INITIAL DECISION RELEASE NO. 795
ADMINISTRATIVE PROCEEDING
File No. 3-16277

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

In the Matter of DOUGLAS L. SWENSON, CPA	INITIAL DECISION May 19, 2015

APPEARANCE: Daniel J. Wadley for the Division of Enforcement, Securities and Exchange Commission

BEFORE: James E. Grimes, Administrative Law Judge

Summary

This Initial Decision grants the Division of Enforcement's Motion for Summary Disposition and bars Respondent Douglas L. Swenson, CPA, from associating with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, and from participating in an offering of penny stock.

Procedural Background

The Commission initiated this proceeding with an Order Instituting Administrative Proceedings and Order of Suspension (OIP) against Swenson. The OIP was issued under Section 15(b) of the Securities Exchange Act of 1934 and Rule 102(e)(2) of the Commission's Rules of Practice. The OIP alleges that a jury in *United States v. Swenson*, No. 1:13-cr-00091 (D. Idaho) (*Swenson*), convicted Swenson of forty-four counts of securities fraud in violation of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and thirty-four counts of wire fraud in violation of 18 U.S.C. § 1343. OIP at 2. The OIP further alleges that Swenson was sentenced to twenty years in prison and three years of supervised release, with restitution to be determined at a later date. *Id.* The OIP also suspended Swenson, alleged to have been a licensed CPA from 1981 to 1995, from appearing or practicing before the Commission. *Id.* at 1-2.

After Swenson failed to file an answer to the OIP, I held a telephonic prehearing conference on January 21, 2015. Counsel for the Division of Enforcement attended the conference but Swenson did not. During the conference, I confirmed that Swenson was served

with the OIP on December 31, 2014. Prehearing Conference Transcript (Tr.) at 3. I also granted the Division leave to move for summary disposition. Tr. at 4-6.

On February 25, 2015, the Division filed its Motion and Memorandum in Support of Motion for Summary Disposition (Division's Motion) and supporting exhibits. Among the Division's exhibits are the judgment in *Swenson* (Ex. A), Swenson's superseding indictment (Ex. B), the district court's amended findings of fact, conclusions of law and order, dated July 29, 2014 (Ex. D), and the district court's restitution order (Ex. E).[1] Swenson did not file an opposition to the Division's Motion.

Swenson is in default for failing to file an Answer, appear at the prehearing conference, or otherwise defend this proceeding. *See* 17 C.F.R. §§ 201.155(a), .220(f), .221(f). Thus, I deem the OIP's allegations true and determine this proceeding upon consideration of the record, including evidence submitted by the Division and facts officially noticed under Rule 323.[2] 17 C.F.R. § 201.155(a); *see* 17 C.F.R. § 201.323. I have applied preponderance of the evidence as the standard of proof. *See Steadman v. SEC*, 450 U.S. 91, 101-04 (1981).

Findings of Fact

Swenson was the founder, operator, and majority owner of DBSI, "a conglomerate of affiliated companies that was engaged in the acquisition, development, management[,] and sale of commercial real estate properties." Ex. D ¶ 35; *see* Rule 29 Order at 9. Swenson was also DBSI's CEO and president, controlled virtually every aspect of its operations, and owned between eighty-eight and eighty-nine percent of DBSI during the relevant period. Ex. D ¶¶ 36, 77, 84, 91; Rule 29 Order at 9.

DBSI marketed Tenant-In-Common (TIC) interests in commercial real estate "and raw land." Rule 29 Order at 5. The district court described "DBSI's marketing approach," explaining that DBSI would

> sell a TIC interest in the property to the investor, and then lease the property back from the TIC investors pursuant to a master lease in which the investors would be guaranteed a set return – typically 7% – on their investment. DBSI would then manage the property – keeping any profits beyond the guaranteed payment to the investors, but also subsidizing the property if it operated at a loss. As one means of assuring the investors that their guaranteed return would be paid, DBSI consolidated all of the TIC investment

[1] On April 27, 2015, I took official notice of the docket sheet, proceedings, record, and all filings in *Swenson* pursuant to 17 C.F.R. § 201.323. *Douglas L. Swenson, CPA*, Admin. Proc. Rulings Release No. 2593, 2015 SEC LEXIS 1589.

