UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 97643 / June 2, 2023

Admin. Proc. File No. 3-15123

In the Matter of

DOMINIC O'DIERNO

ORDER DENYING REQUEST FOR RETURN OF DISGORGEMENT AND INTEREST PAID

On December 6, 2012, the Securities and Exchange Commission issued an order (the "2012 Order") settling proceedings against Dominic O'Dierno and finding that O'Dierno had, in violation of Section 15(a) of the Securities Exchange Act of 1934, "acted as a broker without being registered or associated with a registered broker or dealer" in connection with "a long-running Ponzi scheme that raised over $37 million from more than 100 investors."[1] As part of the settlement, O'Dierno agreed to be barred from association with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, and nationally recognized statistical rating organization, as well as from participating in any offering of penny stock, subject to the right to reapply after three years. O'Dierno also agreed to pay disgorgement plus prejudgment interest.

In 2017, in *Bartko v. SEC*, the United States Court of Appeals for the District of Columbia Circuit held that it was "impermissibly retroactive" to impose a collateral bar based on conduct that pre-dated the effective date of the Dodd-Frank Wall Street Reform and Consumer Protection Act.[2] As a result of that decision, the Commission announced a program allowing persons subject to collateral bars to request that the Commission exercise its discretion to vacate certain of those bars. In doing so, the Commission emphasized that "[t]his process applies *only* to collateral bars, which are bars that prohibit you from associating in a capacity in the securities industry with which you were not associated or were not attempting to associate at the time of your securities law violations."[3]

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1 *Dominic O'Dierno*, Exchange Act Release No. 68371, 2012 WL 6054567 (Dec. 6, 2012).

2 845 F.3d 1217, 1225 (D.C. Cir. 2017).

3 https://www.sec.gov/news/statement/commission-statement-regarding-bartko-v-sec (emphasis added).

In September 2018, O'Dierno applied for relief under that program by submitting a Commission-provided form, which specified that it was for relief "to vacate collateral bars (i.e., bars from industries with which the individual was not associated or not seeking to associate at the time of his or her securities law violation) that were imposed against individuals based entirely on conduct that occurred before the effective date of the Dodd-Frank Wall Street Reform and Consumer Protection Act (July 22, 2010)." The Commission granted O'Dierno the relief he sought on April 13, 2020 (the "2020 Order") by vacating his 2012 Order to the extent that it barred him from association with an investment adviser, municipal securities dealer, municipal advisor, transfer agent, and nationally recognized statistical rating organization, subject to a right to reapply after three years. In doing so, the 2020 Order specified that it otherwise left the 2012 Order "unmodified."[4]

O'Dierno subsequently emailed Commission staff, asking "when [he] might expect the return of the $45,561 in disgorgement and interest" that he had agreed to pay as part of the 2012 Order. But O'Dierno had not previously sought relief from the order of disgorgement, nor did the program under which O'Dierno sought relief provide for such a remedy. As both the 2020 Order vacating O'Dierno's collateral bars and the form provided by the Commission on which O'Dierno submitted his initial request for that relief specified, the Commission's program for relief under *Bartko* "applie[d] only to collateral bars." Indeed, *Bartko* itself is inapplicable, as that decision did not involve the payment of disgorgement or interest.

On April 5, 2022, the Commission issued a Statement Relating to Certain Administrative Adjudications (the "April 5 Statement") describing a control deficiency related to the separation of enforcement and adjudicatory functions within our system for administrative adjudications.[5] The April 5 Statement explained that the Chair had initiated a comprehensive internal review to assess the scope and potential impact of the control deficiency, which review was conducted by experienced investigative staff from the Division of Examinations under the supervision of the Commission's General Counsel. The April 5 Statement further disclosed the review team's findings regarding *SEC v. Cochran*[6] and *SEC v. Jarkesy*.[7] As part of the April 5 Statement, the Commission further committed to the release of information about additional affected matters.

