

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 82951 / March 27, 2018

ADMINISTRATIVE PROCEEDING
File No. 3-18409

In the Matter of

JH DARBIE & CO., INC., and
ROBERT Y. RABINOWITZ

Respondents.

**ORDER INSTITUTING ADMINISTRATIVE
AND CEASE-AND-DESIST PROCEEDINGS,
PURSUANT TO SECTIONS 15(b) AND 21C
OF THE SECURITIES EXCHANGE ACT OF
1934, MAKING FINDINGS, AND IMPOSING
REMEDIAL SANCTIONS AND A CEASE-
AND-DESIST ORDER**

I.

The Securities and Exchange Commission (“Commission”) deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 (“Exchange Act”), against JH Darbie & Co., Inc. (“JH Darbie”) and Robert Y. Rabinowitz (“Rabinowitz”) (collectively, “Respondents”).

II.

In anticipation of the institution of these proceedings, Respondents have submitted a joint Offer of Settlement (the “Offer”) which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission’s jurisdiction over them and the subject matter of these proceedings, which are admitted, and except as provided herein in Section V, Respondents consent to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings, Pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order (“Order”), as set forth below.

III.

On the basis of this Order and Respondents’ Offer, the Commission finds¹ that:

¹ The findings herein are made pursuant to Respondents’ Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

Summary

These proceedings arise out of the failure of JH Darbie, a registered broker-dealer, to properly compute and report its net capital. As a consequence, from September 2015 through July 2016 (the “Relevant Period”), JH Darbie operated with a net capital deficiency and violated net capital reporting and books and records provisions. Rabinowitz, the chief executive officer (“CEO”) and financial and operations principal (“FINOP”), caused JH Darbie’s violations by failing to properly compute and report JH Darbie’s net capital.

Respondents

1. JH Darbie is a New York corporation with its principal place of business in New York, New York. During the Relevant Period, JH Darbie was registered with the Commission as a broker-dealer.

2. Rabinowitz, age 45, lives in Livingston, New Jersey. A New Jersey certified public accountant, Rabinowitz founded JH Darbie in 1997 and is a seventy-six percent owner of the firm. During the Relevant Period, and continuing today, he served as its CEO and FINOP, holding Series 7, Series 24 and Series 27 licenses, among others.

Facts

A. The Net Capital Rule

3. Section 15(c)(3) of the Exchange Act and Rule 15c3-1 thereunder (the “net capital rule”) require that broker-dealers effecting transactions in securities “at all times have and maintain net capital” no less than the greatest of the minimum requirement applicable to its business. The net capital rule requires different minimum amounts of net capital based on the nature of a firm’s business (for example, whether the firm holds customer funds or securities), and the method a firm uses in computing its net capital. The rule is designed to require a broker-dealer to maintain sufficient liquid assets to meet all obligations to customers and counterparties and have adequate additional resources to wind down its business in an orderly manner without the need for a formal proceeding if the firm fails financially.

4. In particular, the net capital rule requires that a broker-dealer perform two calculations: (i) a computation of the minimum amount of net capital the broker-dealer must maintain, which JH Darbie determined was \$5,000 but which, in actuality, was \$250,000 due to the firm’s carrying accounts for customers; and (ii) a computation of the amount of net capital the broker-dealer is maintaining. The minimum net capital requirement is the greater of a fixed-dollar amount specified in the net capital rule or an amount determined by applying one of two financial ratios. The minimum fixed dollar amount for JH Darbie during the Relevant Period was \$250,000.

5. To compute its net capital, a broker-dealer first calculates its net worth, then makes certain adjustments set forth in the rules, including deducting the value of certain illiquid assets,

and deducting certain specific percentages (or “haircuts”) from the market value of the securities it holds in proprietary accounts or other inventory accounts. The resulting figure must be above the firm’s required minimum net capital to comply with the net capital rule.

B. JH Darbie’s Erroneous Net Capital Calculations

6. JH Darbie conducted a securities business while in net capital deficit that ranged from \$72,103.95 to \$788,714.00 at the end of each month during the Relevant Period:

DATE	NET CAPITAL DEFICIENCY
September 2015	(\$72,103.95)
October 2015	(\$170,796.61)
November 2015	(\$265,523.32)
December 2015	(\$473,685.66)
January 2016	(\$589,332.10)
February 2016	(\$524,858.00)
March 2016	(\$444,427.87)
April 2016	(\$410,141.17)
May 2016	(\$355,694.20)
June 2016	(\$306,507.33)
July 2016	(\$788,714.00)

7. During the Relevant Period, Rabinowitz was JH Darbie’s CEO and FINOP. Rabinowitz was the individual responsible for calculating the firm’s monthly net capital and ensuring it met the requirements set forth in the federal securities laws.