[2] Among the documents of which I took official notice is the district court's Memorandum Decision and Order, dated August 15, 2014, denying Swenson's Rule 29 motion for judgment of acquittal (the Rule 29 Order).

> properties which it managed into a Master Lease Portfolio. DBSI promoted the Master Lease program as providing less risk for the investor by spreading any risk over DBSI's entire portfolio – the investor would receive his guaranteed return even if his property did not generate a positive cash flow, because the overall profitability of the portfolio backed each investor's right to a guaranteed return. However, this was only true if the Portfolio itself cash-flowed positive or broke even.

Id. at 5-6.

DBSI represented that the portfolio of properties sold subject to the Master Lease was "self-sustaining and profitable." Rule 29 Order at 6. This was false. By 2005, DBSI was in a negative cash flow situation. *Id.* By 2006, the Master Lease Portfolio had losses in excess of $21 million. *Id.* In 2007 and 2008, the Master Lease Portfolio had a negative cash flow of approximately $3 million per month and used new investor funds to meet its existing obligations. Ex. D ¶ 47; Rule 29 Order at 6. Despite DBSI's precarious financial state, Swenson paid himself $1,717,151 in salary and distributions during 2007 and 2008. Ex. D ¶ 89.

In 2007, DBSI obtained over $458 million from investors. Ex. D. ¶ 70. It obtained almost $274 million from investors in 2008. *Id.* ¶ 81.

Under the Master Lease, the individual TIC investors, as the owners of the properties, were responsible only for capital expenses, tenant improvement, and leasing commissions on the properties. *See* Rule 29 Order at 8, 16. DBSI collected "accountable reserves" from investors to cover these costs. *Id.* DBSI collected $22.9 million accountable reserves in 2007 and $6.6 million in 2008. Ex. D ¶¶ 64, 79. DBSI told the TIC investors that the accountable reserves remained their property, could not be used for DBSI's general operations, and would be repaid to them to the extent not used. Rule 29 Order at 8, 16. In reality, "DBSI spent the bulk of the accountable reserve funds for DBSI's general operations, and not for tenant improvements, leasing commissions and capital expenditures on the investor's properties." *Id.* at 8. In other words, most of the reserves collected by DBSI were used for purposes not disclosed to the TIC investors.

DBSI represented in private placement memoranda (PPMs) and marketing materials provided to investors that two affiliated entities, DBSI Master Leaseco and DBSI Housing, guaranteed the Master Lease, such that if a property subject to the lease was cash flow negative, those entities were responsible for making up any shortfall. Rule 29 Order at 5, 7. The PPMs and marketing materials also contained financial statements for DBSI Housing. *Id.* at 5. Swenson, however, manipulated the financial statements for DBSI Master Leaseco and DBSI Housing to make these entities seem more successful and thus, the guarantee seem more meaningful. *Id.*

DBSI represented that DBSI Master Leaseco, the initial guarantor, "had an audited net worth of $15.4 million in cash or otherwise immediately available assets." Rule 29 Order at 7. In actual fact, millions of dollars were transferred to DBSI Master Leaseco's accounts each year

shortly before its annual audit. *Id.* Most of the funds were then removed after the audit, leaving DBSI Master Leaseco with almost no money. *Id.*

DBSI represented that DBSI Housing, the secondary guarantor, had "a net worth of more than $105 million." Rule 29 Order at 7. In reality, the figure of $105 million was inflated by the use of deceptive accounting practices directed and approved by Swenson. *Id.* at 7, 16; Ex. D ¶ 48. DBSI loaned money to technology start-up companies through Stellar Technologies, a company in which Swenson had a forty-five percent ownership interest. Rule 29 Order at 7; Ex. D ¶¶ 88, 96. By 2008, Stellar and the technology companies under its umbrella owed DBSI Housing $225 million. Rule 29 Order at 7. Between 1999 and 2008, however, Stellar and the technology companies "made [no] material repayment of the loan principal or interest." *Id.* at 16.

