
DANIEL J. GALLAGHER , :
:
Respondent. :
:
-----X

**THE DIVISION OF ENFORCEMENT'S MEMORANDUM OF LAW IN
OPPOSITION TO RESPONDENT'S MOTION TO DISMISS THE DIVISION'S
MOTION FOR SUMMARY DISPOSITION**

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February 25, 2014

The Division of Enforcement (“Division”) respectfully submits this memorandum of law in opposition to Respondent Daniel Gallagher’s Motion to Dismiss the Division of Enforcement’s Motion for Summary Disposition.¹ Gallagher argues that the Division’s motion for summary disposition is premature because he has not received copies of the Division’s investigative files. Gallagher also argues that the remedy the Division seeks, namely an order permanently barring Gallagher from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized rating agency (“collateral bar”), and from participation in an offering of penny stock (“penny stock bar”) was not specified in the Amended Order Instituting Proceedings (“OIP”) and that the Division improperly relies upon facts not alleged in the OIP in support of that relief.

Gallagher asks this Court to direct the Division to send him, at the prison where he is incarcerated as a result of the criminal conviction that underlies this proceeding, paper copies of all documents in its investigative file; deny the Division’s request for collateral and penny stock bars because that relief, and the arguments in support thereof, was not expressly set forth in the OIP; and allow Gallagher ninety days from the completion of discovery to respond to any pending motion for summary disposition.

Gallagher’s motion should be denied in all respects. First, the relief the Division seeks is set forth in the OIP, which provides notice of the range of relief Gallagher may be subject to, including: “[R]emedial action [that] is appropriate in the public interest against Respondent

¹ The Division recognizes that the Court’s December 5, 2013 scheduling order concerning the motion for summary disposition, A.P. Release No. 1084, does not explicitly authorize the Division to file a reply memorandum in response to an opposition brief submitted by Gallagher. Instead of submitting an opposition brief, however, Gallagher has initiated a separate motion seeking various forms of relief from his obligation to file an opposition brief by February 21, 2014, as required by the scheduling order, and the Division respectfully submits this memorandum in opposition to Gallagher’s motion.

pursuant to Section 15(b) of the [Securities] Exchange Act [of 1934], including, but not limited to, disgorgement and prejudgment interest pursuant to Section 21B and 21C of the Exchange Act.” OIP, Section III, B. Collateral bars and penny stock bars are authorized by Section 15(b)(6)(A)(ii) of the Exchange Act and Gallagher fails to cite any legal authority that notice that the Division will seek remedial action pursuant to Section 15(b) of the Exchange Act is insufficient to obtain relief pursuant to Section 15(b)(6)(A)(ii) thereof. Nor has Gallagher demonstrated that he has been in any way prejudiced in his ability to answer the OIP or respond to the motion for summary disposition.

Second, while Gallagher complains that certain facts set forth in the Division’s motion for summary disposition (the “Division’s motion”) were not alleged in the OIP, these facts all relate to the appropriateness of the relief sought. Commission Rule of Practice Rule 200(b)(4) requires only that the OIP: “state the nature of any relief or action sought or taken.” It does not require that the OIP set forth all the facts or legal arguments the Division will advance, if a respondent has been adjudged liable, to support the remedy sought.

Finally, the Commission’s Rules of Practice do not require the Division to provide a respondent with a copy of its investigative file. Rule 230(a)² only requires the Division to make documents in the investigative file “available for inspection and copying.” Here, the Division went one step further and sent Gallagher a CD containing the entire non-privileged portions of its investigative file. The CD was returned by the prison. However, the fact that Gallagher is unable to inspect and copy the investigative file because he is incarcerated does not entitle him to rights not afforded other respondents. Moreover, the Division’s motion seeks collateral and

² All references to “Rule” are to the Commission’s Rules of Practice unless otherwise noted.

penny stock bars based solely on Gallagher's criminal conviction on several counts of securities and mail fraud and nothing in the underlying investigative file can rebut the uncontestable fact of Gallagher's qualifying convictions. Accordingly, Gallagher's inability to inspect the investigative file should not bar or delay the Division's motion for summary disposition.

A. The Motion for Summary Disposition Does Not Exceed the Scope of the Relief Set Forth, or the Facts Alleged, in the OIP.

The motion for summary disposition seeks collateral and penny stock bars, pursuant to Section 15(b)(6)(A)(ii) of the Exchange Act, based on Gallagher's conviction, on April 9, 2012, 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). Section 15(b)(6)(A)(ii) authorizes such relief where the respondent 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.³

Gallagher argues that the Division's motion seeking collateral and penny stock bars exceeds the scope of the OIP because the OIP does not specifically refer to a "lifetime associational ban" or "collateral ban" (sic), as part of the relief sought (Gallagher Br. at p. 5), and

³ The OIP also alleges, as a separate basis for relief, that Gallagher willfully violated Section 17(a) of the Securities Act of 1933 (Securities Act") [15 U.S.C. § 77q(a)(2)], and Section 10(b) of the Exchange Act, [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5], in connection with his solicitation of at least \$427,000 from investors based on false representations and his misappropriation of nearly all of those monies for his personal use (see, e.g., OIP at ¶¶ 5-15). The investigative file, compiled before Gallagher's conviction, relates to these allegations, as to which the Division does not seek summary disposition.

