UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16389

In the Matter of

BRETT THOMAS GRAHAM

DIVISION OF ENFORCEMENT'S STATEMENT IN OPPOSITION TO GRAHAM'S MOTION TO MODIFY BAR ORDER

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Introduction

Brett Thomas Graham is subject to a Commission order entered by consent on February 19, 2015 (the "Order"), which found that Graham willfully violated Section 10(b) of the Exchange Act of 1934 and Rule 10b-5 thereunder in connection with a scheme to acquire certain securities from auctions of collateralized debt obligations ("CDOs") run by Graham in his capacity as CEO of VCAP Securities, LLC, a liquidation agent and broker-dealer then registered with the Commission. *VCAP Securities, LLC*, Securities Exchange Act Release No. 74305, 2015 WL 692238 (Feb. 19, 2015). In particular, the Commission found, among other things, that Graham (i) arranged for a separate broker-dealer to place bids in the auctions on behalf of Vertical Capital, LLC (VCAP's affiliated investment adviser) as VCAP and its affiliates were not permitted to bid under the terms of the relevant engagement agreements; (ii) took advantage of his access to confidential bidding information from the auctions to ensure that Vertical was able to acquire 23 securities in 5 different CDO liquidations conducted by VCAP during 2012; and (iii) made material misrepresentations to the trustees of the various CDOs for which VCAP served as liquidation agent by falsely representing that VCAP and its affiliates would not bid in the auctions and would not misuse confidential and/or bidding information afforded to VCAP as the liquidation agent.

Based on its findings, the Commission ordered that Graham cease and desist from committing or causing violations and any future violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. In addition, the Commission barred Graham from associating in various capacities in the securities industry, subject to a limited one-year carve out, with the right to apply for reentry after three years and ordered him to pay disgorgement of $118,284, prejudgment interest of $9,449, and a civil money penalty in the amount of $200,000.

On January 12, 2017, more than a year before having the right to apply for reentry under the terms of the settled order, Graham filed a Notice of Motion to Modify Order and an accompanying

affidavit. He filed a supplemental affidavit in support of his request on or about February 4, 2017. Graham requests that the Commission modify the Order by:

> (a) removing the provisions contained in Section IV.C. of the Order which bar Mr. Graham from (i) being associated with an investment adviser (ii) being associated with a securities broker or dealer in a non-supervisory capacity, and (iii) serving or acting as an officer, director or employee of a company which issues securities, including, but not limited to 'penny stocks,' as that term is defined in Rule 3a51-1, promulgated under the Securities Exchange Act of 1934, as amended; and (b) adding a provision to the Order pursuant to Rule 506(d)(2)(iii), promulgated under the Securities Act of 1933, as amended, which states that, notwithstanding any other provision of the Order, the Order shall not operate to preclude any issuer with which Graham is associated as an officer, director, employee or investment adviser, from relying upon the exemption of Rule 506.

Graham's motion should be rejected, as nothing has changed since the Order was issued that necessitates reviewing its requirements. Rather, Graham's motion is a transparent attempt to litigate the facts of his case and renegotiate the terms of his settlement. Graham waived his opportunity to do so when he voluntarily offered to settle with the Commission in 2015. Moreover, in order to prevail on his request, Graham must demonstrate that there are "compelling circumstances" for modification, which Graham fails to do. *Stephen S. Wien*, Securities Exchange Act Release No. 49000, 2003 WL 23094748 at *4 (Dec. 29, 2003) ("In the usual case, bars will remain in place; relief will be appropriate only in compelling circumstances."). As discussed below, an assessment of the factors the Commission analyzes in the "compelling circumstances" review shows that the Order should not be modified.

Argument

I. Graham Voluntarily Agreed to the Commission's Order and Cannot Now Attempt to Negotiate New Settlement Terms.

Graham fails to demonstrate that this is the type of case where modifying or vacating a bar is justified. The Commission has modified bar orders when the legal predicate for the bar has been removed, *see, e.g., Linus N. Nwaigwe*, Securities Exchange Act Release No. 69967, 2013 WL

3477085 (July 11, 2013) (vacating bar order based on reversal of underlying criminal conviction), or, in extremely rare circumstances, where a respondent has demonstrated a track record of compliance after a long period of Commission-approved re-association, *see, e.g., Robert Hardee Quarles*, Securities Exchange Act Release No. 66530, 2012 WL 759386 (Mar. 7, 2012) (vacating bar order imposed over 26 years prior against individual who had been continuously employed in securities industry for past 24 years without further regulatory interest). Neither situation is present here. There has been no development that would call the legal predicate for the bar into question and there is still almost one year remaining before Graham even has the right to apply for reentry.

Rather, this appears to be a situation where Graham seeks to undo the terms of a settlement to which he consented. He seeks to remove portions of the bar so that he may immediately associate with certain entities with no restrictions or review.

