

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

Administrative Proceedings Rulings
Release No. 5691 / April 20, 2018

Administrative Proceeding
File No. 3-16318

In the Matter of

**Michael W. Crow,
Alexandre S. Clug,
Aurum Mining, LLC,
PanAm Terra, Inc., and
The Corsair Group, Inc.**

PUBLIC REDACTED
**Order Ratifying in Part and
Revising in Part Prior Actions**

After I issued an initial decision in this proceeding, the Securities and Exchange Commission ratified my prior appointment as an administrative law judge and partially remanded this proceeding to me. *See Pending Admin. Proc.*, Securities Act of 1933 Release No. 10440, 2017 SEC LEXIS 3724 (Nov. 30, 2017). The remand order specifically named only Alexandre S. Clug, the only Respondent that petitioned for review of the initial decision.¹ *See Alexandre S. Clug*, Securities Act Release No. 10057, 2016 SEC LEXIS 1078, at *1 (Mar. 22, 2016) (granting review). The Commission instructed me to allow the parties to present any relevant new evidence and to reconsider the record and my prior actions. Based on the new evidence submitted by the parties and my reconsideration of the record, I have determined to revise the amount of disgorgement ordered. In all other respects, I ratify my prior actions.

¹ I did not preclude participation by the other Respondents, who remain subject to the Division of Enforcement's cross petition for review. Michael W. Crow, Admin. Proc. Rulings Release No. 5300, 2017 SEC LEXIS 3905 (ALJ Dec. 6, 2017). But none of the other Respondents submitted any evidence or otherwise participated in the remand process.

Background

The Commission issued an order instituting proceedings (OIP) on December 16, 2014. The OIP alleged that Clug engaged in fraudulent conduct in violation of, and also aided and abetted and caused violations of, Section 17(a) of the Securities Act and Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder; aided and abetted and caused a company's failures to file complete and accurate periodic reports, and failed to certify those reports, in violation of Section 13(a) of the Exchange Act and related rules; and effected transactions in securities without registering as a broker-dealer in violation of Section 15(a) of the Exchange Act and aided and abetted and caused another to act as a broker-dealer while barred from associating with a broker-dealer. OIP at 13-14.

After a hearing in July 2015, I issued an initial decision on February 8, 2016. Initial Decision Release No. 953, 2016 SEC LEXIS 475 (initial decision). I concluded that Clug violated Exchange Act Section 10(b) and Rule 10b-5 and Securities Act Section 17(a) and aided and abetted and caused violations of those provisions, violated Exchange Act Section 15(a), and willfully aided and abetted and caused violations of Exchange Act Section 15(b). Initial Decision 1, 60, 62, 65, 67, 69. I rejected the claims under Exchange Act Section 13(a) and associated rules related to periodic reports. *Id.* at 67.

I permanently barred Clug from association with a broker, dealer, investment adviser, municipal securities dealer, municipal adviser, transfer agent, or nationally recognized statistical rating organization. *Id.* at 82. I imposed a penny stock bar and investment company bar. *Id.* at 82-83. I issued a cease-and-desist order. *Id.* at 83. With respect to monetary sanctions, I determined that Clug had ill-gotten gains of \$406,591.51.² However, Clug made a "convincing showing of an inability to pay," and I set the amount of disgorgement at \$50,000. *Id.* at 80. I found that the violations "warrant[ed] the imposition of third-tier civil penalties," but, due to the disgorgement ordered and Clug's inability to pay, I found that the public interest factors did not require Clug to pay a civil penalty and did not impose one on him. *Id.*; *see id.* at 81.

² The ill-gotten gains include \$286,810.01 that Clug conceded was appropriate plus \$100,000 "to include proceeds from the Aurum convertible note sales that he received in 2011" and "half of the \$39,563 received from ABS." Initial Decision at 79-80.

As instructed by the Commission in its remand order, I provided both parties with the opportunity to submit any new evidence relevant to my reconsideration of the record. The Division of Enforcement submitted evidence regarding Clug's financial situation and inability-to-pay defense. The Division argues that after the conclusion of the hearing but before the issuance of the initial decision, Clug's financial condition materially changed for the better and he concealed that information. The Division requests that I therefore withdraw my finding that Clug has an inability to pay and revise the sanctions and order Clug to pay the full amount of disgorgement, prejudgment interest, and a civil penalty.

