UNITED STATES OF AMERICA

Before the

SECURITIES AND EXCHANGE COMMISSION

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Administrative Proceedings
File No. 3-14676

In the Matter of Application

Motion To Appear
And Argue At Hearing

ERIC DAVID WANGER

Respondent.

Pursuant to Rule 154 of the Commission's Rule of Practice , 17 C.F.R. , §201.154, Respondent Eric Wanger ("Wanger"), by and through his counsel, hereby respectfully requests that the Commission hold a hearing open to the public on Wanger's application to re-enter the securities industry and that counsel be permitted to make argument at that hearing. Whether or not a person should be permanently barred from the securities industry – especially in a *de minimis* case like this one where the total injury was $2,269, or $1.67 per month per client, over the course of 33 months – should not be decided by *ex parte* communications between the SEC Enforcement staff and the Commission alone.

Given the draconian nature of such a sanction – which the courts have deemed the equivalent of capital punishment and which has already impacted adversely virtually every aspect of Mr. Wanger's professional and personal life, even well beyond the securities industry – the Commission must explain why imposing the most severe, and therefore apparently punitive sanction is, in fact, remedial, particularly in light of the mitigating factors brought to its attention. To present those mitigating factors and to assist the Commission in properly evaluating them, counsel for Mr. Wanger should be allowed to bring all such mitigating evidence to the attention of the Commission free of the staff's biased interpretations and not be required to stand as a spectator in the gallery of the court – or worse, be foreclosed from even attending that court – while the prosecutors argue and decide his fate. Rather, Respondent Wanger must be permitted to stand in the well of the court side by side with his accusers and be given an equal chance to secure employment in the industry of his choice and to clear his name.

The constitutional mandate for due process protection only works and works best only in an open forum between advocates who articulate their respective views on the need for a sanction before an impartial adjudicator.

Dated: May 25, 2017

Respectfully Submitted.

Thomas V. Sjoblom
Counsel for Respondent Wanger
International Square
Suite 500
1875 I Street, N.W.
Washington D.C. 20006
(202) 429-7125

CERTIFICATE OF SERVICE

The undersigned certifies that on May 25, 2017, he caused a copy of Respondent's Motion To Appear and Argue Before Commission and the accompanying Memorandum of Points and Authorities to be sent by electronic mail, by facsimile (703) 813-9793, and by Federal Express overnight for delivery on:

Brent Fields, Secretary
Securities & Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

THOMAS V. SJOBLOM
Counsel to Respondent
Eric David Wanger

International Square
Suite 500
1875 I Street, N.W.
Washington D.C. 20006
Office: (202) 429-7125

UNITED STATES OF AMERICA

Before the

SECURITIES AND EXCHANGE COMMISSION

Administrative Proceedings
File No. 3-14676

In the Matter of Application

ERIC DAVID WANGER

Respondent.

MEMORANDUM OF POINTS AND AUTHORITES
IN SUPPORT OF
MOTION TO APPEAR AND PRESENT ARGUMENT

In support of his motion for counsel to appear and argue before the Commission at the time it considers his application to re-enter the securities industry, Respondent Wanger relies on the following points and authorities.

Point I

Procedural due process embodies the need for fair and open proceedings before administrative agencies. The courts have long acknowledged this requirement:

> There is a general policy favoring disclosure of administrative agency proceedings. See FCC v. Schreiber, supra, 381 U.S. at 293, 85 S.Ct. 1459. Further, when performing quasi-judicial functions, agencies 'must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play.' Morgan v. United States, 304 U.S. 1, 22, 58 S.Ct. 773, 778, 82 L.Ed. 1129 (1938). That 'an 'open or public hearing [is] a fundamental principle of fair play inherent in our judicial process cannot be seriously challenged.' Fitzgerald v. Hampton, note 6, 152

> U.S.App.D.C. at 10, 467 F.2d at 764. The exclusion of members of the public in derogation of these general principles only occurs in essentially three situations: (1) for the protection of a class of spectators, such as the young, to safeguard their morals; (2) to protect the confidentiality of information or its source; and (3) for the benefit of a witness or party.

Pechter v. Lyons, 441 F. Supp. 115, 118 (S.D.N.Y. 1977), citing United States ex rel. Lloyd v. Vincent, 520 F.2d 1272, 1274 (2d Cir.), *cert. denied,* 423 U.S. 937, 96 S.Ct. 296, 46 L.Ed.2d 269 (1975).

For the Commission's proceedings to be respected and free of criticism, it needs to function whenever possible out in the open. The Respondent's application to re-enter the securities industry is such a proceeding. Due process and fairness require no less.

Point II

The Administrative Procedure Act ("APA") recognizes the right of a respondent to participate in agency deliberation concerning sanctions. Decisions of this magnitude – bearing as they do on a person's livelihood – should be held in an open meeting with participation by the Respondent and not occur behind closed doors and decided solely upon *ex parte* communications between the enforcement staff and the Commission.

Subsection (a) of section 556 of the APA, 5 USC §556, provides that the provisions of 556 shall apply when section 554, which governs agency adjudications, applies. The APA defines an "adjudication" as "agency process for the formulation of an *order.*" 5 U.S.C. § 551(7)(emphasis added). An "order" includes all dispositions of an agency, whether affirmative, negative, or declaratory in form in a matter other than rulemaking but including licensing. 5 U.S.C. § 551(6).

Subsection (d) of Section 556 of the APA states the conditions under which an order issuing sanctions can be imposed.

> (d) Except as otherwise provided by statute, the **proponent of** a rule or **order has the burden of proof.** Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A **sanction** may not be imposed or rule or order issued **except on consideration of the whole record** or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. .... **A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.**

5 USC §556(d). Accordingly, the APA recognizes that a person like Respondent Wanger should be permitted to participate in the Commission's deliberations, require that the Commission consider the full record that has been developed before the staff, present evidence, and make rebuttal argument. Fairness and impartiality require no less.

1. Impropriety of Staff Ex Parte Communications

Of great concern to Respondent is the Commission's practice of only allowing the staff to address the Commission when deciding sanctions. Under the APA, an "*ex parte* communication" is defined as "an oral or written communication not on the public record with respect to which reasonable prior notice is not given." 5 U.S.C. § 551(14). Section 557(d) of the APA, which forbids *ex parte* communications by persons <u>outside the agency</u> to members of the body comprising the agency, does not apply to *ex parte* communications between the staff and the Commission. [1] However, the spirit of the APA and the purpose of the ban on *ex parte* communications prohibition ensure that agency decisions are not influenced by private, off-the-record communications from those personally interested in the outcome. In other law enforcement proceedings, government attorneys – for example, those brought by the United States Attorneys Offices - are forbidden from having *ex parte* communications with the trial judge or with an appellate panel. No court would cotton *ex parte* communications between it and a prosecutor to decide the sentence of a criminal defendant or the judgment of a civil defendant. The rule banning *ex parte* communications ensures that the proceedings are conducted in an open and fair manner with all parties present and that all parties have the same information as the ultimate decision maker. Each party has an equal voice in the proceedings, and if either party disagrees with the final ruling, they can appeal to a higher authority, or in this case, to the United States Court of Appeals.

The instant proceeding does not involve a decision to charge someone or institute an initial enforcement proceedings, which are traditionally non-public proceedings, where the staff may need to discuss behind closed doors the evidence gathered in its investigation pointing to possible violations of the federal securities laws. In that context, the staff and the Commission need to discuss the quality of that evidence and the implications of such conduct on the Commission's various policies and enforcement programs, without worry of the risk of reputational injury

[1] The Commissions' Rules of Practice are silent on the matter at issue here. See 17 C.F.R. § 201.120, which governs ex parte communications between persons presiding over evidentiary hearings and others regarding fact issues.

to a potential respondent, were the public and press otherwise allowed to be present.

Those same policy considerations are not present here. The need to protect against risk to reputation of Respondent Wanger has past. It has occurred. Likewise, the need to consider the policy implications of novel legal theories and interpretations and their application to new or uncharted areas of the industry are not present. Therefore, ex *parte* communications between the staff and the Commission should not be allowed when considering Respondent's re-application into the securities industry, especially under the "public interest" standard.

2. The "Public Interest" Standard

What constitutes the "public interest" by its very nature demands that both the Respondent and the public be permitted to participate in and evaluate such determinations. Since the "public interest" standard easily lends itself to <u>subjective</u> determinations and opinions, respondents who are the target of such subjective determinations have a right to participate. The "public interest" standard should not be defined either in the first instance or in the final analysis by the very people who brought the law enforcement proceedings in the first place. The risk of bias is too great. Self-justification can pervade such a proceeding.

Just as the enforcement staff needs to justify its own enforcement proceedings, so too the Respondent's views should be given equal time and weight as to why a given sanction should now be terminated.

Further, there must be some <u>objective</u> criteria by which "in the public interest" is measured in the context of a bar order with right to reapply after one year when the enforcement staff insists that it must remain in full force and permanent. The Commission cannot offer with one hand a sanction and words of relief after the passage of one year in order to obtain settlement, but then on the other hand withdraw the one-year "carrot" and insist on the "stick" of the sanction in perpetuity. [2]

3. Need for Continued Sanction

These considerations are particularly pronounced is this proceeding where the Commission's hearing will decide the continuation of a sanction. When a sanction, like this one, has become so obviously punitive, the Commission carries the burden of explaining and articulating why it must continue and why it is not punishment. [3] That is no place for *ex parte* communications between the staff and the Commission alone.

The Commission is considering the need for continuation of a sanction that has outlasted its remedial purpose. The hue and cry of the enforcement staff that Mr. Wanger's case demands continued and permanent "regulatory prophylaxis" is quixotic, vacuous and illogical. Respondents in similar cases have received the much lesser sanction of a suspension of only one (1) year, after which they

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[2] Respondent's March 20, 2017 letter, page 9, cites to an email from his then counsel who advised that the CRO staff has "given every indication that as long as you do not violate the bar, or otherwise become statutorily disqualified, your re-entry application would be accepted" after one (1) year. *See Exhibit A, page 9.*

[3] This case has generated enough interest that *The New York Times* published a lengthy article in its Sunday Business section on May 7, 2017. That article can be found at: In S.E.C.'s Streamlined Court, Penalty Exerts a Lasting Grip -... www.nytimes.com/2017/05/04/business/sec-internal-cou...

automatically re-entered the securities industry.[4] Moreover, the staff simply cannot, as required by section 556(d) of the APA, carry its burden of proving the likelihood of future misconduct. There can be no such proof, because there is none, and such proof must be based on something other than the argument or inference that past misconduct alone suggests repetition in the future. [5] It does not and cannot.

Therefore, how the Commission decides its sanctions and the terms under which and the extent to which the Commission will continue various sanctions – on the so-called grounds of "remedial" and "prophylaxis" purposes – are precisely the kinds of things a respondent, who will be affected by those decisions, should have a participatory role in discussing and about which the public should be entitled to witness first hand.

Point III

The United States Court of Appeals for the District of Columbia Circuit requires the Commission to consider mitigating factors when imposing sanctions. So that such mitigating factors are presented and appropriately considered by the Commission from the Respondent's perspective, unfiltered by the staff's view of them, Respondent's counsel should be permitted to present them.

The United States Court of Appeals for the District of Columbia Circuit has recognized that a lifetime bar is "the equivalent of capital punishment." Saad v. SEC,

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[4] *See* Application Under Section 203(f) of the Investment Advisers Act and Rule 193 for Consent to Associate with an Investment Adviser of Broker-Dealer, dated April 16, 2016, ¶ 3 and cases cited therein, attached as Exhibit B.

[5] *See* Supplemental Affidavit of Eric D. Wanger, ¶ 10-12, attached as Exhibit C.

718 F.3d 904, 905 (D.C. Cir. 2013). Given the draconian nature of such a sanction – which has already impacted adversely virtually every aspect of Mr. Wanger's professional and personal life, well beyond the securities industry – the Commission must "explain why imposing the most severe, and therefore apparently punitive sanction is, in fact, remedial, particularly in light of the mitigating factors brought to its attention." Id. In his initial affidavit dated April 11, 2016 and his supplemental affidavit dated May 20, 2016, both of which were submitted to the Enforcement staff with his application to re-enter the securities industry, Mr. Wanger has recounted his efforts to gain employment in the securities industry, his ejection from the CFA Institute, his rejection from various teaching positions, closure of bank and credit card accounts, and even his inability to obtain computer software consulting positions.

The Commission's sanction orders should not have such omnipotent and ubiquitous reach. Even within the securities industry itself, the United States Court of Appeals for the District of Columbia Circuit now requires the Commission to justify collateral bar orders. See e.g., *Bartko v. SEC,* 845 F.3d 1217 (D.C .Cir. 2017)(holding that the Commission cannot bar an individual from a category of industry participation with which he has no nexus). If that is true within the securities industry itself, more should be required to continue a sanction that cuts a broad swathe across virtually every aspect of Mr. Wanger's professional, personal and private life.

That the Commission's bar order – even with right to reapply after one year – has been punitive, there can be no doubt. That there is no longer any further remedial need for it is also beyond doubt. If the staff believes that "public interest" standard justifies further continuation of this bar order, Respondent's counsel should be permitted to rebut those arguments before the Commission at the same time that the staff presents them.

Dated: May 25, 2017

Respectfully Submitted,

Thomas V. Sjoblom
Counsel for Respondent Wanger
International Square
Suite 500
1875 I Street, N.W.
Washington D.C. 20006
(202) 429-7125

THOMAS V. SJOBLOM
Attorney At Law

International Square
Suite 500
1875 I Street, N.W.
Washington D.C. 20006
(202) 429-7125
Email: tvsjoblom@tvs-law.com
www.tvs-law.com

March 20, 2017

VIA PRIORITY MAIL
Kenneth Hall,
Office of Chief Counsel
Division of Enforcement
United States Securities & Exchange Commission
101 F. Street, N.E.
Washington, D.C. 20-549 - Senior Counsel

RE: Applications of Eric David Wanger for Consent to Associate; Request for Right to Participate in Commission Meeting

Dear Mr. Hall:

I have received your letter dated February 22, 2017 in which you state that the Chief Counsel's Office of the Division of Enforcement intends to recommend to the Commission that Mr. Wanger's request to associate with any registered or unregistered broker-dealer, investment adviser, or any other entity that participates in the securities industry, or to establish an entity that provides one or more of those services, should be denied as not "consistent with the public interest."

