

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES ACT OF 1933

Release No. 10886 / November 9, 2020

SECURITIES EXCHANGE ACT OF 1934

Release No. 90385 / November 9, 2020

INVESTMENT COMPANY ACT OF 1940

Release No. 34089 / November 9, 2020

Admin. Proc. File No. 3-16318

In the Matter of

ALEXANDRE S. CLUG,
AURUM MINING, LLC,
PANAM TERRA, INC., and
THE CORSAIR GROUP, INC.

OPINION OF THE COMMISSION

CEASE-AND-DESIST PROCEEDING

BROKER-DEALER PROCEEDING

Grounds for Remedial Action

Antifraud violations

Reporting violations

Registration violations

Respondents violated antifraud, reporting, and registration provisions of the federal securities laws. *Held*, it is in the public interest to: (i) impose bars from the industry and penny stock offerings; (ii) enter a cease-and-desist order; and (iii) order payment of disgorgement plus prejudgment interest and a third-tier civil money penalty.

APPEARANCES:

Daniel A. Bushell for Alexandre S. Clug.

David Stoelting and *Ibrahim Bah* for the Division of Enforcement.

Appeal filed: March 1, 2016
Last brief received: February 14, 2019
Oral argument: September 18, 2019

I. Introduction

Alexandre S. Clug appeals, and the Division of Enforcement cross-appeals, an administrative law judge's initial decision and subsequent orders concerning alleged violations of the antifraud, reporting, and registration provisions of the federal securities laws by Clug, Michael W. Crow, and three companies that they founded in 2011 and controlled—Aurum Mining, LLC (“Aurum”), PanAm Terra, Inc. (“PanAm”), and The Corsair Group (“Corsair”).¹

The ALJ found that: (i) Aurum, Clug, and Crow violated, and Clug and Crow aided, abetted, and caused violations of, Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, and Section 17(a) of the Securities Act of 1933, by misrepresenting: Crow's professional background; that Aurum had satisfied the conditions necessary for it to retain investor funds when it had not and that Aurum had satisfied the conditions necessary for noteholders to convert into shares when it had not; and Aurum's gold production estimates for a mining exploration property; (ii) PanAm violated Securities Act Section 17(a)(2) by misrepresenting in its filings the status of a convertible note held by Crow and that the company had submitted an application to list its stock on the OTC Bulletin Board; (iii) Corsair, Clug, and Crow violated, and Clug and Crow aided, abetted, and caused Corsair's violation of, Exchange Act Section 15(a)(1) by acting as unregistered broker-dealers; and (iv) Crow violated Exchange Act Section 15(b)(6)(B) by associating with a broker-dealer (Corsair) in contravention of a bar that prohibited him from doing so, and Clug aided, abetted, and caused that violation.

The ALJ ordered that Clug and Crow cease-and-desist from further violations of the relevant statutory provisions, pay disgorgement plus prejudgment interest, and be barred from the securities industry and from participating in penny stock offerings. Crow was also ordered to pay a civil penalty. The ALJ did not sanction Aurum, PanAm, or Corsair.

Aurum, PanAm, Corsair, and Crow did not appeal or respond to the Division's cross-appeal. Crow settled with the Commission during the pendency of this appeal.² Clug appeals the findings of fact and conclusions of law as to his violations and sanctions.

¹ *Michael W. Crow*, Initial Decision Release No. 953, 2016 WL 489352 (Feb. 8, 2016); *Michael W. Crow*, Admin. Proc. Rulings Release No. 3708 (Mar. 15, 2016) (Order Granting the Division's Motion to Correct a Manifest Error of Fact), *available at* <https://www.sec.gov/alj/aljorders/2016/ap-3708.pdf>; *Michael W. Crow*, Admin. Proc. Rulings Release No. 5691 (Apr. 20, 2018) (Order Ratifying in Part and Revising in Part Prior Actions), *available at* <https://www.sec.gov/alj/aljorders/2018/ap-5691.pdf>.

² *Michael W. Crow*, Exchange Act Release No. 84914, 2018 WL 6722724 (Dec. 21, 2018) (ordering that Crow cease-and-desist from violations of Securities Act Section 17(a), Exchange Act Section 10(b) and Rule 10b-5 thereunder, and Exchange Act Sections 15(a)(1) and 15(b)(6)(B); pay disgorgement of \$100,000 plus prejudgment interest; and be barred from association with a municipal securities dealer, municipal advisor, transfer agent, nationally

The Division cross-appeals the ALJ's conclusion that it did not establish that Crow served as a de facto executive officer of PanAm. According to the Division, we should find that Crow was a de facto executive officer and that the following violations resulted from PanAm's failure to disclose that fact or information about Crow's background in its periodic reports: (i) PanAm violated, and Clug aided, abetted, and caused PanAm's violations of, the antifraud provisions of Exchange Act Section 10(b) and Rule 10b-5 and Securities Act Section 17(a); (ii) PanAm violated, and Clug aided, abetted, and caused PanAm's violations of, the public company reporting requirements of Exchange Act Section 13(a) and Rules 12b-20, 13a-1, and 13a-13 thereunder; and (iii) Clug violated Exchange Act Rule 13a-14(a) by certifying certain of those reports as PanAm's CEO. The Division further cross-appeals the ALJ's finding that PanAm violated Securities Act Section 17(a)(2) by misrepresenting the status of a convertible note held by Crow; it contends that through this misrepresentation PanAm also violated Securities Act Sections 17(a)(1) and (a)(3) and Exchange Act Section 10(b) and Rule 10b-5, and that Clug aided, abetted, and caused those violations. Finally, the Division seeks the imposition of cease-and-desist orders, disgorgement plus prejudgment interest, and civil penalties on Clug, Aurum, PanAm, and Corsair; and industry, penny stock, and officer-and-director bars on Clug.

No party appealed the findings that: (i) Aurum violated Securities Act Section 17(a) and Exchange Act Section 10(b) and Rule 10b-5 by making the misrepresentations noted above; (ii) PanAm violated Securities Act Section 17(a)(2) by misrepresenting that it had submitted an application to list its stock on the OTC Bulletin Board; and (iii) Corsair violated Exchange Act Section 15(a)(1). But the initial decision "cease[d] to have any force or effect" when we granted the petitions for review.³ As a result, we discuss these findings and the issues appealed below.⁴

II. Procedural History

On November 30, 2017, after Clug and the Division filed their appeals, we ratified the appointments of the Commission's ALJs, including the ALJ assigned to this case.⁵ We also remanded this proceeding (among others) in order for the ALJ to conduct a de novo reconsideration and reexamination of the record to determine "whether to ratify or revise in any respect all prior actions taken by" the ALJ.⁶ As part of the remand, the parties were allowed to submit new evidence and briefs.⁷ On April 20, 2018, based upon the new evidence submitted and reconsideration of the record, the ALJ determined to ratify all prior actions he had taken, including the initial decision, except that he increased the disgorgement amount from \$50,000 to

recognized statistical rating organization, or investment company, and from participating in any penny stock offering). Because he settled, our findings herein do not apply to Crow.

³ *Eric J. Brown*, Securities Act Release No. 9311, 2012 WL 1143573, at *2 (Apr. 5, 2012).

⁴ *See Larry C. Grossman*, Securities Act Release No. 10227, 2016 WL 5571616, at *1 (Sept. 30, 2016).

⁵ *Order*, Exchange Act Release No. 82178, 2017 WL 5969234, at *1-2 (Nov. 30, 2017).

⁶ *Id.*

⁷ *Michael W. Crow*, Admin. Proc. Ruling Release No. 5300 (Dec. 6, 2017), available at <https://www.sec.gov/alj/aljorders/2017/ap-5300.pdf>.

\$67,000 after Clug submitted an updated financial statement reflecting that he was “now gainfully employed” and that “he and his wife’s joint net assets ha[d] increased.”⁸ Thereafter, Clug and the Division again sought Commission review.