because the motion relies upon facts not alleged in the OIP in support of these remedial sanctions, id. at pp. 3-5. Both arguments are unfounded.⁴

Rule 200(b) of the Commission's Rules of Practice provides that:

The order instituting proceedings shall:

- (1) state the nature of the action;
- (2) state the legal authority and jurisdiction under which the hearing is to be held;
- (3) contain a short and plain statement of the matters of fact and law to be considered and determined, unless the order directs an answer pursuant to Rule 220 in which case the order shall set forth the factual and legal basis alleged therefore in such detail as will permit a specific response thereto; and
- (4) state the nature of any relief or action sought or taken.

The OIP sufficiently sets forth the nature of the relief that may be imposed. It puts Gallagher on notice that the Commission will consider: "What, if any, remedial action is appropriate in the public interest against Respondent pursuant to Section 15(b) of the Exchange Act, including, but not limited to, disgorgement and prejudgment interest pursuant to Section 21B and 21C of the Exchange Act." OIP, Section III, B. Collateral and penny stock bars are authorized by Section 15(b)(6)(A)(ii).⁵

Gallagher fails to cite any legal authority to support his argument that the OIP must explicitly set forth each possible remedial sanction provided for by Section 15(b). Gallagher also fails to demonstrate that he has been prejudiced in any way in his ability to answer the OIP or

⁴ Gallagher also argues that the OIP fails to specify civil penalties as a possible sanction. This argument is not only baseless but beside the point, given that the Division's motion does not seek civil penalties and indeed the Division obtained permission to amend the OIP in part to drop the request for civil penalties. See Division Br. at p.3, fn.2.

⁵ The OIP also provides notice that Gallagher may be subject to a cease-and-desist order, disgorgement and prejudgment interest. See, OIP, III. C. However, the Division's motion does not request such relief. See Division's Br. at p. 1, fn.1 and p. 7, fn.10.

respond to the Division's motion seeking collateral and penny stock bars. Thus, the Division's motion does not seek relief beyond that authorized by the OIP.

Gallagher also argues that the following allegations or arguments in the Division's motion are improper because they were not alleged in the OIP: (1) that Gallagher's actions were egregious; (2) that Gallagher's violations were not isolated but were recurrent and that the Court should enter summary disposition based on Gallagher's violating "federal, state [and] self-regulatory [bodies]"(sic); (3) that the Court should "summarily dispose of Respondent's defenses based on events that took place decades before any event referenced in the AOIP"; (4) that any promise by Gallagher not to violate the law in the future would be insincere and not be kept; (5) that the Court should enter summary disposition because of an absence in the record of expressions of remorse and assurances by Gallagher that he will refrain from future securities violations; (6) that Gallagher has no concern for the law, the truth or the impact of his conduct on investors, customers, friends or business associates; and (7) that Gallagher "accepts absolutely no responsibility for his actions, but instead blames the prosecutorial and regulatory agencies that have held him to account." Gallagher Br. at pp. 3-5.

While Gallagher is correct that these facts and arguments are not set forth in the OIP, there is no requirement that the OIP set forth facts or arguments that are directed only to relief sought in the OIP, as is the case here. As noted above, Rule 200(b)(4) requires only that the OIP: "state the nature of any relief or action sought or taken." It does not require that the OIP set forth all the facts or legal arguments the Division will advance, once a respondent has been adjudged liable, to support the remedy sought. See, e.g., Stephen J. Sogin et al., Initial Decision Release No. 276 (January 16, 1997), 1997 WL 55512, at *1, where the court rejected a motion to dismiss

the OIP because it failed to allege, in support of the remedies sought, that respondents were likely to commit future violations. The court stated:

... there is no need for the Division to allege a likelihood of future violations at this stage of the proceeding. While the likelihood of future violations is relevant to the imposition of sanction, it need not be alleged by the Division at this time.

Indeed, even as to the substantive violations alleged: “It has long been established that a respondent is not entitled to disclosure of the evidence on which the Commission intends to rely or the disclosure of the Division’s theory of the case. Charles M. Weber, 35 S.E.C. 79, 80-81 (1953); J. Logan & Co., 38 S.E.C. 827, 829-30 (1959); M.J. Reiter Co., 39 S.E.C. 484, 486 (1959).” OptionsExpress et al., A.P. Rulings Release No. 710 (July 11, 2012); 2012 WL 8704501.

Thus, the facts and arguments advanced by the Division in support of the imposition of collateral and penny stock bars were not required to also be set forth in the OIP.