A. The Commission Has a Strong Interest in the Finality of Settlement Orders and Graham Waived His Opportunity to Enter Evidence.

This effort to change the terms of the Order years after it was entered is impermissible under relevant Commission precedent. The Commission has stated that "[w]e have a strong interest in the finality of our settlement orders. Public policy considerations favor the expeditious disposition of litigation, and a respondent cannot be permitted to [follow] one course of action and, upon an unfavorable [result], to try another course of action. If sanctioned parties easily are able to reopen consent decrees years later, the SEC would have little incentive to enter into such agreements. There would always remain open the possibility of litigation on the merits at some time in the distant future when memories have faded and records have been destroyed." *Michael H. Johnson*, Securities Exchange Act Release No. 75894, 2015 WL 5305993, at *4 (Sept. 10, 2015) (internal citations and quotations omitted).

Given this strong interest in the finality of settlement orders, Graham cannot now offer evidence concerning the conduct described in the Order because he views the result as unfavorable. Graham claims up front in his affidavits that he is not now denying the conduct described in the Order. Graham Aff. ¶ 4 ("nothing stated herein is intended to deny my involvement in the actions described in the Order"); Graham Supp. Aff. ¶ 3 ("neither Mr. Hyland's conduct nor Ms. Ferraro's testimony alter certain basic facts of the matter and my involvement in them"). Nonetheless, he offers a self-serving version of the facts to justify his conduct and minimize the frequency and impact of his misdeeds under the justification that some of this information could not have been known at the time the Order was issued. *See, e.g.,* Graham Aff. ¶ 11 ("I believe every market participant would have deemed my actions 'commercially reasonable'"); ¶ 12 ("Vertical had placed a limited number of indirect bids in the auction through an intermediary broker-dealer" and "we believed at the time that we were permitted to do this under our engagement agreement"); ¶ 13 ("it remains true that our Client benefitted and nobody has claimed harm"); Graham Supp. Aff. ¶ 9 ("In many (though I would certainly not say all) instances, when Vertical (through me) submitted an adjusted indirect bid, it was Ferraro telling me what to re-bid."); ¶ 10 ("We sought no advantage, nor do I believe gained any (and, to my knowledge, no party on either side of the auction transactions nor any investor has claimed harm)."). However, Graham waived any opportunity to enter evidence and argue the merits of his case when he offered to settle the matter.[1]

Rule 240 of the Commission's Rules of Practice states that a settling respondent waives all hearings, the filing of proposed findings of fact and conclusions of law, proceedings before, and an initial decision by, a hearing officer, all post-hearing procedures, and judicial review by a court. 17 C.F.R. § 201.240(c)(4). Graham's offer of settlement waived those rights specified in Rules

[1] To be clear, the staff does not accept Graham's description of all of the facts of the case, but it does not view this as the appropriate forum for introducing additional facts or allegations. Suffice to say that if this matter had not settled, the staff would have included additional facts and allegations in a litigated complaint.

240(c)(4) and (5) and stated that it was "made voluntarily." He does not now claim that his consent to the bar was "not voluntary, knowing, or informed." *Kenneth W. Haver*, Securities Exchange Act Release No. 54824, 2006 WL 3421789, at*3 (Nov. 28, 2006); *cf. Sargent v. Dep't of Health & Human Servs.*, 229 F. 3d 1088, 1091 (Fed. Cir. 2000) ("It is well-established that in order to set aside a settlement, an appellant must show that the agreement is unlawful, was involuntary, or was the result of fraud or mutual mistake."). As a result, Graham "forfeited his opportunity to adduce his evidence" and "may not now complain that the record is inaccurate or incomplete." *Haver,* 2006 WL 3421789 at *3 (citations omitted).

B. Graham's Allegations About the Performance of His Counsel Do Not Provide a Basis for Modification of the Order.

Graham claims that his counsel's representation of him "was fatally flawed" and prevented all relevant facts from being revealed to the staff during the investigation. *See, e.g.* Graham Supp. Aff. ¶¶ 3, 4, 5, 9 and 10. He states that "the outcome [of the investigation] might well have been substantially different" had the staff been afforded a more accurate understanding of the circumstances. *Id.* ¶ 10. Putting aside the fact that Graham "forfeited his opportunity to adduce" this evidence, Graham's argument fails in several ways.

First, the facts cited by Graham in his supplemental affidavit concern the extent of Beth Ferraro's knowledge of and involvement in the scheme charged in the Order. Those facts do not exculpate Graham in any way. Even if we assumed for argument's sake that the outcome of the investigation may have been different as to Ferraro had these facts come to light during the investigation, the outcome for Graham would have been the same.