On June 21, 2018, the Supreme Court issued its decision in *Lucia v. SEC*.⁹ In *Lucia*, the Court held that the Commission’s ALJs were appointed in a manner that violated the Appointments Clause of Article II of the Constitution.¹⁰ The Court remanded for the Commission to provide the respondent with a new hearing before a hearing officer who was properly appointed and had not participated in the matter previously.¹¹ Subsequently, we ratified the appointment of our ALJs and once again remanded this proceeding (and others) to provide the parties with a “new hearing before an ALJ who did not previously participate in the matter.”¹² We specified that, in any such hearing, the newly assigned ALJ would “exercise the full powers conferred by the Commission’s Rules of Practice and the Administrative Procedure Act” and not “give weight to or otherwise presume the correctness of any prior opinions, orders, or rulings issued in the matter.”¹³ We also provided the parties with the option of submitting an “express agreement . . . regarding alternative procedures” to the Chief ALJ.¹⁴

On September 11, 2018, Clug and the Division jointly requested that the Commission decide their petitions and cross-petitions for review on the existing record. Their joint agreement stated that Clug knowingly and voluntarily “waive[d] any claim or entitlement to . . . a new hearing before another ALJ or the Commission”; “waive[d] any challenge to this administrative proceeding, as well as the Commission’s consideration of the Petitions for Review, and any and all orders . . . issued during or at the conclusion of these proceedings . . . based upon any alleged or actual defect in the appointment of [the] ALJ”; and “elect[ed] to have the Commission decide the issues raised in the” already-filed petitions for review without “taking new evidence.”¹⁵

⁸ *Michael W. Crow*, Admin. Proc. Ruling Release No. 5691 (Apr. 20, 2018), available at <https://www.sec.gov/alj/aljorders/2018/ap-5691.pdf>.

⁹ 138 S. Ct. 2044 (2018).

¹⁰ *Id.*

¹¹ *Id.* at 2055.

¹² *In re Pending Admin. Proceedings*, Exchange Act Release No. 83907, 2018 WL 4003609, at *1-2 (Aug. 22, 2018).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ In Clug’s brief in support of his petition for review, Clug stated that he “continue[s] to assert” and “incorporate[s] . . . by reference” the “constitutional challenges [he] raised before the ALJ” to preserve them for any appeal of the Commission opinion, but that he does “not focus on those arguments in [his briefs to the Commission] because [he] recognize[s] that the Commission disagrees with them.” As stated above, in 2018, Clug explicitly waived any challenge based upon the appointment of the ALJ. In his post-hearing brief, Clug had raised an Appointments Clause challenge and added that in his view the proceeding also “violates Article II of the U.S. Constitution based upon *Free Enterprise [Fund v. PCAOB]*” and “violates Art. I delegation

III. The Aurum Violations

Exchange Act Section 10(b) and Rule 10b-5(b) thereunder prohibit, through means of interstate commerce and in connection with the purchase or sale of securities, making an untrue statement of material fact or omitting to state a material fact necessary to make statements not misleading.¹⁶ A fact is material if there is a “substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information made available.”¹⁷ A violation of these provisions requires scienter.¹⁸ Scienter is the intent to deceive, manipulate, or defraud.¹⁹ It includes recklessness—highly unreasonable conduct that represents an “extreme departure from the standards of ordinary care, . . . which presents a danger of misleading buyers or sellers that is either known to the [respondent] or is so obvious that the [respondent] must have been aware of it.”²⁰

We find that Clug violated Exchange Act Section 10(b) and Rule 10b-5(b) in three respects: (1) he misrepresented Crow’s professional background in an August 2011 Aurum private placement memorandum (“PPM”) by not disclosing Crow’s prior violations of the securities laws; (2) he misrepresented in a letter to Aurum’s investors in January 2012 that Aurum had satisfied the conditions necessary for it to retain investor funds when it had not, and in a separate letter in January 2012 that Aurum had satisfied the conditions necessary for noteholders to convert into shares when it had not; and (3) he misrepresented in numerous PPMs and marketing materials the gold estimates for a mining exploration property in Peru.²¹ A

doctrine and a right to a jury trial.” Clug did not expand on these statements in his post-hearing brief let alone in his briefing to the Commission. “[E]ven pro se litigants must brief arguments in order to preserve them. Merely listing claims with no analysis is inadequate to preserve the claim on appeal.” *Moss v. La. Dep’t of Corr.*, 671 F. App’x 351, 352 (5th Cir. 2016). Accordingly, we find that Clug has not preserved any other “constitutional challenges.” In any case, the Commission recently held that “*Free Enterprise Fund* does not compel the conclusion that the statutory restrictions on removal of ALJs violate separation-of-powers principles” and that the Seventh Amendment right to a jury trial is not applicable to administrative proceedings. *John Thomas Cap. Mgmt. Grp. LLC, d/b/a Patriot 28 LLC; and George R. Jarkesy, Jr.*, Exchange Act Release No. 89775, 2020 WL 5291417 at *26-27 (Sept. 4, 2020).

¹⁶ 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5(b). Clug does not dispute that he acted through interstate commerce or that his actions were “in connection with the purchase or sale” of securities.

¹⁷ *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988); *see also TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 445 (1976) (“The question of materiality . . . is an objective one, involving the significance of an omitted or misrepresented fact to a reasonable investor.”).

¹⁸ *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 214 (1976).

¹⁹ *See, e.g., SEC v. Steadman*, 967 F.2d 636, 641-42 (D.C. Cir. 1992).

²⁰ *Id.* (quoting *Sundstrand Corp. v. Sun Chem. Corp.*, 553 F.2d 1033, 1045 (7th Cir. 1977)); *accord Rockies Fund, Inc. v. SEC*, 428 F.3d 1088, 1093 (D.C. Cir. 2005).

²¹ In light of our findings, we need not determine whether Clug or Aurum also violated Securities Act Section 17(a) as a result of these misrepresentations.

company is liable for the actions of its responsible officers, and its scienter is imputed from that of the individuals controlling it.²² As a result, Aurum is also liable for these misrepresentations because Clug controlled Aurum and therefore his conduct and scienter are imputed to it.

A. Clug misrepresented Crow’s professional background.

1. Clug made materially misleading omissions about Crow’s background with scienter.

Clug and Crow, who were described as Aurum’s “managers” in its offering documents, exercised control of Aurum through their ownership of two trusts that each held 50% of Aurum’s Class B membership units—the only equity shares with voting rights. Between 2011 and 2014, Clug and Crow raised almost \$4 million for Aurum from investors through the sale of convertible notes and nonvoting Class A membership units (the “Class A Shares”). Of that money, Aurum paid \$377,347 to Clug, \$293,614 to Crow, and \$625,000 in “retainer fees” to Corsair, an entity Clug and Crow owned and controlled. Aurum paid Corsair the retainer fees pursuant to an “advisory agreement” making Corsair Aurum’s “financial and management consultant.” Aurum went out of business in 2014, resulting in a total loss of investor funds.

Aurum began selling the Class A Shares using a PPM dated August 2011. Clug and Crow drafted the PPM and caused Aurum to distribute it to investors. The PPM described the professional backgrounds of Aurum’s three managers—Clug, Crow, and CFO Angel Lana.²³ For Crow, the PPM described his education as well as Crow’s past business successes.

But the PPM omitted any mention of Crow’s disciplinary history regarding violations of the securities laws. In 1998, in an action brought by the Commission, Crow consented to a judgment in federal district court barring him from acting as an officer or director of a public reporting company.²⁴ The Commission’s action was based on allegations, which Crow neither admitted nor denied, that he committed securities fraud as the president and chairman of Wilshire Technologies, Inc. In 2008, a federal district court found that Crow aided and abetted securities law violations by two broker-dealers that he controlled.²⁵ The court found that Crow aided and abetted Duncan Capital Group LLC’s violation of Exchange Act Section 15(a) by acting as an unregistered broker; and that he aided and abetted Duncan Capital LLC’s violations of Exchange Act Section 15(b)(1) and (7) and rules thereunder by, among other things, failing to disclose that Crow controlled, and was a de facto officer and director of, the firm. Crow was enjoined from further violations of Exchange Act Section 15(a) and (b) and rules thereunder and

²² *A.J. White & Co. v. SEC*, 556 F.2d 619, 624 (1st Cir. 1977) (holding that a firm “can act only through its agents, and is accountable for the actions of its responsible officers”); *Warwick Capital Mgmt., Inc.*, Advisers Act Release No. 2694, 2008 WL 149127, at *9 n.33 (Jan. 16, 2008) (“A company’s scienter is imputed from that of the individuals controlling it.”).

