UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File Nos. 3-16227 / 3-16229

In the Matter of

MIDDLEBURY SECURITIES, LLC and GREGORY OSBORN

Respondents.

DIVISION OF ENFORCEMENT'S MEMORANDUM OF LAW IN OPPOSITION TO RESPONDENT OSBORN'S PENALTY REASSESSMENT REQUEST

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November 10, 2016

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The Division of Enforcement ("Division") respectfully submits this memorandum of law opposing Respondent Gregory Osborn's request that the Securities and Exchange Commission ("Commission") reduce the collateral bars against him.

PRELIMINARY STATEMENT

In October 2014, Respondent Osborn consented to the Commission entering an order, inter alia, (1) finding that he committed fraud, (2) imposing industrywide and penny stock bars, and (3) ordering additional proceedings to determine what, if any, monetary relief was appropriate. Osborn now asks the Commission to reduce his bars to either "time served" or three years because the bars have had the entirely foreseeable effect of complicating his ability to find work in the mergers and acquisition industry. However, Osborn is unable to demonstrate—as he must—any compelling and unforeseeable circumstances warranting a modification of the bars. Indeed, Osborn's conduct since the bar was entered supports the appropriateness of that relief. As discussed further below, Osborn recently informed a potential employer that he plans to hire consultants to move news of the Commission's findings against him lower in the results yielded by Google searches. In other words, Osborn plans to hide the Commission's order from the public in order to make it easier for him to seek work. The difficulties Osborn faces in entering the mergers and acquisition industry are entirely of his own making, given his decision to commit fraud. Thus, there is no reason—let alone a compelling one—to modify the bars in this case.

PROCEDURAL BACKGROUND

I. Osborn Consents to the Entry of a Bifurcated Settlement, Including Associational Bars

On Osborn's consent, the Commission instituted its action against Respondent Osborn on October 31, 2014, finding that Osborn committed securities fraud.[1] On that day, the Commission also entered an Order on consent against the broker-dealer of which Osborn had been a general partner at the relevant time, Middlebury Securities, LLC. ("Middlebury"), and a litigated Order against Gregory Rorke ("Rorke") and his company, Navagate, Inc., alleging much of the same conduct that the Commission found against Osborn and Middlebury.

In the Order with respect to Osborn, the Commission: (1) found that Respondent willfully violated—and aided and abetted Rorke's and Navagate's violations of—Securities Act of 1933 ("Securities Act") Section 17(a) and Securities Exchange Act of 1934 ("Exchange Act") Section 10(b) and Rule 10b-5 thereunder; (2) entered cease-and-desist orders against Respondent; (3) barred Respondent Osborne from association with any broker, dealer, investment adviser, municipal securities dealer, municipal adviser, transfer agent, or nationally recognized statistical rating organization; (4) prohibited Osborn from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor or principal underwriter; and (5) barred Osborne from participating in any offering of a penny stock. (Order at 8-9.) The Commission also ordered additional proceedings:

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[1] For a fuller description of Osborn's fraud see the Commission's Order Instituting Administrative and Cease-and-Desist Proceedings 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, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order, and Notice of Hearing, dated Oct. 31, 2014 (the "Order").

> to determine the amount of disgorgement and civil penalties, plus prejudgment interest if ordered, pursuant to Section 8A of the Securities Act, Section 21B of the Exchange Act, and Section 9(d) of the Company Act against Respondent[s]

(Order, ¶ V.) For the purpose of the additional proceedings: (1) Respondent is barred from arguing that he did not violate Securities Act Section 17(a), Exchange Act Section 10(b), or Rule 10b-5; and (2) the factual findings set out in the Orders "shall be accepted and deemed true by the hearing officer." (Id.)

