UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 10244 / November 1, 2016

SECURITIES EXCHANGE ACT OF 1934
Release No. 79217 / November 1, 2016

INVESTMENT ADVISERS ACT OF 1940
Release No. 4563 / November 1, 2016

INVESTMENT COMPANY ACT OF 1940
Release No. 32352 / November 1, 2016

ADMINISTRATIVE PROCEEDING
File No. 3-15617

In the Matter of

LARRY C. GROSSMAN

ORDER GRANTING PARTIAL STAY

On September 30, 2016, the Commission issued an opinion and order (the "Opinion") finding that Larry C. Grossman, the founder and former owner and principal of Sovereign International Asset Management, Inc. ("Sovereign"), a registered investment adviser, violated antifraud provisions of the federal securities laws, and aided and abetted and was a cause of Sovereign's violations. Grossman did not dispute his liability, but contended that sanctions were prohibited by the five-year statute of limitations under 28 U.S.C. § 2462 and were otherwise inappropriate. The Commission concluded that the statute of limitations barred the imposition of civil penalties, but did not prohibit an industry bar, cease-and-desist order, and disgorgement. The Commission barred Grossman from the securities industry, imposed a cease-and-desist order, and ordered Grossman to pay disgorgement of $3,004,180.65, plus prejudgment interest.[1]

Grossman now moves for a stay of the obligation to pay disgorgement plus prejudgment interest pending judicial review. The Commission considers the following four factors in determining whether to grant a stay: (i) whether there is a strong likelihood that the moving party will succeed on the merits of its appeal; (ii) whether the moving party will suffer

[1] *Larry C. Grossman*, Securities Act Release No. 10227, 2016 WL 5571616, at *9-24 (Sept. 30, 2016).

irreparable harm without a stay; (iii) whether any person will suffer substantial harm as a result of a stay; and (iv) whether a stay is likely to serve the public interest.[2] The party seeking a stay has the burden of establishing that relief is warranted.[3]

Grossman has not established a strong likelihood that he will succeed on the merits of his appeal. His main argument is that the Eleventh Circuit held in *SEC v. Graham*[4] that "disgorgement is subject to Section 2462's five-year statute of limitations"; that "the Eleventh Circuit is not required to give deference to the Commission's interpretation of Section 2462"; and that "the Commission's refusal to follow the law within the Eleventh Circuit knowing that [he] would appeal any adverse decision to such circuit amounts to willful nonacquiescence." This argument lacks merit because the Commission did not willfully nonacquiesce in the Eleventh Circuit's decision in *Graham*.

The Opinion was not decided on the basis that *Graham* erred in construing the term "forfeiture" in Section 2462, which led the court to conclude that "Section 2462's statute of limitations applies to disgorgement" because "forfeiture and disgorgement are effectively synonymous."[5] Rather, the Opinion interpreted the term "disgorgement" in the Securities Enforcement Remedies and Penny Stock Reform Act of 1990 (the "Remedies Act").[6] After explaining that the Remedies Act authorizes the Commission "to 'enter an order' in an administrative cease-and-desist proceeding for 'accounting and disgorgement'" and "to 'adopt . . . orders concerning such . . . matters as it deems appropriate to implement'" its authority to order disgorgement,[7] the Opinion concluded that "disgorgement is an equitable *in personam* remedy distinct from and not equivalent to what courts have held to be the punitive *in rem* sanction of 'forfeiture' to which Section 2462 applies."[8]

Disgorgement, the Opinion held, "is an equitable remedy that imposes a personal liability on a defendant in the amount of his ill-gotten gains 'regardless whether he retains the self-same proceeds of his wrongdoing.'"[9] Yet *Graham*'s construction of the term "forfeiture" relied on

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2 *Dennis J. Malouf*, Securities Act Release No. 10202, 2016 WL 4537671, at *1 (Aug. 31, 2016) (partial stay order); *Raymond J. Lucia Cos.*, Exchange Act Release No. 76241, 2015 WL 6352089, at *1 (Oct. 22, 2015) (partial stay order); *see also*, *e.g.*, *Nken v. Holder*, 556 U.S. 418, 434 (2009).

3 *See*, *e.g.*, *Malouf*, 2016 WL 4537671, at *1; *Lucia*, 2015 WL 6352089, at *1.

4 823 F.3d 1357 (11th Cir. 2016).

5 *Graham*, 823 F.3d at 1363-64.

6 Pub. L. No. 101-429 (1990).

7 *Grossman*, 2016 WL 5571616, at *16 (quoting Pub. L. No. 101-429, codified at 15 U.S.C. §§ 77h-1(e), 78u-3(e), 80b-3(k)(5)).