²³ Lana consented to sanctions for violating Securities Act Section 17(a)(2) and (3). *Angel E. Lana, CPA*, Exchange Act Release No. 73852, 2014 WL 7145627 (Dec. 16, 2014).

²⁴ *SEC v. Crow*, No. 96-1661 S (S.D. Cal. Apr. 16, 1998).

²⁵ *SEC v. Crow*, No. 07-CV-3814 (S.D.N.Y. Nov. 13, 2008).

ordered to pay disgorgement and civil penalties.²⁶ Based on the civil action, the Commission barred Crow from association with any broker, dealer, or investment adviser.²⁷

The PPM's omissions were material because they provided investors a misleading basis for believing that Crow could be trusted to manage the funds they invested in Aurum. The disclosures in the PPM highlighted Crow's business successes while omitting any reference to his disciplinary history or the names of the companies involved—Wilshire Technologies, Duncan Capital Group LLC, and Duncan Capital LLC. Two Aurum investors, Howard Paul Hollander and Simon Stern, testified that the professional backgrounds of Aurum's managers, including Crow, were important to their investment decisions. We conclude that a reasonable investor would have wanted to know about Crow's disciplinary history.²⁸

Clug acted with scienter because he admittedly was aware of Crow's history before they launched Aurum in 2011. Clug testified that he learned about Crow's disciplinary history when they worked together between 2005 and 2008 at DC Associates, a merchant bank that Crow founded and ran as CEO, and that Clug worked for as CFO and COO. Clug testified that Crow resigned as CEO in 2008 when he was sanctioned for violating the securities laws.²⁹

2. Clug's challenges to materiality and scienter are unpersuasive.

Clug challenges materiality and scienter by claiming that subsequent PPMs included adverse information about Crow's past after Clug became "conscious of the omission" in the August 2011 PPM. He further challenges materiality by claiming that no investors "complained" and "many made further investments" after Crow's disciplinary history was "communicated to investors." But the record does not show that Aurum ever made adequate disclosure to investors, in subsequent PPMs or otherwise, about Crow's background.

Subsequent disclosures in the December 2011, September 2012, and January 2013 PPMs did not correct the earlier omissions.³⁰ All three PPMs contained a link to an online "data room,"

²⁶ The district court stated that "[t]here is no assurance that Crow can be trusted in the future to comply with securities laws" because, among other things, he "perjured himself" in court and "took steps to cover up" his "egregious" conduct at Duncan Capital LLC.

²⁷ *Michael W. Crow*, Exchange Act Release No. 59982, 2009 WL 2779121 (May 27, 2009).

²⁸ See *SEC v. Merchant Capital, LLC*, 483 F.3d 747, 770-71 (11th Cir. 2007) (finding it materially misleading to omit from manager's business experience "touted in" offering materials that manager had a personal bankruptcy that resulted from the failure of a related business); *SEC v. Weintraub*, No. 11-21549-CIV, 2011 WL 6935280, at *4-5 (S.D. Fla. Dec. 30, 2011) (finding defendant's tender offer documents materially misleading for omitting his criminal record, officer and director bar, personal bankruptcy, and unpaid Commission judgment).

²⁹ See *SEC v. Pirate Inv'r LLC*, 580 F.3d 233, 243 (4th Cir. 2009) (stating that "the fact that a defendant publishes statements when in possession of facts suggesting that the statements are false is 'classic evidence of scienter'") (citation omitted).

³⁰ Cf. *N.J. Carpenters Health Fund v. Royal Bank of Scot. Grp., PLC*, 709 F.3d 109, 127 (2d Cir. 2013) (recognizing "serious limitations on a corporation's ability to charge its

which the December 2011 PPM stated included a “discussion of any past litigation” involving Aurum’s managers, and which the September 2012 and January 2013 PPMs stated included “details” about Crow’s “litigat[ion] with the SEC” in 2008. But the record does not show whether Aurum made a full disclosure in the data room.³¹ And the disclosures in the PPMs were vague and incomplete. Indeed, the December 2011 PPM provided no additional information, and the September 2012 and January 2013 PPMs did not mention Crow’s disciplinary history from 1998. As for Crow’s disciplinary history from 2008, the September 2012 and January 2013 PPMs stated only that Crow “was ordered to pay a fine and restitution” because of a finding that “an investment, ownership and relationship with a broker dealer . . . required a license.” The PPMs omitted the cease-and-desist order and industry bar imposed on Crow and that he committed multiple violations of Exchange Act Section 15 through two broker-dealers.

Nor do we find that these subsequent incomplete disclosures negate scienter because Clug was not “conscious of the omission” in the August 2011 PPM. Clug and Crow drafted the PPM, and Clug knew Crow’s disciplinary history at the time. Clug’s omission of Crow’s disciplinary history from the August 2011 PPM was, at the least, such an extreme departure from the standards of ordinary care that Clug must have known of the danger of misleading investors.³²

Clug claims further that he did not act with scienter because he “consulted with and relied on counsel throughout the production of all these documents.” An advice-of-counsel defense requires that Clug prove he “made complete disclosure to counsel, sought advice as to the legality of his conduct, received advice that his conduct was legal, and relied on that advice in good faith.”³³ The record contains no evidence that Clug (or anyone else at Aurum) sought or received legal advice regarding the adequacy of the PPM’s disclosures or that any lawyers consulted were even aware of Crow’s disciplinary history.

B. Clug made misrepresentations concerning a project in Brazil.

1. Clug represented falsely that Aurum satisfied the conditions in the August 2011 PPM necessary for it to retain investor funds and the conditions in convertible notes necessary for noteholders to convert into shares.

In addition to the offering of Class A Shares through the August 2011 PPM, Aurum raised funds by selling convertible notes (the “Aurum Notes”) through a term sheet dated May

stockholders with knowledge of information omitted from a document such as a . . . prospectus on the basis that the information is public knowledge and otherwise available to them”) (omission in original) (quoting *Kronfeld v. Trans World Airlines, Inc.*, 832 F.2d 726, 736 (2d Cir. 1987)).

³¹ The record includes an email from Clug to Crow dated September 14, 2012, stating that someone had downloaded from the data room a document entitled “Press Release SEC Prevails in Trial Against Michael W. Crow for Unlawfully Controlling Registered Broker-Dealer.”

³² See *supra* note 20 and accompanying text (describing the standard for recklessness).

³³ *Markowski v. SEC*, 34 F.3d 99, 104-05 (2d Cir. 1994).

2011 (the “Aurum Term Sheet”). Both offerings included conditions related to a tract of land in Brazil, known as the Batalha property, which Aurum purportedly planned to develop as a gold mine in a joint venture with a Brazilian entity, Arthom Participacoes, Ltda. (“Arthom”).

The August 2011 PPM stated that Aurum would “promptly” refund all money raised through the offering if it did not: (i) raise \$1 million through the offering; (ii) receive a geologist report attesting to the gold content of Batalha; and (iii) receive a legal opinion stating that the joint venture had irrevocable land and mining rights to Batalha and all necessary licenses. The Aurum Notes and Aurum Term Sheet stated that noteholders would receive “8% per annum” at the end of a nine-month term but could convert the principal and interest into Class A Shares (at a 50% discount to the share price) either at maturity or earlier upon the joint venture’s “acquisition [of] . . . land . . . and mining rights for the [g]old project known as Batalha”—the “conversion event.” Aurum did not satisfy any of the PPM’s three closing conditions discussed above or the conditions for the Aurum Notes’ conversion event.³⁴

Nonetheless, Clug and Crow claimed falsely in a January 2012 letter to investors who received the PPM that Aurum had “satisfied the conditions of closing.” They requested that investors sign the letter to acknowledge they “wish[ed] to continue” their investments under a new PPM dated December 2011 and “receive [their] Class A” Shares. All such investors agreed to continue their investment and receive Class A Shares. Aurum, in clear violation of the August 2011 PPM, retained all of the \$115,000 in proceeds that investors had conditionally contributed.

Clug concedes that Aurum had not satisfied the conditions of closing.³⁵ Nonetheless, he contends that other communications Aurum made corrected the statement that Aurum “satisfied the [PPM’s] conditions of closing.” But no communications in the record corrected the January 2012 letter’s false claim that the closing conditions had been met.

