INITIAL DECISION RELEASE NO. 1110
ADMINISTRATIVE PROCEEDING
FILE NOS. 3-16227, 3-16229

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

In the Matters of MIDDLEBURY SECURITIES, LLC, and GREGORY OSBORN	INITIAL DECISION March 1, 2017

APPEARANCES: Alexander Janghorbani and Jorge Tenreiro for the Division of Enforcement, Securities and Exchange Commission

Aegis J. Frumento, Stern, Tannenbaum & Bell LLP, for Middlebury Securities, LLC

Gregory Osborn, pro se

BEFORE: Cameron Elliot, Administrative Law Judge

Summary

Respondents committed securities fraud, as the Securities and Exchange Commission found when it imposed non-monetary sanctions against them. The Commission ordered further proceedings to determine what, if any, monetary sanctions are in the public interest. I grant the Division of Enforcement's motion for summary disposition and impose partial disgorgement on Respondent Gregory Osborn. I do not impose disgorgement on Respondent Middlebury Securities, LLC, or civil penalties on either Respondent, because of their respective demonstrations of inability to pay.

Procedural Background

On October 31, 2014, the Commission issued an order instituting proceedings against Respondent Middlebury pursuant to Section 8A of the Securities Act of 1933, Sections 15(b) and 21C of the Securities Exchange Act of 1934, and Section 9(b) of the Investment Company Act of 1940 (Middlebury OIP). On the same day, the Commission issued an OIP pursuant to the same provisions against Respondent Osborn, who was the managing partner at Middlebury responsible for the alleged violations (Osborn OIP, collectively "OIPs"). The OIPs allege that Respondents willfully violated—and willfully aided and abetted Navagate, Inc. and its principal Gregory

Rorke's violations of—Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder because they made false and misleading statements about the risks of investing in the short-term notes of Navagate. *See* OIPs ¶ III.1, 41-43. Specifically, Respondents made false and misleading statements concerning the assets supposedly guaranteeing the notes and how the proceeds from the notes offering would be used. *Id*. ¶ III.1.

The OIPs followed Respondents' submission, and the Commission's acceptance, of an offer of settlement. OIPs ¶ II. Pursuant to the settlement, the Commission ordered Respondents to cease and desist from committing or causing any violations and future violations of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. *Id*. ¶ VI.A. The Commission censured Middlebury and entered permanent industry bars against Osborn. Middlebury OIP ¶ VI.B; Osborn OIP ¶ VI.B. Respondents agreed to additional proceedings to determine what, if any, disgorgement, prejudgment interest, and civil penalties are in the public interest. OIPs ¶ V. Respondents also agreed that, solely for purposes of such additional proceedings, the allegations of the OIPs "shall be accepted as and deemed true by the hearing officer," and that the remaining issues may be determined "on the basis of affidavits, declarations, excerpts of sworn deposition or investigative testimony, and documentary evidence." *Id*.

The Commission also instituted a proceeding against Navagate and Rorke on October 31, 2014. On December 4, 2014, I ordered that all three proceedings be stayed based on a request by the U.S. Attorney's Office for the Southern District of New York indicating that there was a criminal case pending against Rorke. *See, e.g.*, *Gregory Osborn*, Admin. Proc. Rulings Release No. 2094, 2014 SEC LEXIS 4668. I lifted the stay on June 7, 2016. *See, e.g.*, *Gregory Osborn*, Admin. Proc. Rulings Release No. 3899, 2016 SEC LEXIS 2021. On June 14, 2016, I consolidated the Middlebury and Osborn proceedings. *Middlebury Secs., LLC*, Admin. Proc. Rulings Release No. 3915, 2016 SEC LEXIS 2100. Navagate and Rorke submitted an offer of settlement to the Commission, which was accepted on October 21, 2016, ending that case. *Navagate, Inc.*, Securities Act Release No. 10237, 2016 SEC LEXIS 3968.

On July 28, 2016, the Division submitted a motion for summary disposition (Div. MSD) against Respondents, and attached a declaration (Tenreiro Decl.) with fifty-eight exhibits (Div. Exs.). On August 19, 2016, Middlebury submitted an opposition to the motion (Middlebury Opp.) accompanied by a declaration (Robinson Decl.) with seven exhibits (Middlebury Exs.). The Division submitted a reply on August 29, 2016 (Div. Reply), and Middlebury submitted a supplemental declaration (Robinson Supp. Decl.) with two exhibits on September 7, 2016 (Middlebury Supp. Exs.). On September 6, 2016, Osborn submitted a declaration with sixteen exhibits (Osborn Exs.). I held a telephonic prehearing conference on September 15, 2016, for the Division and Middlebury to orally argue several matters raised in the Division's motion and Middlebury's opposition (Prehearing Tr.). *See Middlebury Secs., LLC*, Admin. Proc. Rulings Release No. 4143, 2016 SEC LEXIS 3394 (ALJ Sept. 9, 2016). Following the prehearing conference, I allowed Middlebury to file additional information concerning its inability to pay. *Middlebury Secs., LLC*, Admin. Proc. Rulings Release No. 4163, 2016 SEC LEXIS 3488 (ALJ Sept. 16, 2016). Subsequently, I allowed Osborn to provide additional information concerning his inability to pay because of inconsistencies and omissions in his September 6, 2016, submission. *Middlebury Secs., LLC*, Admin. Proc. Rulings Release No. 4424, 2016 SEC LEXIS

4554 (ALJ Dec. 8, 2016). Respondents' additional submissions were received by my office between January 13, 2017 and January 24, 2017 (Robinson Second Supp. Decl.; Middlebury Second Supp. Exs.; Osborn Supp. Decl.; Osborn Supp. Exs.). On January 20, 2017, the Division submitted a reply (Div. Supp. Reply).