On June 2, 2023, we released a Second Commission Statement Relating to Certain Administrative Adjudications (the "June 2 Statement") regarding *Cochran* and *Jarkesy,* as well as findings about additional adjudicatory matters currently pending before the Commission,

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[4] *Dominic O'Dierno*, Exchange Act Release No. 88624, 2020 WL 1862512, at *1 (Apr. 13, 2020).

[5] https://www.sec.gov/news/statement/commission-statement-relating-certain-administrative-adjudications.

[6] Admin. Proc. File No. 3-17228; *see also Axon Enters., Inc. v. FTC*, 598 U.S. ___, 143 S. Ct. 890 (2023).

[7] Admin. Proc. File No. 3-15255; *see also Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022), *pet. for rev. filed* (Mar. 8, 2023).

related to memoranda drafted by our Office of the General Counsel's Adjudication Group.[8] Those include 28 matters in which Division of Enforcement administrative staff accessed one or more memoranda specific to one of those particular matters (the "Affected Matters"). *O'Dierno* was one of those matters.

As detailed in the June 2 Statement, the review team found no evidence that any Enforcement staff assigned to investigate and prosecute any of the 28 Affected Matters accessed any of the case-specific memoranda before the Commission approved the action recommended in them. Further, the review team found no evidence that any Enforcement staff assigned to investigate and prosecute any of the 28 matters contacted or communicated with Adjudication staff as to any of those matters.

Although the review team's investigation revealed no evidence that the control deficiency resulted in harm to any respondent or affected the Commission's adjudication in any proceeding, we nevertheless determined to grant, as a matter of discretion, petitions to vacate certain collateral bars identified in the June 2 Statement that remained pending before the Commission.[9] We found that doing so was appropriate to preserve the Commission's resources.[10] Here, however, the Commission already granted O'Dierno's request to vacate his collateral bars.[11] And, to the extent his email to Commission staff regarding disgorgement could be construed as a request for further relief under the *Bartko* program, it seeks relief beyond the scope of that program. Given the important interest in maintaining the finality of Commission orders, we do not believe such an email provides a basis to expand the limited program providing for relief

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8 https://www.sec.gov/news/statement/second-commission-statement-relating-certain-administrative-adjudications

9 Order Vacating Certain Associational Bars, *In re Pending Administrative Proceedings* (June 2, 2023), https://www.sec.gov/litigation/opinions.htm.

10 *Id.*

11 *O'Dierno*, 2020 WL 1862512, at *1.

from collateral bars—under which O'Dierno already sought and obtained relief—to include a collateral attack on a settlement to which O'Dierno previously agreed.[12]

Accordingly, it is ORDERED that Dominic O'Dierno's request for the return of disgorgement and interest paid pursuant to the 2012 Order is DENIED.

By the Commission.

Vanessa A. Countryman
Secretary

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[12] *See, e.g.*, *Gregory Osborn*, Exchange Act Release No. 86001, 2019 WL 2324337 (May 31, 2019) ("We will not entertain Osborn's collateral attack on the settlement."); *Gordon Brent Pierce*, Exchange Act Release No. 2016 WL 1566396, at *2–3 (Apr. 18, 2016) (declining to reopen proceedings or to vacate final Commission orders that resulted from such proceedings based "on the important interest in maintaining the finality of our orders and in bringing administrative proceedings to a certain end"), *pet. denied*, 786 F.3d 1027 (D.C. Cir. 2015); *Michael H. Johnson*, Exchange Act Release No. 75894, 2015 WL 5305993, at *4–5 (Sept. 10, 2015) (finding that it would weigh against our "'strong interest'" in the finality of our settlement orders to modify the order (quoting *Kenneth W. Haver, CPA*, Exchange Act Release No. 54824, 2006 WL 3421789, at *2 (Nov. 28, 200))); *cf. Miller v. SEC*, 998 F.2d 62, 65 (2d Cir. 1993) ("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.").