Similarly, Clug and Crow claimed falsely in a second letter dated January 2012—this one to the noteholders—that Aurum had “[c]losed on acquiring the 50% interest in Batalha.” All nine noteholders, who had invested a total of \$250,000, subsequently converted to Class A Shares rather than receive the principal and interest to which they were entitled. Five noteholders converted before their notes matured.

Clug argues that the statement that Aurum “[c]losed on acquiring the 50% interest in Batalha” was true because Aurum became a 50% owner of Batalha when it signed a joint venture agreement with Arthom in December 2011. Although Aurum sometimes used the term “Batalha” to refer to the joint venture, the letter makes clear that in its statement about acquiring

³⁴ Clug contends that the ALJ erred in concluding that noteholders did not have the option to convert prior to maturity without the conversion event happening. But the Aurum Notes stated that they were “convertible at the election of the [h]older at the earlier of the Close or” the maturity date, and “[t]he ‘Close’ is defined as the financing and closing of the acquisition on the land rights and mining rights for the [g]old project known as Batalha.”

³⁵ During oral argument, Clug contended that the only closing condition he concedes was not satisfied was raising \$1 million through the offering. But at the hearing, Clug testified that Aurum did not obtain the geologist report or the legal opinion required by the August 2011 PPM.

a 50% interest Aurum was referring to the land. The letter stated that Aurum completed successfully its “acqui[sition of] an interest in Batalha, a 3,742 hectare property in northern Brazil with our partners there”—a statement Clug knew was untrue.

Clug also asserts that the Aurum Term Sheet “was not used for” selling the notes and, in any case, stated that “it was only ‘proposed,’” that it was “not an offer to [p]urchase [s]ecurities,” and that “any such offer [would] only be made by the subscription agreement and associated memorandum.” But Lana testified that he presented the Term Sheet to investors, and in any case the relevance of Clug’s arguments is not clear. Clug does not, and could not, dispute that the misrepresentation in the January 2012 letter to noteholders regarding the completion of the conversion event was in connection with the purchase or sale of securities.³⁶

2. Clug’s misrepresentations in the January 2012 letters that Aurum had satisfied the conditions necessary for it to retain investor funds and for noteholders to convert to shares were material.

These misrepresentations, which allowed Aurum to retain the funds raised through the PPM and the Aurum Notes, were material. A reasonable investor would consider it important that Aurum had not raised the funds necessary to complete the offering under the PPM.³⁷ A reasonable investor would also consider it important that, for the only property named in the offerings, Aurum had not obtained a geologist report or a legal opinion stating that it had obtained land and mining rights or necessary licenses.³⁸

Clug contends that the statement that Aurum “satisfied the conditions of closing” was not material because investors “understood that their investment was very risky,” and none filed complaints or testified that they relied on the misstatements “to make an investment.” Although investors may have understood that the mining venture was risky, a reasonable investor would have considered it important that Clug misrepresented the extent of those risks by claiming falsely that the closing conditions had been met and the conversion event had occurred.³⁹

³⁶ *SEC v. Zandford*, 535 U.S. 813, 819, 825 (2002) (holding that the “in connection with” requirement is satisfied if the “fraudulent scheme” and securities transaction coincide).

³⁷ *See, e.g., Svalberg v. SEC*, 876 F.2d 181, 183-84 (D.C. Cir. 1989) (finding that closing of all-or-nothing stock offering without having sold the required minimum stock to the public was material because “shareholders clearly would consider it ‘important’ that principals were acting on their own to close what appeared to be a weak underwriting”).

³⁸ *See, e.g., SEC v. Arcturus Corp.*, 171 F. Supp. 3d 512, 536 (N.D. Tex. 2016) (finding that reasonable investors “would find it important in making their investment decision to learn that the [defendants’] working interest in the . . . well was, at the very least, ‘in dispute’, because this would call into question any right to participate in testing and drilling of the well—the exact business purpose of their potential investment”), *rev’d on other grounds*, 912 F.3d 786 (5th Cir. 2019); *SEC v. Asset Mgmt. Corp.*, No. IP 78-34-C, 1979 WL 1275, at *3-6, 14 (S.D. Ind. Dec. 10, 1979) (finding that misrepresentations that new company offering securities had coal property leases and mining rights were material), *aff’d*, 694 F.2d 130 (7th Cir. 1982).

³⁹ *See Rodney v. KPMG Peat Marwick*, 143 F.3d 1140, 1145 (8th Cir. 1998) (“Reasonable investors reading the Fund’s prospectuses and KPMG’s reports would conclude that, whatever

Investors would have wanted to know that Aurum had not met the necessary conditions—it had not raised \$1 million, it had not received a geologist report attesting to the gold content of Batalha, and it had not received a legal opinion stating that the joint venture had irrevocable land and mining rights to Batalha and all necessary licenses. As for proof of reliance, that is not an element of a securities fraud action by the Commission.⁴⁰

3. Clug made the misrepresentations about the securities offerings with scienter.

We find further that Clug made the misrepresentations with scienter. He conceded below that he knew, at the time he made the false statements in the two January 2012 letters, that Aurum had not satisfied the PPM’s closing conditions.⁴¹ Contemporaneous emails establish that he knew, by the time he sent the two letters in January 2012, that the Aurum Notes’ conversion event had not yet occurred because Arthom’s CEO told Clug and Crow in an email on December 14, 2011 that he had not yet obtained the land and mining rights for Batalha.

Clug contends that the statement that Aurum “satisfied the conditions of closing” was negligent but not reckless because, due to the illness and death of a close family member, he “did not catch that apparently erroneous one line in that one document, which was prepared with counsel and all managers.” But updating investors about the closing conditions was the primary purpose of the two-page letter, which Clug and Crow drafted and signed. And by misleading investors about the satisfaction of those conditions, Aurum was able to retain investor funds. As discussed above, Clug knew the statement about the closing conditions was false when he sent the letter and must have known that stating the closing conditions had been satisfied would mislead investors. As for reliance on counsel, Clug and Crow testified that an attorney named Bob Brantl drafted the line about Aurum having satisfied the closing conditions. But Clug and

risks they were accepting by investing in a mutual fund that traded in derivatives and engaged in forward commitments, they were not encountering the enhanced risks created by violations of the Fund’s own basic investment policies.”); *Fundamental Portfolio Advisors, Inc.*, Exchange Act Release No. 48177, 2003 WL 21658248, at *12 (July 15, 2003) (finding that a fund’s failure to disclose changes to its investment strategy that increased its risk was material), *petition denied*, 167 F. App’x 836 (2d Cir. 2006).

⁴⁰ See, e.g., *SEC v. Teo*, 746 F.3d 90, 102 (3d Cir. 2014) (citing *SEC v. Morgan Keegan & Co., Inc.*, 678 F.3d 1233, 1244 (11th Cir. 2012) (citing *SEC v. Blavin*, 760 F.2d 706, 711 (6th Cir. 1985); *SEC v. Wolfson*, 539 F.3d 1249, 1256 (10th Cir. 2008); see also *S.W. Hatfield, CPA*, Exchange Act Release No. 73763, 2014 WL 6850921, at *7 (Dec. 5, 2014) (rejecting argument that investor testimony was necessary to establish materiality because “the reaction of individual investors is not determinative of materiality, since the standard is objective, not subjective”).

⁴¹ See *Svalberg*, 876 F.2d at 184 (affirming Commission finding that respondents acted with scienter because “they certainly knew . . . that they were closing the . . . offering although the required minimum had not been sold to the public”) (internal quotation omitted).

Crow put on no evidence or testimony to support their assertion that Brantl provided advice concerning the letter or was even aware of whether the closing conditions had not been met.⁴²

C. Clug misrepresented the geological results for a Peruvian property.

1. Clug misrepresented the gold estimates at the Molle Huacan site.

In 2012, Aurum secured a permit to mine a tract of land in Peru known as the Molle Huacan property. Elias Garate, an in-house geologist, conducted tests of Molle Huacan's gold potential between March 2012 and February 2013 and reported his findings to Clug and Crow. From May 2012 to July 2013, Aurum touted Molle Huacan's gold potential as reflected by Garate's findings in communications with investors.