Legal Standard

A motion for summary disposition may be granted if there is no genuine issue with regard to any material fact and the party making the motion is entitled to summary disposition as a matter of law. 17 C.F.R. § 201.250(b).[1] The facts on summary disposition must be viewed in the light most favorable to the non-moving party. *See Jay T. Comeaux*, Securities Act Release No. 9633, 2014 SEC LEXIS 3001, at *8 (Aug. 21, 2014). Once the moving party has carried its burden of showing it is entitled to summary disposition on the factual record, the opposing party may not rely on bare allegations or denials, but must instead show that there is a genuine dispute of material fact that needs to be resolved by hearing. *Id*.

In accordance with the OIPs' instructions, I accept and deem true the factual allegations in them. OIPs ¶ V. I have also considered stipulations and admissions made by Respondents, uncontested affidavits, and facts officially noticed pursuant to 17 C.F.R. § 201.323. *See* 17 C.F.R. § 201.250(a). Sworn statements, such as declarations, certifications, and attestations, are equivalent to affidavits. *See Allen v. Potter*, 152 F. App'x 379, 382 (5th Cir. 2005). Thus, I have considered uncontested statements made by the Division and by Middlebury in their respective sworn declarations. *See, e.g.*, Tenreiro Decl., Robinson Decls. Similarly, a statement by a party, or by a party's agent, or that a party agrees is true, constitutes an admission within the meaning of Rule of Practice 250. *See Wheat, First Sec., Inc.*, Exchange Act Release No. 48378, 2003 SEC LEXIS 3155, at *45 & n.55 (Aug. 20, 2003) (citing Federal Rule of Evidence 801(d)(2)). Accordingly, I have considered the Division's other exhibits only to the extent they reflect statements or admissions by Respondents. *See, e.g.*, Div. Ex. JJ (escrow release signed by Osborn). Additionally, official notice has been taken of related Commission proceedings against Rorke and Navagate, and the FINRA BrokerCheck reports for Respondents. Div. Exs. DDD, EEE; *see, e.g.*, *Gregory Evan Goldstein*, Exchange Act Release No. 71970, 2014 SEC LEXIS 4625, at *2 n.1, *10 n.12 (Apr. 17, 2014) (official notice may be taken of information on FINRA BrokerCheck).

The filings, documents, and exhibits of record have been fully reviewed and carefully considered. Preponderance of the evidence has been applied as the standard of proof. *See Steadman v. SEC*, 450 U.S. 91, 101-04 (1981). All arguments and proposed findings and conclusions that are inconsistent with this initial decision have been considered and rejected.

[1] The former Rule 250 applies to these proceedings because the initial prehearing conference in this case was held prior to September 27, 2016. *See* Amendments to the Commission's Rules of Practice, 81 Fed. Reg. 50212, 50229 (July 29, 2016). All citations to Rule 250 in this initial decision refer to the former Rule. *See* 17 C.F.R. § 201.250 (2015).

Findings of Fact

A. Background

1. Participants

Osborn, who was fifty when the OIP was issued, lives in New Jersey. Osborn OIP ¶ III.8. During the relevant period, he was a managing partner at Middlebury and was primarily responsible for Middlebury's relationship with Navagate. *Id*. Osborn was registered with FINRA from 1988 until April 2014, when FINRA barred him from associating with any FINRA-registered member. *Id*. Osborn is currently employed by ZapGo, a London-based company, and also advises Brio Financial for a monthly fee. Osborn Ex. 10 at 8.

Middlebury was a FINRA-registered broker-dealer with offices in Vermont, New Jersey, and New York. Middlebury OIP ¶ III.8; Osborn OIP ¶ III.11. Middlebury was the placement agent for Navagate's notes offering from approximately December 2009 to April 2011. *Id*. The company has decided to stop doing business. Robinson Decl. ¶ 8. In July 2016, Middlebury filed a Form BDW with the Commission requesting the withdrawal of its broker-dealer registration. Robinson Decl. ¶ 8; Middlebury Ex. E. Middlebury was officially terminated as an entity on December 27, 2016, when it filed a certificate of cancellation with the Delaware Secretary of State. Robinson Second Supp. Decl. ¶ 4; Middlebury Second Supp. Ex. E.

Navagate is a Delaware limited liability company with its principal place of business in New York. OIPs ¶ III.9. Navagate purportedly created and sold computer software to provide sales force automation to financial services organizations. *Id*. Rorke, age fifty-nine when the OIP was issued, lives in New York and is the co-founder and CEO of Navagate. *Id*. ¶ III.10. Rorke pled guilty to criminal conduct arising from Navagate's notes offering. *Navagate, Inc.*, 2016 SEC LEXIS 3968, at *16. As part of their settlement with the Commission, Navagate and Rorke were ordered to cease and desist from committing or causing any violations and any future violations of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. *Id*. at *18. Rorke was also permanently prohibited from acting as an officer or director of any issuer that has a class of securities registered pursuant to Section 12 of the Exchange Act, or that is required to file reports pursuant to Section 15(d). *Id*.