As you correctly point out, Mr. Wanger's current application for consent to re-associate was grounded on two separate provisions of the federal securities laws: Rule 193, which applies to registered entities, and Section 203(f) of the Investment adviser Act of 1940, which governs the request for consent to associate with an investment adviser (including one that is not registered). Without citation to any authority, you state in your letter (footnote 2) that the Commission "historically" considers the factors under Rule 193 in resolving the application of Section 203(f). As pointed out below, while that statement may have some facial appeal, it ignores the differences the two provisions are intended to address.

The staff has failed to articulate the criteria under which it makes the ultimate subjective determination that a particular case is or is not in **the "public interest."** In doing so the staff neglects to address both the underlying actual factual and legal bases for such "finding," resorting instead to the staff's allegations in the OIP and Order Imposing Remedial Sanctions ("Bar Order " or "Sanctions Order"). Staff allegations do not undergo a metamorphosis and become "findings" when there has been no factual presentation and due process hearing to support them. Particularly is that true and compelling in this case where the staff investigation by-passed the real underlying conduct (corporate waste and mismanagement and insider trading). Instead, the staff charged Mr. Wanger with an alleged fraud involving an investment management company, Wanger Investment Management ("WIM"), which the staff claimed earned management fees of **$2,269** over the course of 33 months. That equates to **$69 per month** for those 33 months. Worse, since respondent Wanger Long Term Opportunity Fund ("WLTOF") had 41 clients at that time, that translates into a total loss of $55 per client over those 33 months, which is **$1. 67 per month per client**. The Commission simply cannot justify a lifetime bar as being "in the public interest" on such grounds.

In addition, after the District of Columbia Circuit's recent January 2017 decision in *Gregory Bartko v. SEC*, 845 F.3d 1217 (D.C. Cir. 2017), in which the court of appeals criticized the Commission reading of the *Koch* decision and declared unlawful any collateral bar orders that fail to narrowly address the industry category at issue and are retroactive (*i.e.*, seek to apply to conduct predating the Dodd –Frank Act), the current Bar Order has no legal basis and must be vacated to the extent it seeks to go beyond solely applying to investment advisory activity.

Even as to a narrowly constructed bar order that survives *Bartko*, Mr. Wanger respectfully disagrees with the staff's recommendation. Mr. Wanger requests that the staff attach this letter to any memorandum the staff sends to the Commission in connection with its recommendation to deny his application. In addition, in order to ensure that Mr. Wanger receives the due process hearing to which he is entitled before the decision maker, undersigned counsel respectfully requests that undersigned counsel and Mr. Wanger be permitted to attend and appear before the Commission to make oral argument at any Commission meeting at the time of its consideration of whether the "public interest" mandates a continued bar as to the investment advisory business. As outlined below, Mr. Wanger's recent application to re-associate cries out for impartiality (free from prosecutorial influences – especially subjective ones – that have driven and dictated his life to this point), as well as fairness, justice and an end to oppressive, arbitrary and capricious governmental actions. For the last seven (7) years, procedure, not substance, has been the prosecutorial tool of choice, used both initially to investigate and deprive Mr. Wanger's his chosen profession, and now to block Mr. Wanger's from re-entering the industry. It must end.

Finally, just as you have imposed time constraints and deadlines on Mr, Wanger, he insists that you also abide by deadlines, since his statutory rights are at stake. Seven (7) years have gone by since the investigation in this matter started and five (5) years since the Bar Order. Inasmuch as Mr. Wanger has now twice sought a final order from the Commission as to the status of his right to re-associate, [1] Mr.Wanger emphatically requests that this matter be concluded, one way or the other, no later than **May 12, 2017.** Commission delays and procedures cannot be used to deny Mr. Wanger his other statutory rights that must be asserted in a timely manner.

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[1] Mr. Wanger's first application in October 214 was rejected on procedural grounds, apparently because the staff believed it was not properly submitted under Rule 193, 17

I. FACTUAL BACKGROUND

In the staff's "public interest" determination, it has completely failed to look at the underlying facts that led to this misuse of the administrative process. Let me take this opportunity to summarize the historical facts that led to the Commission's Bar Order.

A. The Tender Offer for and Shareholder Activism of Altigen

During the spring and summer of 2006, Ten Pine Advisors ("Ten Pines") engaged in a number of tender offer attempts for Altigen [2] because of its undervalued shares, poor cash management, and board members too entrenched in and close to operations. Ten Pines made all the requisite filings with the Commission on Form 13D and 13D/A, including disclosure of its letter of intent ("LOI") to Altigen. Mr. Wanger also made filings on Form 13G during this period that he had increased his holdings to 5.15 %. In an effort to keep Altigen shareholders from knowing about and voting on the tender offer and LOI, the Altigen board of directors repeatedly disavowed any knowledge of them. Due to lack of response, Ten Pines issued a press release raising the bid price from $28 million to $30.5 million. Ten Pines even wrote a letter to Altigen, stating that it was profoundly disappointed in Altigen's board's failure to acknowledge receipt of and address the tender offer and the LOI, failure to inform its shareholders, and failure to enhance shareholder value. Ten Pines also talked directly to a partner at the law firm of Wilson Sonsini, who advised Altigen, about the tender offer and Altigen's failure to respond.

Frustrated over Altigen's inaction, Mr. Wanger became a member of the Altigen board in early 2007 and became chairman of the audit committee. He pushed for strategic alternatives and alliances because the Altigen board was sitting on $10 million in cash with no R&D or M&A plans,[3] because the cost to remain a public company at the rate $900,00 per year was too high,[4] and because board members were too entrenched. The market cap at times was so low it matched the cash on the balance sheet, *i.e.,* $10 million.

During 2008, with no manipulative purpose in mind, Mr. Wanger started to acquire additional shares of Altigen through the Wanger Long Term Opportunity Fund ("WLTOPF"). With each acquisition of shares, he timely filed the requisite 13D and 13D/A forms with the Commission. He retained Ungaretti & Harris, a well-known law firm in Chicago, Illinois, to advise on the securities purchases, and Ungaretti & Harris consulted with Wilson Sonsini, Altigen's outside counsel, to bring all SEC filings

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[2] Altigen was a Silicon Valley company that designs, manufactures and markets phone systems and call center products for use on the internet and public telephone networks.

[3] Altigen had conducted a secondary public offering to raise $10 million.

[4] Altigen was ultimately delisted from NASDAQ over its illiquidity, something Mr. Wanger had been pressing for at the board level. *See* Wanger Declaration, note 2.

current. The SEC staff's later 2010 investigation did a "look back" to this time period to identify a handful of trades in Altigen that the staff claimed marked the close, though a later experts found there was no manipulative purpose.

The Altigen board refused to uphold their fiduciary duties. Mr. Wanger reached out to other shareholders. Altigen responded to this shareholder activism with a buyback plan to further entrench management and to protect their own financial interests in disregard of the public shareholders. As stated below, Mr. Wanger has reason to believe that the insiders were also trading on the shares to line their own pockets.

In January 2009, Mr. Wanger asked his counsel at Ungaretti & Harris to notify Wilson Sonsini that he had decided to file a Schedule 13D/A, changing his plans for Altigen to step up his shareholder activism to include discussing a strategic plan with Altigen board, to initiate strategic plans with other shareholders, and to consider a possible going private transaction.

In January 2009, Ungaretti & Harris then sent a prophetic email to Mr.Wanger:

> "[A] re you at all concerned that Gilbert, as CEO [of Altigen], would ask Wilson Sonsini to go after you, without even discussing the matter with Alan and Jerry? He appears to have authority, all on his own, to ask WS [Wilson Sonsini] to, say, put together an injunction suit, **call a friend at the SEC and ask them to take a "hard look" at you**, or anything else in their **bag of tricks**. I think that WS would jump at the chance and ask questions later. Chester and Mike [two other Altigen board members] might rubber stamp the action as well."

Wilson Sonsini did just that. In retaliation for Mr. Wanger's efforts at a strategic plan for the company, on January 8, 2009 Altigen filed a Form 8-K, claiming that Mr.Wanger had failed to file Forms 3, 4 and 5 and that the Altigen board had decided not to re-nominate Mr.Wanger to the board. However, Wilson Sonsini did draft a press release that no negative inference should be drawn from the filing of the Form 8-K, in particular that no negative inference should be drawn that Mr. Wanger was anything less than a man of utmost honor and integrity. The draft press release stated that any failure to file timely Forms 3, 4 and 5 was merely inadvertent. In any event, the same disclosure had already been made by the joint filings (on behalf of Mr.Wanger individually and the WLTOPF) on Forms 13D and 13D/A. Accordingly, there had been adequate disclosure in the marketplace about the stock purchases.

Mr. Wanger resigned from the board of Altigen directors because, among other reasons, (1) the Chairman of the company, Gilbert Hu, had been selling hundreds of thousands of shares, (2) the enterprise value of the company was effectively zero, (3) there was an intransigent and entrenched board, (4) there were fundamental differences of opinion about strategy and corporate governance, and (5) Mr. Wanger felt he could no longer represent the interest of shareholders.

By letter dated May 15, 2009 on behalf of the Altigen shareholders, Mr.Wanger discussed the "gross and repeated failure" of Altigen board members to discharge their fiduciary duties, lack of independence in the composition of the board, and ineffective oversight of Altigen's entrenched Chairman and CEO, Gilbert Hu. Mr. Wanger also criticized the board for adopting a "poison pill" shareholder rights plan that effectively restricted the company's ability to pursue value-creating strategic alternatives, to change board composition and used a staggered plan, and to change executive compensation plans, all designed to further entrench management. One week later, the company called a special meeting of Altigen shareholders at which time the company would take up a proposal to increase executive incentive and compensation plans. Mr. Wanger planned to recommend to shareholders that they vote "no," and Mr. Wanger planned to call for the resignation of Mr. Hu as Chairman.

The SEC investigation quickly unfolded thereafter. Ungaretti & Harris's prophetic email came true.

B. The SEC Investigation

The SEC staff commenced its investigation in February 2010 and pursued it for almost two years.

After its own internal review and investigation, Ungaretti & Harris sent a letter to Mr.Wanger stating that any deficiencies in Section 16 (Forms 3, 4 and 5) and Section 13(d) (Form 13D) filings were "merely inadvertent and clearly not evidence of misconduct." Ungaretti & Harris also concluded that there was **no evidence** that any of the transactions were timed to take advantage of the receipt of material nonpublic information (*e.g.*, following a board meeting or prior to an earnings announcement) or to **manipulate the stock price.** The letter pointed out that Altigen's own outside counsel, Wilson Sonsini, had conducted its own independent review of the compliance issues and agreed with these conclusions. Wilson Sensing reached these conclusions even though Mr. Wanger was then engaged in an ongoing dispute with Altigen management over the company's direction, "when it would doubtless have preferred to highlight any real or perceived illegality, however slight." *See* Wanger Declaration, note 3.

In June 2011, the SEC made its Wells Call, and in July 2011, Mr. Wanger's counsel sent his Wells Submission. Three (3) months later, in October 2011, the SEC issued more subpoenas on Mr. Wanger, seeking contact information of all investors in the WLTOPF. Mr. Wanger's counsel objected. He stated – and correctly so – that this tactic was an attempt to circumvent the discovery rules and constraints of the administrative process.

The staff then failed to commence any proceedings within 180 days after the Wells Notice. [5] Instead, in November 2011, it sought an extension from the Director of

[5] Section 4E of the 1934 Exchange Act, (Section 929U of Dodd-Frank), entitled " DEADLINE FOR COMPLETING ENFORCEMENT INVESTIGATIONS AND COMPLIANCE EXAMINATIONS AND INSPECTIONS," provides as follows".

the Division of Enforcement. Undaunted, and ignoring the real issues and debate over underlying gross mismanagement of – and possible insider trading by – Altigen management, the staff sought Commission authorization to commence an administrative proceedings against Mr. Wanger and his investment advisory firm, WIM. The Commission issued it Order Instituting Administrative Proceedings on December 23, 2011, two days before Christmas.

C. The Administrative Proceedings

The Order Instituting Proceedings ("OIP") charged fraud under three theories: (1) marking the close of Altigen stock, (2) the transfer of stocks from the Long Term Opportunity Fund's brokerage account to the investment adviser, WIM, to pay operating expenses and payroll, notwithstanding that the outside accountants structured the transactions that created and reclassified the general partner debt and outside counsel opined that it need not be disclosed, and (3) relying on Altigen's 8-K filing , the staff 's added its post Wells Submission allegation that Mr. Wanger failed to file timely file Forms 4, even though both Ungaretti & Harris and Wilson Sonsini had independently concluded that such failure was a mere inadvertence, and disclosures of the trades had already been made in timely filed Schedules 13D and 13D/A. Remarkably, although the OIP alleged that by failing to file Form 4, Mr. Wanger acted at least negligently, the OIP is devoid of any allegation of state of mind (*e.g.*, intent to deceive or recklessness) for the alleged marking the close transactions, which has been the primary focus throughout the current reapplication process.