8 *Id.*

9 *Id.* (quoting *SEC v. Banner Fund Int'l*, 211 F.3d 602, 617 (D.C. Cir. 2000)).

dictionaries that defined forfeiture as "'the divesting of the ownership of particular property.'"[10] Because this definition was "inconsistent with [the Commission's] interpretation of disgorgement as an obligation to return a sum equal to the ill-gotten gains rather than a requirement to replevy a specific asset," the Opinion respectfully disagreed with *Graham*'s conclusion that disgorgement was a forfeiture subject to Section 2462.[11]

In so doing, the Opinion cited *National Cable & Television Association v. Brand X Internet Services.*[12] The Supreme Court in *Brand X* held that "a court's prior interpretation of a statute" may "override an agency's interpretation only if the relevant court decision held the statute unambiguous."[13] *Graham* did not hold that the meaning of disgorgement was unambiguous.[14] In this situation, an agency's decision to construe a statutory term "differently from a court does not say that the court's holding was legally wrong."[15] "Instead, the agency may, consistent with the court's holding, choose a different construction, since the agency remains the authoritative interpreter (within the limits of reason) of such statutes."[16] The Opinion was therefore not an exercise in nonacquiescence; the Commission did not refuse to accept *Graham*'s interpretation of forfeiture but rather provided its authoritative interpretation of *disgorgement* and concluded that under that interpretation disgorgement did not fit within *Graham*'s definition of forfeiture.

Grossman is wrong to characterize the Opinion as "amount[ing] to willful nonacquiescence" for another reason: Grossman states that he will appeal to the Eleventh Circuit, but the Commission did not know where he would file an appeal at the time it issued the Opinion. The Opinion noted that Grossman could appeal to either the Eleventh Circuit or the D.C. Circuit.[17] As a result, the Commission issued the Opinion "without knowing in advance which court of appeals will consider any petition for review that may be filed."[18]

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10 *Graham*, 823 F.3d at 1363 (quoting *Webster's Third New Int'l Dictionary* (2002)).

11 *Grossman*, 2016 WL 5571616, at *18 & n.148.

12 545 U.S. 967 (2005).

13 *Id.* at 984.

14 *Grossman*, 2016 WL 5571616, at *18 (noting that *Graham* "rejected potential alternative definitions" of disgorgement "that did not support its ultimate conclusion").

15 *Brand X*, 545 U.S. at 983.

16 *Id.*

17 *Grossman*, 2016 WL 5571616, at *18 n.148 (citing 15 U.S.C. §§ 77i(a), 78y(a)(1), 801-42(a), 80b-13(a)).

18 *Id.* (quoting Samuel Estreicher and Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 Yale L.J. 679, 687 (1989)).

Grossman protests that this is implausible and cites the D.C. Circuit's recent decision in *Heartland Plymouth Court MI, LLC v. NLRB*.[19] In *Heartland*, the court stated that "when a case's facts result in only two venue choices for the party appealing the adverse order, and one circuit's precedent is in agreement with the agency's legal interpretation while the other is adverse to it, the agency knows any appeal will be to the adverse circuit."[20] The Commission had no such knowledge here. Although the D.C. Circuit's precedent is in agreement with the Commission's legal interpretation of disgorgement,[21] disgorgement is not the only remedy that Grossman contended was time-barred under the statute of limitations. Grossman argued that Section 2462 prevented the Commission from barring him from the securities industry under the D.C. Circuit's decision in *Johnson v. SEC*.[22] The Opinion held that Section 2462 does not apply to an industry bar; it relied in part on Eleventh Circuit precedent holding that Section 2462 does not apply to equitable remedies such as injunctive relief, and reasoned that an industry bar is a species of injunctive relief.[23] Accordingly, the Commission had no basis to know whether Grossman was more likely to pursue on appeal his challenge to disgorgement under *Graham* or to a bar from the securities industry under *Johnson*; it therefore had no basis to know the court to which he was likely to appeal.

Additional considerations distinguish the Opinion from the D.C. Circuit's decision in *Heartland*. That decision stated that nonacquiescence is permissible because "opposing adverse circuit decisions permits [an agency] to bring national . . . questions to Supreme Court resolution." Venue uncertainty aside, therefore, the D.C. Circuit stated that "proper nonacquiescence" requires both that after an issue has "'percolat[ed]' among the circuits" the agency seeks Supreme Court review, and that the agency is forthright in its nonacquiescence.[24] The D.C. Circuit faulted the NLRB for nonacquiescing in its precedent rather than seeking *certiorari* because its own precedent had been adverse to the agency's "for almost a quarter century" and a circuit split had already "engulf[ed] most circuits."[25] Conversely, the Eleventh Circuit issued *Graham* only months before the Opinion issued, *Graham* was the first court of appeals decision to hold that Section 2462 applies to disgorgement, and the majority of circuits

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19 *Heartland Plymouth Court MI, LLC v. Nat'l Labor Relations Bd.*, — F.3d —, 2016 WL 5485145 (D.C. Cir. Sept. 30, 2016).