2. The Fraud

Rorke formed a Delaware limited liability company named G2X in 2000 to develop software to automate certain sales and customer-relationship processes. OIPs ¶ III.12. In 2006, the company changed its name to Navagate. *Id*. Navagate developed a software program called Agility Source Platform to provide customer relations management and sales force automation. *Id*. ¶ III.13. Around October 2009, Navagate and Rorke decided to raise capital by selling notes. *Id*. ¶ III.15. The notes had a six-month maturity and bore annual interest of 12%. *Id*. In the event of default, the interest on the notes would increase to 15% and then 20%. *Id*. It was contemplated that the sale of notes would be a bridge to an eventual public offering of Navagate equity securities. *Id*. On October 12, 2009, Navagate and Rorke hired Middlebury as a placement agent to assist Navagate in selling its notes. *Id*. ¶ III.14. Osborn, a managing partner

at Middlebury, was responsible for the firm's relationship with Rorke and Navagate. Osborn OIP ¶ III.8.

Respondents, Navagate, and Rorke prepared and disseminated offering documents for the notes with the assistance of counsel. OIPs ¶ III.16. Those documents were backed by a personal guarantee based on Rorke's wealth. *Id*. ¶ III.17. The personal guarantee represented to investors that Rorke had the "full power and capacity to execute and deliver" the personal guarantee and to incur and perform the financial obligations in it. *Id*. ¶ III.18. Rorke also provided a personal financial statement purporting to disclose that he solely owned the following assets: (1) $200,000 in cash on hand; (2) $800,000 in cash in banks; (3) $5,000,000 in readily marketable securities in a brokerage account; (4) $1,400,000 in real estate (his primary residence); (5) $4,000,000 in shares of Navagate; and (6) $1,000,000 in illiquid investments in two other unrelated companies. *Id*. ¶¶ III.3, 19. The personal financial statement also provided that Rorke had no liabilities other than those detailed in the statement, and that he had sole title to all the assets in the statement unless otherwise noted. *Id*. ¶ III.18.

The personal financial statement contained several false and misleading statements about Rorke's assets and liabilities. *Id*. ¶ III.21. Rorke did not have six million dollars in cash and readily marketable securities. *Id*. Rather, his wife held $4,355,502, he held $1,527, and they jointly held $33,635. *Id*. The other roughly 1.6 million dollars in cash and readily marketable securities claimed by Rorke did not exist at all, which means he overstated the value of the assets by more than 36%. *See id*. Moreover, Rorke did not own the primary residence he listed because he had transferred it to his wife in October 2008. *Id*. Rorke had no legal authority to pledge his wife's assets. *Id*. In the personal guarantee, Rorke agreed to mortgage his primary residence in the event of default on the notes, but Rorke could not do so because he did not own it. *Id*. ¶ III.24-25. To further assure investors, Rorke had also represented that he would not transfer or otherwise encumber his rights to the assets he had listed in the personal financial statement; this was also misleading because Rorke did not hold title to most of the assets and thus had no ability to prevent their transfer or encumbrance. *Id*. ¶ III.22-23. Finally, in the personal financial statement, Rorke claimed he had no liabilities when in fact he owed at least one million dollars to the IRS. *Id*. ¶ III.21.

During the notes offering, Respondents repeatedly touted to investors Rorke's personal guarantee and personal financial statement as selling points of the offering. *Id*. ¶ III.26. Osborn said that he viewed them as the "key" terms of the offering. *Id*. He told an investor in December 2010 that investment in Navagate's notes offering was a "layup" because Rorke had "Personally Guaranteed the loan." Middlebury OIP ¶ III.26.

However, Respondents knew or were reckless in not knowing that Rorke's personal guarantee and personal financial statement were materially false or misleading. OIPs ¶ III.27. First, Rorke told Osborn in April 2010 that the readily marketable securities mentioned in the personal financial statement were jointly held with his wife, not solely held by Rorke as Rorke had represented to investors. *Id*. ¶ III.28. Thus, Osborn, and through him Middlebury, knew or recklessly disregarded that Rorke could not pledge those assets to mitigate the risk of default on the notes. *Id*. ¶ III.29. Similarly, in approximately December 2009, Rorke had refused to request that his wife sign any personal guarantee, which made clear to Respondents that he did not

intend to put her assets at risk. *Id*. ¶ III.17, III.29. Second, in early 2010, Middlebury hired a private detective agency to perform a background check on Rorke. *Id*. ¶ III.30. The agency found, in a written report provided to Osborn and others at Middlebury on April 21, 2010, that Rorke had transferred his house to his wife in October 2008. *Id*. Third, in April 2010, Middlebury's attorney told Osborn in an e-mail that Rorke was personally liable for $1.8 million of Navagate's past-due payroll tax liabilities. *Id*. ¶ III.31. Rorke then admitted to Osborn in a follow-up e-mail that he was personally liable for at least $1 million of those taxes. *Id*. Thus, Respondents knew or recklessly disregarded that Rorke's claims in his personal financial statement regarding his lack of personal liabilities were false. *Id*.

Osborn, and through him Middlebury, also improperly used the proceeds from the notes offering. *Id*. ¶ III.32-34. The offering documents stated that the proceeds of the notes were to be used only "to fund [Navagate's] sales efforts, for other working capital purposes and to satisfy certain tax liabilities." *Id*. ¶ III.32. Nonetheless, in October 2010, Osborn used over $275,000 of the notes proceeds to pay back four investors who had purchased notes in December 2009 and whose notes were overdue. *Id*. ¶ III.33. These investors had important business relationships with Respondents, and three had demanded prompt repayment. *Id*. Osborn, and through him Middlebury, knew or recklessly disregarded that the offering documents for the notes did not allow repaying prior investors with new investors' funds. *Id*. ¶ III.34. Additionally, Osborn never told Navagate investors that he was using their money to repay other noteholders, even though such information was material to investors in the notes. *Id*. ¶ III.36-37.