Failure to Consider Foreign Accounts in Minimum Net Capital Requirement

8. During the Relevant Period, JH Darbie determined its minimum net capital requirement to be \$5,000, as described under Exchange Act Rule 15c3-1(a)(2)(vi). During the Relevant Period, JH Darbie executed transactions with foreign investment banks on behalf of multiple customers. Under Rule 15c3-1(a)(2)(i), carrying customer accounts and receiving or holding funds or securities for those accounts requires a minimum net capital of \$250,000.

9. In multiple instances during the Relevant Period, JH Darbie had executed trades for its customers through at least three foreign investment banks. All customer interactions on the accounts were with JH Darbie’s representatives, not representatives at the foreign investment banks. Accordingly, JH Darbie was subject to the heightened minimum net capital requirement of \$250,000. As described in paragraph 6, above, during the Relevant Period, JH Darbie was in violation of the net capital requirement even if its minimum net capital was \$5,000, except for the months of September and October 2015.

10. JH Darbie ended the relationship with the foreign firms in July 2016 in order to meet the \$5,000 minimum net capital requirement under Exchange Act Rule 15c3-1(a)(2)(vi).

Misclassification of Foreign Commission Receivables

11. JH Darbie received commissions from the foreign investment banks during four of the eleven months of the Relevant Period. It misclassified those commissions as allowable assets for the purpose of its net capital computation. The misclassified receivables ranged from \$5,000 in October 2015 to \$225,000 in February 2016. When properly reclassified as non-allowable, JH Darbie was further out of net capital compliance.

Failure to Accrue for Legal Liabilities

12. In August 2015, the firm JH Darbie used to clear transactions (the “Clearing Firm”) notified JH Darbie and Rabinowitz that one of JH Darbie’s customers had threatened to sue it in connection with a stock transaction. In accordance with the Fully Disclosed Clearing Agreement between JH Darbie and the Clearing Firm, JH Darbie was required to indemnify the Clearing Firm for fees and expenses incurred in defense of the threatened legal action.

13. The Clearing Firm notified JH Darbie and Rabinowitz of its intent to seek such indemnification in August 2015 and informed JH Darbie of the amounts being spent in response to the legal action. In December 2015, the Clearing Firm advised JH Darbie and Rabinowitz that it would begin invoicing JH Darbie for monthly installments to cover the indemnity in manageable increments. According to the Clearing Firm’s December 2015 notice, the amount due to the Clearing Firm for the months of August and September 2015 totaled \$155,325.73. The amount due grew each month until it reached \$500,000 in February 2016. The Clearing Firm’s insurance policy covered the amounts above \$500,000. JH Darbie did not pay the Clearing Firm any of the amount due. The Clearing Firm waived the indemnification provision on August 16, 2016 (with the right to reinstitute it), which brought JH Darbie back into net capital compliance at that time.

14. JH Darbie should have, but did not, accrue for this liability.

15. On August 5, 2016, JH Darbie submitted a notification to the Commission and FINRA of its net capital deficiency. Upon submission of the notice, JH Darbie’s business was limited to liquidating transactions of existing customer positions due to the net capital deficiency.

Filing Inaccurate Monthly FOCUS Reports

16. Due to the accrual errors, misclassifications, and other issues described in paragraphs 6 to 15, above, JH Darbie filed eleven monthly FOCUS reports pursuant to the requirements of Rule 17a-5(a) from September 2015 through July 2016 that inaccurately reflected the firm’s compliance with its net capital requirements.

C. Rabinowitz Caused JH Darbie’s Erroneous Net Capital Calculations, Books and Records and Financial Reports

17. Rabinowitz was JH Darbie’s CEO and FINOP, with a Series 27 license. During the Relevant Period, in his capacity as FINOP, he prepared JH Darbie’s net capital calculation and monthly financial package, including a statement of liabilities, as well as JH Darbie’s FOCUS reports. Rabinowitz failed to calculate JH Darbie’s net capital accurately, which resulted in the firm’s net capital deficiencies and reporting errors.

18. Rabinowitz was aware that JH Darbie maintained foreign accounts and that foreign commissions were received and misclassified as allowable receivables for the purposes of the net capital computation. He also was involved in JH Darbie’s communications with the Clearing Firm about the legal liabilities.

D. Violations

19. As a result of the conduct described above, JH Darbie willfully² violated Section 15(c)(3) of the Exchange Act and Rule 15c3-1 thereunder, which require broker-dealers to maintain minimum net capital, and Section 17(a)(1) of the Exchange Act and Rules 17a-3 and 17a-5 thereunder, which require broker-dealers to make and keep current certain books and records, and to make certain reports and filings with the Commission.

20. As a result of the conduct described above, Rabinowitz caused JH Darbie’s violations of Sections 15(c)(3) and 17(a)(1) of the Exchange Act, and Rules 15c3-1, 17a-3 and 17a-5 thereunder.

21. As a result of the conduct described above, Rabinowitz willfully³ made or caused to be made false statements in reports required to be filed with the Commission under the Exchange Act.

Undertakings

22. Respondent JH Darbie has undertaken to retain, for a period of no less than three (3) years from the date of this Order, a FINOP not unacceptable to the Commission staff.

