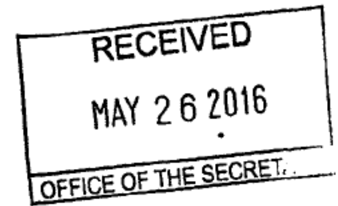

UNITED STATES OF AMERICA

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.

The Need For Sponsorship and Supervision

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.

"Permanent" Bar

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)

(Signature of Notary Public)

CERTIFICATE OF SERVICE

The undersigned certifies that, on May 25, 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

EXHIBIT 1

Supplemental Letters

Stanford Law School

Joseph A. Grundfest
W. A. Franke Professor of Law and Business
Senior Faculty, Rock Center for Corporate Governance

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559 Nathan Abbott Way
Stanford, CA 94305-8610
Tel 650 723 0458
Fax 650 725 0253
grundfest@stanford.edu

April 19, 2016

The Honorable Mary Jo White, Chairman
The Honorable Kara M. Stein, Commissioner
The Honorable Michael S. Piwowar, Commissioner
100 F Street, NE
Washington, DC 20549

Re: Petition of Eric David Wanger for Re-Admission

Dear Chairman and Commissioners:

I am the William A. Franke Professor of Law and Business at Stanford Law School, and served as a Commissioner of the United States Securities and Exchange Commission from 1985 to 1990. I am also Senior Faculty at the Rock Center on Corporate Governance at Stanford University, and am the founder and co-director of Stanford Law School's executive education programs, including Stanford Directors' College. I am trained as an economist and attorney, and my scholarship has appeared in the Harvard, Yale and Stanford law reviews, as well as in refereed economic journals. I have taught courses on securities regulation, corporate governance, and finance. I have been named as among the nation's 100 most influential attorneys and among the 100 most influential in the field of corporate governance.

I am receiving no compensation in this matter.

I am personally familiar with Mr. Wanger. He is a 1999 graduate of Stanford Law School. I have known him personally and professionally since that time. I am familiar with the facts of the Commission's proceeding against Mr. Wanger and believe that, whatever may have occurred in the years 2008-2010, Mr. Wanger has been amply sanctioned. It is, in my view, time to allow Mr. Wanger to resume his professional and economic life.

I strongly urge the Commission to grant Mr. Wanger's petition for readmission. To the best of my knowledge:

1. Mr. Wanger has complied with the Order in every respect;
2. The one-year suspension period imposed by the Commission's Order expired in July, 2013, more than two years ago;
3. Mr. Wanger's individual circumstances require that he direct his reapplication directly to the Commission rather than to a self-regulatory organization; and
4. The failure to grant Mr. Wanger's petition would, in effect, constitute a *de facto* lifetime bar, a sanction that appears never to have been contemplated by anyone involved in this proceeding, and that would be disproportionate to the alleged violations.

The Commission's Order speaks for itself. The Order sanctions Mr. Wanger because of conduct that allegedly generated profits of $2,269.81 over a 33 month period, amounting to profits of less than $69 per month. The Order also suggests that Mr. Wanger "marked the close" to inflate his profits, and alleges an average maximum portfolio inflation over all alleged marks of approximately 00.85 percent -- eighty five one-hundredths of one percent. The effect of the bar is quite significant when measured against both the aggregate dollar amounts and percentage of inflation alleged in Order.

It is a fundamental tenet of criminal law that, once a person serves his sentence, the person should have an opportunity to resume his life as a productive member of society. As a society, we believe in an opportunity for redemption, and the ability to resume one's occupation following full compliance with the terms of a Commission order should, *a factiori*, lead to no different result. The fact pattern giving rise to the Commission's civil settlement with Mr. Wanger contemplated a maximum one-year bar, and the circumstances giving rise to Mr. Wanger's direct application to the Commission should not operate as a *de facto* extension of the bar beyond the period specified in the Commission's order.

I respectfully request that the Commission accept Mr. Wanger's application for readmission.

With best regards

Joseph A. Grundfest

EDWARD H. SCHWARTZ
180 EAST PEARSON STREET
CHICAGO, ILLINIOS 60611

April 19, 2016

United States Securities & Exchange Commission
Office of the Secretary
100 F Street, N.E.
Washington, DC 20549

Dear Secretary,

My name is Edward H Schwartz and I am writing to you today in support of Eric David Wanger and his pending application to be reinstated as a member in good standing in the securities industry.

As a longtime leader in the property casualty business, I began my career in 1947 at Continental Casualty Company (CNA) after which I joined a firm started by my father in 1919, Schwartz-Kruger and Company. When my father died in 1950, I became partners with my brother in Schwartz Brothers Insurance Agency. In addition to the property and casualty business we later created Schwartz Benefit Services to market health, disability and long term care insurance as well. I personally also served as Co- President of Finance Risk Underwriting Agency for 5 years. I am proud to say that Schwartz Brothers Insurance was reported to be one of the largest brokerages in Chicago with considerable influence and business dealings elsewhere in the U.S.

Over the course of my long career I have met many industry leaders and have frankly learned how to judge the character of people with whom I want to do business. Eric Wanger was one of them who I knew personally and with whom I eventually did business.

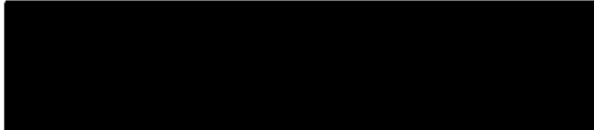
I knew Eric for about ten years and invested a not insignificant amount of money in two of his funds, both of which outperformed other financial opportunities in which I had invested. And while the returns were very satisfying, they were matched equally by Eric's consulting and communicative manner with me, his client and I am sure with other clients as well. Wanger Investment Management was one of the best choices I could have made to safeguard and grow my capital.

Eric's integrity and honesty were never issues for me. In fact, were he permitted to practice again and I sincerely hope that this will happen sooner rather than later. I would hope to be first in line to once again invest with him.

Frankly I was surprised and puzzled from the get go that Eric was barred for a year from the industry since it was clear, to me at least, that he had done nothing to earn such action. And now four years into the ban, it seems the SEC is overreaching in keeping Eric away from a business in which he excelled, where for all intent and purposes, he did nothing wrong and from clients who suffer from not receiving his advice.

Please add me and my feelings for this situation to what I am sure is a very long list of Eric Wanger's friends and clients who most assuredly are petitioning for his return to the securities industry.

Most respectfully,



Edward H. Schwartz