Navagate began defaulting on its notes in June 2010. *Id*. ¶ III.38. Nevertheless, Respondents, Navagate, and Rorke kept selling the notes without telling investors about the defaults. *Id*. Navagate raised approximately another $2.2 million through these sales. *Id*. Rorke did not carry through with his personal guarantee to repay investors. *Id*. ¶ III.39. As of early 2014, Navagate owed over $1.25 million in principal and $1.4 million in interest on the notes. *Id*. ¶ III.40.

B. FINRA Sanctions

On August 21, 2013, Middlebury agreed, on a neither-admit-nor-deny basis, to be censured by FINRA and pay a $325,000 fine for alleged violations of the Exchange Act and FINRA and NASD rules. Div. Ex. DDD at 16-18. FINRA alleged that Middlebury, apparently acting through its registered representative (Osborn), misused $200,000 in escrowed customer funds that were the proceeds of two issuers' offerings. Div. Ex. DDD at 16; *see* Div. Ex. EEE at 9-11 (Osborn's BrokerCheck report implies that he is the Middlebury representative referred to in its BrokerCheck report); *see also* Robinson Decl. ¶ 4. According to FINRA, Osborn commingled funds in a non-segregated manner in escrow accounts and wired approximately $125,000 to his personal bank account, among other violations. Div. Ex. DDD at 16; Div. Ex. EEE at 11. Additionally, Middlebury failed to reasonably supervise the handling of customer funds. Div. Ex. DDD at 16-17.

On April 8, 2014, Osborn consented, on a neither-admit-nor-deny basis, to the entry of a bar by FINRA expelling him from the organization. Div. Ex. EEE at 9-13. FINRA alleged, among other things, that Osborn (1) made fraudulent misrepresentations and omissions in

connection with two private securities offerings; (2) commingled the funds from offerings in a non-segregated manner in escrow accounts; (3) misused approximately $200,000 in escrowed investor funds to make payments to, or on behalf of, a different issuer of securities; (4) failed to disclose his federal tax lien; and (5) wired escrowed funds to his personal bank account. *Id*. at 10-11, 13. FINRA also noted several aspects of Osborn's misconduct alleged in the OIPs, such as his failure to disclose Rorke's debts to investors. *See id*. at 10.

C. Factual Findings Pertaining to Disgorgement

The law firm McMillan, Constabile, Maker & Perone, LP, was the escrow agent for Navagate's notes offering. Tenreiro Decl. ¶ 11. McMillan received the proceeds of the notes sales and released those funds at Osborn and Rorke's direction to various parties. *See, e.g.*, Div. Ex. JJ (escrow release notices signed by Osborn and Rorke). The parties do not dispute that Osborn transferred some Navagate funds to Middlebury. *See, e.g.*, Tenreiro Decl. ¶¶ 36-40; Robinson Decl. ¶ 2; Middlebury Ex. A. The parties likewise do not dispute that Middlebury transferred some of the money it received to Osborn as compensation. *See* Div. Exs. AAA & BBB; Middlebury Opp. at 3-4; Robinson Decl. ¶ 2; Middlebury Ex. A. And, as detailed above, Respondents, acting through Osborn, improperly used some of the proceeds to repay other Navagate investors. *See* OIPs ¶ III.32-37.

The Division and Middlebury initially disputed how much money Middlebury received from the proceeds of the notes offering. The Division claimed that Middlebury received $311,150; Middlebury maintained that it received only $284,650. Tenreiro Decl. at 13 (Table D); Robinson Decl. ¶ 2; Middlebury Ex. A. However, this dispute was resolved through further briefing and at the prehearing conference held on September 15, 2016. At the prehearing conference, Middlebury stated that it had inadvertently included a $6,000 payment dated March 30, 2010, in its table of Navagate proceeds received, but that this payment was not related to Navagate. Prehearing Tr. 41, 56-57; *see* Middlebury Ex. A. Middlebury also agreed that it had inadvertently omitted a $10,000 payment it received on January 8, 2010. Prehearing Tr. 54-57. This would bring the total Middlebury received to $288,650. As to the remaining $22,500 difference between Middlebury's numbers and the Division's calculations, Middlebury explained in its supplemental declaration that the Division mistakenly included two additional payments made to other entities in its total. Robinson Supp. Decl. ¶ 6. Specifically, on November 24, 2010, Osborn released $15,000 from the escrow to Middlebury Ventures, LLC and $7,500 from the escrow to Middlebury Advisors, LLC. *Id*. (referring to Div. Ex. JJ). Middlebury explained that it is not connected to these companies, despite the similarity of their names. *Id*. The Division does not dispute this explanation, which is consistent with a response that Middlebury previously provided to FINRA, stating that Middlebury Ventures was wholly owned by Osborn and Middlebury Advisors was wholly owned by another individual. *Id*.; Middlebury Supp. Ex. B; Osborn Ex. 1 at 20; *see also* Prehearing Tr. 49-50. When given an opportunity to orally refute Middlebury's statements, Osborn remained silent on this point, and nowhere in Osborn's papers does he contest the characterization of these two payments in Robinson's supplemental declaration. *See* Prehearing Tr. 61-64. Thus, the declaration amounts to an uncontested affidavit, establishing that Middlebury received $288,650 from the Navagate proceeds, and that Osborn directed the payment of an additional $22,500 from the Navagate proceeds.