The largest part of DBSI Housing's net worth was the $225 million it was owed by the technology companies. Rule 29 Order at 15. "DBSI hid this receivable by netting it against the monies owed to its bond and note holders." *Id.* DBSI also "netted interest payable to bond and note holders – actually paid as an expense – against interest receivable from the technology companies," which accrued but was never paid. *Id.* at 15-16. By pairing a non-existent asset with an actual liability, DBSI was able to "substantially overstate [its] actual net worth." *Id.* at 7-8. Swenson benefited financially from his decision to divert money to Stellar. Ex. D ¶¶ 91, 96, 107. Through his ownership stake, he personally obtained $27,566,757 in proceeds from DBSI's diversion of investor funds to Stellar in 2007 and 2008. *Id.* ¶ 107.

On August 20, 2014, Swenson was convicted of forty-four counts of securities fraud in violation of Exchange Act Section 10(b) and Rule 10b-5 thereunder, and thirty-four counts of wire fraud in violation of 18 U.S.C. § 1343. OIP at 2; Ex. A. He was sentenced to concurrent terms of sixty months on the securities fraud counts and 240 months on the wire fraud counts. Ex. A at 2. He was ordered to forfeit $228,659,378 and pay $180,632,025 in restitution. Ex. D at 23; Ex. E at 5.

Conclusions of Law

A. Summary Disposition Standard

Motions for summary disposition are governed by Rule of Practice 250. *See* 17 C.F.R. § 201.250. An administrative law judge "may grant [a] motion for summary disposition if there is no genuine issue with regard to any material fact and the party making the motion is entitled to a summary disposition as a matter of law." 17 C.F.R. § 201.250(b). "The facts of the pleadings of the party against whom the motion is made shall be taken as true, except as modified by stipulations or admissions made by himthat party, by uncontested affidavits, or by facts officially noted pursuant to Rule 323." 17 C.F.R. § 201.250(a). In order "to survive a motion for summary disposition, the non-moving party must do more than 'simply show that there is some metaphysical doubt as to the material facts.'" *Gary M. Kornman*, Exchange Act Release No. 59403, 2009 SEC LEXIS 367, at *21 n.24 (Feb. 13, 2009) (citation omitted), *pet. denied*, 592 F.3d 173 (D.C. Cir. 2010).

Summary disposition is appropriate in "follow-on" proceedings—an administrative proceeding instituted following a conviction or entry of an injunction—where the only real issue involves the determination of the appropriate sanction. *Mitchell M. Maynard*, Advisers Act of 1940 Release No. 2875, 2009 SEC LEXIS 1621, at *27 (May 15, 2009); *see Jeffrey L. Gibson*, Exchange Act Release. No. 57266, 2008 SEC LEXIS 236, at *19-20 & nn.21-24 (Feb. 4, 2008), *pet. denied*, 561 F.3d 548 (6th Cir. 2009). The exception occurs in those "rare circumstances" in which "a respondent may present genuine issues with respect to facts that could mitigate his or her misconduct." *Mitchell M. Maynard*, 2009 SEC LEXIS 1621, at *27 (internal quotation marks omitted).

B. The Division's evidence demonstrates that a full collateral bar is warranted

As is relevant to this proceeding, Section 15(b) of the Exchange Act empowers the Commission to impose a collateral bar[3] against Swenson if three statutory factors are met: (1) at the time of his misconduct, he was associated with a broker or dealer; (2) he was convicted in the last ten years of an offense that (a) involves the purchase of sale of any security; (b) "involves the larceny, theft, . . . fraudulent conversion, or misappropriation of funds;" *or* (c) is a violation of 18 U.S.C. § 1343; and (3) imposition of the bar is in the public interest. 15 U.S.C. §§ 78*o*(b)(4)(B)(i), (iii), (iv), (6)(A)(ii).