The staff hand-picked the trades on which it chose to base its allegations of marking the close. From among hundreds of stock trades, the staff selected only fifteen (15) trades – and only 10 of them for Altigen – over the course of 33 months that the staff believed marked the close. Since Altigen stock was thinly traded, any trade at any time of the day might have the effect of raising the price by mere pennies. Thus, without alleging the <u>size</u> of the trades, the staff asserted that at its high point, a trade in January

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(a) ENFORCEMENT INVESTIGATIONS

> (1) IN GENERAL.— Not later than 180 days after the date on which Commission staff provides a written Wells notification to any person, the Commission staff shall either file an action against such person or provide notice to the Director of the Division of Enforcement of its intent to not file an action.
>
> (2) EXCEPTIONS FOR CERTAIN COMPLEX ACTIONS.— Notwithstanding paragraph (1), if the Director of the Division of Enforcement of the Commission or the Director's designee determines that a particular enforcement investigation is **sufficiently complex** such that a determination regarding the filing of an action against a person cannot be completed within the deadline specified in paragraph (1), the Director of the Division of Enforcement of the Commission or the Director's designee may, after providing notice to the Chairman of the Commission, extend such deadline as needed for one additional 180-day period.

2008 in Altigen by Mr. Wanger (on behalf of the Fund) moved the price by **3 cents**, from $.160 to $1.63, or **1 cent**, from $1.37 to $1.38; when Altigen was dropping in price, a trade moved its price by **6 cents** (from 93 cents to 99 cents), or by only **1 cent** (rom 68 cents to 69 cents); ; and, after Altigen announced its plans to de-list from NASDAQ, a trade moved price **4 cents** (from 72 cents to 76 cents). The staff's allegations in the OIP, however – using over blown and sensationalized math – assert that these trades on behalf the Fund not only "improperly inflated the Fund's monthly reported performance by amounts ranging from approximately.3.60 % **to 5,908.71%,"** but also "artificially increased the Fund's NAV by amounts ranging from approximately.24 % to 2./56%." Doubtless, unsure of the strength of its case, the staff failed to allege in the OIP any fraudulent state of mind, whether in the form of *scienter* or even negligence.

Shocked by the gross over exaggeration of the allegations, Mr. Wanger requested the assistance of his former law school professor, Professor Joe Grundfest at Stanford Law School, who was also trained as an economist and who was a former SEC Commissioner, to analyze the data. Professor Grundfest quite logically wrote that neither the Order Instituting Proceedings nor the Division's expert had undertaken any effort to **<u>quantify</u>** what affect the alleged stock trades had on earnings. Despite the sensationalized percentages (*i.e.*, 5,908.71 %), Professor Grundfest explained that the OIP failed to allege that Mr.Wanger and WIM, the investment advisory company, in fact earned any <u>material</u> additional compensation from such activities. Professor Grundfest pointed out that, even taking as true the staff's assertions that the so-called "illegal" stock trades resulted in increased management fees of $2,269 (i.e., **$69 per month over 33 months**), there was <u>no basis in the record or otherwise</u> to support the conclusion that "amounts of this magnitude would be considered material by any investors," or that they would be material to Mr.Wanger, or even that such amounts "would serve as a sufficient incentive to engage in the activity" in the first place. Professor Grundfest also engaged in a far more careful economic analysis than the CRO staff to demonstrate that using ***actual*** **portfolio positions** (rather than selecting maximum historical portfolio positions, as was done by the CRO staff) the ***maximum portfolio inflation*** over all fifteen (15) stock trades could be no more than **00.85 percent**, that is, no more than eighty-five one-hundreds of one percent. *See* Wanger Declaration ¶ 2(b).

It is no answer to all of this to say that a respondent cannot articulate the facts underlying the case when seeking relief and claim, as you have in footnote 6 of your letter, that he is prohibited and foreclosed by another one of the Commission's **"preliminary notes"** from doing so. Preliminary staff notes are not law, and preliminary staff notes should not be allowed to dictate the end results of a person's professional life and chosen livelihood, especially when the enforcement proceeding was constructed on the basis of a carefully selected and scant record (15 trades from among hundreds) and relying on an alleged benefit of **$69** per month for a grand total alleged fraud of **$2,269**. That simply pushes the "Broken Windows" enforcement philosophy too far. That approach also is simply too harsh a consequence on life and liberty, particularly when the determination of what constitutes the "public interest" is so highly subjective. The public interest should have been exercised to save the shareholder value of Altigen and to have prevented Altigen management from stripping it of its cash, rather than presumably acting on Wilson Sonsini's "bag of tricks" of reporting Mr. Wanger to the SEC staff to get rid of his nagging efforts to protect shareholders.

Respondent's then counsel filed a hard-hitting motion to dismiss summarized in the frontispiece:

> "The OIP is full of exaggerations and misrepresentations that, strung together, still fail to state prima facie causes of action. Worse, the Division of Enforcement (Division) omits material facts from the OIP that demonstrate no such actions exist. The Division alleges that Respondents: (1) marked the close to increase management fees; (2) entered into undisclosed transactions; and (3) filed forms late. The Division purposely pleads in terms of percentages to obscure the fact that the total alleged increase in management fees is $2,269.81over 33 months. It ignores that Wanger did not profit; ignores the partnership agreement and Delaware law authorizing the alleged improper transactions; and ignores that Respondents self-reported and corrected all form filings. Finally, the Division failed to institute this action within 180 days of the Wells Notice as required by the Dodd-Frank Act. Accordingly, the OIP should be dismissed in its entirety."

The administrative law judge ("ALJ") was unimpressed. At a prehearing conference, the ALJ denied all aspects of the motion to dismiss except the alleged violation of Section 4E of the Exchange Act (929U of Dodd-Frank) for failure to commence the administrative proceedings within 180 days after the Wells Notice. The staff of the Enforcement Division, however, contended that Respondent Wanger motion should be denied because: (1) the Division staff of the Chicago Regional Office requested an extension from the Division Director on November 2, 2011, and the Division Director, who could seek an extension if he determined the case was <u>sufficiently complex</u>, granted an extension to December 30, 2011, after notifying the Chairman of the Commission; and (2) Exchange Act Section 4E is not a statute of limitations for Commission actions, but only a mere guideline. Based on the staff's assertions, the ALJ denied the remaining aspect of Respondent's motion that the staff's case was untimely.

The case did not go to trial. For some unknown and inexplicable reason, Respondent Wanger was unable to obtain <u>fact</u> witnesses to attend. The staff contacted his mother, who was an investors in the WLTOPF, but who was fearful of the SEC staff and would only talk to them with an attorney represent. The staff also contacted some of Mr. Wanger's proposed witnesses in order to corner them into agreeing prior to trial that marking the close was illegal. After that, other phone calls by Mr. Wanger's counsel to prospective witnesses were unfruitful.

Mr. Wanger was also denied the right to call Professor Grundfest as his <u>expert</u> witness. The staff moved *in limine* to strike Mr. Grundfest's expert testimony on the grounds that the ALJ was fully capable of interpreting the law. While acknowledging Professor Grundfest' s "impressive credentials," the staff contended that "such credentials are not a license to lecture this tribunal about securities laws." Underlying the staff's assertions that the testimony of Professor and former SEC Commissioner Grundfest would not be helpful to the tribunal was the notion that this case was not so complex as to require his type of thoughtful economic analysis and testimony, even though the staff had relied on the complexity of the case to justify an extension beyond 180 days to commence the proceedings.

With no fact witnesses, no expert testimony, and the ALJ holding that the OIP was fully supported by the law, the staff maneuvered the procedures to deny Mr. Wanger a fair hearing. The substance of the allegations would never be tested fairly in a due process hearing. Facing a one-sided show choreographed exclusively by the SEC staff, Mr. Wanger has informed me that he was advised by his then counsel that if Mr. Wanger still wished to go to trial, he would have to retain a different lawyer. Mr. Wanger's counsel said that he had no hope of a fair hearing. Having been procedurally whipsawed into the corner, there was no use going to trial against an in-house ALJ, with no fact or expert witnesses. Any trial would be a foregone conclusion. According to his counsel, Mr. Wanger would simply have to buckle under the staff's pressure to settle.

Instead of a suspension up to 12 months with automatic re-entry, the staff insisted on a bar with **right to reapply after one (1) year.** Why the staff insisted on a bar rather than a suspension is unknown. But under the facts of this case, it was regulatory over-kill. Then the **SEC staff suggested**, as it had done in other cases, that a trust structure might be used to allow Mr. Wanger's companies to continue to function during the short period of the Bar Order. Mr. Wanger contacted lawyers at Gould & Ratner in Chicago to set up a trust to oversee operations during the one (1) year bar. Following several telephone calls between the SEC staff and his then counsel, Mr. Wanger and his counsel were led to believe that Mr. Wanger's re-entry after one (1) year would be a "no brainer." See Wanger Declaration ¶¶ 2(c) & 11(a).

Based on the staff's representations, suggestions and involvement, Mr. Wanger's counsel told Mr.Wanger he had no option but to settle. The Order Making Findings and Imposing Remedial Sanctions followed. See Investment Advisers Act Release No. 3427 (July 2, 2012). Mr. Wanger fully expected to be back to work after one (1) year. Indeed, Mr. Wanger's then counsel advised him as much:

> "The Staff has given every indication that as long as you do not violate the bar, or otherwise become statutorily disqualified, **your reentry application will be accepted.** The CRD Report does include the language regarding the right to reapply after one year. "

As the saying goes, history – and the last five (5) years – have proven otherwise.

D. Impermissible Breadth and Scope of the Collateral Bar Order

The Commission's collateral Bar Order is impermissibly broad.[6] The Bar Order seeks to reach not just Mr. Wanger's conduct as an investment adviser, but extends to six (6) other categories: broker, dealer, municipal securities dealer, municipal advisor, transfer agent, and national recognized statistical rating agencies. It is also objectionable and overbroad because it further seeks to prohibit Mr. Wanger from "serving or acting as an employee, officer, director, member of an advisory board , investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person such investment advisor, depositor, or principal underwriter."

In January 2017, the District Columbia Circuit ruled that collateral bars- especially ones that apply retroactively - are unlawful. *See Gregory Bartko v. SEC*, 845 F.3d 1217 (D.C. Cir. 2017). Previously, in *Tiecher v. SEC*, the D.C. Circuit rejected the notion that section 203(f) of the Advisers Act sanctioned a collateral bar. In *Tiecher*, the D.C. Circuit held that "the Commission could not bar an individual from a class that he had no association—no 'nexus'—with." *Tiecher v. SEC*, 177 F.3d 1016, 1020-21 (D.C. Cir. 1999). In other words, "[a]n investment adviser could be immediately barred from associating with the investment adviser class; a broker-dealer could be barred from associating with the broker-dealer class—but because a collateral bar was not statutorily authorized, the SEC could not bar him from other classes unless and until he sought to associate with those classes." *Id.* The SEC staff here ignored this law when it imposed the collateral bar order on Mr. Wanger – or simply imposed it anyway.

In *Bartko,* the D. C. Circuit rejected the Commission's attempt to make an end-run around its *Tiecher* ruling. The Commission had claimed that court's *Koch* decision (which rejected the retroactive application of the Dodd-Frank provisions) permitted collateral bars. According to the Commission's reading of the *Koch* decision, it implicitly allowed the retroactive application of a collateral bar on the broker, dealer, investment adviser, municipal securities dealer and transfer agent classes "notwithstanding the fact that, at the same time, it explicitly prohibited the Commission from extending that bar to the newly regulated municipal advisor and NRSRO classes." To support its reading, the

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6 Collateral bar orders are orders that seek to apply across the board to all categories of industry participation mentioned in the statute, including those categories of conduct with which the resident has no association or nexus. Thus, a collateral bar like the one imposed here seeks to bar an individual from seven (7) categories or classes of conduct regardless of whether his misconduct touched that category: "any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization." *See* Sanctions Order, at 9. But here, the only category with which Mr. Wanger had any "nexus" was the investment advisory business. Thus, the collateral bar here goes too far. Before the Dodd-Frank Act, such collateral bars had been rejected by the District of Columbia Circuit. *See Tiecher v. SEC*, 177 F.3d 1016, 1019-20 (D.C.c.ir. 1999). The D. C. Circuit has now also rejected their use post Dodd-Frank. *See Gregory Bartko v. SEC*, 845 F.23d 1217 (D.C.Cir. 2017).

Commission believed *Koch* held that a "limited" collateral bar—that is, the prohibition against acting as a broker-dealer, investment adviser, municipal securities dealer and transfer agent prohibitions—constituted a mere *procedural* change and therefore did not run afoul of the retroactivity prohibition. 845 F.3d at 1224. However, the D.C. Circuit flatly rejected that reading of *Koc*h. The court of appeals stated that *Koch* addressed only one issue: whether the Commission order barring Koch from associating "*with municipal advisors or rating organizations*" was impermissibly retroactive. *Koch*, 793 F.3d at 152 (emphasis added). The court stated that "[w]e held that it was and went no further." *Bartko*, 845 F.3d at 1224.

Like the one imposed here, the Commission's purported collateral bar order against Bartko was invalid:

> "Bartko had no cognizable association with the investment adviser, municipal securities dealer or transfer agent classes when his misconduct occurred.[5] Nonetheless, the Commission has again attempted to retroactively apply Dodd-Frank to bar Bartko from the investment adviser, municipal securities dealer and transfer agent classes. Thus, as we did in *Koch*, we conclude that the Commission's use of Dodd-Frank's collateral bar against Bartko constitutes an impermissibly retroactive penalty. The application of post-Dodd-Frank penalties to pre-Dodd-Frank misconduct constitutes a quintessential example of "attach[ing] new legal consequences to events completed before [Dodd-Frank's] enactment."

845 F.3d at 1224.

The same is true here. The Commission's Bar Order can only reach Mr. Wanger's activity as an investment adviser. It can go no further. But, as discussed below, even that far more limited application can no longer pass the so-called "public interest" test.

E. Effect of "Permanent" Bar

Despite everyone's understanding at the time, the notion of a one (1) year bar has morphed into a **permanent lifetime bar** – all over $69 per month for 33 months for a total of $2,269. Almost five (5) years have passed since the Order Imposing Remedial Sanctions with no relief in sight. Despite the way this case was initiated, handled, litigated and settled by the SEC staff, the staff persists in in maintaining that a **permanent** lifetime bar is **"in the public interest."**

The consequences have been staggering. Much of it has been recited in Mr. Wanger's declaration filed in support of his request for re-entry. I highlight a few here.