It is less clear how much of the Navagate proceeds Osborn personally received from Middlebury. The Division stated that Middlebury paid Osborn either $180,510 or $193,469, and provided two contradictory exhibits. Tenreiro Decl. ¶ 41-42; Div. Exs. AAA & BBB. Middlebury claimed it paid Osborn $226,915. Robinson Decl. ¶ 2; Middlebury Ex. A. Nonetheless, because I impose joint-and-several liability as discussed below, the amount of the proceeds Osborn personally received from Middlebury is not material.

Conclusions of Law and Sanctions

A. Summary Disposition is Appropriate

Respondents cannot contest the findings in the OIPs regarding the fraud. Thus, this proceeding is limited to the narrow issue of monetary sanctions. Summary disposition is appropriate here because a careful review of the record reveals that there are no material facts in dispute. *See* 17 C.F.R. § 201.250(b); *China-Biotics, Inc.*, Exchange Act Release No. 70800, 2013 SEC LEXIS 3451, at *62 n.105 (Nov. 4, 2013) (summary disposition "has been applied in cases alleging a variety of securities law violations," not just in follow-on proceedings). As discussed above, it is undisputed that Middlebury received $288,650 from the Navagate proceeds. Although Middlebury argues that because it did not keep those funds, it should not be required to disgorge them, that argument is a legal one, not a factual one. *See* Middlebury Opp. at 7-8, 10. Similarly, Middlebury's arguments that disgorgement and civil penalties are not in the public interest raise legal issues, but reveal no factual disagreement between the parties. *Id.* at 6-9. Additionally, Osborn's declaration and exhibits pertain to matters that have already been settled in the OIP or relate to his current financial situation. They do not present any material factual dispute that would require a hearing to resolve. The settled facts, in addition to the parties' submissions, which include financial records pertaining to their inability to pay, provide sufficient grounds to make the findings discussed below. *See* OIPs ¶ V (noting that the remaining question of sanctions can be determined "on the basis of affidavits, declarations, excerpts of sworn deposition or investigative testimony, and documentary evidence").

B. Disgorgement and Prejudgment Interest

Securities Act Section 8A(e), Exchange Act Sections 21B(e) and 21C(e), and Investment Company Act Section 9(e) authorize disgorgement in this proceeding, including prejudgment interest. 15 U.S.C. §§ 77h-1(e), 78u-2(e), 78u-3(e), 80a-9(e). Disgorgement is an equitable remedy that requires a violator to give up wrongfully obtained profits causally related to the proven wrongdoing. *E.g.*, *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1230-32 (D.C. Cir. 1989). The amount of the disgorgement "need only be a reasonable approximation of profits causally connected to the violation." *Laurie Jones Canady*, Exchange Act Release No. 41250, 1999 SEC LEXIS 669, at *38 n.35 (Apr. 5, 1999) (quoting *SEC v. First Jersey Secs., Inc.*, 101 F.3d 1450, 1475 (2d Cir. 1996)), *pet. denied*, 230 F.3d 362 (D.C. Cir. 2000). Once the Division shows that its disgorgement figure reasonably approximates the amount of unjust enrichment, the burden shifts to the respondent to demonstrate why that is not the case. *Guy P. Riordan*, Securities Act Release No. 9085, 2009 SEC LEXIS 4166, at *85 (Dec. 11, 2009), *pet. denied*, 627 F.3d 1230 (D.C. Cir. 2010). The standard for disgorgement is but-for causation and does not require analysis of the public interest factors or consideration of the combination of sanctions. *Jay T. Comeaux*, 2014 SEC LEXIS 3001, at *9, *17 n.32, *22. And although the temporal

remoteness of the violations must be considered, that consideration is insignificant here. *See Larry C. Grossman*, Securities Act Release No. 10227, 2016 SEC LEXIS 3768, at *80-81 (Sept. 30, 2016).

The Commission found in the OIPs that Middlebury was the placement agent for the sale of Navagate's notes, and that Respondents knew or recklessly disregarded fraudulent misrepresentations and omissions in Rorke's personal guarantee and personal financial statement on which the offering was premised. These misrepresentations and omissions were material to investors, who likely would not have purchased the notes had they been aware of the fraud. *See* OIPs ¶ III.27 (personal guarantee and personal financial statement were materially false and misleading). Additionally, Osborn's use of investor proceeds to pay back older notes was material to investors in the notes. *Id*. at ¶ III.37. Therefore, any money that Respondents received from the proceeds of the offering would not have been received but for the fraud, and is properly subject to disgorgement.

The Division argues that Respondents should be jointly and severally liable for $311,150 in disgorgement, which is the total amount they collectively obtained from the Navagate offering. Div. MSD at 14-16. As clarified above, $288,650 of this amount was received by Middlebury in its role as placement agent for the notes, and an additional $22,500 was separately transferred by Osborn from Navagate's escrow account with McMillan to Middlebury Ventures and Middlebury Advisors. *See supra* at 7. Middlebury maintains that joint-and-several liability is inappropriate in these circumstances, and that it should not be liable to disgorge any funds it paid to Osborn, or any Navagate funds Osborn received by other means. *See* Middlebury Opp. at 7-8. I will address first the $288,650 that Middlebury admits it received before paying Osborn, and then turn to the additional $22,500 Osborn removed from escrow.