B. Gallagher is Not Entitled to Receive Paper Copies of the Division’s Investigative File

Gallagher also argues that the Division’s motion is premature because he has not been provided with paper copies of the Division’s investigative file in this case. Gallagher’s argument is based on an erroneous understanding of Rules 230 and 250. Rule 250(a) provides that a motion for summary disposition may be made after a respondent’s answer has been filed and “documents *have been made available* to that respondent for inspection and copying pursuant to Rule 230 (*emphasis added*).” Rule 250 does not require the Division to actually provide the respondent with paper copies of its investigative file before filing a motion for summary disposition. It merely requires the Division to make its files available for inspection and copying. Similarly, Rule 230(a) does not require the Division to provide a respondent with paper copies of its investigative file. It only requires the Division to: “make available for inspection

and copying by any party documents obtained by the Division prior to the institution of proceedings, in connection with the investigation leading to the Division's recommendation to institute proceedings." Furthermore, Rule 230(f) explicitly provides that: "The Respondent shall be responsible for the costs of photocopying. Unless otherwise ordered, charges for copies made by the Division of Enforcement at the request of the respondent will be at a rate charged pursuant to the fee schedule at 17 CFR 200.80e for copies."⁶ Thus, contrary to Gallagher's claim, the Division is not required to physically deliver paper copies of the investigative file to a respondent and certainly is not required to pay for the costs of making paper copies of the investigative file and sending it to the respondent.

In this case, the Division went one step beyond making its files available for inspection and copying. Recognizing that Gallagher was unable to personally appear at the Division's office and review the investigative file, as a result of his incarceration and his pro se status, the Division downloaded the non-privileged portions of its investigative file onto a compact disc ("CD") and sent it to Gallagher. The CD was returned by prison officials. Gallagher's incarceration is entirely a result of his wrongdoing, however, and nothing in the Commission's rules requires the Division to rectify a situation created by the respondent by incurring the time and expense of creating paper copies of its investigative file and mailing them to Gallagher free of charge. Indeed, pursuant to Rule 230(f), if Gallagher wants paper copies of the Division's investigative file, he must bear the cost of that production and mailing.⁷

⁶ 17 CFR 200.80e currently provides for a copy rate of 24 cents per page.

⁷ Although hard to estimate, the investigative file is likely to contain at least 10,000 pages, and could well exceed four to five times that amount, resulting in copy costs ranging from at least \$2,500.00 to possibly in excess of \$10,000. Gallagher already owes the Commission over \$175,000 as a result of a prior enforcement action, see Division's Br. at pp.4-5, and fn. 8. Thus, if the Court allows Gallagher additional time to obtain paper

Finally, there is no basis to unduly delay Gallagher's obligation to respond to the motion for summary disposition. The motion is limited in scope. 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.⁸

No genuine issue of material fact exists regarding the appropriateness of the Division's requested relief. The Division's motion is based on incontrovertible facts, e.g., the public record relating to Gallagher's criminal conviction and the prior SEC civil proceeding against him in S.E.C. v. Christopher Castalso et al., 08-CIV-8397 (S.D.N.Y.)(JSR), including the sentencing judge's findings in the criminal case that Gallagher is "a menace to society," "[h]e's dangerous," "[h]e defrauded people. [h]e will do it again," see Division's Br. at p. 10, and Gallagher's prior association with a broker-dealer during the period of the conduct underlying the conviction. Nothing in the investigative file will contradict these facts. Indeed, all of the documents upon which the Division relies in support of the relief it seeks are attached to its motion. See, Exhibits

copies of the investigative file, he should be ordered to pay for the documents in advance, given his failure to comply with his existing financial obligations to the Commission.

⁸ 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 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).

A through H, attached to the January 9, 2014 Declaration of Kevin P. McGrath, and the Declaration of John Graubard dated January 8, 2014.⁹

Gallagher's motion presents the identical question addressed by this Court in Daniel Charboneau, A.P. File No. 3-11765, Initial Decision Release No. 276 (February 28, 2005). In that case, the Division filed a motion for summary disposition based on an injunction against violating the antifraud provisions of the securities laws that had been imposed against the respondent and sought a penny stock bar. Instead of responding to the motion, the respondent filed a request for a stay of the proceeding based on logistical constraints arising from his incarceration and the fact that he had not been given the Division's investigative file as ostensibly required by Rule 230. This Court rejected the respondent's argument, stating: "That rule, however, does not require the Division to deliver its investigative file to a respondent; it requires the Division to allow a respondent or his representative to inspect and copy its file." In rejecting the respondent's motion for a stay, this Court also cited arguments made by the Division, including arguments similar to those made herein, that the respondent conducted discovery in the underlying injunctive case and that the disposition of the proceeding was based on the respondent's injunction, not on material to be discovered from the Division's file. The Court not only denied the request for a stay but granted the Division's motion for summary disposition and imposed the relief requested. The Court should do the same here.

⁹ Moreover, Gallagher has already had access to the wide-ranging discovery mandated in the underlying related criminal case based on the same conduct alleged in this proceeding and had access to the discovery mandated in Securities and Exchange Commission v. Christopher Castaldo et al., 08-CIV-8397 (S.D.N.Y. Aug. 17, 2009) (JSR).

CONCLUSION

For the foregoing reasons, Gallagher's motion should be denied and he should be ordered to promptly respond to the motion for summary disposition.

Dated: New York, New York
February 25, 2014

DIVISION OF ENFORCEMENT

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