1. <u>FINRA Broker Check</u>

FINRA has posted on its BrokerCheck in a golden yellow box preceded by an encircled exclamation mark:

> **! The SEC has permanently barred this individual from acting as a broker and investment adviser, or otherwise associating with firms that sell securities or provide investment advise to the public.**

The words and their impact could not be more draconian.

As described in his declaration, Mr. Wanger has been unable to obtain employment, let alone a sponsor who would be willing to entertain even the notion of a conditional employment opportunity, with the SEC staff ultimately approving the terms, conditions and supervisory procedures of the conditional employment in the industry. Fear of SEC repercussions is ubiquitous and rampant. The Commission's September 2016 OCIE Risk Alert that any broker-dealer or investment adviser that hires someone with a "disciplinary event," including bar orders, has virtually guaranteed that a firm will be subject to an examination of its supervision practices and compliance programs. Even before that Risk Alert was published, the industry feared staff scrutiny were it to employ anyone subject to a bar order. Accordingly, the right to reapply is an empty remedy. Unquestionably, Mr. Wanger is subject to a **full lifetime bar**, to the same extent and just as if he had engaged in the most egregious frauds the Commission has ever encountered.

In an effort ot take down or at least soften the wording in the FINRA Broker Check, in April 2016 Mr. Wanger filed an application with the Commission under Section 19(d) and (e) of the Exchange Act requesting the Commission to direct FINRA to modify or set aside that posting. FINRA filed an opposition stating that the Commission had made "findings" that Mr. Wanger had <u>intentionally</u> engaged in fraud – despite the absence of such language and despite the clear language of the Order that Mr. Wanger entered into the settlement without admitting or denying the staff's allegations. FINRA also asserted that the Commission **<u>lacked jurisdiction</u>** over FINRA to modify or set aside the FINRA posting. Five (5) months later, the Commission agreed with FINRA and ruled that Mr. Wanger's application to try to correct the posting was <u>not reviewable</u> by the Commission. <u>See</u> Release No. 79008 (September 30, 2016). Thus, again, opting to invoke a <u>procedure</u> (rather than address the underlying substantive issues, abuse and obvious miscarriage of justice), the staff agreed with FINRA that the Commission effectively lacked a remedy to correct the FINRA posting.

2. <u>CFA Institute</u>

Immediately after entering into the settlement, Mr. Wanger was also told either to resign or he would be ousted from the CFA Institute,[7] where he and his family had been supporters for approximately 50 years. His father had recently received a lifetime achievement award from the Chicago chapter. And, Eric Wanger, the respondent here, even mentored a research challenge team that came in fourth in the world competition.

None of it mattered. The SEC had issued a Bar Order. Despite the procedures invoked by the SEC staff to block a fair hearing and its insistence on a hasher remedy than the more typical 12 month suspension with automatic re-entry, the current president of the CFA Institute has written to Mr. Wanger saying that there is nothing he can do. The SEC Order prevails.

3. Closure of Accounts

As discussed in his declaration in support of his right to re-enter the industry, *see* Wanger Declaration ¶7, the SEC Bar Order has transcended Mr. Wanger's professional life and even affected his banking relationships. Based on the SEC order, he has experienced closure of his SEP IRA account at Bank of America, his CMA account at Merrill Edge, cancellation of his credit card at Chase Bank, and cancellation of custodial accounts for his family at Charles Schwab.

4. Software Consulting

Mr. Wanger has sent out from 75 to 100 applications in response to job postings or inquiries by executive search firms in the software industry. Despite his high level of qualification as a prior consultant in that field, he has been granted only one interview. The court of "Google," where the SEC's Bar Order is so prominently displayed, has ended all hope of a job in that industry as well.

5. Teaching Positions

Mr.Wanger has been denied teaching positions at various universities. He sought teaching positions (full or part-time) at the University of Chicago, Stanford University, and Illinois Institute of Technology. He was even denied a nomination to the investment committee for the Latin School in Chicago. *See* Wanger Declaration, note 13. The SEC's Bar Order has stood in the way.

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7 The mission of the CFA Institute is to generate value for core investment management professionals and to advance ethics, market integrity, and professional standards of practice, which collectively contributes value to society. Core investment management professionals include those individuals primarily involved in activities related to the investment decision-making process—generally portfolio managers, financial advisors, and research analysts on both the buy and sell side.

A bar from the securities industry has thus taken on an impermissibly broad application and cut a huge swath across Mr. Wanger's life that has adversely impacted all career fields. It simply goes too far.

II. CONSTITUTIONAL ISSUES

Mr. Wanger's declaration raises a number of constitutional issues in connection with the staff's handling of this investigation the administrative proceedings and two parallel SEC examinations.

A. Appointment of ALJs

To avoid having to try its case before a United States District Court judge, the staff here opted for an in-house administrative law proceeding before an ALJ.

Relying on its previous decision in *Landry v. FDIC*, 204 F.3d 1125 (D.C.Cir. 2000) cite] that ALJs do not issue final decisions but only make recommendations, the District of Columbia Circuit ruled in *Raymond J. Lucia Companies v. SEC* that administrative law judges are not interior officers and their decisions are subject to review by the Commission. They were therefore not constitutional officers subject to the Appointments Clause the United States Constitution. 832 F.3d 277 (D.C. Cir. 2016). [8]

However, the Tenth Circuit recently ruled in in *Bandimere v. SEC* that ALJs <u>are</u> inferior officers under the Appointments Clause of the United States Constitution. Under the Supreme Court's decision in *Frytag,* the Commission's ALJs exercise significant discretion in the case, much like an Article III court:

> "SEC ALJs exercise significant discretion in performing "important functions' commensurate with the STJs' functions described in *Freytag*. SEC ALJs have 'authority to do all things necessary and appropriate to discharge his or her duties.' This includes authority to shape the administrative record by taking testimony, regulating document production and depositions, ruling on the admissibility of evidence,

[8] The Appointments Clause to the United States Constitution states:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. Art. II, § 2, cl. 2.

> receiving evidence, **ruling on dispositive and procedural motions,** issuing subpoenas and presiding over trial-like hearings. When presiding over trial-like hearings, SEC ALJs make credibility findings to which the SEC affords "considerable weight" during agency review.
>
> They also have authority to issue initial decisions that declare respondents liable and impose sanctions. ***
>
> "Further, SEC ALJs have power to enter default judgments and otherwise **steer the outcome of proceedings** by holding and requiring attendance at settlement conferences.

Bandimere v. SEC, 844 F.3d 1179-81 (emphasis added).[9]

Given the split in the circuits, the District of Columbia Circuit on February 16, 2017 vacated its prior ruling in *Raymond J. Lucia* and has agreed to a rehearing *en banc.* Therefore, under current law in this circuit, the ALJs at the SEC lack authority to act on and issue any final rulings not only on dispositive motions, but also procedural motions that compel a respondent to go to trial.

Here, the ALJs made rulings on several key motions that "steered the outcome of proceedings " and dictated the ultimate inevitable but improvident result:

• Denial of a motion for *subpoenas* to require the Division of Enforcement to explain why it was invoking the exception clause to Section 4E of the Exchange Act (929U of Dodd –Frank) to exceed the 180 day requirement in complex cases. The ALJ

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[9] The court in Bandimere emphasized the importance of the Appointments Clause:

> "The Appointments Clause embodies both separation of powers and checks and balances." citing *Ryder v. United States*, 515 U.S. 177, 182, 115 S.Ct. 2031, 132 L.Ed.2d 136 (1995) ("The Clause is a bulwark against one branch aggrandizing its power at the expense of another branch...."). "The Appointments Clause also promotes public accountability by identifying the public officials who appoint officers. *Edmond v. United States*, 520 U.S. 651, 660, 117 S.Ct. 1573, 137 L.Ed.2d 917 (1997). "And it prevents the diffusion of that power by restricting it to specific public officials." *Ryder*, 515 U.S. at 182, 115 S.Ct. 2031; *Freytag*, 501 U.S. at 878, 883, 111 S.Ct. 2631. "The Framers understood ... that by limiting the appointment power, they could ensure that those who wielded it were accountable to political force and the will of the people." *Freytag*, 501 U.S. at 884, 111 S.Ct. 2631.

Bandimere v. SEC, 844 F.3d 1168, 1172-73 (10th Cir. 2016).

refused to certify the question to the Commission because it did not involve a controlling question of law.

• Denial of Mr. Wanger's *motion to dismiss* for failure to adhere to the 180-day requirement under Section 4E of the Exchange Act (929U of Dodd-Frank).

•Denial of *motion to dismiss* for failure to allege any *prima facie* causes of action.

•Grant of the staff's motion to strike Professor Grundfest as an expert witness on the materiality issues central to the Division of Enforcement's case against Mr. Wanger.

Had the ALJ not ruled against Mr. Wanger on these key motions, Mr.Wanger would have proceeded to trial before the ALJ, and given the scant and over-inflated "evidence" of alleged marking the close as well as the lack of materiality on the issue of the management fee (i.e., $1.67 per month per client), no legitimate court – especially a federal district court – would have upheld such charges. No doubt, the enforcement staff knew that and opted for an administrative proceeding before an in-house and enforcement friendly ALJ.

As in *Bandimere*, the ALJ who presided over Mr. Wanger's administrative proceedings "held [her] office unconstitutionally." It was a structural defect in the proceedings. Therefore, her rulings were - and are - null and void.

It is no answer to say that Mr. Wanger settled these proceedings without going to trial. He was forced into that position. Had the rulings of the ALJs not so crippled his ability to obtain a fair – and hopefully some semblance of a due process – hearing, the inevitable result would never have occurred. More importantly, no Article III court would have ever entertained this case, and no finding – let alone a lifetime bar – would have survived an appeal in this circuit, given the lack of substantial evidence and given the District of Columbia Circuit continual admonition to the Commission that it will not tolerate lifetime bars absent substantial and compelling evidence and a clear articulation of the e reasons why it is necessary.

B. Denial of Due Process

Due Process violations occurred during the staff's investigation of Mr.Wanger and his affiliated entities as well as during his administrative proceedings.

1. <u>The 2010 SEC Examination</u>

On March 19, 2010, one month **<u>after</u>** SEC had started its investigation and after it had already issued its subpoenas, the SEC announced that it was going to conduct an <u>examination</u> of WIM, one of the subjects of the staff investigation and to which it issued a subpoena. The examination staff asked for documents to be produced about WIM, the investment adviser.

This is a misuse of the SEC processes. The enforcement staff and examination staff should not be "double teaming" a subject of an investigation. If the staff has opted to invoke its investigative powers under section 21(a) of the Exchange Act, it should not be circumventing – or supplementing – those powers by also invoking at the same time its examination authority. There may be a need for referral to enforcement following an examination. It is quite another matter to use the Commission's examination authority <u>after</u> – and <u>concurrently</u> with – an ongoing investigation – both seeking documents.

2. <u>Redemption Requests by Investors</u>

Mr. Wanger has been informed by investors in the Wanger Long Term Opportunity Fund (WLTOPF) that they were contacted by the SEC investigative staff during the investigation.

Total assets under management ("AUMs") in the WLTOPF in January 2010 – the month <u>before</u> the SEC staff commenced its investigation in February 2010 –were $12.1 million. In September 2010 – six (6) months <u>after</u> the staff commenced the investigation - redemption requests started to poor into WLTOPF. From September 2010 to April 2012, all investors (except employees and family) had requested redemption, many without explanation and almost all prior to the SEC's OIP on December 23, 2011. The sole intervening event was the SEC's investigation. By the time of the July 2012 Sanctions Order and consent settlement, the AUMs of the Fund had dropped to $6.7 million, by almost half of its value.

The SEC staff has previously been criticized for over reaching and causing a run on and collapse of a bank – a collapse that the SEC lawyer acknowledged in open court was caused by the SEC staff. *See* "SEC Assailed by Judge for Triggering Cayman Bank Collapse," *Bloomberg News* (November 10, 2015). *See SEC v. Caledonian Bank*, Civil Action No. 1:15 – cv- 00894 (SDNY).

Not only is this practice an abuse of process, but it also interferes with the contractual relations between the investment firm and its clients. Such conduct would be chargeable under the Federal Tort Claims act.

3. <u>Staff Issuance of Subpoenas AFTER the Well Submission</u>

As noted, in June 2011, the SEC made its Wells Call, and in July 2011, Mr. Wanger's counsel filed the Wells Submission. Three (3) months later, in October 2011, the SEC issued more subpoenas on Mr. Wanger, seeking contact information of all investors in the Long Term Opportunity Fund. The staff persisted despite the objections of Mr. Wanger's counsel that this tactic was an attempt to circumvent the discovery rules and constraints of the administrative process. The end result was the addition of the alleged violations under Section 16(a) for failure to file Forms 4, even though two law firms had concluded it was merely inadvertent and even though there was already disclosure in the marketplace by the Schedule 13D and Schedule 13D/A.

4. Section 4E of 1934 Exchange Act / 929U of Dodd –Frank

As stated above, four months after Mr. Wanger's counsel made his Wells Submission, in November 2011the SEC staff sought a thirty (30) day extension from the Director of the Division of Enforcement under Section 4E of the Exchange Act (section 929U of Dodd Frank) until January 2, 2012.[10] The staff told counsel that they were planning on adding charges under Section 16(a) for failure to timely file Forms 3, 4 and 5. Mr. Wanger's counsel sought copies of the staff's request for an extension, which was denied.

After the Commission issued the OIP, counsel asked for approval from the ALJ to issue a subpoena to the staff to turn over any documents explaining why the extension was needed. The ALJ denied the request. Counsel asked for certification to the Commission by the ALJ. That was denied. Counsel petitioned for interlocutory review by the Commission. That, too, was denied. *See* Wanger Declaration, note 5.