It is settled law that what a respondent chooses to do with ill-gotten gains, other than return them to victims, is immaterial to disgorgement. *Edgar R. Page*, Advisers Act. Release No. 4400, 2016 SEC LEXIS 1925, at *45 n.68 (May 27, 2016) ("how a defendant chooses to spend his ill-gotten gains, whether it be for business expenses, personal use, or otherwise is immaterial to disgorgement" (quoting *SEC v. Aerokinetic Energy Corp*., 444 F. App'x 382, 385 (11th Cir. 2011) (alteration omitted))); *see also SEC v. Palmisano*, 135 F.3d 860, 863-64 (2d Cir. 1998) (disgorgement should be offset by money paid in restitution). The fact that Middlebury used most of the money to pay Osborn for his services does not exempt it from disgorging that portion. *See, e.g.*, *SEC v. Radius Capital Corp.*, No. 2:11-cv-116, 2015 WL 1781567, at *6 (M.D. Fla. Apr. 20, 2015) (disallowing reduction to disgorgement where claimed legitimate business expenses included eighty percent commissions paid to representatives who originated loans underlying mortgage-backed security offering). It does not matter that Osborn was the Middlebury employee responsible for the fraud; it would be no different had Middlebury spent the money on other business expenses such as rent or salaries for other employees not involved in the Navagate offering. *See Laurie Jones Canady*, 1999 SEC LEXIS 669, at *38 n.35. Middlebury received and benefited from the Navagate proceeds, and if not for its inability to pay, would be required to disgorge the entire amount it received.

Osborn shares Middlebury's responsibility to disgorge the $288,650 in ill-gotten gains on a joint-and-several basis. The Commission found both Respondents in violation of the securities

laws for perpetrating a fraud on Navagate investors. Osborn was the Middlebury employee responsible for its relationship with Navagate, and thus the misconduct of Osborn and Middlebury is "inextricably entwined." *Edgar R. Page*, 2016 SEC LEXIS 1925 at *52. Respondents "collaborate[d] or ha[d] a close relationship in engaging in illegal conduct," and therefore joint-and-several liability is appropriate. *Id*. (emphasis omitted). Joint-and-several liability is particularly appropriate where the individual respondent, in this case Osborn, was "the means through which [the entity respondent] committed the fraud." *Id*. at *53-54.

An additional $22,500 of Navagate funds was released under Osborn's direction on behalf of two other entities, Middlebury Ventures and Middlebury Advisors. *See* Robinson Supp. Decl. ¶ 6. Because Osborn controlled and directed this fraudulently obtained money for his own benefit, it is ill-gotten gains, and he is required to disgorge it. Again, what Osborn ultimately did with this money is immaterial. *Edgar R. Page*, 2016 SEC LEXIS 1925 at *45 n.68. I find, however, that Middlebury is not jointly and severally liable for the $22,500. To the extent Middlebury was involved in the fraud, it must disgorge any money it received from the Navagate offering in its role as a placement agent for the notes. This additional $22,500, however, is not attributable to Middlebury because Middlebury never received it; there is no evidence that Osborn was acting as Middlebury's agent or representative when he released the $22,500, or that any person at Middlebury (other than Osborn) ever had control over the $22,500.

Payment of prejudgment interest would also be warranted here. *See Terence Michael Coxon*, Securities Act Release No. 8271, 2003 SEC LEXIS 3162, at *65 (Aug. 21, 2003) ("[E]xcept in the most unique and compelling circumstances, prejudgment interest should be awarded on disgorgement . . . to deny a wrongdoer the equivalent of an interest free loan from the wrongdoer's victims."), *aff'd*, 137 F. App'x 975 (9th Cir. 2005). However, it will not be ordered because of Respondents' demonstrations of their inability to pay.

C. Civil Penalties

Civil penalties are authorized in this proceeding by Securities Act Section 8A(g), Exchange Act Section 21B(a)(1)-(2), and Investment Company Act Section 9(d), because the Commission found that Respondents violated relevant provisions of the federal securities laws. 15 U.S.C. §§ 77h-1(g), 78u-2(a)(1)-(2), 80a-9(d). There is a three-tier system identifying the maximum amount of civil penalties, depending on the severity of the respondent's conduct. Third-tier penalties are awarded in cases where (1) violations involve fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement, and (2) the conduct in question directly or indirectly resulted in substantial losses, or created a significant risk of substantial losses to other persons, or resulted in substantial pecuniary gain to the person who committed the act or omission. 15 U.S.C. §§ 77h-1(g)(2)(C), 78u-2(b)(3), 80a-9(d)(2)(C).

Penalties must also be in the public interest. In deciding whether a civil penalty is in the public interest, the Commission considers several factors: (1) whether the act or omission involved fraud; (2) harm to others; (3) unjust enrichment; (4) prior violations; (5) deterrence; and (6) such other matters as justice may require. 15 U.S.C. §§ 77h-1(g)(2), 78u-2(c), 80a-9(d)(3);

Francis V. Lorenzo, Securities Act Release No. 9762, 2015 SEC LEXIS 1650, at *58-59 (Apr. 29, 2015).

The Commission has discretion to determine the amount of penalties appropriate within a given tier. *See S.W. Hatfield, CPA*, Exchange Act Release No. 73763, 2014 SEC LEXIS 4691, at *48 (Dec. 5, 2014). A separate civil penalty may be imposed for each "act or omission" in violation of the securities laws. *J.S. Oliver Capital Mgmt.*, Securities Act Release No. 10100, 2016 SEC LEXIS 2157, at *55-56 (June 17, 2016). Part of the Commission's discretion involves determining what constitutes an "act or omission." *See id*. at *59.