Specifically, Aurum sent investors a first quarter update in May 2012 that Clug and Crow drafted and signed estimating that Molle Huacan had "at least 500,000 ounces of gold that can be mined near the surface." Aurum described that gold as "worth \$42.5 million" and, if fully mined, worth "\$800 million." Aurum added that it is "in the process of preparing the site for production . . . by third quarter 2012," and advised investors that "now is the time" to "increase their stake" in Aurum. In a second quarter update sent in July 2012 that Clug and Crow drafted and signed, and PPMs issued in September 2012 and January 2013 that Clug and Crow drafted, Aurum claimed that its "senior geologist, Elias Garate, is becoming increasingly convinced that Molle Huacan is a major gold concession and may have more than 1 million ounces of gold." The second quarter update and September 2012 PPM reiterated that Aurum's "goal is to be able to initiate mining of the ore from Molle Huacan by the end of" the third quarter of 2012.

But in October 2012, Steven Park, an independent geologist, issued a report that conflicted with Garate's findings. Park concluded that Molle Huacan was "not ready for production" considering the "low average [gold] grade and small tonnage potential" from samples, and that Molle Huacan "should be considered as an exploration target that will require significant expenditure in field work in order to discover and locate sufficient resources to move to the production stage." The report estimated that Molle Huacan had an average grade of 2.97 grams of gold per ton within 75,600 metric tons of mineral. From this data, Allan Moran, the Division's geology expert, calculated that Park's report estimated 7,219 ounces of gold potential at Molle Huacan—substantially lower than the estimated 500,000 ounces contained in the May 2012 update. Aurum withheld Park's findings from investors because, as Clug explained in an email to Crow, "an unsophisticated viewer" might view the report "as rather negative."

Despite Park's assessment, Aurum continued to increase its gold estimate and withhold Park's findings from investors. In November 2012, Aurum sent investors a third quarter update that Clug and Crow drafted and signed stating that it estimated Molle Huacan had 1.254 million ounces of gold. It projected the first day of operational mining "to be November 25, [2012,] with processing and cash flow starting by January 2013," and "2013 net cash flow" of more than \$9 million. Aurum added that it needed "to raise an additional \$500,000" to "put Molle Huacan into production," that it was "first offering this to [its] existing [shareholders]" given "the excellent

⁴² See *supra* note 33 and accompanying text (discussing the elements of an advice-of-counsel defense).

upside and valuation now per [Class A Share],” and that it would “seek the funds from other investors” if shareholders did not “increase [their] stake[s] . . . by November 30, 2012.” At least two Aurum shareholders made additional investments as a result. On November 26, 2012, Mitchell Melnick emailed Clug to invest an additional \$50,000 “[i]n response to the . . . new offering” mentioned in the letter. Melnick testified that he discussed the letter with Arthur Weinshank, his business partner, who then invested an additional \$25,000.

In February 2013, Aurum sent investors a fourth quarter update that Clug and Crow drafted and signed that again increased Molle Huacan’s gold estimate. The update stated that Aurum’s previous 1.254 million ounce estimate was now “significantly higher, perhaps as much as double,” because of “excellent” test results and that Aurum had hired an independent geologist to “confirm [its] gold reserves.” Claiming that production at the mine was set to begin “no later than March 15, 2013,” Aurum encouraged investors to make additional investments by February 28, 2013. Aurum made similar claims in a business plan that Clug and Crow drafted and that accompanied the fourth quarter update, which estimated that Molle Huacan had “gold mineral resources of a minimum 2,842,000 ounces.” The estimates in the February 2013 update and business plan were based on an internal report Garate wrote in January 2013 stating that Molle Huacan had gold potential of 2,842,000 ounces. The business plan reiterated that Aurum had hired an independent geologist “to confirm” the gold estimate.

Aurum misrepresented the report that Peter Daubeny, the independent geologist hired to “confirm” Molle Huacan’s estimated gold resources, wrote. In May 2013, Daubeny estimated that Molle Huacan had 195,000 ounces of gold potential but did “not contain any know[n] mineral resources or reserves.” Daubeny’s report also observed that Daubeny’s samples returned lower gold grades than those that Aurum’s personnel took at the same locations, and posited that Aurum’s samples may have been collected or handled improperly. Crow acknowledged at the hearing that Daubeny’s report made it “pretty clear” that “Garate was not using good sampling practices.” As with Park’s earlier report, Aurum withheld Daubeny’s findings from investors.

Instead, Aurum assured investors in a July 2013 first quarter update that Clug and Crow drafted and signed that an independent geologist had “confirm[ed] [Molle Huacan] as a project of merit.” This was misleading because, although Daubeny considered Molle Huacan to have “merit for further exploration,” he had not confirmed Garate’s estimates. The update nonetheless assured investors that, after the first year of production, Aurum “expect[ed] to have more resources and reserves established.” The July 2013 update also stated that Aurum’s data room contained a copy of Daubeny’s report, although the record does not establish whether that was the case. In any event, the update was supposed to inform investors rather than make them search for the truth.⁴³ To the extent the data room contained curative disclosures, we find that it was not conveyed to investors “with a degree of intensity and credibility sufficient to counter-balance effectively” the misrepresentations and omissions in the update.⁴⁴ In any case, barriers

⁴³ *SEC v. Church Extension of the Church of God, Inc.*, No. 1:02CV1118-DFH-VSS, 2005 WL 3370568, at *8 (S.D. Ind. Dec. 12, 2005) (stating that offering documents “were supposed—were required—to inform note buyers, not to challenge their critical wits in a hunt for contradictions”) (citing *Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083 (1991)).

⁴⁴ *SEC v. Mudd*, 885 F. Supp. 2d 654, 667 (S.D.N.Y. 2012) (citations omitted).

existed to entering the data room. In an email to an investor’s representative, Clug stated that the links sometimes did “not work well automatically.” And passwords for the links changed periodically. Three investors testified that they did not recall accessing the data room, and an investor’s representative accessed it only after emailing Clug that the link was “broken.”

In December 2013, mineral production began and ended at Molle Huacan. Aurum produced a single bar that it sold for \$4,633. Clug testified that the bar was “probably 80” or “90% copper” and “10% gold,” which was the “reverse” of what it should have been. In January 2014, Crow emailed an investor that Molle Huacan was a “[m]arginal mine” with gold production “way below what [the] independent geologist and [Aurum’s] people” had estimated and that Aurum’s new plan was “to do merchant banking.” As discussed above, Aurum ceased operations in 2014 and investors lost the entirety of their investments—a total of \$3,995,775.

2. The misrepresentations about the gold estimates were material.

Aurum’s failure to disclose that two independent geologists estimated less gold potential than its in-house geologist, while touting its in-house geologist’s estimates, was material. A reasonable investor would have considered the independent geologists’ reports important.⁴⁵

Clug contends that Park’s report was not material because Aurum “did a lot more investing and testing on” Molle Huacan in the time between when Park took 44 samples there in April 2012 and when he issued his report in October 2012, and because most of Park’s samples “contained errors.” According to Clug, Park’s report was “outdated” and as a result might have confused investors by “convey[ing] a mistaken status of the mine.” But Clug has not shown that the approximately 150 samples that Garate took at Molle Huacan—presumably the additional testing he references—invalidated Park’s 44 samples. And Crow testified that it was Garate who Aurum knew “was not using good sampling practices.” As for any errors in Park’s samples, Park acknowledged that location data from most of his samples had been lost but he determined that he was still able to use other data from his samples (such as gold grade) to reach the conclusions in his report. Clug provides no reason why this was improper.

Clug also contends that the Division did not establish materiality because it did not ask the testifying investors whether Park’s report would have been important to them and that investors suggested the opposite.⁴⁶ But no investors testified that Park’s report was unimportant

⁴⁵ *SEC v. Blavin*, 557 F. Supp. 1304, 1313 (E.D. Mich. 1983) (finding that there was “no doubt that” misstatements about an oil and gas exploration company’s prospects, including its drilling activities and anticipated production, were material), *aff’d*, 760 F.2d 706 (6th Cir. 1985); *see also SEC v. Murphy*, 626 F.2d 633, 653 (9th Cir. 1980) (“Surely the materiality of information relating to financial condition, solvency and profitability is not subject to serious challenge. A prospective purchaser of a limited partnership interest would have considered it quite significant . . . that the promised tax shelter might prove more illusory than real.”).