Every step of the way, the staff has found a procedural mechanism on which to base a denial of what every other litigant would obtain in a federal court proceeding.

5. The ALJ Hearing.

Mr. Wanger sought to have his due process rights acknowledged in the proceedings before the ALJ. It turned out otherwise.

As noted above, beyond the issue of violating the 180-day restriction, Mr. Wanger's counsel moved to dismiss the OIP because it was "full of exaggerations and misrepresentations that, strung together, still fail to state *prima facie* causes of action. Worse, the Division of Enforcement (Division) omits material facts from the OIP that demonstrate no such actions exist." It was denied.

Also as noted above, because fact witnesses were fearful of SEC repercussions, they declined to appear voluntarily. Some had been contacted by the SEC staff. Professor Grundfest was also struck as an expert witness on Mr. Wanger's behalf because the staff thought he would just lecture the ALJ about the federal securities laws.

With no witnesses and facing an administrative proceeding where the staff nearly always wins, he capitulated to the staff pressure to settle with right to reapply after one (1) year.

Due process was absent in all material respects.

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[10] *See* note 1 *supra.*

C. 5th Amendment Taking

Regulatory takings may violate the Fifth Amendment Takings Clause. The general rule is that "while property may be regulated to a certain extent, **if regulation goes too far** it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415, 43 S.Ct. 158, 67 L.Ed. 322 (1922). *See also Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992); *Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 124, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978).

1. Redemption Requests by Investors in WLTOPF

As stated, after being contacted by SEC staff, in January 2011 investors in Wanger Long Tern Opp Fund (WLTOPF) start requesting **redemptions**. The telephone calls by the SEC staff to investors caused a "run on the bank" that caused the collapse of the wLTOPF.

2. The 2012 SEC Examination of WOW

Wanger Omniwealth ("WOW"), now defunct, was a mutli-family office. It provided wealth management services including strategic asset allocation, estate management, income tax solutions, financial analysis and reporting as well as multi-generational education to a small number of clients. [11] WOW was not a subject of the SEC's investigation or the July 2012 Order Imposing Sanctions.

Later in July 2012, after the Bar Order, Mr. Wanger's then counsel was informed by the SEC staff that inasmuch as WOW was only a small three (3) person office, if Mr.Wanger had any involvement or was on the premises, the SEC staff would perceive it as violation of the Sanctions Order. However, there was no reason for the staff to engage in such aggressive tactics. It hardly served the public interest of the clients.

[11] WOW was formed by the merger of WIM and OmniWealth, LTD (a Denver company controlled by Don Scott). Since its formation and throughout most of 2012, Mr. Wanger and Mr. Scott were the two managers of WOW. Mr. Wanger resigned as manager on July 2, 2012, however, after SEC settlement and Sanctions Order, and Don Scott resigned as manager on until September 1, 2012. As agreed with the SEC staff, an irrevocable trust was created (into which Mr. Wanger contributed 100% of his ownership in WLTOPF) and on September 1, 2012, John Washburn (an attorney in Chicago at Gould & Ratner) was appointed the sole manager of WOW under that trust arrangement until his resignation on January 28, 2013. Even though WOW had different owners than WIM, a different CEO, and a different CCO, from pressure form the SEC staff Mr. Wanger agreed to be "fire walled" from that entity because of the Sanctions Order, even though it was not a respondent.

In August 2012, the SEC staff even contacted Mr. Wanger's then counsel about WOW's "continued listing of Eric Wanger as a team member on its website." Mr. Wanger had simply been listed as co-founder of WOW. Nevertheless, in order to be obsequious, Mr. Wanger's counsel instructed WOW to remove Mr. Wanger's name from the website, even though there was a different CEO and CCO.

In October 2012, the SEC then announced that it was going to exam WOW. WOW also was notified that certain accounts at Charles Schwab were deemed a violation of SEC custody regulations. Once these accounts were de-linked from WOW, however, WOW could no longer distribute funds on behalf of those accounts. An on site examination of WOW occurred in late October 2012, and on October 23, 2012, the SEC staff provided handwritten notes to an officer of WOW of things to address, including "[c]ommunications/instructions **removing** Eric Wanger's **access** to the following: Building management, IT vendor, custodians, banks and any other service providers." On November 5, 2012, Mr. Wanger was advised by building security that he could not access the building or his office.

From SEC's unrelenting pressure and demands, during December 2012 and January 2013, most of WOW's officers quit and the office was packed up. Without officers or employees and with client departures, the CEO quit. *See* Wanger Declaration ¶ 5. On April 1, 2013, a public sale of WOW's assets was held, and WIM, as the senior secured creditor, purchased WOW's few remaining assets for $10,000.

Attorneys at Gould & Ratner, who set up the irrevocable trust, maintain that the SEC was the real cause of WOW's demise.

III. FOIA REQUESTS

In an effort to get to the bottom of what actually transpired during the investigation and follow-on SEC 2012 examination, in November 2016 Mr. Wanger served on the SEC's FOIA office a request for all information regarding the SEC examinations and the SEC's investigation. The paper trail back and forth is another procedural nightmare. Finally, on February 8, 2017, the SEC FOIA staff wrote back saying that it had identified 309 boxes of information, with an estimated 937,000 pages of documentation. The cost to Mr. Wanger for a review of that material would be **$150,000**, and the staff could not even **<u>begin</u>** the process for **three (3) years!** *See* Attachment A.

More procedure – most of it designed to delay or block access to government records. *See* Attachment B.

The staff has no problem demanding immediate production – often by the next day or the next week – during its examination and investigations, but can delay a request made on it for three (3) years before it will even <u>begin</u>.

Moreover, using the same style of over-exaggerated math and inflammatory rhetoric as put forth by the staff in the OIP, the cost of the FOIA review of $150,000 exceeds the full amount of disgorgement of $2,269 by SIX THOUSAND FIVE HUNDRED ELEVEN PERCENT (6,511%).

And, all of this over 15 stock trades that allegedly enhanced management fees by $2,269 over almost two and one-half years.

IV. THE CURRENT APPLICATION FOR CONSENT TO ASSOCIATE

In 2014, Mr. Wanger first applied for consent to re-associate. The staff rejected the application on procedural grounds. He then filed this application in April 2016, almost one (1) year ago.

Your letter states that it is in the "public interest" that Mr. Wanger remains barred, which in my meetings with you and your colleagues, the staff now deems to be permanent. You and your colleagues state that the righty to reapply after one (1) year does not mean that the bar will be lifted. Indeed, you have stressed that there will be a multiple step process in getting re-associated with the securities industry.

Mr. Wanger must find a person or entity that will "sponsor' his reapplication which may need to be conditional and without paying. The Enforcement staff in the Chief Counsel's office will then review that entities' supervisory procedure and make a determination whether they are adequate to address the conduct at issue. If he is granted re-entry, it will be only for a "limited" role at that entity. He will have to reapply to change his role.

If the Commission now grants the application under Section 203(f) to associate with an unregistered entity but Mr. Wanger later wishes to become associated with a registered entity, he must reapply under Rule 193.

If Mr. Wanger were desirous of reopening WIM or WOW, he would have to apply again.

Given the one (1) year that has passed since the filing of the current application, this multi- step process could end up taking years. For a person who is already 53 years of age, who has already been forced out of the industry for seven (7) years, this process is just too much and over burdensome. This is regulation that has gone too far.

A. Rule 193

1. The Rule

I would note that Rule 193 is a general rule. It is not meant to be rigidly applied in all cases for all purposes for all times. It certainly cannot support collateral bars. Like all rules, it must be equitably applied. If the ultimate criterion under the rule is "the public interest," the staff is afforded too much discretion and invites arbitrary and capricious determinations. There also appears to be a double standard. The staff seems to insist that the applicant be a person who demonstrates the utmost integrity and proof that he has redeemed himself (by not collaterally attacking or otherwise challenging the Commission's Sanctions Order), who will be employed (conditionally at first) by an entity whose procedures will first have to be "vetted" and approved by the staff, and who will then still be scrutinized as he "graduates" from step to step. At the same time, the staff seems quite willing to ignore its own representations in procuring – or rather forcing – a consent settlement [12] and its own improprieties during the investigation, litigation and associated examinations, especially when they rise to a constitutional level.

I find nothing in Rule 193 that requires a graduated step by step re-application process for an applicant.

As noted above, I would also respectfully point out that a preliminary note to Rule 193 written by the staff that the applicant cannot reargue or collaterally attack the "findings" that result in the bar order is not a basis to forbid a respondent from calling to the Commission's attention the manner in which the staff handled this investigation and the litigation. That the staff would under the facts of this case continue to assert that it is in the public interest that the receipt of $2,269 remains grounds for a permanent bar pushes the regulatory agenda too far and too harshly.

2. Absence of Supervision

Your letter seems to say that the sole basis for the Division's denial is the absence of proposed supervision, procedures and terms and conditions of employment that would be designed to prevent recurrence of the conduct for which Mr. Wanger stands barred. You add that Mr. Wanger's burden will be especially difficult to meet were he to desire to become a sole proprietor.

The staff must appreciate that it has constructed a veritable "catch 22." Mr. Wanger cannot obtain re-entry without a proposed (conditional) employer. But, the staff's OCIE Risk Alert in September 2016 makes clear that anyone employing a barred individual will immediately be subject to an SEC examination of the closest scrutiny. Thus, entities with which Mr. Wanger has sought employment state that he is "too great a regulatory, business and reputational risk" and would subject them to "a heightened level of regulatory scrutiny." Wanger Declaration ¶ 6(a). It is no answer to say, as you do in note 3 of your letter, that such "challenges" in obtaining employment in the securities industry are a "normal consequence" of the settlement and Bar Order. That pill is particularly too hard to swallow when the understanding at time of settlement, as expressed to Mr. Wanger's by his then counsel, based on his conversations with the SEC staff, was that "his re-entry application would be accepted." *See* page 9 *supra*.

[12] You state in your letter (note 4) that "we do not believe they were made," contrary to Mr. Wanger's counsel's conversation with the CRO staff. *See* page 9 *supra*.

3. Permanent Bar and Its Effect

During our discussions throughout the spring, summer and fall of 2016, the staff repeatedly stated that the bar order here, even though it permits re-application after one (1) year, in actuality is a **permanent** bar. The staff insists that **all bars are "permanent."** The right to re-apply after one (1) is permitted, but it is up to the staff to decide under Rule 193, by delegated authority to the Division of Enforcement, whether the staff will permit re-entry. Thus, for all practical purposes, the Chief Counsel of the Division of Enforcement decides the livelihood of the respondent's professional life, since the Division Director inevitably rubber stamps the Chief Counsel's decision.

Many of the consequences that flowed from this bar have been described above. Not only loss of employment, but also loss of bank, brokerage and credit card accounts have occurred, which is far too much.

It simply cannot be the case that the "public interest" demands so much of a respondent, when the staff's recommendation is largely subjective and when the staff had informed Mr. Wanger's counsel at the time of settlement that "as long as you do not violate the bar, or otherwise become statutorily disqualified, your reentry application will be accepted."

B. Section 203(f)

In addition to Rule 193, Mr. Wanger also filed his application for consent to associate on the separate and independent basis under Section 203(f) of the Investment Advisers Act of 1940. Under that section, a person subject to a bar order cannot associate with an investment adviser "without the consent of the Commission." You advised me during our meetings that, unlike Rule 193, which addresses registered entities, Section 203(f) also applies to unregistered entities. Accordingly, Mr. Wanger is seeking Commission review and consent of his application to re-enter the industry by associating with an unregistered investment adviser.

In your letter (note 2), you state that the Commission has "historically" considered the Rule 193 factors when evaluating Section 203(f) applications. I find no legal precedent for that comment. Indeed, it would undermine the ability of anyone to start a new advisory business – *e.g.,* a private fund. They would not yet have developed all the procedures because they would not have yet received Commission consent to start the new business.

Therefore, your comment that a sole proprietor will have a difficult burden in fulfilling the Rule 193 factors (page 3), is not only inapplicable under Section 203(f), but also puts the cart before the horse.

C. Public Interest

The exercise of discretion granted to the enforcement staff under Rule 193 in assessing the "public interest" is too subjective. The staff's insistence on a lifetime bar for the above conduct is excessive, arbitrary and capricious.

It is particularly troubling and unwarranted in this case. A lifetime bar from "the securities industry [is the] equivalent of capital punishment," Saad v. SEC, 718 F.3d 904, 905 (D.C. Cir. 2013).

Where there has been sufficient passage of time, the need for a continued – and permanent – sanction diminishes, if not vanishes in a case such as this one. There should be some showing required of a realistic and objective evidentiary basis for the need for a continuing sanction. As Professor Grundfest has pointed out in his October 2014 letter to all SEC Commissioners, "once a person serves his sentence, the person should have an opportunity to resume his life as a productive member of society." Wanger Declaration, Exhibit 10.

The District of Columbia Circuit, in both its Saad and Paz decisions, has criticized the Commission for failure to articulate the need for remedial relief, lest it be deemed punishment. In PAZ Sec., Inc. v. S.E.C., then Circuit Court Judge Ginsburg wrote:

> "If the Commission upholds the sanctions as remedial, then it must explain why; furthermore, 'as the circumstances in a case suggesting that a sanction is excessive and inappropriately punitive become more evident, the Commission must provide a more detailed explanation linking the sanction imposed to those circumstances if it wishes to uphold the sanction.' [Citations omitted.] *** We do not suggest the Commission must make an on-the-record finding that a sanction is remedial, but it must *explain why imposing the most severe, and therefore apparently punitive sanction is, in fact, remedial*, particularly in light of the mitigating factors brought to its attention.
>
> "The Commission did state its view that the sanctions here imposed ... would 'serve as a deterrent to others ... , *but such 'general deterrence' is essentially a rationale for punishment, not for remediation.* *** Here, however, general deterrence was not considered as part of a larger remedial inquiry; the Commission offered no other rationale whatsoever. It simply held the ... sanctions were not excessive or oppressive..... Nowhere did the Commission advert to any purpose other than 'deterr[ing] others who may be inclined to ignore [rules and regulations]. ' Therefore, the Commission did not adequately explain why the sanctions ... imposed upon the petitioners were not punitive rather than remedial."
>
> Accordingly, "[t]he Commission abused its discretion by failing to address certain mitigating factors the petitioners raised before it and by affirming the severe sanctions imposed upon them ... without first determining those sanctions were remedial rather than punitive. "

> Accordingly, "[t]he Commission abused its discretion by failing to address certain mitigating factors the petitioners raised before it and by affirming the severe sanctions imposed upon them ... without first determining those sanctions were remedial rather than punitive. "

PAZ Sec., Inc. v. S.E.C., 494 F.3d 1059, 1065-66 (D.C. Cir. 2007). See also Saad v. SEC, 718 F.3d 904, 912-14 (SEC failed to articulate a remedial rather than punitive purpose for the sanction).