Although I will not impose civil penalties because of Respondents' inability to pay, third-tier penalties would be appropriate here. The Commission found that Respondents committed fraud because their sale of Navagate's notes involved material misrepresentations and omissions. *See* OIPs ¶ III.1. As of 2014, over $2.6 million obtained in the fraud, including interest, had not been repaid. *Id*. at ¶ III.40. Respondents also profited from the fraud, as Middlebury received money in fees from the notes offering, much of which it paid to Osborn. *See* Tenreiro Decl. ¶¶ 41-42; Div. Exs. AAA & BBB; Robinson Decl. ¶ 2; Middlebury Ex. A. And Osborn apparently further profited through his use of additional Navagate funds that he directed to Middlebury Ventures and Middlebury Advisors. *See* Robinson Supp. Decl. ¶ 6.

Penalties would also be in the public interest. With regard to the first two factors, there was fraud and harm to others, as discussed above. Regarding the third factor, Middlebury argues that it was not unjustly enriched to the extent claimed by the Division, because it paid Osborn most of the Navagate funds it received. Middlebury Opp. at 7. To be sure, that Middlebury paid Osborn might weigh against imposing maximum third-tier penalties, but it does not absolve Middlebury entirely.

Middlebury also argues that further punishment would be "duplicative," considering the fines it has already paid to FINRA and the legal fees it continues to incur. Middlebury Opp. at 9. However, the FINRA fines were in large part imposed for violations of FINRA rules related to Osborn's misuse of escrowed funds and Middlebury's failure to supervise Osborn. *See* Div. Ex. DDD at 15-21. FINRA made note of the material misrepresentations and omissions Respondents made in the Navagate offering, *see* Div. Ex. DDD at 15, 18; Robinson Decl. ¶ 4, but FINRA's findings, unlike those in the OIPs, did not focus primarily on the fraud perpetrated on Navagate investors. *Compare* Div. Ex. DDD at 15-21 *with* OIPs ¶¶ III.1-7. Therefore, Middlebury's securities fraud is sufficiently distinct from its FINRA violations that it remains in the public interest to impose civil penalties on it.

Finally, Middlebury argues that further sanctions will have no deterrent effect, because the company has ceased doing business and will liquidate shortly. Middlebury Opp. at 9. Middlebury additionally argues that Rorke has been sent to prison. *Id*. But deterrence has a dual purpose; even if Middlebury does not need to be deterred, sanctions send a strong message to the public about the consequences of violating the securities laws. *See Francis V. Lorenzo*, 2015 SEC LEXIS 1650, at *63 (civil penalties will deter "others in similar positions from committing future violations"). Thus, the public interest would weigh in favor of third-tier civil penalties against Middlebury.

Osborn makes no arguments concerning the public interest factors. I find that third-tier civil penalties for Osborn would be justified for the same reasons they would be justified for Middlebury.

D. Respondents' Inability to Pay

Under Securities Act Section 8A(g)(3), Section 21B(d) of the Exchange Act, and Section 9(d)(4) of the Investment Company Act, in any proceeding in which the Commission may impose a civil penalty, a respondent may present evidence of its ability to pay the penalty. 15 U.S.C. §§ 77h-1(g)(3), 78u-2(d), 80a-9(d)(4). The Commission may, in its discretion, consider such evidence in determining whether a penalty is in the public interest. *Id*. Such evidence may relate to the extent of the respondent's ability to continue in business and the collectability of the penalty, taking into account any other claims of the United States or third parties upon the respondent's assets and the amount of the respondent's assets. *Id*. Pursuant to Rule 630(a) of the Commission's Rules of Practice, the Commission also considers evidence of ability to pay as a factor in determining whether to impose disgorgement and interest. 17 C.F.R. § 201.630(a). In *First Securities Transfer Systems, Inc.*, Exchange Act Release No. 36183, 52 S.E.C. 392, 397 (1995), the Commission stated that it is:

> [C]ognizant of the inadvisability of assessing penalties so heavy that the persons against whom they are assessed are unable to pay them. Such a situation results in the expenditure of agency resources in unsuccessful attempts to collect the penalties. Moreover, the imposition of a sanction that cannot be enforced may ultimately render the deterrent message intended to be communicated by the sanction less meaningful.

1. Middlebury

On January 13, 2017, Middlebury submitted information concerning its inability to pay. Most relevant is its final Financial and Operational Combined Uniform Single (FOCUS) Report, dated September 27, 2016. Middlebury Second Supp. Ex. C. The FOCUS Report indicates that Middlebury has virtually no assets left. *Id*. at 1-2; Robinson Second Supp. Decl. ¶ 3. Moreover, Middlebury's most recent financial statements demonstrate that nearly all of its remaining cash is earmarked for an account payable to a law firm for services rendered in another proceeding. Middlebury Second Supp. Ex. L (balance sheet); Robinson Second Supp. Decl. ¶ 8. In fact, it would appear that this money is already gone. Middlebury Second Supp. Ex. M (image of signed check). Middlebury predicts, reasonably, that any remaining cash will likely go to other legal expenses. Robinson Second Supp. Decl. ¶ 8. Finally, since Middlebury has ceased doing business and is no longer a corporate entity, it has no means of earning additional capital to pay sanctions. *See* Robinson Decl. ¶ 8; Middlebury Second Supp. Ex. A (Form BDW), Ex. E (Certificate of Cancellation). For these reasons, I find that Middlebury has demonstrated an inability to pay, and I will not require it to pay any sanctions.