⁴⁶ Clug also contends that the Division did not establish materiality because it “did not call an expert to testify about whether mentioning the [Park] report in the PPM would have been important to investors.” But materiality need not be based on expert testimony. *See, e.g., SEC v.*

to their investment decisions. Indeed, as discussed above, one investor testified that he and his business partner increased their stakes in Aurum due to the November 2012 update—distributed a month after Clug and Crow decided not to disclose the Park report—that estimated 1.254 million ounces of gold at Molle Huacan and offered new shares first to existing shareholders “[g]iven the excellent upside and valuation now per [Class A Share].” In any event, the Division need not establish materiality through investor testimony.⁴⁷ Nor must it show “that disclosure of the omitted fact would have caused the reasonable investor to change” his behavior.⁴⁸

3. Clug made the misrepresentations about the gold estimates with scienter.

We find that Clug acted with scienter because he knew or must have known that investors would be misled by touting Garate’s estimates while failing to disclose Park’s and Daubeny’s reports. Indeed, Clug’s own email to Crow advised withholding Park’s report because he feared investors might view the report “as rather negative.” Similarly, Clug must have known that it was misleading to describe Daubeny’s report as “confirm[ing] [Molle Huacan] as a project of merit” without disclosing the report’s overall negative assessment of the project.⁴⁹

IV. The PanAm Violations

We find that Clug and PanAm violated the Exchange Act by failing to disclose Crow’s role at PanAm and arrangements with PanAm. Specifically, PanAm failed to disclose in its periodic reports that Crow was a de facto executive officer of PanAm and that he had a disciplinary history and pending bankruptcy proceeding. As a result, PanAm violated Exchange Act Section 10(b) and Rule 10b-5(b) thereunder and Exchange Act Section 13(a) and Rules 12b-20, 13a-1, and 13a-13 thereunder. We find that Clug aided and abetted and caused these violations and that Clug violated Exchange Act Rule 13a-14(a) by certifying filings that failed to disclose Crow’s role at PanAm. We also find that PanAm violated, and Clug aided and abetted and caused PanAm’s violations of, Exchange Act Section 10(b) and Rule 10b-5(b) thereunder by stating in PanAm’s periodic reports that PanAm and Crow had agreed to extend the payment term of a convertible note issued by PanAm to Crow but omitting the material fact that Crow had already converted the majority of the note into PanAm shares.

A. Clug and Crow formed PanAm as a public company with periodic reporting obligations.

In 2009, shortly after being sanctioned for aiding and abetting a broker-dealer’s failure to disclose Crow’s status as a de facto officer and director of the firm, Crow’s merchant bank, DC Associates, collapsed. Crow, who a federal district court had barred from serving as an officer or

Jensen, No. CV 11-5316-R, 2013 WL 12129377, at *4 (C.D. Cal. Mar. 13, 2013) (finding expert testimony “not required to show that the stock price drop [wa]s probative of materiality”).

⁴⁷ *Hatfield*, 2014 WL 6850921, at *7.

⁴⁸ *TSC Indus., Inc.*, 426 U.S. at 449.

⁴⁹ In light of our findings, we need not determine whether Clug also defrauded investors by making overly optimistic projections about the potential returns on their investments.

director of a public company, sought to return to business through an arrangement with his former DC Associates colleague Clug. In a 2010 memorandum “propos[ing] to get us started again,” Crow explained that, in a new venture, Clug would serve in the position of “Managing Director and Partner” with “a seat on the Board of Directors” and be the “CEO . . . in the shell(s).” Despite these titles, Clug would “[f]unction . . . as [Crow’s] right hand man in most matters with emphasis on making sure deals are tracking and being fulfilled.” The memorandum stated that Crow would “concentrate more on sales and deals.”

Around this time, Clug and Crow formed PanAm by renaming a shell company that they controlled and filing a Form 10 to register a class of its common stock under Exchange Act Section 12(g). Emails between Clug and Crow show that they split most tasks for launching PanAm, including preparing its Form 10, financial model, and business plan—the acquisition and development of farmland in Latin America. Crow provided initial funding of \$25,000 to PanAm in exchange for a convertible note, which Clug signed on behalf of the company.

1. PanAm’s periodic reporting obligations required it to disclose its executive officers.

PanAm filed its Form 10 on April 29, 2011, which became effective sixty days later, and remained effective until PanAm filed a Form 15 on May 1, 2013, terminating its registration of its class of common stock under Exchange Act Section 12(g). During that period, PanAm had reporting obligations under Exchange Act Section 13(a). Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 thereunder required issuers of a class of common stock registered with the Commission under Exchange Act Section 12 to file complete and accurate annual and quarterly reports on Forms 10-K and 10-Q with the Commission.⁵⁰

Form 10-K required that issuers identify their “executive officers” and describe their executive officers’ business experience and prior legal proceedings involving bankruptcy or securities law violations.⁵¹ Exchange Act Rule 3b-7 defines “executive officer” to include a registrant’s “president, any vice president . . . in charge of a principal business unit, division or function (such as sales, administration or finance), any other officer who performs a policy making function or any other person who performs similar policy making functions for the registrant.”⁵² Policy making functions “include business and legal decisions.”⁵³

⁵⁰ 15 U.S.C. § 78m(a) (requiring that public companies “file with the Commission . . . such annual reports . . . and such quarterly reports . . . as the Commission may prescribe”); 17 C.F.R. § 240.13a-1 (requiring that public companies “file an annual report on the appropriate form authorized or prescribed therefor”); 17 C.F.R. § 240.13a-13 (requiring that public companies that file their annual reports on Form 10-K also file quarterly reports “on Form 10-Q”).

⁵¹ 17 C.F.R. §§ 229.10(a)(2), 229.401(b), (e), & (f); Form 10-K, Part III, Item 10.

⁵² 17 C.F.R. § 240.3b-7.

⁵³ *Adoption of Integrated Disclosure Sys.*, Securities Act Release No. 6383, 1982 WL 90370, at *26 & n.68 (Mar. 3, 1982) (final rule adopting definition of “executive officer”).

PanAm filed an annual report for 2011 on Form 10-K and five quarterly reports on Form 10-Q. Exchange Act Rule 13a-14(a) required the CEOs for issuers such as PanAm to certify the Forms 10-K and 10-Q.⁵⁴ For two of the Forms 10-Q, Clug signed Exchange Act Rule 13a-14(a) certifications stating that, “[b]ased on [his] knowledge, th[e] report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances made, not misleading.”

The Forms 10 and 10-K identified PanAm’s executive officers—the CEO and CFO—and described their professional backgrounds. Clug was the CEO until 2012, at which time he was replaced by Steven Ross, who served on a part-time basis. The CFO was Angel Lana (also Aurum’s CFO). The Forms 10 and 10-K also identified and described the professional background of PanAm’s Board of Directors: Clug (who served as Chairman even after he resigned as CEO), Ross, Henry Gewanter, and E. Chadwick Mooney. The Forms 10-Q stated that PanAm’s CEO and CFO were the company’s only employees, and identified them by name.

From January 2011 to March 2013, PanAm raised \$400,000 from investors. Of that amount, \$230,000 was raised after PanAm’s first periodic filing.

2. Crow exercised authority over PanAm’s board, management, and financing.

None of PanAm’s periodic reports mentioned Crow despite the fact that he performed policy making functions at PanAm. For example, in October 2010, Crow recruited and selected Mooney for PanAm’s Board of Directors. Contemporaneous emails show that, when Crow informed Clug that Mooney had “agreed to join the Board,” Clug had not met or spoken with Mooney. These emails also show that Mooney understood he was “in business with [Crow].”

Crow also played a leading role in hiring Clug and then Ross as CEO. When Clug and Crow launched PanAm, Crow provided comments for Clug’s employment agreement as CEO. Crow recruited Ross, a longtime business associate, and drafted Ross’s employment agreement. During the hiring process, Ross emailed Crow asking if he was “still planning on getting [him] started [as CEO] this week?” Ross looked to Crow for guidance after he became CEO, noting in an email shortly after taking the position that he “still need[ed] support from” Crow and Clug.