It would be an arbitrary and capricious exercise of the staff's discretion and consequently a gross abuse of the Commission's discretion to continue a permanent bar against Mr. Wanger for the conduct at issue: $1.67 per client or $69 each month for 33 months.

IV. CONCLUSION

The Commission's regulatory morass of procedural mechanisms that have been - and continue to be - arbitrarily imposed on Mr. Wanger cannot be a substitute for fairness and justice. It has been ten (10) years since the staff commenced its investigation and five (5) years since Mr. Wanger was subjected to a bar with right to re-apply after one (1) year. Mr. Wanger has been patient over the last twelve (12) months as the staff has considered and met with undersigned counsel.

However, Mr. Wanger is convinced that the staff has acted in an arbitrary and capricious manner, both during the staff's investigation and examination. In the proceedings before the ALJ, he quite appropriately asserts that he has been denied due process. He also believes that the staff caused the collapse of other businesses that were not part of the investigation and administrative proceedings. And he believes that the staff is continuing to act in an arbitrary and capricious manner by bumptiously divining under Rule 193 and Section 203(f) of the Advisers Act what the staff believes is "in the public interest." As the Tenth Circuit stated in *Bandimere*, agency discretion must be subject to "to the will of the people."

Mr. Wanger therefore respectfully insists that this matter be resolved, once and for all, so that he can be deemed to have exhausted his administrative remedies and to have obtained a final order of the Commission.

Sincerely,

Thomas V. Sjoblom
Counsel to Respondent Wanger

UNITED STATES OF AMERICA

Before the

SECURITIES AND EXCHANGE COMISSION

Administrative Proceedings
File No. 3-14676

In the Matter of

ERIC DAVID WANGER

Application under Section 203(f) of the Investment Advisers Act and Rule 193 for Consent to Associate with An Investment Adviser or Broker-Dealer

Respondent.

Pursuant to Section 203(f) of the Investment Advisers Act of 1940, 15 U.S.C. § 80b-3(f), and Rule 193, 17 C.F.R. §201.193, Respondent Eric David Wanger ("Wanger" or "Respondent"), through his counsel, Thomas V. Sjoblom of Washington, D.C., hereby respectfully applies for consent to re-enter the securities industry either to (1) associate with any registered or unregistered broker-dealer, investment adviser, or other entity that participates in the securities industry, or (2) establish his own entity that provides one or more of those services. Accordingly, Respondent respectfully requests an Order from the Commission granting him the right to associate with any industry participant with which he can find employment or to establish his own firm or firms.

Respondent's right to re-enter the securities industry is in the public interest for the following compelling reasons:

1. *2012 SEC Order.* Respondent, without admitting or denying any of the Commission's allegations or findings, consented to an Order Making Findings and Imposing Remedial Sanctions issued July 2, 2012 that barred Respondent, but expressly granted Respondent the right to reapply after one (1) year. ("Bar Order" or "SEC Bar Order".) [*See Attachment A*]. The fundamental basis underlying the voluntary settlement, as represented by the Commission's staff in its Chicago Regional Office ("CRO"), would be Respondent's right after one (1) year to re-enter the securities industry, including resuming his duties at the companies over which he held direct or indirect control, and his ability to regain the rights he had prior to his voluntary acceptance of the sanction. According to the Commission's CRO enforcement staff, the lifting of the sanction would be a "no brainer" and that the consequences of the sanction would be lifted through his successful "reapplication" one year later. [*See Attachment B, Wanger Affidavit, ¶¶ 2 (c) & 11(a) and (j).*] Given those representations, as well as the futility of going forward with the administrative proceedings, [*see Attachment B, Wanger Affidavit, ¶¶ 2 (b) and (c)*], Respondent settled. [*See Attachment C.*]

2. *Illegal Provisions of SEC Bar Order.* In accordance with a recent decision, Koch v. SEC, issued by the United States Court of Appeals for the District of Columbia, the SEC Enforcement Division impermissibly has sought to bar Respondent from associating with a municipal securities dealer, municipal advisor, transfer agent, and nationally recognized statistical rating service. The Circuit Court

in Koch held that the SEC's reliance on the Dodd Frank Act provisions was an unconstitutionally retroactive application of the Dodd Frank Act. Koch v. S.E.C., 793 F.3d 147, 157 (D.C. Cir. 2015)("the Commission impermissibly applied the Dodd—Frank Act retroactively by barring Koch from associating with municipal advisors and rating organizations" because it "attache[d] new legal consequences" to his conduct). Although the Commission, relying on narrowly drawn words of the Circuit Court, has initiated a program to permit persons sanctioned after Dodd-Frank to apply to the Commission to have the sanction lifted as applied to municipal securities dealers and nationally recognized statistical rating agencies for conduct prior to July 21, 2010, a program under which Respondent has submitted his application, the Commission has not extended that program to transfer agents. Accordingly, the Bar Order should be vacated to the extent it seeks to apply that bar to municipal securities dealers, municipal advisor, transfer agents or nationally recognized statistical rating agencies.

3. *De Minimis Infraction and Unusual Sanction*. The SEC's CRO Staff commenced its investigation in February 2010. From virtually the outset of the investigation, and well before the staff had amassed much evidence, Respondent's then counsel, Ungaretti & Harris in Chicago, Illinois, contacted the staff to discuss the investigation. At that time, the SEC's CRO Staff insisted on a *bar* – even before the investigation had advanced much and well before any Wells Notice had been provided. [*Attachment B, Wanger Affidavit, ¶¶ 2(a) and (c).*]

The CRO Staff investigated for two and one-half years. From over 300 stock trades in illiquid stocks, the SEC staff selected 15 stock trades (13 of which were in

Altigen (ATGN) stock) that they claimed "marked the close." [*Attachment B, Wanger Affidavit, ¶¶ 2(a).*] However, the basis for the CRO Staff's charge and their principal theory on which the CRO staff relied was not that Respondent and his investment advisory company, Wanger Investment Management ("WIM"), had manipulated the stock market, but rather that his activities were undertaken to improve his and WIM's management fees by a total of **$2,269** over **33 months, or $69 per month,** which, according to Respondent's proposed expert, could account for no more than eighty five one-hundreds of one percent **(00.85 %)** maximum portfolio inflation. [*Attachment B, Wanger Affidavit, ¶¶ 2(b).*]

Despite the lack of materiality of the violation [*Attachment B, Wanger Affidavit, ¶¶ 2(b)*], the Commission's CRO Staff insisted on a bar with right to re-apply after one (1) year, rather than a censure, an order placing limitations on the operations of WIM, or even a suspension up to twelve (12) months, sanctions that Section 203(f) of the Investment Advisers Act of 1940 otherwise permitted. Such a harsh sanction is highly unusual and not found in similar cases. [*Attachment B, Wanger Affidavit, ¶¶ 2(a), note 1.*] Counsel can find no other case where a bar order has been entered for such minimal conduct. Indeed, Respondents in far more egregious cases – even ones where there has been evidence of *scienter* – have received lesser sanctions. *See e.g., In the Matter of Edward Brokaw*, Release No. 70883 (November 15, 2013), at 27 (one year suspension and $25,000 fine deemed not excessive or oppressive, but was consistent with FINRA's Sanctions

Guidelines); [1] *In re Richard D. Chema*, Exch. Act Release No. 40719 (November 30, 1998) (broker-dealer who aided and abetted customer's manipulative conduct – 119 wash trades and 18 marking-the-close trades – suspended for one year); *In re Sharon M. Graham and Stephen Voss*, Exch. Act Release No. 40727 (November 30, 1998) (customer's activities exhibited so many indicia of wash trades and matched orders that Graham, an experienced securities professional, should have recognized and attempted to stop it and was suspended for two months; Voss, who engaged in supervisory failures over customer's manipulative conduct, given only a three - month suspension); *In re Adrian C. Havill*, Exch. Act Release No. 40726 (November 30, 1998) (Respondent, a broker who did trades for chairman of bank who wanted to "create interest in the stock," which was thinly traded, executed 7 wash trades and matched orders as well as 30 marking-the-close trades, for which the broker received the "trivial" amount of $1,500; Commission upheld ruling of ALJ, who had found that the broker had acted "extremely reckless in not realizing that what he was doing was improper," but who rejected the Division of Enforcement's request for 6 to 9 months suspension and instead ordered him suspended for only two months, "considering his otherwise clean record and community activities."); *In re James T. Patten*, 1998 NASD Discip. LEXIS 20 (February 3, 1998) (broker/trader/options principal intentionally and/or recklessly caused his brokerage firm to enter, at or near the close of the market, 147 trade reports in the relevant securities (71 of which were fictitious and 76 of which substantive);

[1] In the *Brokaw* case, the Commission noted that it was using the FINRA Sanctions

Respondent was censured and fined $ 175,000 ($ 125,000 for marking the close and $ 50,000 for reporting fictitious trades); *In re Carole L. Haynes*, Admin. Proc. No. 3-85051995 SEC LEXIS 3134 (November 24, 1995)(ALJ's initial decision) and Exch. Act. Release No. 34- 36692 (respondent, former NASD examiner and owner of her own NASD registered brokerage firm, who supervised compliance, financial and operational aspects of the business and who also provided accounting and tax services, engaged in directed trades (matched orders), alternating between the buy and sell side of trades, generated volume of 218,384 and 259,884 shares, respectively, in just one year for a client who had severe short term cash flow needs; in addition to a cease and desist order, Commission ordered her suspended from association with a broker-dealer for five months); *In re Richard M. Kulak*, 1995 SEC LEXIS 2481 (September 26, 1995) (broker who knew about and assisted in market manipulation of customer by executing numerous marking-the-close trades suspended for five months). Thus, the long history of far lesser sanctions in much more egregious cases calls into question the fairness and overreaching conduct exhibited by the CRO Staff in Respondent's case. [*Attachment B, Wanger Affidavit, ¶¶ 2 (a) and (c).*] [2]

[2] In other contexts, the Second Circuit has found the Commission's sanction imposing a bar too severe and reduced it to a 12-month suspension. *See e.g., Arthur Lipper Corp. v. S.E.C.*, 547 F.2d 171, 184 (2d Cir. 1976)("We are moved also by the inordinately long time in which this proceeding has been pending, particularly the unexplained lapse of over three years from the argument to the decision of the Commission, the cloud that has hung over petitioners' heads during this period and the tremendous disparity between the sanctions invoked against petitioners and that imposed on two other brokers whose violations were perhaps more clear. *** [W]ith the choices limited to a suspension of not more than twelve months or a revocation or bar, we consider that, under the special circumstances of this case, selection of the latter was an abuse of discretion."

4. *FINRA BrokerCheck Website: "Permanent" Bar.*

To the surprise of Respondent and his former officers and employees, FINRA, in response to the SEC Bar Order, posted on its BrokerCheck website that Mr. Wanger had been permanently barred. [*Attachment B, Wanger Affidavit, ¶3.*] When Respondent and his counsel contacted FINRA to find out why the order was posted as a *permanent* bar, they were informed that it was FINRA's *policy* to treat all such orders as *permanent*. [*Attachment B, Wanger Affidavit, ¶3, note 7.*] The concept of "permanence," however, was a construct created by the FINRA of its own accord, out of whole cloth. The Commission has never said that a bar with right to reapply after one year creates a permanent bar. Nor was Respondent ever provided with the minimum requirements of due process (notice and opportunity for a hearing) by FINRA before its posting. Instead, FINRA took it upon itself to alter the SEC Bar Order and re-interpret the words of the SEC Bar Order that now perforce has permanently blocked Respondent's of his right to seek employment and has now also attached to Respondent's name and reputation a stigma that violates due process of law. [3]

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[3] In a companion filing, Respondent has submitted to the Commission another Application under Section 19 (e) of the 1934 Exchange Act, 15 U.S.C. §78s(e), that requests the Commission to review the actions taken by FINRA to post on its own website a different and greater sanction than the words specified in the SEC Bar Order and to review FINRA's actions permanently to block Respondent from seeking employment in the securities industry. Respondent considers FINRA's action to be excessive or oppressive in violation of Section 19(e)(2) and to have not been applied consistent with the purposes of the Exchange Act, thus requiring either cancellation or reduction of FINRA's purported sanction under Section 19(e)(2) or permitting Applicant to associate under Section 19(f). So that the timing of any appeals from the Commission's ultimate determinations may be coordinated to ensure that any appeals of both applications can occur simultaneously, Respondent

Had the Commission's CRO Staff informed Respondent that the bar with right to re-apply after one (1) year would actually mean that he would be *de facto* *permanently* barred from any employment and that he would have no right to a hearing under current SEC and FINRA regulatory interpretation to challenge that posting, Respondent would have declined to settle this proceeding and gone forward with the SEC administrative hearing, even though the administrative law judge ("ALJ") had consistently ruled against Respondent and his counsel on each and every motion filed in the administrative proceedings (including motions to dismiss, for discovery, and for use of an expert witness), and even though he had been denied a fair and impartial hearing with witnesses of his choosing. [*Attachment B, Wanger Affidavit ¶¶2(c).*] The absence of a fair and impartial hearing raises serious constitutional due process issues.