In consenting to the entry of the Order, Osborn signed an Offer of Settlement ("Offer"). (See Tenreiro Decl., Ex. A.)[2] Per that Offer, Osborn agreed to the bars set out in the Order. (See id. at 3.) In addition, in his Offer, Osborn waived his rights, inter alia, to a hearing, fact finding, all post-hearing procedures, and judicial review by any court as set out in the Commission's Rule of Practice 240(c)(d). (See id. at 2 (waiving "those rights specified in Rule[] 240(c)(4) . . . of the Commission's Rules of Practice").)

II. The ALJ Stays the Bifurcated Proceedings

On December 4, 2014, the Court stayed the proceedings at the request of the U.S. Attorney's Office pending the resolution of the criminal case against Rorke. (See Order Following Prehearing Conference and Granting Stay, Dec. 4, 2014, at 1.) On June 7, 2016, the Court lifted the stay. (See Order Lifting Stay and Scheduling Prehearing Conference, June 7, 2016, at 1.) On June 14, 2016, the Court consolidated the actions against Osborn and Middlebury, Administrative Proceedings 3-16227 and 3-16229, "in their entirety" and set a schedule for briefing summary disposition with respect to the proper penalties against them. (See Scheduling and Consolidation Order, June 14, 2016, at 1.)

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[2] All references to "Tenreiro Decl." are to the Declaration of Jorge Tenreiro, dated November 10, 2016.

III. Summary Disposition

On June 13, 2016, the ALJ held a prehearing conference and set a schedule for filing motions for summary disposition as to, inter alia, what, if any, monetary relief should be ordered against Respondent Osborn, as well as against Middlebury. (See Scheduling and Consolidation Order, June 14, 2016, at 1.) The Division moved for summary disposition on July 28, 2016. Osborn filed a brief in opposition on August 24, 2016, arguing, inter alia, that civil penalties against him were not appropriate because he was a victim of Navagate and Rorke and, citing no concrete evidence, because he was "for all intents and purposes completely bankrupt." (See id., Ex. B (Osborn Br. dated Aug. 24, 2016) at 5). The ALJ has not yet ruled on that motion.

IV. Osborn Seeks a Reduction of His Permanent Associational Bars

On September 27, 2016, Osborn submitted to the ALJ a "Penalty [R]eassessment Request" ("Resp. Br."). (See Order, Sept. 28, 2016, at 1.) Osborn requested that the ALJ reduce the bars to either "'time served' or 3 years, and to reduce the additional penalties placed on me." (Resp. Br. at 2.) Despite stating that he was not "looking to become relicensed," Osborn further wrote that this relief would assist him in finding work in the securities industry: "This will eliminate the 'Bad Actor' rule, enabling me the opportunity to work at certain companies and/or funds." (Id.) Osborn went on to write:

> I do not think that I, nor Middlebury should be so severely damaged because we truly relied on Counsels and Management lied to us. We did everything with Compliance and Counsel review. Nothing done was with ill intent. Yet we have suffered beyond any reasonable amount already. Again, just removing or limiting the "life bar" and the working with "funds" additional penalties would provide enough optics to help minimize the substantial damage heretofore. I believe it to be a reasonable solution as we have been damaged here to date. On behalf of the circumstances, the post fact admittance of quilt by Mr. Rourke, the fact this was a firm "team effort' I

> find it unreasonable that I suffer multiples of all others and the others do not suffer at all.

(Id.)

Osborn also attached to his submission an e-mail chain wherein he is seeking employment from Synergy Business Brokers. (Tenreiro Decl., Ex. C at 1.) According to its website, Synergy Business Brokers is "a leading Mergers & Acquisitions firm focused on selling successful businesses." (See http://www.synergybb.com/.) In that chain, Osborn indicates that his Commission-imposed bars will not present a meaningful obstacle to business generation because he will be able to hire a service to ensure that notice of the Order will not appear early on in a Google search:

> The SEC search with effort can be dropped substantially lower, where it isn't an event. It is there due to no effort t[o] address until now. - it wasn[']t time!
>
> [. . .]
>
> I understand your hesitancy. However, there are many remedies to the Google search concern. Again, reference the SEC issue. It is a []no admit and no deny . . . settlement, as I ran out of funds and one is not entitled to counsel as it is not a legal process. It was NEVER ANYTHING CRIMINAL. The SEC is a[n] "administrative process" is non a judicial [sic] process with a judge, jury et. Only things that are criminal, theft, fraud etc go to DOJ. Looking ahead, I greatly enjoyed the call as well. I am excited about this business.
>
> The SEC issue only shows up on top of a my search currently because it has been the only thing viewed recently, as I haven't done other activities and/or made an effort that would fix this.
>
> [. . .]
>
> I can now address my public Google search. As soon as I pay to have organization [sic] address my google search, this page will be pages down any search. The service is about $6k. I also have friends in the PR world whom [sic] will assist in placing my name in articles with greater viewership volumes to help move it down even further.

(Id. at 1-3.) And, contrary to his assertions to the ALJ in connection with the relief proceeding, Osborn also wrote that he currently has "a good job," with a "$150k base plus up to $300k addition in bonus . . . and . . . company stock." (Id. at 1, 3.)

On September 28, 2016, the ALJ issued an Order stating that "[b]ecause I lack authority to grant the relief Osborn seeks, I construe his request as one directed solely to the Commission." (See Order, Sept. 28, 2016, at 1.) The ALJ forwarded Osborn's request to "the Office of Secretary for filing." (Id.) On September 30, 2016, the Division wrote that it opposes any request to modify Osborn's bars. (Tenreiro Decl., Ex. D.) On October 27, 2016, the Commission ordered the Division to "file a brief in opposition" to Osborn's submission by November 10, 2016. (See Order Scheduling Briefs, Oct. 27, 2016, at 2.) The Division also noted that it would not, at this stage, consider Osborn's request to reduce penalties because "no disgorgement or civil penalties have been imposed yet." (Id. at 2 n.4.)

ARGUMENT

The Commission should deny Respondent's request because Osborn cannot demonstrate, as he must, any compelling circumstances necessary to warrant a modification of the bars. Indeed, Osborn's conduct both during and after the fraud suggests that he refuses to accept responsibility for his actions and that a permanent bar continues to be in the public interest.

The Commission has a "strong interest in the finality of [its] settlement orders," because otherwise "[t]here would always remaining open the possibility of litigation on the merits at some time in the distant future . . . ." In the Matter of Kenneth W. Haver, CPA, Rel. No. AE-2517, 2006 WL 34211789, at * 3 (S.E.C. Nov. 28, 2006) (quotation marks and citations omitted). Thus, the Commission has held that "bars should remain in place in the usual case and be removed only in compelling circumstances." Id. (quotation marks and citations omitted); see also In the Matter of Richard D. Feldman, Rel. No. 33-10078, 2016 WL 2643450, at *2 n.15 (S.E.C. May 10, 2016)

(applying the "compelling circumstances" standard to a request to modify disgorgement order and collecting cases). In determining whether a respondent has shown such "compelling circumstances" the Commission considers

> the nature of the misconduct at issue in the underlying matter; the time that has passed since issuance of the administrative bar; the compliance record of the petitioner since issuance of the administrative bar; the age and securities industry experience of the petitioner, and the extent to which the Commission has granted prior relief from the administrative bar; whether the petitioner has identified verifiable, unanticipated consequences of the bar; the position and persuasiveness of the Division of Enforcement's response to the petition for relief; and whether there exists any other circumstance that would cause the requested relief from the administrative bar to be inconsistent with the public interest or the protection of investors.

Id. (quotation marks and citations omitted). The Commission is also "guided" by "whether there exists any . . . circumstance that would cause the requested relief from the administrative bar to be inconsistent with the public interest or the protection of investors." In the Matter of Richard D. Feldman, 2016 WL 2643450, at *2 n.15 (quotation marks and citation omitted). "Not all of these factors will be relevant in determining the appropriateness of relief in a particular case, and no one factor is dispositive." Id. (quotation marks and citations omitted).