As to the first factor, during the time period of his misconduct, Swenson was associated with a registered brokerage firm. OIP at 1; Ex. C at 3; DBSI Securities Corporation (CRD# 11687) Broker Check Report and West Ridge Securities LLC (CRD# 137795) BrokerCheck Report, *available at* http://brokercheck.finra.org (last visited May 6, 2015).[4]

The second factor is also easily met. Swenson was convicted in August 2014 of multiple counts of securities fraud under Exchange Act Section 10(b) and Rule 10b-5 thereunder, provisions requiring that his manipulative and deceptive conduct be committed "in connection with the purchase or sale of [a] security." 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5. His offenses thus indisputably involved the purchase or sale of securities. It is also clear that Swenson misappropriated and fraudulently converted investor funds. He repeatedly represented that the accountable reserves DBSI collected from investors would be used only to cover certain expenses related to the investment properties, yet he instead used the majority of the reserves to fund DBSI's general operations. Rule 29 Order at 8, 16. In addition to his securities law

[3] The term "collateral bar" refers to the authority to "exclude[] an associated person of a regulated entity not only from the type of business the person was in when" that person violated federal securities laws, "but also from any aspect of the securities business." *Toby G. Scammell*, Advisers Act Release No. 3961, 2014 SEC LEXIS 4193, *1 n.1 (Oct. 29, 2014). Under the authority to issue a collateral bar, the maximum sanctions authorized in this proceeding are barring Swenson from being associated with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, and from participating in an offering of penny stock. *See* 15 U.S.C. §§ 78*o*(b)(6)(A).

[4] I take official notice of these records under 17 C.F.R. § 201.323.

violations, Swenson was convicted of thirty-four counts of wire fraud in violation of 18 U.S.C. § 1343. Ex. A.

With respect to the third factor, whether imposition of a collateral bar would be in the public interest, I must consider the public interest factors set forth in *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981). *See Toby G. Scammell*, 2014 SEC LEXIS 4193, at *23. The public interest factors include:

> the egregiousness of the [respondent's] actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the [respondent's] assurances against future violations, the [respondent's] recognition of the wrongful nature of his conduct, and the likelihood that the [respondent's] occupation will present opportunities for future violations.

Steadman, 603 F.2d at 1140 (quoting *SEC v. Blatt*, 583 F.2d 1325, 1334 n.29 (5th Cir. 1978)). "[T]he . . . inquiry into the appropriate sanction to protect the public interest is . . . flexible . . . and no one factor is dispositive." *Conrad P. Seghers*, Advisers Act Release No. 2656, 2007 SEC LEXIS 2238, at *13 (Sept. 26, 2007), *pet. denied*, 548 F.3d 129 (D.C. Cir. 2008). The Commission also considers the degree of harm resulting from the violation, *KPMG Peat Marwick LLP*, Exchange Act Release No. 43862, 2001 SEC LEXIS 98, at *100 (Jan. 19, 2001), *pet. denied*, 289 F.3d 109 (D.C. Cir. 2002), and the deterrent effect of administrative sanctions, *Schield Mgmt. Co.*, Exchange Act Release No. 53201, 2006 SEC LEXIS 195, at *35 & n.46 (Jan. 31, 2006).

In *Ross Mandell*, the Commission directed that before imposing an industry-wide bar, an administrative law judge must "'review each case on its own facts' to make findings regarding the respondent's fitness to participate in the industry in the barred capacities." Exchange Act Release No. 71668, 2014 SEC LEXIS 849, at *7-8 (Mar. 7, 2014) (quoting *McCarthy v. SEC*, 406 F.3d 179, 188 (2d Cir. 2005)). The Commission also explained that an administrative law judge's decision "should be grounded in specific 'findings regarding the protective interests to be served' by barring the respondent and the 'risk of future misconduct.'" *Id.*, at *8 (quoting *McCarthy*, 406 F.3d at 189 & 190).