Next, Graham was put on notice repeatedly during the course of the investigation that his counsel may have had a conflict. Attached to his subpoena for testimony was SEC Form 1662 which states the following:

> You may be represented by counsel who also represents other persons involved in the Commission's investigation. This multiple representation, however, presents a potential conflict of interest if one client's interests are or may be adverse to another's. If you are represented by counsel who also represents other persons involved in the investigation, the Commission will assume that you and counsel have discussed and resolved all issues concerning possible conflicts of interest. The choice of counsel, and the responsibility for that choice, is yours.

SEC Form 1662 § B.2, *available at* https://www.sec.gov/about/forms/sec1662.pdf.[2] During Graham's testimony, the staff marked SEC Form 1662 as an exhibit. Graham testified that he reviewed the form and did not have any questions about it. Nonetheless, to be sure that Graham was aware of the potential conflict, staff read the above-quoted language from SEC Form 1662 into the record during his testimony. For obvious reasons, staff is not privy to any conversations that Graham and his counsel may have had about potential conflicts of interest caused by his counsel's multiple representation. But, staff put Graham on notice that a conflict could exist and informed Graham that the choice of counsel was his. Graham should not now be permitted to use his recent "discovery" of a conflict in the representation as a vehicle to introduce new evidence and modify the Order.

Finally, Graham had ample opportunity during the course of the investigation to make staff aware of the facts now alleged in his supplemental affidavit. Graham testified under oath for nearly two full days before members of the staff during the investigation. Staff asked a range of questions about the business activities of Vertical and VCAP, the auction practices at VCAP, and the roles, actions, and knowledge of Vertical and VCAP's partners and employees. At the conclusion of questioning, staff also afforded Graham the opportunity to clarify any of his answers or make an additional statement. Whether or not he had access to a transcript of Ferraro's testimony, Graham had his chance to describe in detail the conduct of anyone who participated in the scheme described

[2] Graham received an earlier version of SEC Form 1662 than the version contained at the hyperlink; however, the quoted language remains the same.

in the Order. Having chosen not to do so, he cannot now use that choice as a basis for modifying the Order.

C. Graham's Allegations About the Possibility of an Administrative Proceeding Do Not Provide a Basis for Modification of the Order.

Graham claims that staff made clear in a presentation to his counsel that in the absence of a settlement the matter would be referred to an administrative law judge ("ALJ") which his counsel advised should be avoided at almost any cost. Graham Aff. at ¶ 14. He further claims that it was based on this advice that he settled. *Id.* Given a recent court decision on the constitutionality of the process for appointing ALJs, Graham states that "it was unfair to use the threat of such a proceeding as a basis to convince me to consent to the Order." *Id.* at ¶ 35.

Staff is somewhat limited in responding to this argument as it does not know exactly what Graham's counsel told him about the presentation or exactly what counsel advised him to do. However, staff discussed with Graham's counsel what proposed relief could be sought in any litigated action against Graham, including an injunction if litigated in federal court or a cease and desist order in an administrative proceeding. In addition, there may have been a discussion with Graham's counsel about it making sense to file any potential case in this matter as an administrative proceeding given Graham's status as a registered person, but staff takes issue with Graham's characterization of this being a "threat." Graham spent decades in the securities industry and operated both a registered broker-dealer and a registered investment adviser at the time of the presentation. It was completely foreseeable and reasonable for the staff to be giving serious consideration to recommending that the Commission bring an action against him in an administrative proceeding. Neither the fact that the staff considered recommending a litigated action against Graham in an administrative proceeding nor the existence of the court of appeals opinion referenced by Graham provides a basis for modifying the settled Order.

II. Graham Presents No Compelling Circumstances Under the Factors the Commission Considers in Reviewing a Motion to Modify a Bar Order.

The Commission has stated that "[i]n reviewing requests to lift or modify administrative bar orders, [it] will determine whether, under all the facts and circumstances presented, it is consistent with the public interest and investor protection to permit the petitioner to function in the industry without the safeguards provided by the bar." *Wien*, 2003 WL 2309478 at *4. "In the usual case, bars will remain in place; relief will be appropriate only in compelling circumstances." *Id.* The factors that guide the Commission's inquiry include:

> the nature of the misconduct at issue in the underlying matter (more serious and extensive allegations militate against relief); the time that has passed since issuance of the administrative bar; the compliance record of, and any regulatory interest in, 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, as expressed in 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. The Commission has indicated that "[n]ot all of these factors will be relevant in determining the appropriateness of relief in a particular case, and no one factor is dispositive." *Johnson*, 2015 WL 5305993 at *3 (citation omitted).

As discussed below, a review of the factors relevant to Graham's situation demonstrates that there are no compelling circumstances that would justify modifying the bar.