Clug submitted an opposition and, on my instructions, filed a new financial disclosure statement. The Division submitted a reply brief, and Clug submitted a surreply.³

Constitutional Issues

In his opposition, Clug incorporated by reference constitutional arguments that he previously raised before me. These arguments are that this proceeding violates the Appointments Clause, runs afoul of separation of powers concerns under *Free Enterprise Fund v. PCAOB*, 561 U.S. 477 (2010), violates the non-delegation doctrine,⁴ and infringes Clug's right to a jury trial. Opp'n 1 n.2, 5-6. To the extent Clug raises these objections to preserve them for his petition for review before the Commission or a future appeal, see Opp'n 1 n.2, they are noted. Otherwise, I reject the separation of powers and jury trial challenges for the reasons I explained in the initial decision. See Initial Decision 55.

³ The surreply is titled "Alexandre S. Clug's Corrections to Division of Enforcement's Reply to Alexandre S. Clug's Response to the Division's Submission of New Evidence" and dated March 6, 2018.

⁴ The question of whether Congress impermissibly delegated too much authority to the Commission is not a question the Commission can answer. *William J. Haberman*, Exchange Act Release No. 40673, 1998 SEC LEXIS 2466, at *10 n.14 (Nov. 12, 1998) ("As this Commission has noted in the past, we have no power to invalidate the very statutes that Congress has directed us to enforce."), *pet. denied*, 205 F.3d 1345 (8th Cir. 2000); see *Elgin v. Dep't of the Treasury*, 567 U.S. 1, 18 n.8 (2012) ("It is not unusual for an appellate court reviewing the decision of an administrative agency to consider a constitutional challenge to a federal statute that the agency concluded it lacked authority to decide.").

Since the initial decision was issued, there have been further developments in litigation about whether SEC administrative law judges are inferior officers whose appointments must conform to the Appointments Clause. In *Bandimere v. SEC*, 844 F.3d 1168 (10th Cir. 2016), *petition for cert. filed*, No. 17-475 (U.S. Sept. 29, 2017), the court of appeals held that SEC administrative law judges are inferior officers. And the Supreme Court granted certiorari on that question in *Lucia v. SEC*, 138 S. Ct. 736 (2018). But by ratifying my appointment as an SEC administrative law judge, the Commission has remedied any Appointments Clause defect in my original appointment. *Pending Admin. Proc.*, 2017 SEC LEXIS 3724, at *1 (putting “to rest any claim that administrative proceedings pending before, or presided over by, Commission administrative law judges violate the Appointments Clause”); see *Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 370-71 (D.C. Cir. 2017) (holding that NLRB’s ratification of the appointment of a regional director remedied any defect arising from the director’s improper appointment and the regional director’s ratification of his own prior invalid actions was proper).

Inability to Pay

The only issue about which the parties presented new evidence and made arguments is my finding in the initial decision that Clug lacked the ability to pay a civil penalty and the full amount of disgorgement.

In its initial filing on remand, the Division submitted evidence that Clug and his wife purchased a townhouse in December 2015—after the hearing but before I issued my initial decision in February 2016. I am troubled by this evidence because Clug did not update his sworn financial disclosure statement to reflect this change in circumstances as required by the Rules of Practice. 17 C.F.R. §§ 201.630(b) (“Any respondent who asserts an inability to pay disgorgement, interest or penalties may be required to file a sworn financial statement and to keep the statement current.”), 209.1(b) (“The respondent filing Form D-A is required to promptly notify the Commission of any material change in the answer to any question on this form.”).

Clug, who has represented himself since February 2016, explains in his opposition that he was unaware of the requirement to keep his financial disclosure form up to date. He also asserts that the purchase of the house, [REDACTED] caused his financial condition to deteriorate and reduced his ability to pay disgorgement, and therefore did not have a material effect on his financial situation. Opp’n 2; Surreply 3.