5. *Demise of The Wanger Entities*

In preparation for entry of SEC Bar Order, Respondent removed himself as an officer of any of his companies [*Attachment B, Wanger Affidavit ¶4(b)]* and had himself "firewalled" from other entities so that there would not be even the appearance of a possible violation of the SEC Bar Order. [*Attachment B, Wanger Affidavit ¶5.*] In response to comments by the CRO Staff, Respondent also was denied access to his office and his files, and he was even blocked from entering the building where his office was located. [*Attachment B, Wanger Affidavit ¶5.*]

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requests that the within Application to the Commission for consent to re-associate with a registered broker-dealer, investment advisor, or other entity, or to set up his own entity, be considered together with and at the same time as his Application under Section 19(e) for Commission's review of FINRA's enlargement of the SEC Bar Order.

Further, the effect of the Commission's Bar Order and the entry by FINRA of the *permanent* bar language on its website disrupted and ultimately caused the demise of the following Wanger entities:

(a) Wanger Investment Management.

Wanger Investment Management ("WIM"), an Illinois corporation, was a registered investment adviser with Commission until 2011 when it voluntarily sought deregistration. With the demise if the Wanger Long Term Opportunity Fund and the uncertainty of the long-term impact of the double bar orders of the Commission and FINRA on WIM's continued existence, Respondent shifted his emphasis and energies from WIM to Wanger OmniWealth, a multi-family office. Thus, WIM was reduced to a mere shell. [*Attachment B, Wanger Affidavit ¶4(b).*]

(b) Wanger Long Term Opportunity Fund

Wanger Long Term Opportunity Fund II, LP ("WLTOF"), the supposed victim of the $2,269 overcharge from the alleged conduct of Mr. Wanger, was promptly closed and all investor funds returned after entry of the Commission's Bar Order. Accordingly, Mr. Wanger dropped his campaign of shareholder activism designed to compel the Altigen management to return corporate cash (nearly $10 million) to its shareholders. As of the date of this application, that money is now entirely gone and ATGN now trades at $0.29 per share on the pink sheets, having been delisted from NASDAQ. [*Attachment B, Wanger Affidavit ¶4(a).*]

(c) Wanger OmniWealth

Wanger OmniWealth ("WOW"), a $300 million technologically sophisticated, multi-family office, which was growing at the rate of over $100 million per year, suffered the same consequences as WIM. [*Attachment B, Wanger Affidavit ¶5.*] Even though Respondent had retained lawyers to "firewall" him from WOW and its activities, in the aftermath of the SEC investigation and Bar Order, the Commission staff engaged in new relentless onsite examinations, which all the WOW officers and employees perceived as a furtive attempt at yet another enforcement proceedings. Such pressure from the Commission staff, together with the growing realization that Respondent may never return to work under the effective double "permanent" bar orders of the Commission and FINRA, caused employees gradually to resign, one by one, until WOW could no longer efficiently services its clients. Only then, the bulk of the clients departed. After all clients left, the remaining officer(s) resigned. WOW is now defunct. [*Attachment B, Wanger Affidavit ¶5.*]

Thus, the nearly immediate and practical result of the Commission's Bar Order and the staff's conduct was the demise of three businesses, with the consequent dislocation of clients and their funds. With respect to WOW in particular, an entity that was not even a party to any of the administrative proceedings, the Commission's regulatory efforts went too far, which interfered with and deprived Respondent of WOW's economically beneficial use to himself, its officers and employees, and its clientele. This, too, raises serious constitutional issues.

6. *Inability to Obtain Employment.* Since the date of the SEC's Bar Order and FINRA's posting that he is *permanently* barred, and after the demise of his own businesses, Respondent has sought but been unable to obtain any formal employment in the securities industry. He has unsuccessfully sought employment

and association with numerous registered broker-dealers, investment advisers and asset managers. [*Attachment B, Wanger Affidavit ¶6(a).*] However, the officers, managers and compliance officers of those entities have consistently stated that his association with them – particularly in light of the "permanent" bar that appears on the FINRA BrokerCheck website – would subject them to added business and regulatory risk because of the heightened level of regulatory – and possible enforcement – scrutiny to which they would be subjected by the SEC and FINRA were they to employ Respondent, even with the requisite supervision in place. In their view, he would constitute such a business, reputational and regulatory risk for them that they cannot risk hiring him. [*Attachment B, Wanger Affidavit ¶6(a).*] Accordingly, given the inability to obtain employment, Respondent was unable to reapply immediately following expiration of the one (1) year term under the Commission's Bar Order.

Perhaps an unintended consequence, but nevertheless entirely foreseeable by the Commission and its CRO staff, Respondent has even been denied employment at universities and non-securities industry institutions, and has even been expelled from professional organizations like the CFA Institute. [*Attachment B, Wanger Affidavit ¶6(b) and (c).*]

7. *Right to Re-Association.*

Respondent seeks a full restoration of his rights to seek employment in the securities industry as those rights exited prior to the Commission's Order in July 2012. The one (1) year term of the Bar Order has run. But, the combined effect of the SEC one-year Bar Order together with the FINRA permanent bar – in effect a *de facto* permanent and insurmountable bar – has created a set of circumstances and conditions that have made it impossible for him to gain re-employment. Moreover, because of the combined effect of the double bar orders, Respondent cannot obtain a sponsor or a supervisor. Unless the Commission removes the bar, which in turn will permit FINRA to remove its permanent bar language, Respondent's right to work in the industry and his liberty interest in his occupation have been blocked forever. Thus, Respondent should be permitted to seek meaningful employment in the securities industry without the prohibitive conditions and stigma hanging over his employment efforts. Once Respondent re-enters the industry, any firm that employs him will have a proper supervisory structure in place. [*Attachment B, Wanger Affidavit ¶9.*] Alternatively, should participants in the industry decline to employ him – whether out of fear of SEC retribution or increased regulatory scrutiny – Respondent should be permitted to start his own company to serve the securities industry.

8. *Disgorgement and CMPs.* Mr. Wanger has paid both the amount of the disgorgement ($2,269.81) and the civil monetary penalties ($75,000.00) required by the Commission's Order. [*Attachment B, Wanger Affidavit ¶1.*]

9. *Public Interest.*

(a) The Commission's Order permitted Respondent to reapply after one-year. However, FINRA's interpretation of that Order and FINRA's posting on its BrokerCheck of the Order as a "permanent" bar – without a hearing – have precluded Respondent from obtaining employment. A permanent bar was not what

Respondent agreed to, was not the intent of the sanction, and is procedurally unfair. It simply does not comport with substantial justice and fair dealing. How can it be contended that he consented to a sanction that, as it now turns out, resulted in a *de facto* permanent bar? And, why was he not so advised by the Commission's CRO staff at the time? It is no answer to contend that his counsel should have known of or foreseen such a sequence of catastrophic events.

(b) Efforts to gain employment in the securities and financial industry has been blocked by the current "Broken Windows" enforcement policy, FINRA's BrokerCheck posting that Respondent is subject to a "permanent" bar, and fear by industry participants of increased regulatory scrutiny (or enforcement) were they to employ Respondent. The last three (3) years has shown that no firm will employ someone who has been *permanently* barred.

(c) Moreover, financial institutions (banks, broker-dealers, and asset managers) have cancelled Respondent's accounts, including his credit cards, his IRA account, his SEP-Ira account, and custodial accounts. [*Attachment B, Wanger Affidavit ¶7.*] When they were questioned about their actions, the explanation offered was that Respondent is a "reputational risk." Administrative bar orders such as the one issued by the Commission against Respondent should not operate to instill fear in financial institutions to such a degree that qualified people cannot obtain and maintain bank, credit, and brokerage accounts.

(d) Professional organizations to which he was a certified member and mentor, such as the CFA Institute, gave Mr. Wanger the option to resign or be expelled. [*Attachment B, Wanger Affidavit ¶6(b).*] It is no answer to say that they are an independent organization with their own sets of bylaws and rules over which the Commission has no oversight. Enforcement actions must take these collateral consequences into account. Regulation and enforcement by *caveat emptor* is a failure of government. It goes too far.

(e) Mr. Wanger has more than "paid his dues to society" by losing more than three (3) years of his career. [*Attachment B, Wanger affidavit ¶ 11(e), note 14 and Exhibit 7attached thereto.*]

(f) The effect of the Commission's Bar Order has been the dislocation of clients, client funds, and employees of his companies, and the cause of the collapse of three (3) companies: WIM, WLTOP Fund, and WOW, once a thriving multi-family office with over $300 million in assets under management and which was *not* the subject of the SEC Order. The clients of WOW were subjected to a host of expensive and wasteful transition costs, including the loss of the significant and comprehensive service offerings of WOW. [*Wanger Affidavit, ¶ 5.*]

(g) By barring Respondent from managing and funding WOW, the startup company he was running, the Commission virtually guaranteed its demise and ultimately interfered with and deprived Respondent of WOW's economically beneficial use to himself, its officers and employees, and its clientele.

(h) The reapplication process requires that Respondent find a sponsor or some source of supervision. Given that he have been permanently barred by FINRA, however, it has proven impossible to find such a sponsor or supervision. Therefore, the administrative remedy is fundamentally flawed and unfair, because by definition, the Commission's Bar Order and its Rule 193 are incapable of being fulfilled and incapable of restoring rights the Bar Order has taken away.

(i) Respondent's interests in obtaining a fair adjudicatory hearing was undermined by the existence of a widely recognized biased administrative judicial system, by contact with potential witnesses by SEC staff who instilled enough fear in them that they declined to appear and testify, and by the Division of Enforcement's opposition to and the ALJ's ruling that his expert witness, Professor Joseph Grundfest, a former SEC Commissioner and well recognized law professor from Stanford Law School, could not testify, though he offered to appear *pro bono* and testify only about the "materiality" of the $2,269 alleged violations. The lack of due process, owing largely to the Division of Enforcement's virtual control over the entire process, dictated the inevitable outcome of what has proven to be an unfair settlement.

(j) Respondent's then attorney filed a motion to dismiss the charges alleged in the OIP. He contended that "the OIP is full of exaggerations and misrepresentations that, strung together, still fail to state *prima facie* causes of action," and he contended that staff also violated Section 929U of Dodd Frank Act., 15 U.S.C. § 78d-5. [*Attachment B, Wanger Affidavit ¶ 2 (b)*.] [4] The ALJ dismissed this

[4] Section 929U of Dodd Frank requires the Commission to institute the enforcement proceedings within 180 days after the Wells Notice. The staff complicated the proceedings by sending out new subpoenas after the Wells Notice and after Respondent's Wells Submission, creating new theories after the Wells Submission had been provided to the staff. Respondent's then attorney complained about the unfairness of the staff's tactic of adding charges under 16(a) of the Exchange Act for inadvertent filings of Forms 4 after the Wells Notice has already been issued and a Wells Submission filed—all just to obtain leverage in settlement discussions. [*See Attachment B, Wanger Affidavit ¶ 2(b), note 3 and Exhibit 2.*] Moreover, as a control

motion. If this case was so "complex" under Section 929u of the Dodd Frank Act, however, that the staff needed additional time to address these complexities before instituting administrative proceedings, then fairness required that highly qualified people – such as Professor and former SEC Commissioner Grundfest – be permitted to testify about those complexities and the staff's allegations about them.

(k) Respondent was informed through his then attorney that CRO Staff had stated that if he settled this matter, his right to re-associate after one year would be a "no brainer." [*Wanger Affidavit ¶¶ 2 (c) and 11 (a).*] He acted in good faith on those representations when settling the administrative proceedings and accepting the Bar Order.

(l) The difference between a suspension not exceeding 12 months with automatic re-entry and a bar with right to reapply after one (1) year – *i.e.,* literally the difference of <u>only one day</u> – should not have engendered such negative consequences that have befallen Respondent, his employees, his clients, their funds, and his three companies.

(m) The CRO Staff's new investigation, which was commenced shortly before Christmas 2015 and about which Respondent was notified on December 23, 2015, on the eve of the Christmas holiday, appears to be a reaction to requests of

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person of WIM, Respondent had previously timely and jointly filed Schedules 13D and 13G, so that disclosure had been made about those purchases. Further, Respondent had self-reported his failure to file Forms 4 to the board of Altigen. Finally, outside counsel to Altigen, Wilson Sonsini, had similarly concluded that Respondent's failure to file Forms 4 was merely inadvertent. [*See Attachment B, Wanger Affidavit ¶ 2(b), note 3 and Exhibit 3.*]

opposing counsel in a private arbitration pending in Chicago. Respondent had commenced private arbitration proceedings to seek the return of excess redemption payments over and above what certain investors were entitled to. On information and belief, attorneys representing investors in that private arbitration referred the topic of the arbitration proceedings to the Commission's CRO staff rather than litigate this matter before JAMS. In response to the Commission entry into this private arbitration, the JAMS arbitrator stopped the arbitration. The Commission has thus allowed itself to be improperly thrust into a private party arbitration and has brought those proceedings to a halt. [*Attachment B, Wanger Affidavit ¶ 10 (a).*]

10. *Supplementation with Letters from Former Clients.*

Respondent supplements this application with letters from various former clients and other individuals. [*See Attachment D.*]

Dated: April 12, 2016

Eric David Wanger

UNITED STATES OF AMERICA

Before the

SECURITIES AND EXCHANGE COMISSION

Administrative Proceedings
File No. 3-14676

In the Matter of Application

ERIC DAVID WANGER

Supplemental Affidavit of
Eric David Wanger

Respondent.

I, Eric David Wanger, submit this supplemental affidavit in support of my application pursuant to Section 203(f) of the Investment Advisers Act of 1940, 15 U.S.C. § 80b-3(f), and Rule 193, 17 C.F.R. §201.193, for consent to re-enter the securities industry either to (1) associate with any registered or unregistered broker-dealer, investment adviser, or other entity that participates in the securities industry, or (2) establish my own entity that provides one or more of those services.