23. Respondent Rabinowitz has undertaken to refrain, for a period of no less than three (3) years from the date of this Order, from serving as a FINOP. Thereafter, Rabinowitz will re-take, and pass, the Series 27 examination before resuming as a FINOP.

² A willful violation of the securities laws means merely ““that the person charged with the duty knows what he is doing.”” *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (quoting *Hughes v. SEC*, 174 F.2d 969, 977 (D.C. Cir. 1949)). There is no requirement that the actor ““also be aware that he is violating one of the Rules or Acts.”” *Id.* (quoting *Gearhart & Otis, Inc. v. SEC*, 348 F.2d 798, 803 (D.C. Cir. 1965)).

³ See footnote 2, *supra*.

24. Respondents shall certify, in writing, compliance with the undertaking set forth above. The certification shall identify the undertaking, provide written evidence of compliance in the form of a narrative, and be supported by exhibits sufficient to demonstrate compliance. The Commission staff may make reasonable requests for further evidence of compliance, and Respondent agrees to provide such evidence. The certification and supporting material shall be submitted to Thomas P. Smith Jr., Assistant Regional Director, with a copy to the Office of Chief Counsel of the Enforcement Division, no later than sixty (60) days from the date of the completion of the undertakings.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondents' Offer.

Accordingly, pursuant to Sections 15(b) and 21C of the Exchange Act, it is hereby ORDERED that:

A. Respondent JH Darbie shall cease and desist from committing or causing any violations and any future violations of Sections 15(c)(3) and 17(a)(1) of the Exchange Act and Rules 15c3-1, 17a-3 and 17a-5 thereunder.

B. Respondent Rabinowitz shall cease and desist from committing or causing any violations and any future violations of Sections 15(c)(3) and 17(a)(1) of the Exchange Act and Rules 15c3-1, 17a-3 and 17a-5 thereunder.

C. Respondent JH Darbie is censured.

D. Respondent JH Darbie shall pay civil penalties of \$50,000 plus agreed upon post-Order interest of \$113.00 to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury, subject to Exchange Act Section 21F(g)(3). Payment shall be made in the following installments:

- a. \$25,000.00 shall be due within ten (10) days of entry of this Order;
- b. \$12,581.50 shall be due May 31, 2018;
- c. \$12,531.50 shall be due August 31, 2018.

If any payment is not made by the date the payment is required by this Order, the entire outstanding balance of civil penalties, plus any additional interest accrued pursuant to 31 U.S.C. Section 3717 shall be due and payable immediately, without further application.

Payment must be made in one of the following ways:

- (1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;

- (2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
- (3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying JH Darbie as Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Lara S. Mehraban, Associate Director, Division of Enforcement, Securities and Exchange Commission, 200 Vesey Street, 4th Floor, New York, New York, 10281.

E. Respondent Rabinowitz shall pay civil penalties of \$25,000 plus agreed upon post-Order interest of \$56.50 to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury, subject to Exchange Act Section 21F(g)(3). Payment shall be made in the following installments:

- a. \$12,500.00 shall be due within ten (10) days of entry of this Order;
- b. \$6,290.75 shall be due May 31, 2018;
- c. \$6,265.75 shall be due August 31, 2018.

If any payment is not made by the date the payment is required by this Order, the entire outstanding balance of civil penalties, plus any additional interest accrued pursuant to 31 U.S.C. Section 3717 shall be due and payable immediately, without further application.

Payment must be made in one of the following ways:

- (1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
- (2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
- (3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Rabinowitz as Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Lara S. Mehraban, Associate Director, Division of Enforcement, Securities and Exchange Commission, 200 Vesey Street, 4th Floor, New York, New York, 10281.

F. Amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondents agree that in any Related Investor Action, they shall not argue that they are entitled to, nor shall they benefit by, offset or reduction of any award of compensatory damages by the amount of any part of Respondents' payments of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondents agree that they shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the Securities and Exchange Commission. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against Respondents by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

G. Respondent JH Darbie shall comply with the undertakings as enumerated in Section III, Paragraphs 22 and 24, above.

H. Respondent Rabinowitz shall comply with the undertakings as enumerated in Section III, Paragraphs 23-24, above.

V.

It is further Ordered that, solely for purposes of exceptions to discharge set forth in Section 523 of the Bankruptcy Code, 11 U.S.C. § 523, the findings in this Order are true and admitted by Respondent Rabinowitz, and further, any debt for disgorgement, prejudgment interest, civil penalty or other amounts due by Respondent Rabinowitz under this Order or any other judgment, order,

consent order, decree or settlement agreement entered in connection with this proceeding, is a debt for the violation by Respondent Rabinowitz of the federal securities laws or any regulation or order issued under such laws, as set forth in Section 523(a)(19) of the Bankruptcy Code, 11 U.S.C. § 523(a)(19).

By the Commission.

Brent J. Fields
Secretary