In this case, the public interest would best be served by imposing a full collateral bar. Swenson's conduct was egregious. He was DBSI's founder, CEO, president, and majority owner, and he was in charge of virtually every aspect of DBSI's operations. Ex. D ¶¶ 35-36, 77, 84; Rule 29 Order at 9. In this position of control, he touted DBSI's strength and ability to meet its financial obligations to investors and repeatedly lied about the company's success, profitability, and net worth. Ex. D ¶¶ 36, 45-48; Rule 29 Order at 6. Despite these assurances, DBSI's businesses were almost entirely unprofitable, and as a result, DBSI investors lost at least $180,632,025. Ex. D ¶ 46; Ex. E at 3. While DBSI struggled to stay afloat, using new investor funds and accountable reserves to fund its operations and pay investor returns, Swenson paid himself almost $2 million in salary and distributions and misdirected over $61 million of DBSI's money to technology start-up companies in order to personally benefit himself. Ex. D ¶¶ 46, 89-91, 94; Rule 29 Order at 7- 8.

The egregiousness of Swenson's actions is reflected in his criminal conviction of multiple counts of securities fraud. Such conduct is "especially serious and subject to the severest of sanctions under the securities laws." *Marshall E. Melton*, Advisers Act Release No. 2151, 2003 SEC LEXIS 1767, at *29-30 (July 25, 2003); *cf. John S. Brownson*, Exchange Act Release No. 46161, 2002 WL 1438186, at *2 (July 3, 2002) (holding that "[a]bsent extraordinary mitigating circumstances," an individual who has been criminally convicted of securities fraud "cannot be permitted to remain in the securities industry"), *pet. denied*, 66 F. App'x 687 (9th Cir. 2003).

Swenson's conduct was also recurrent. Throughout 2007 and 2008, DBSI obtained new investments through Swenson's continued concealment of the true nature of DBSI's financial condition, including the fact that DBSI was losing more than $3 million per month and misappropriating investor funds. Ex. D ¶¶ 46-47; Rule 29 Order at 5-6. Swenson also included misleading and inaccurate financial information in PPMs and marketing materials. Rule 29 Order at 5-8.

Swenson acted with a high degree of scienter. His securities fraud convictions were necessarily based on the finding that he willfully defrauded his victims. Rule 29 Order at 2-3 (quoting model jury instructions); *see* 15 U.S.C. § 78j(b). Similarly, his wire fraud convictions were necessarily based on the finding that he was involved in a scheme to defraud and that he acted with intent to defraud. Rule 29 Order at 3 (quoting model jury instructions); *see* 18 U.S.C. § 1343. There is no question that Swenson knew that the representations about the financial condition of DBSI and its guarantors were false, and that he approved and directed the use of deceptive accounting practices in order to obscure the lies in the PPMs and accompanying balance sheets. *See SEC v. Universal Exp., Inc.*, 475 F. Supp. 2d 412, 424 (S.D.N.Y. 2007) ("Representing information as true while knowing it is not, recklessly misstating information, or asserting an opinion on grounds so flimsy as to belie any genuine belief in its truth, are all circumstances sufficient to support a conclusion of scienter."), *aff'd sub nom.*, *SEC v. Altomare*, 300 F. App'x 70 (2d Cir. 2008). He also affirmatively diverted investor money to start-up companies for his own benefit. The evidence is overwhelming that these actions and misrepresentations were part of a knowing and intentional scheme to defraud investors.