The Division's arguments against a finding of inability to pay are unavailing. The Division argues that Middlebury's disclosures are insufficient because it has not submitted sworn

financial statements or tax returns. Div. Supp. Reply at 3. However, Middlebury's FOCUS report reveals all that needs to be told—that the company has insufficient assets for sanctions. Middlebury Second Supp. Ex. C at 1. That Middlebury reported some income in 2016, that most of its liabilities consist of money owed to its owner James Robinson, and that it has drained its remaining funds to pay legal and other fees, is unimportant. *See* Div. Supp. Reply at 3-4. The Commission brought this case against Middlebury as an entity, not against Robinson, and however Middlebury spent its money, it no longer has any. And Middlebury's certificate of cancellation is highly relevant; unlike an individual, Middlebury has no means now to generate any additional funds. Furthermore, unlike a district court, I have no authority to freeze Middlebury's assets or prevent it from expending the remaining cash it has on hand. Once the company is defunct and without assets, as is the case now, there is no meaningful way to extract monetary sanctions from it.

2. Osborn

Osborn also submitted information relevant to his inability to pay. In addition to a sworn statement of financial condition, he provided bank statements, personal loan documents, unpaid bills, past due mortgage statements, tax transcripts, and tax returns from 2011-2015.[2] Osborn Exs. 10, 14, 15; Osborn Supp. Exs. Osborn's financial statement indicates that his liabilities greatly exceed his assets, and he estimates that his monthly expenses exceed his income. Osborn Ex. 10 at 2, 6-8. His financial statement is corroborated by various supporting documents. *Id*. at 2-6; Ex. 15 at 9-15; Osborn Supp. Ex. Home Value, First Mortgage, and HELOC. However, not every one of Osborn's liabilities has been fully documented. *See generally* Div. Supp. Reply at 6. It is hard to determine, for example, whether he paid off any of the personal loans he claims. He is inconsistent about the amount he owes the IRS, and his tax transcripts are hard to interpret. *Compare* Osborn Ex. 10 at 2 *with* Osborn Response to Request for Additional Financial Documentation at 3; *see* Osborn Ex. 15 at 10-15.

As for income and assets, Osborn has a significant and steady salary from his job at ZapGo, which includes the potential for a bonus. Osborn Ex. 10 at 8; Osborn Supp. Ex. ZapGo Employment Agreement and Bonus Pool. Osborn has already received substantial income from ZapGo since he joined in September 2016, and he expects to receive a larger amount in 2017. Osborn Supp. Ex. ZapGo Employment Agreement and Bonus Pool. He receives some consulting fees from Brio Financial. Osborn Ex. 10 at 8. And he has assets in a company named Nuvel, although he claims they may never become liquid. *See id*. at 1; Osborn Supp. Ex. Personal Loans Tied to Nuvel Stock at 1.

Given Osborn's documented financial liabilities and considerable monthly expenses, I have no doubt it will be difficult for him to pay sanctions. However, I am reluctant to relieve him entirely of his obligation. Several points inform my decision. First, Osborn has a substantial steady salary with the potential for a bonus. Second, his bank statements for the last several years reveal a flurry of activity, with large sums coming and going on a monthly basis. *See* Osborn Supp. Exs. (Citibank and TD Bank account statements). This may be the mark of a

[2] Contrary to the Division's claims, Osborn included his 2014 tax return, at least in the hardcopy filing that this office received. *See* Div. Supp. Reply at 6.

man with many creditors, but it also indicates that Osborn can pay his debts on a regular basis. Third, as the Division correctly points out, Osborn has had net income in every year for which he submitted a tax return, and in some years, that income was quite substantial. Div. Supp. Reply at 7. That he accrued his various liabilities, particularly to the IRS, suggests a profligacy that weighs against a finding of inability to pay. Lastly, Osborn may be able to enter into an installment payment plan with the Commission that will allow him to pay any sanctions over time as he reestablishes his financial footing.

For all of these reasons, I find that Osborn must pay $150,000 in disgorgement. This amount, which is only a portion of the $311,150 plus prejudgment interest that Osborn owes, is reasonably related to his current income. I will not impose civil penalties on Osborn.

Order

It is ORDERED, pursuant to Securities Act of 1933 Section 8A(e), Securities Exchange Act of 1934 Sections 21B(e) and 21C(e), and Investment Company Act of 1940 Section 9(e), that Respondent Gregory Osborn shall DISGORGE $150,000 with no prejudgment interest.

It is further ORDERED that this proceeding is DISMISSED as to Respondent Middlebury Securities, LLC.

Payment of disgorgement shall be made no later than twenty-one days following the day this initial decision becomes final, unless the Commission directs otherwise. Payment shall be made in one of the following ways: (1) transmitted electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request; (2) direct payments from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or (3) by certified check, bank cashier's check, bank money order, or United States postal money order made payable to the Securities and Exchange Commission and hand-delivered or mailed to the following address along with a cover letter identifying the Respondent and Administrative Proceeding Nos. 3-16227 and 3-16229: Enterprises Services Center, Accounts Receivable Branch, HQ Bldg., Room 181, AMZ-341, 6500 South MacArthur Blvd., Oklahoma City, Oklahoma 73169. A copy of the cover letter and instrument of payment shall be sent to the Commission's Division of Enforcement, directed to the attention of counsel of record.

This initial decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice, 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 of the Commission's Rules of Practice, 17 C.F.R. § 201.111. If a motion to correct a manifest error of fact is filed by a party, then any 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 occur, the initial decision shall not become final as to that party.

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Cameron Elliot
Administrative Law Judge