Here, each relevant factor demonstrates the need to keep Osborn's bars in place. Moreover, keeping the bars in place is in the public interest and necessary for the protection of investors. First, Osborn committed fraud. It is virtually axiomatic that a finding of fraud should result in associational bars. See In the Matter of Toby G. Scammell, Rel. No. IA-3961, 2014 WL 5493265, at *5 (S.E.C. Oct. 29, 2014) (citation and quotation marks omitted) ("ordinarily, and in the absence of evidence to the contrary, it will be in the public interest to bar from participation in the securities industry a respondent enjoined from violating antifraud provisions"); see also In the Matter of Jose P. Zollino, Rel. No. IA-2579, 2007 WL 98919, at *5 (S.E.C. Jan. 16, 2007)

(violations of the "antifraud provisions of the federal securities laws is especially serious and subject to the severest sanctions."). Second, only two years have passed since the imposition of the bars. Third, while there is no evidence that Osborn has violated the bars since their imposition, he has indicated that he plans to attempt to bury evidence of the Order by paying a service to hide the Commission's action against him in any Google search. Fourth, Osborn has extensive experience in the securities industry. (See Order, ¶ III.8 (finding that Osborn was registered with FINRA from 1988 until April 2014).) Fifth, Respondent has not identified any unanticipated consequences against him as the result of the bar. That it is difficult for him to find work in the mergers and acquisitions context is (and was when he consented to the Order) an entirely foreseeable consequence of settling fraud charges with the Commission.

Indeed, the egregiousness of Respondents' fraud—which occurred from approximately December 2009 through March 2011 and resulted in losses to investors of over $2.6 million—demonstrates the need for continued associational bars. (See Order, ¶¶ III.1, III.40.) The Commission has upheld permanent associational bars where the fraud lasted for a much shorter time and resulted in far fewer losses. See, e.g., In the Matter of Francis V. Lorenzo, Rel. No. 33-9762, 2015 WL 1927763 (S.E.C. Apr. 29, 2015) (respondent sent two false and misleading emails within minutes of each other; Lorenzo made $150; and investors lost $15,000); In the Matter of Toby G. Scammell, 2014 WL 5493265, at *6 (fraud lasted for two weeks).

Sixth, other circumstances—such as Osborn's inconsistent statements about his financial condition to the ALJ (to whom he portrays himself as bankrupt) and to a prospective employer (to whom he claims to be gainfully employed)—demonstrate the continuing need for a bar against Osborn in order to protect investors. Finally, that Osborn continues to attempt to shift blame to "counsel" and Rorke, as well as minimize the public's view of his role in this fraud by hiding the

Commission's action in Google searches strongly suggests that he remains unwilling to accept responsibility for his action. See, e.g., In the Matter of David F. Bandimere, Rel. No. 33-9972, 2014 WL 6575665, at *27 (S.E.C. Oct. 29, 2015) (in assessing whether bars are in the public interest, the Commission considers, inter alia, "respondent's recognition of the wrongful nature of his or her conduct") (quotation marks and citation omitted). Moreover, the impact of the bars is mitigated by the fact that he is currently employed and making a six-figure salary.

CONCLUSION

The Division of Enforcement respectfully requests that the Commission deny Osborn's motion to reduce his bars for the reasons discussed above.

Dated: November 10, 2016
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Respondents.

Certificate of Service

I hereby certify that I served (1) the Division of Enforcement's ("Division") Memorandum of Law in Opposition to Respondent Osborn's Penalty Reassessment Request and (2) the Declaration of Jorge Tenreiro, dated November 10, 2016, and all exhibits attached thereto on this 10th day of November, 2016, on the below parties by the means indicated:

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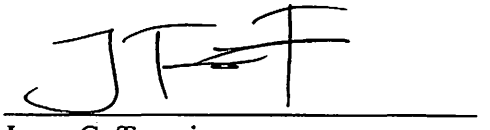

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