20 *Id.* at *5.

21 *See Grossman*, 2016 WL 5571616, at *16-18.

22 *See Johnson v. SEC*, 87 F.3d 484, 490 (D.C. Cir. 1996). Grossman also relied on a Fifth Circuit decision that purported to follow *Johnson* in holding that an officer-and-director bar was punitive, and therefore subject to Section 2462, "in light of the minimal likelihood" of recurring misconduct and the "severe" consequences of such a bar. *SEC v. Bartek*, 484 F. App'x 949, 957 (5th Cir. 2012). Grossman could not appeal the Opinion to the Fifth Circuit.

23 *Grossman*, 2016 WL 5571616, at *14 & n.92.

24 *Heartland*, 2016 WL 5485145, at *4.

25 *Id*. at *7.

have not addressed the issue.[26] In *Heartland*, the D.C. Circuit also faulted the NLRB for "pretend[ing] there is no conflict between its Order and our law."[27] But in the Opinion the Commission stated explicitly that it "disagree[s]" with *Graham*.[28] The Opinion does not amount to willful nonacquiescence.

In addition to failing to establish a likelihood of success on the merits, Grossman has not shown irreparable injury absent a stay. He concedes "that the financial hardship of" paying disgorgement plus prejudgment interest "do[es] not rise to the level of irreparable harm." Indeed, the Commission has held repeatedly that "financial detriment does not amount to irreparable harm."[29] Yet Grossman claims that "the consequences of his inability to pay if the Commission sought to enforce the Monetary Sanctions, namely contempt and potential incarceration, is an irreparable harm that could be circumvented upon the issuance of a stay pending appeal." A respondent claiming an inability to pay disgorgement ordinarily bears the "burden of proving financial inability to pay."[30] Grossman has offered nothing more than a conclusory assertion about the "financial hardship" he faces.

The first two factors under the traditional standard for evaluating stay requests "are the most critical."[31] Grossman does not address the remaining two factors.[32] Accordingly, we find that none of the four factors militates in favor of a stay.

Nonetheless, the Commission has at times stayed monetary sanctions pending appeal without reference to the applicant's likelihood of success on the merits or the other components

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26 *But see SEC v. Kokesh*, 834 F.3d 1158, 2016 WL 4437585, at *6 (10th Cir. Aug. 23, 2016) (holding that disgorgement is not a forfeiture within the meaning of Section 2462), *petition for cert. filed*, No. 16-529 (Oct. 18, 2016); *Riordan v. SEC*, 627 F.3d 1230, 1234-34 & n.1 (D.C. Cir. 2010) (same). The D.C. Circuit recognized that an agency "may also petition a circuit to reconsider its adverse precedent via *en banc* review." *Heartland*, 2016 WL 5485145, at *4 n.5. Nonetheless, the court noted that "where a precedent has been reaffirmed multiple times" there "is little or no reason for the agency to conclude the circuit is open to revisiting its precedent." *Id.* Unlike in *Heartland*, *Graham* has not yet been reaffirmed once let alone multiple times.

27 *Heartland*, 2016 WL 5485145, at *7.

28 *Grossman*, 2016 WL 5571616, at *18.

29 *Lucia*, 2015 WL 6352089, at *1.

30 *Edgar R. Page*, Advisers Act Release No. 4400, 2016 WL 3030845, at *14 (May 27, 2016) (quoting *Terry T. Steen*, Exchange Act Release No. 40055, 1998 WL 278994, at *6 (June 2, 1998)).

31 *Nken*, 556 U.S. at 434.

32 *See, e.g.*, *Johnny Clifton*, Exchange Act Release No. 70639, 2013 WL 5553865, at *4 (Oct. 9, 2013) (finding, in denying a request for a stay, that respondent had not "shown that the financial losses he claims he will suffer outweigh protecting the public").

of the four-factor test.[33] Under the circumstances and as a matter of discretion, we elect to stay the requirement in the Opinion that Grossman pay disgorgement plus prejudgment interest, pending the filing of a petition for review with a United States Court of Appeals and, upon the timely filing of such a petition, pending the determination of that appeal.

Accordingly, IT IS ORDERED that the requirement in the Opinion that Grossman pay disgorgement plus prejudgment interest is stayed for sixty days from September 30, 2016, pending the filing of a petition for review with a United States Court of Appeals and, upon the timely filing of such a petition, pending determination of that appeal and the issuance of the court's mandate. The Opinion remains effective in all other respects.

For the Commission, by the Office of the General Counsel, pursuant to delegated authority.

Brent J. Fields
Secretary

[33] *See, e.g.*, *Malouf*, 2016 WL 4537671, at *3; *Lucia*, 2015 WL 6352089, at *1 n.7.