Inasmuch as Swenson has not answered the OIP or opposed the Division's Motion, he has made no assurances against future violations or demonstrated that he recognizes the wrongfulness of his conduct. I thus infer that if Swenson were given the opportunity, he would likely engage in similar conduct. *Cf. Tzemach David Netzer Korem*, Exchange Act Release No. 70044, 2013 SEC LEXIS 2155, at *23 n.50 (July 26, 2013) ("the existence of a violation raises an inference that" the acts in question will recur) (quoting *Geiger v. SEC*, 363 F.3d 481, 489 (D.C. Cir. 2004)). Although Swenson is presently serving a prison term, this does not demonstrate that he will not engage in similar conduct when he is released. The Commission "do[es] not view [a] criminal sentence as mitigative of the appropriate sanction to be imposed in the public interest . . . ." *Don Warner Reinhard*, Exchange Act Release No. 63720, 2011 SEC LEXIS 158, at *27 (Jan. 14, 2011). Swenson has previously worked as a registered representative of a broker-dealer, a position which places the representative in contact with investors who rely on him for full and accurate information. *See* Ex. C. Swenson has also worked as a certified public accountant, an occupation in which he could engage in the same

type of deceptive accounting practices for which he has already shown a propensity. *See* OIP at 1; Ex. G. Swenson's occupational background is rife with opportunities for future illegal conduct in the securities industry upon his release from prison.

The degree of harm to investors and the marketplace – as measured by the proceeds involved in, and lost as a result of, the scheme – was massive. *See Toby G. Scammell*, 2014 SEC LEXIS 4193, at *28 n.44. As a final matter, I find that a full collateral bar will serve as a general and specific deterrent. *See Guy P. Riordan*, Securities Act of 1933 Release No. 9085, 2009 SEC LEXIS 4166, at *81 & n.107 (Dec. 11, 2009), *pet. denied*, 627 F.3d 1230 (D.C. Cir. 2010). It will deter Swenson and will further the Commission's interest in deterring others from engaging in similar misconduct. Given the foregoing, I find that it is in the public interest to impose a permanent collateral bar against Swenson.

Order

It is ORDERED that, pursuant to Rule 250(b) of the Securities and Exchange Commission's Rules of Practice, the Division of Enforcement's Motion for Summary Disposition is GRANTED.

It is FURTHER ORDERED that, pursuant to Section 15(b) of the Securities Exchange Act of 1934, Douglas L. Swenson, CPA, is permanently BARRED from associating with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

It is FURTHER ORDERED that, pursuant to Section 15(b) of the Securities Exchange Act of 1934, Douglas L. Swenson, CPA, is permanently BARRED from participating in an offering of penny stock, including acting as any promoter, finder, consultant, agent, or other person who engages in activities with a broker, dealer, or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

This Initial Decision shall become effective in accordance with and subject to the provisions of Rule 360. *See* 17 C.F.R. § 201.360. Pursuant to that Rule, a party may file a petition for review of this Initial Decision within twenty-one days after service of the Initial Decision. A party may also file a motion to correct a manifest error of fact within ten days of the Initial Decision, pursuant to Rule 111. *See* 17 C.F.R. § 201.111. If a motion to correct a manifest error of fact is filed by a party, then a party shall have twenty-one days to file a petition for review from the date of the undersigned's order resolving such motion to correct a manifest error of fact.

The Initial Decision will not become final until the Commission enters an order of finality. The Commission will enter an order of finality unless a party files a petition for review or motion to correct a manifest error of fact or the Commission determines on its own initiative to review the Initial Decision as to a party. If any of these events occurs, the Initial Decision shall not become final as to that party.

Swenson may move to set aside the default in this case. Rule of Practice 155(b) permits the Commission, at any time, to set aside a default for good cause, in order to prevent injustice and on such conditions as may be appropriate. 17 C.F.R. § 201.155(b). A motion to set aside a default shall be made within a reasonable time, state the reasons for the failure to appear or defend, and specify the nature of the proposed defense in the proceeding. *Id.*

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James E. Grimes
Administrative Law Judge