Crow’s relationship with Lana, PanAm’s CFO, further evinced his leading role at PanAm. From May 2012 to August 2012, Crow and Clug repeatedly demanded that Lana update them on the status of the Forms 10-K and 10-Q, and repeatedly threatened to fire him. For example, on June 6, 2012, Crow emailed Lana (copying Clug) to complain that Lana was not taking Crow’s calls, which Crow described as “just not acceptable.” Crow warned Lana that “[i]f you can[’]t get the work finished . . . it is really best if we move the work and limit the

⁵⁴ 17 C.F.R. § 240.13a-14(a); *see also* 15 U.S.C. § 7241(a)(2) (requiring the Rule 13a-14(a) certification to state that, “based on the officer’s knowledge, the report does not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which such statements were made, not misleading”).

damage,” and that, “if the work isn[']t done before Monday [June 11, 2012,] we are out of time and patience.” Lana responded by assuring Crow that he would “definitely finish . . . today.”

Crow also made substantial efforts to secure financing for PanAm. PanAm needed funding because, as stated in its Form 10-K, the company could not “commence [its farmland] acquisition program” without financing “of at least \$3 million.” And PanAm had raised only \$345,000 at the time it filed its Form 10-K. To obtain additional financing, Crow negotiated an agreement for a management services firm, Mickelson Capital Consulting, Inc., to assist PanAm in obtaining a “working capital investment” of at least \$2 million and “investment capital from an offering structured by” Mickelson of at least \$50 million. In return, PanAm agreed to provide Mickelson a \$6,000 “monthly retainer,” a \$25,000 “start-up cash fee,” and warrants, plus deferred cash and stock to be paid upon PanAm obtaining the minimum working and investment capital. Crow and Ross (after becoming CEO) negotiated the agreement throughout 2011 and 2012. One email from Mickelson’s COO to Ross stated that the COO “spoke with [Crow] and we are pretty close to agreement.” In another email, Ross asked Crow if he should “push back” on the deferred cash and stock terms, to which Crow responded: “Think you need to make the deal. Only way to move forward.” Ross then signed the agreement with those terms unaltered. This financing agreement was the only agreement of its kind that PanAm ever reached.

Crow also worked on obtaining business partners for PanAm in Latin America. For example, he assisted Clug in negotiating an agreement that PanAm executed with Ariel Investment Management, an asset management services company in Uruguay. Ariel agreed to assist PanAm in acquiring, managing, and ultimately disposing of farmland investments. Crow also attempted to set up meetings in Latin America with other local companies. In emails to the CEO of one such company concerning such a meeting, Crow referred to Clug (copied on the emails) as his “business partner” and PanAm as “[o]ur farmland investment company.”

3. Crow also exercised his power over PanAm by causing it to allow him to convert a convertible note into more than 5% of its outstanding shares.

In addition to exercising authority over PanAm’s board, management, and financing, Crow orchestrated a scheme, which Clug, Ross, and Lana assisted, to defraud PanAm and its investors so that he could raise money to pay off his personal debts. On August 27, 2012, Crow emailed Clug that he learned his “passport renewal . . . is being held pending old 2008 arrears in [personal financial obligations]” and that he was “stuck in the USA until [he] get[s] this resolved.” Crow stated that he “need[ed] some money fast,” that one option would be to sell a convertible note PanAm had issued him in 2011, and that he would “keep working on other ideas.” The convertible note, which PanAm had issued to Crow in exchange for a \$25,000 loan, was due to mature in September 2012 but could be converted into shares at any time—in an amount up to but not in excess of 4.99% of PanAm’s outstanding common shares. Clug testified that the purpose of the 4.99% cap was to ensure that Crow would not violate his officer-and-director bar by obtaining “enough shares to force anything through.”

On August 29, 2012, Crow emailed Clug and Lana a “structure” to “get [his] arrears handled”: Crow would convert the note “in part into common shares and sell them in a direct private deal to accredited investor[s]” at a “price of 25 cents.” Clug would give \$.05 to Lana for “helping with the trade” so that Crow would “net 20 cents.” Crow acknowledged that the

transaction would compete directly with PanAm—he emailed Clug and Lana: “I know PanAm wants to raise money too but at a higher price.” On September 14, 2012, Crow emailed Lana a “letter for investors to sign” in which the investors would acknowledge buying PanAm shares “at 25 cents per share.” That same day, Lana sent the letter to Mitchell Melnick (a client of Lana’s solo CPA practice), who signed and returned it to Lana for the purchase of 100,000 shares. Simon Stern and Elisa Ramirez, two other Lana clients, also purchased 100,000 shares each.

On September 18, 2012, Clug emailed Crow that Lana had received wire transfers from the investors totaling \$75,000. Lana did not tell the investors that Crow was the seller of the shares, that their money was going to Crow, or that he needed it to pay arrears. Melnick and Stern testified that they thought the money was going to fund PanAm’s business operations. Stern, who had already invested \$110,000 in PanAm, added that he believed PanAm “would need money to get [off] the ground.” Instead, the \$75,000 was paid to Crow (making Crow the only PanAm investor to profit from the sale of its securities).

In executing Crow’s scheme, PanAm waived a clause in the convertible note that prohibited Crow from converting the note into more than 4.99% of the outstanding common shares of PanAm—a limit of 438,035 shares. Crow needed only 300,000 shares for the three investors discussed above. Yet Crow instructed Ross to convert the majority of the note (\$17,859 of \$25,000) into 1,382,500 shares. This gave Crow 16% of PanAm’s stock (before his transfers to the three purchasers and other third parties).⁵⁵ Although Ross testified that he knew about the ownership cap at the time, PanAm converted the majority of the note in excess of the ownership cap and received nothing in return for waiving the cap.

PanAm also misrepresented the status of the convertible note to its auditor and investors. The convertible note had been due and payable on September 10, 2012, if not converted before that date. On September 20, 2012—two days after Lana received wire transfers from investors for Crow’s shares—Lana emailed Clug (copying Crow and Ross) that PanAm’s auditor “would like to see something in writing prior to issuance of the financial statements that an extension [of the note] has been agreed to, otherwise [PanAm] would be in default and disclosure thereof would be required.” Clug responded that the parties “had agreed to a 3 year extension.” A few days later, Crow emailed Lana and the auditor a signed form stating the same. On October 18, 2012, the auditor emailed Clug and Ross requesting “executed copies of the extension[.]” Because no such document existed, Clug backdated an agreement to September 10, 2012, that extended the note to September 10, 2015. Clug signed the agreement as CEO of PanAm even though Ross had been the CEO since July. Crow also signed the agreement.

The backdated agreement was reflected in PanAm’s Form 10-K for year-end 2011 and three Forms 10-Q for the first three quarters of 2012. Those reports stated that the “note was modified to extend the maturity and note conversion deadline dates to September 10, 2015,” and that the note could be converted into 1,935,284 shares unless that amount exceeded 4.99% of PanAm’s outstanding shares. The reports did not disclose that Crow had already converted most of the note into 1,382,500 shares or that PanAm had waived the ownership cap to allow him to do so. Ross and Lana signed the Forms 10-K and 10-Q on behalf of PanAm and signed and

⁵⁵ Crow transferred 300,000 shares to the three investors Lana found, transferred 682,500 shares to family members and people he owed money, and retained 400,000 shares.

certified the Forms 10-K and 10-Q as PanAm’s CEO and CFO. Clug signed the Form 10-K as a director. PanAm’s auditor testified that he was unaware of the note conversion, considered it material, and would have withdrawn as auditor had he known about it.

By September 2012, PanAm had raised only \$345,000, of which it had spent all but \$119,349. In its Form 10-K, PanAm’s independent auditor determined that PanAm’s financial condition “raise[d] substantial doubt as to [its] ability to continue as a going concern.” Clug, Ross, and Lana testified that PanAm could have used the \$75,000 raised for Crow.

By the end of January 2013, PanAm had only \$22,405 left and was struggling to pay its bills. On January 31, 2013 and February 11, 2013, Ross emailed Lana for updates on whether PanAm received a “critical” \$25,000 check. In the latter email Ross stated that he had “held off Mickelson as long as [he could] without damaging the relationship, and really need[ed] to get them the \$6[,]000 for January’s retainer right away.” Mickelson never raised any money for PanAm. Lana raised an additional \$80,000 for PanAm from individual investors. PanAm received the last influx of this cash in March 2013, but it spent the money shortly after receiving it. PanAm ceased operations and deregistered its common stock in May 2013.