Even if purchasing the house worsened Clug's finances, I do not agree that it was immaterial. Although § 209.1(b) does not define "material change," under the general definition of materiality in the securities law context, the home purchase was a material change. The transaction, which closed just weeks before the initial decision was issued, is information a reasonable adjudicator would consider important in analyzing inability to pay. *Cf. Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988). It is particularly material because Clug's living situation

was one of the factors I considered in the inability to pay analysis in the initial decision. Initial Decision 77. Due to Clug's failure to update, that portion of the initial decision was no longer true when it was issued. Even assuming Clug's argument that the purchase worsened his finances, the requirement to update is not confined to material improvement but includes positive or negative material changes. Spending that worsens a respondent's financial condition is relevant in determining ability to pay. *See Russell C. Schalk, Jr.*, Securities Act Release No. 10219, 2016 SEC LEXIS 3584, at *8-11 (Sept. 21, 2016).

Nevertheless, I also do not accept the Division's argument that Clug's failure to update his financial disclosure form is evidence of "bad-faith and an intent to deceive." Reply 2. In the initial decision, I found that Clug was "a sincere individual who made regrettable decisions, in large part because he attempted to undertake endeavors that he was ill-equipped for" and that he appeared to be "a hard-working, generally good person." Initial Decision 80. The evidence presented on remand has not convinced me to change my view. Clug's failure to update was most likely an honest mistake and not an attempt at deception. The purchase itself was conducted openly and in the name of Clug and his wife—the Division's evidence of the purchase are public records available online and a real estate database website. Div. Br. Bah Decl. Exs. A-C. Had Clug intended to hide the purchase, it could have been structured to conceal the identity of the purchasers. Because I do not find that Clug acted in bad faith, I do not deem his inability-to-pay claim waived. *Cf. 17 C.R.F. § 201.630(e)*. I will instead evaluate the claim in light of Clug's updated financial disclosure.

After reviewing Clug's statement of financial condition dated January 29, 2018, and supporting documents, I conclude that Clug still lacks the ability to pay the full amount of disgorgement or a civil penalty. But Clug's finances have improved since the statement of financial condition he submitted. He is now gainfully employed

Opp'n 4;

Initial Decision 76. [REDACTED]

[REDACTED] See Opp'n
3. Despite the monthly negative cash flow [REDACTED] reported by Clug, he and his wife's joint net assets have increased [REDACTED]. Opp'n Ex. 7. Because of this improvement, I find it appropriate to increase the disgorgement from \$50,000 to \$67,000. This is in line with the reasoning of the initial decision [REDACTED], which "will have a strong deterrent effect." Initial Decision 80-81.

The Division, in its reply, argues that Clug's updated financial statement contains false and misleading information and points to various purchases to argue that "Clug is living a life of comfort and luxury and is more than capable of paying full disgorgement and a civil penalty." Reply 5. The Division maintains that the supporting financial documentation supplied by Clug "cast serious doubt about his claim to a negative monthly cash flow." *Id.* at 4. As noted above, the negative monthly cash flow is generally belied by the overall improvement in Clug's financial picture, and I have not based my assessment on Clug's cash-flow figures. Regarding Clug's spending on luxury items, I find Clug's explanations of those expenses reasonable. See Surreply 9-12. This is not a case of spending thousands at the race track. *Cf. Schalk*, 2016 SEC LEXIS 3584, at *10.

While Clug's finances have improved, they are still precarious. I find that he lacks the ability to pay a civil penalty and the full amount of disgorgement. Disgorgement of \$67,000 plus prejudgment interest is appropriate and serves the public interest.

Ratification and Order

Per the Commission's instructions, I have reconsidered the record and my actions in this proceeding. I REVISE the initial decision as follows:

Alexandre S. Clug shall PAY DISGORGEMENT in the amount of \$67,000, plus prejudgment interest.

Prejudgment interest shall be calculated from December 31, 2013, to the last day of the month preceding the month in which payment of disgorgement is made, consistent with 17 C.F.R. § 201.600. Prejudgment interest shall be calculated at the underpayment rate of interest established under Section 6621(a)(2) of the Internal Revenue Code, 26 U.S.C. § 6621(a)(2), and shall be compounded quarterly. 17 C.F.R. § 201.600. Interest shall continue to accrue on all funds owed until they are paid.

Aside from this revision and the inability-to-pay findings underlying it, I RATIFY my prior actions. The process contemplated by the Commission's November 30, 2017, order is complete.

Jason S. Patil
Administrative Law Judge