I make this supplemental affidavit to address recent conversations between my counsel, Thomas V. Sjoblom of Washington, D.C., and the staff of the Chief Counsel's Office in the Division of Enforcement ("Staff") on May 2 and 3, 2016.

<u>The Need For Sponsorship and Supervision</u>

1. In conversations with my current counsel, the Staff has pressed the need to comply with "all of the factors" under Rule 193, including especially the need for supervision under Rule 193 (d), 17 C.F.R. §201.193(d).

2. The Staff has recognized that persons subject to a *de facto* permanent bar, such as me, are unlikely to find adequate "supervision" (via employment) given that this would require a regulated firm to first hire a "barred" person. The Staff has suggested, instead, that I somehow find a prospective employer who would be willing to "sponsor" me, *i.e.*, to promise to employ me "if and when" the bar is lifted, and to have that prospective employer propose and describe what supervisory structure would be in place over me were the bar to be lifted and they employed me. The Staff suggested to my counsel that such sponsorship would be a way for me to meet the supervisory requirements of Rule 193.

3. The Staff and the Commission need to be aware that I have already broadly pursued and attempted such conditional sponsorship; and, I have consistently failed. On almost every occasion, after employment or partnership was summarily dismissed as an impossibility (generally due to FINRA's assertion that I have been permanently barred), I would suggest a conditional arrangement, *i.e*, sponsorship, as a possible alternative. Unfortunately, to a regulated firm, there is no practical difference between supervision (via employment) and sponsorship (via conditional employment). The fear of unwanted regulatory scrutiny is the source of the issue, not the details of its implementation. So pervasive is the fear of negative regulatory

scrutiny stemming from my "permanent(?!)" bar, that it has caused all my attempts to re-enter the industry, no matter how creative, to be nullities.

To reiterate: "Sponsorship" (a promise of conditional employment rather than actual employment) has proven just as unattainable as employment, and thus is also only an empty fiction vis-à-vis Rule 193. As I stressed in paragraph 6 of my original affidavit:

> *I have sat through 20 or more face-to-face meetings and telephone interviews in which I have been told that, even though I am well qualified, I am "untouchable" due to my status as a "barred person." I have been referred to as a person wearing a "regulatory bulls-eye." I have been told that, in the "no broken windows" regulatory environment that currently exists, no rational person or firm would ever possibly expose himself or itself to the extra-regulatory scrutiny that would inevitably come with a person like me who is subject to a "Permanent Bar." I have been told that I am "radioactive."*
>
> *I have explained that it was a settled case, without admitting or denying anything. However, I have been told that, as long as the SEC continues to hold me up as a "small-time white collar criminal," even though the SEC staff never proved any of its allegations, there is no possible way I can expect to be able to work in the securities and finance industry ever again."*

Initial Affadavit of Eric David Wanger, ¶ 6 (April 11, 2016).

Let me reiterate that everything I stated in paragraph 6 of my initial affidavit applies to both "supervision" and "sponsorship." The simple truth is that in today's regulatory environment, no regulated firm is going to touch a barred person "with a ten foot pole." Prospective employers repeatedly told me that in this regulatory environment – especially the current Broken Windows enforcement environment– they are unwilling to take on the added regulatory scrutiny, monitoring and SEC oversight such a structure would entail. The ever-present threat of SEC – and FINRA – enforcement is enough. These firms said that they do not need any further regulatory attention.

4. The Staff has admitted that this form of conditional employment, *i.e.*, sponsorship, typically has not been granted by the Commission. Indeed, according to the Staff, the Commission has approved it in no more than one dozen cases since 2000. Nevertheless, the Staff is not blind to the possibility that conditional sponsorship may be just as unattainable as employment.

5. My prior counsel and I discussed the Commission's orders in such cases as *In Re Bruce Lieberman*, Release No. 3631 (July 18, 2013), *In Re Timothy Miller*, Release No. 2702 (February 11, 2008), and *In re William M. Ennis*, Release No. 2853 (March 17, 2009), all of which granted relief on a conditional basis. In *Lieberman*, the proposed employer agreed to require advance approval by its chief financial officer ("CFO") of all equity trades, to engage in a daily review of all profits and losses from trading, and to provide an independent monitoring program for Mr. Lieberman by an outside firm for two years. In *Miller*, the applicant represented that he would be closely supervised by the chief investment officer ("CIO") of the investment adviser, including daily oversight of fund activities as well as weekly and monthly meetings to review his trading in the funds he managed; the firm would subject the applicant to added supervision by the chief compliance officer ("CCO"), including monthly and quarterly meetings, as well as reports of any unusual trading activity; require general oversight by the Boards of Directors of the respective funds; and require the

applicant to undergo comprehensive training in funds management. In *Ennis,* the respondent was the former president of the investment adviser of the Evergreen Fund family. The Commission alleged that the respondent market timed in violation of the fund's internal policy. The Commission granted relief because respondent's new employer is not an adviser to investment companies, respondent would be employed to over see business strategy and not engage in trading, would not provide investment advise and would be supervised by the portfolio managers. The Commission noted that additional relief would be required were his employer to become an adviser to investment companies.

6. The types of "thinking outside of the box" solutions suggested by the above cases have fallen flat and proven to be of little practical use in my case. As noted above, any and all attempts to suggest similar procedures to prospective employers (or conditional sponsors) were non-starters. It cannot be stressed enough that the fear of added regulatory scrutiny and SEC oversight in the current environment is so pervasive that I have never even been able to broach suggested solutions to the (putative) concerns of added expense (*e.g.,* outside compliance monitors) or the added duties imposed on the firms' CFOs, CIOs and CCOs. I even sought to retain an outside consulting firm to serve in a supervisory capacity for me. The company declined.

<u>"Permanent" Bar</u>

7. During the Staff's conversation with my current counsel, the Staff stated that bar orders, even those with the right to reapply after one year, are considered permanent. However, at the time the topic of a consent settlement was being aired by the staff of the Chicago Regional Office ("CRO staff") and at which time the CRO staff told my then counsel that my right to re-associate with my companies under a bar order with right to reapply would be a "no brainer," no one on the CRO staff told me or even suggested that the bar would be considered permanent. Despite the fact that I was led to believe on many occasions, both verbally and in writing, that my sanction is not, would not, and should not, be considered permanent, it apparently has become just that: a *de facto* permanent bar. In other words, the things I must theoretically do to reenter the industry have been made practically impossible by the SEC and FINRA. I have yet to meet a compliance officer who would even allow a barred individual to set foot in the firm's file room, let alone allow the firm to offer up some promise of present or future employment. My sanction is, in every practical sense, permanent, and no set of activities I have taken or can currently imagine being able to take will lift it.

8. Had the mere possibility of permanence been broached at the time I and my counsel were persuaded by the CRO staff to agree to the proposed settlement, there is absolutely no way I would have accepted it. Let me state clearly: There is no way I would have accepted any settlement that even entertained the possibility of a bar with righty to reapply becoming a permanent bar from the securities industry.

9. The profound unfairness of this entire process, culminating in the unjust (and self-actualizing) declaration by both FINRA and the Staff that the sanction is permanent, has been well-articulated and need not be reiterated here. Let me simply encourage the Staff and the Commission to read and acknowledge the number of former investors, a former SEC Commissioner (*pro bono*) and others who have protested against what was done to me. *See* Supplemental Letters attached to my Initial Affidavit and to this Supplemental Affidavit.

Regulatory Prophylaxis

10. The Staff also contended to my current counsel that bar orders have a prophylactic purpose to protect investors. Such an assertion clearly depends on the belief that I have done something to harm investors in the first place, an assertion that is groundless. The Staff, in its zeal to "protect" the investing public, must not forget that my entire case has never been based on more than a set of poorly articulated exaggerated , *de minimis* allegations which, even in the aggregate, represent little more than hair-splitting.[1] After more than two years of investigation, the most serious allegations the staff was able to muster were that my acts resulted in slightly more than $2200 in management fees spread over a 33 month period: **$2,200 in the aggregate over 33 months!** The fact that I was

[1] Indeed, as my 2012 motion to dismiss clearly stated, "the OIP is full of exaggerations and misrepresentations that, strung together, still fail to state *prima facie* causes of action." [Attachment B, Wanger Initial Affidavit ¶ 2 (b)]. Such hyperbolic allegations hardly constitute proof of anything, let alone actual proof of injury to public investors for which a prophylactic sanction is needed.

successfully pressured into accepting a one-year bar after being subjected to an impossible set of circumstances, carefully engineered to be just so by the CRO staff, the ALJ and the Commission, cannot and must not be interpreted as proof or admission of anything. No one denies the raw power of the SEC. However, the idea that a sanction, accepted under such duress, could somehow be interpreted as demonstrating a need for "regulatory prophylaxis" defies all logic.

Prophylaxis, as typically understood, means taking preemptive steps to prevent the possibility of future harm. While it is certainly true that permanent bar orders, by definition, forestall the possibility of future harm to the investing public, the threat of future harm would seemingly need to be grounded on some evidence that there was harm in the first place. Thus far, no one has ever shown or admitted that the alleged acts harmed my investors or the investing public in any way.

Moreover, the justification for a permanent bar as prophylaxis requires some proof of reasonable likelihood that the harm will be repeated in the future. Just as there was no showing of actual past harm, there was no showing of likelihood of future repetition. Indeed, absent such proof, a notion of prophylaxis is tantamount to saying that all criminals, regardless of how small the infraction, should be kept in prison indefinitely – or permanently - as prophylaxis designed to protect the public against the possibility that they might commit some future crime. Such a permanent sanction would defy even the most basic tests of Due Process and Equal Protection. Yet no one has proven or admitted any such harm – in the past or in the future. [2]

11. How is it possible to justify the arbitrary and extra-judicial imposition of a self-actualizing permanent bar by FINRA and, now by the Staff as well? FINRA has clearly stated the bar is permanent, creating that reality by asserting it. And the SEC appears to support FINRA in that assertion. Proof or not, the bar has become permanent. The acts in question took place six or more years ago! But I am still barred, and the businesses that were destroyed are only a fond memory.

12. Bar orders must be viewed for what they are, *to wit*: punishment. A bar order is a total prohibition of conduct – present and future. This is only prophylaxis in the sense that euthanasia is medical treatment.

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[2] What Chief Justice Burger said and warned in *Aaron v. SEC* about injunctions applies equally to bar orders:

> "It bears mention that this dispute [*i.e.*, whether the SEC is required to establish scienter as an element of an action to enjoin violations of antifraud provisions under the 1933 and 1934 Acts], though pressed vigorously by both sides, may be much ado about nothing. This is so because of the requirement in injunctive proceedings of a showing that "there is a reasonable **likelihood** that the wrong will be **repeated.**" *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1100 (2nd Cir. 1975). *Accord, SEC v. Keller Corp.*, 323 F.2d 397, 402 (7th Cir. 1963). To make such a showing, it will almost always be necessary for the Commission to **demonstrate** that the defendant's past sins have been the result of more than negligence. Because **the Commission must show some likelihood of a future violation,** defendants whose past actions have been in good faith are not likely to be enjoined. See opinion of the Court, ante, at 701. That is as it should be. **An injunction is a drastic remedy, not a mild prophylactic, and should not be obtained against one acting in good faith.**"

Aaron v. SEC, 446 U.S. 680, 703, 100 S. Ct. 1945, 64 L. Ed. 2d 611 (1980)(concurring)(emphasis added).

Denial of Basic Economic and Property Rights

13. A bar order that denies a person basic economic and property rights goes way too far. This one continues to do exactly that.

14. This is not the place to reiterate my previous complaints about how the sanction caused Chase to cancel my credit cards over "reputational risk," Merrill to arbitrarily cancel my retirement accounts, or the refusal by Schwab and Fidelity to allow me access my funds, etc. *See Wanger Initial Affidavit*, ¶¶ 7 & 11(d) (April 11, 2016).

15. Yet, the harm continues actively to this very moment. On May 18, 2016, I was informed that, because of an outstanding bar order against me, which showed up on a background check, I could not lease and sublet office space on 111 W. Wacker Drive in my home town of Chicago, Illinois.

Supplemental Letters

16. The Staff and the Commission may not appreciate the degree to which the fear of agency harassment and retribution drive the actions of its regulated participants. I have presented a number of letters of supplementation from former investors and even former regulators. I have attached two more here. *See* Exhibit 1. However, my concerted efforts to obtain letters of supplementation from individuals employed in the securities industry have generally failed. Many of these people enjoy prominent jobs in the industry. Out of fear of unwanted scrutiny and possible SEC retribution against themselves or their firms, many declined, even after I

offered to present them as "John Doe" letters, with their real names protected from the Commission's view. These are some of the same people who were too afraid of the SEC to testify in my defense at the administrative hearing that was supposed to have occurred in 2012.

* * *

State of Illinois)
County of Cook)

Affiant has personal knowledge of the foregoing, is competent to testify thereto, and certifies under penalty of perjury under the laws of Illinois that the foregoing is true and correct.

Dated: May 23 , 2016,

Eric David Wanger

Signed and sworn (or affirmed) to before me on the 23rd of May, 2016 by Eric David Wanger (name of person making statement).

(Seal)

"OFFICIAL SEAL"
MICHAEL L PACE
Notary Public - State of Illinois
My Commission Expires March 08, 2020

(Signature of Notary Public)

CERTIFICATE OF SERVICE

The undersigned certifies that, on May 15, 2016, he caused to be served on the following person a Supplemental Affidavit of Eric David Wanger, by depositing the same in the United States Post Office for delivery by priority US Mail to:

Office of the Secretary
Unites States Securities & Exchange Commission
101 F Street, N.E.
Washington D.C. 20549

Thomas V. Sjoblom
Counsel to Respondent Wagner