Nature of misconduct. The Commission found that Graham willfully violated Section 10(b) of the Exchange Act of 1934 and Rule 10b-5 thereunder in connection with a scheme to acquire certain securities from auctions of CDOs. "[C]onduct that violates the antifraud provisions of the securities laws is especially serious and subject to the severest of sanctions." *See, e.g., Peter Siris*, Securities Exchange Act Release No. 71068, 2013 WL 6528874, at *6 (Dec. 12, 2013)

(internal quotations and citation omitted), *petition denied*, 773 F.3d 89 (D.C. Cir. 2014). In addition, the conduct did not involve an isolated incident. As outlined above, the Commission also found that Graham took advantage of his access to confidential bidding information from the auctions to ensure that Vertical was able to acquire 23 securities in 5 different CDO liquidations conducted by VCAP during 2012 and that he made material misrepresentations to the trustees of the various CDOs for which VCAP served as liquidation agent. The seriousness and repeated nature of Graham's conduct counsels against modifying the bar.

Time that has passed since issuance. Graham filed his Notice of Motion to Modify Order on January 12, 2017, less than two years after the entry of the bar. In considering prior motions to modify or vacate, the Commission has found that similar periods of time were "hardly enough time to conclude that [a bar's] continuation is no longer required in the public interest." *Johnson*, 2015 WL 5305993 at *4 (denying motion to modify bar where only sixteen months had passed since entry of the bar) (citation omitted); *William H. Pike*, Investment Company Act Release No. 20417, 1994 WL 389872, at *2 (July 20, 1994) (denying motion to vacate order where "Order was entered just a little more than two years ago"), *petition denied*, 52 F.3d 1122 (D.C. Cir. 1995) (per curiam). Similarly, in Graham's case, two years is an insufficient amount of time to conclude that the bar is no longer required.

Compliance record of the petitioner since issuance of the administrative bar. As far as the staff is aware, Graham has had no compliance record nor been the subject of any regulatory interest since issuance of the bar. That said, he has had little opportunity to engage in behavior that would require the attention of regulators. As detailed above, the bar was entered only two years ago and Graham still does not have the right to apply for reentry. And, during the one-year carve out period in which he was allowed to participate in the sales of securities, he was subject to regular

reviews by a compliance monitor and required to make certifications to the staff that he was in compliance with certain undertakings specified in the Order. In short, Graham has not yet established a compliance record since issuance of the bar that would justify modifying the Order.

Age and securities experience of the petitioner, and the extent to which the Commission has granted prior relief from the administrative bar. Graham is approximately 53 years old and has many years of experience in the securities industry, nearly all of which he gained prior to the entry of the Order. Graham has not sought prior relief from the administrative bar as he does not yet have the right to apply for reentry under the terms of the Order. He is seeking to remove portions of the bar so that he may immediately associate with certain entities without restrictions or review. As the Commission has stated "[w]e generally first grant incremental relief in our cases vacating bars," this factor also weighs against granting the requested relief. *Johnson*, 2015 WL 5305993 at *4 (denying motion to modify bar in part because Johnson had not sought prior incremental relief from bar) (citation omitted).

Whether the petitioner had identified verifiable, unanticipated consequences of the bar. In support of his request, Graham details the financial consequences and employment obstacles he has suffered as a result of the bar. *See, e.g.*, Graham Aff. at ¶¶ 28, 30. He also describes the difficulties he experienced in dealing with the partners of Vertical, and in particular Beth Ferraro, during settlement negotiations with the Commission and during the one-year carve out period. *See, e.g.*, Graham Aff. at ¶¶ 15-16, 21-23. While the bar has likely had a financial impact on Graham and obviously impacts his ability to obtain employment in the securities industry, these are not examples of unexpected consequences of a bar. The Commission has ruled in considering prior motions for modification that diminished employment prospects and financial difficulties "are among a range of natural and foreseeable consequences that flow from a bar on employment in the

securities industry." *Johnson*, 2015 WL 5305993 at *4 n. 20; *Pike*, 1994 WL 389872 at *2 ("Pike's difficulties in obtaining employment do not render our Order inequitable. They are simply a natural consequence of the action taken against him."). Likewise, Graham's frustrations with the decisions and actions of his partners are a foreseeable consequence of no longer being permitted to be involved with the management of Vertical, particularly during a period when the remaining partners were trying to determine whether to remain in business. Graham has not identified any verifiable, unanticipated consequences of the bar and this factor also weighs in favor of denying his request for modification.

Conclusion

For the reasons set forth above, the Commission should deny Brett Thomas Graham's request to modify the Order.

Respectfully submitted,

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Certificate of Service

I certify that on February 22, 2017, the foregoing Division of Enforcement's Statement in Opposition to Graham's Motion to Modify Bar was served on counsel and other persons entitled to notice as follows:

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