B. PanAm and Clug violated the securities laws by failing to disclose that Crow was a de facto executive officer of PanAm with a disciplinary history and pending bankruptcy.

1. Crow was a de facto executive officer.

We find that Crow was a de facto executive officer of PanAm. Under Exchange Act Rule 3b-7, a person who performs a policy making function for a registrant is a de facto executive officer.⁵⁶ “Courts regularly rely on th[is] definition[] to determine whether an individual acted as a de facto officer of a company.”⁵⁷ In other words, the broad definition of “executive officer” is not limited to those “formally designated as such, but also any person who performs a similar role for the company” or can be deemed “a significant figure in the management of the company.”⁵⁸ Here, Crow acted as a de facto executive officer of PanAm because he set policy for PanAm in a way that a mere investor or consultant could not. Specifically, Crow exercised authority over the selection of members of PanAm’s board and

⁵⁶ See 17 C.F.R. § 240.3b-7.

⁵⁷ *SEC v. Brown*, 740 F. Supp. 2d 148, 161 (D.D.C. 2010) (citations omitted).

⁵⁸ *SEC v. Enters. Sols., Inc.*, 142 F. Supp. 2d 561, 574 (S.D.N.Y. 2001). No proof of scienter is necessary to establish violations of Exchange Act Section 13 and its rules. *SEC v. McNulty*, 137 F.3d 732, 740-41 (2d Cir. 1998); see also *SEC v. Savoy Indus., Inc.*, 587 F.2d 1149, 1167 (D.C. Cir. 1978) (holding that the Commission “need not prove scienter to establish a violation” of Exchange Act Section 13(d)(1) because it is a “reporting, and not an antifraud, provision,” which “place[s] a simple and affirmative duty of reporting on certain persons”).

management, led PanAm's negotiations to obtain financing, and made the decision to sell PanAm stock to raise money for his personal use rather than for PanAm's business.⁵⁹

Clug concedes that Crow "offered recommendations and input" to PanAm but argues that he did not meet the definition of a de facto executive officer "because he did not have decision-making authority or control over PanAm." According to Clug, Crow did not exercise the requisite authority because several witnesses testified that Crow was not a de facto officer of the company and the ALJ found "this uniform testimony" to be credible and because PanAm's management rejected Crow's recommendations in some cases. The evidence Clug cites does not establish that Crow did not perform policy making functions for PanAm.

Substantial evidence, including that Crow exercised authority over PanAm's personnel, negotiations, and stock sales, establishes that Crow performed policy making functions for PanAm and outweighs the testimony of witnesses who denied that Crow was a de facto officer of PanAm.⁶⁰ In any case, documentary evidence contradicts some of the testimony on which Clug relies. For example, Ross testified that Crow did not participate in meetings with Mickelson following an initial introduction. But documents in the record show that Crow both participated in meetings with Mickelson as well as handled some of the final negotiations himself. We do not dispute Clug's claim that "outside persons" may be retained to negotiate on a company's behalf and that such action may not itself create officer status. But Crow's principal role in these negotiations is a factor weighing in favor of our finding that he was an executive officer.⁶¹

Henry Gewanter, one of PanAm's directors who disputed Crow's authority, also was unaware of the full extent of Crow's role at the company. Gewanter believed erroneously that Crow was merely providing advice on possible land acquisitions, and admittedly was unaware that Crow had been involved in Ross's hiring and the Mickelson negotiations. Nor did Gewanter know that Crow owned the convertible note and had sold PanAm shares after converting it.

The instances Clug cites of PanAm rejecting Crow's recommendations also do not show that he did not perform policy making functions. For example, Clug contends that he rejected Crow's recommendation that Daniel Najor become a director. But the record does not support this contention. Crow emailed Najor to ask if he "really want[ed] to be involved with [P]an Am," and noted that Clug "never got [Najor's] bio and questionnaire." The record does not show what happened with respect to Najor after this email exchange. Clug similarly contends that, despite Crow's urging, "PanAm did not give a company credit card to Mooney." But

⁵⁹ See, e.g., *Enters. Sols., Inc.*, 142 F. Supp. 2d at 570 (finding that "the Commission presented substantial evidence that [the defendant] controlled the company" by hiring the CEO and putting his daughter on the Board of Directors, paying the company's expenses on three occasions, providing comments for the company's registration statement, and negotiating loans for the company and a proposed acquisition of another company).

⁶⁰ See Exchange Act Rule 3b-7, 17 C.F.R. § 240.3b-7 (defining an executive officer not as a person who exercised control but as a person who performs policy making functions for the registrant); see also generally, e.g., *Hyland v. HomeServices of Am., Inc.*, 771 F.3d 310, 322 (6th Cir. 2014) (stating that "a witness may not testify to a legal conclusion").

⁶¹ See *supra* note 59.

Mooney emailed Clug that “[Crow] said he would give [Mooney] a credit card to use for air, car rental, etc.” Clug did not overrule this decision; rather, Clug suggested that Mooney (who had a recent personal bankruptcy) “may have to use a debit card with limits as credit cards need to be personally guaranteed but that should help with [Mooney’s] capital raising related efforts.”

We recognize that the ALJ found that Crow was not a de facto executive officer, but we respectfully disagree. The record contradicts the ALJ’s conclusion that Crow’s role was “as a consultant and investor.” Crow helped form the company, selected members of its board and management (and threatened to fire its CFO), and negotiated its only significant financing agreement. Mooney, a PanAm director, understood that he was “in business with [Crow].” Crow also described PanAm as “our [his and Clug’s] farmland investment company.” Crow even arranged for PanAm stock to be sold so that the proceeds could be used to pay off his personal debts rather than for PanAm’s business. The only case that the ALJ cited to support his conclusion, *SEC v. Prince*, involved an employee who “did not have the authority to make or implement any policy decisions.”⁶² As discussed above, that is not the case here. Accordingly, we find that Crow was a de facto executive officer of PanAm.⁶³

2. PanAm violated, and Clug aided and abetted and caused PanAm’s violations of, Exchange Act Section 10(b) and Rule 10b-5(b) thereunder and Exchange Act Section 13(a) and Rules 12b-20, 13a-1, and 13a-13 thereunder by failing to disclose that Crow was a de facto executive officer of PanAm.

PanAm violated Exchange Act Section 10(b) and Rule 10b-5(b) thereunder by failing to disclose that Crow was an executive officer with a disciplinary history and pending bankruptcy.⁶⁴ Form 10-K required the disclosure of the company’s executive officers, their disciplinary

⁶² 942 F. Supp. 2d 108, 136 (D.D.C. 2013).

⁶³ See *SEC v. Solucorp Indus. Ltd.*, 274 F. Supp. 2d 379, 383-86, 420 (S.D.N.Y. 2003) (finding that a purported “consultant” was actually a de facto officer of the company because virtually no action could be taken without the consultant’s approval, employees viewed the company as the consultant’s “baby;” the consultant “was the only guy bringing money in;” the consultant leveraged that role to extract benefits from the company, and business and merger partners dealt exclusively with the consultant in their negotiations with the company); *Enters. Sols., Inc.*, 142 F. Supp. 2d at 574 (finding that where putative consultant provided management leadership for the company, negotiated acquisition by the company, and hired the CEO and negotiated compensation, the evidence supported the conclusion that his activities on behalf of the company were “sufficiently similar to the duties of an officer or director of the company that his involvement . . . ought to have been disclosed”); *Robert G. Weeks*, Exchange Act Release No. 48684, 2004 WL 828, at *9 (Oct. 23, 2003) (rejecting argument that petitioner “was merely a ‘consultant’ whose role need not be disclosed” because petitioner selected the company’s officers and directors who acted at his direction and understood they were acting in his place).

⁶⁴ In light of our findings, we need not determine whether PanAm also violated Securities Act Section 17(a) as a result of this omission. The ALJ also found that PanAm violated Securities Act Section 17(a)(2) by misrepresenting that it had submitted an application to list its stock on the OTC Bulletin Board. Because we find that PanAm violated the antifraud provisions of the Exchange Act in other respects, we need not address this basis for liability either.

histories, and any pending bankruptcies,⁶⁵ and Exchange Act Rule 12b-20 required issuers to include any “material information . . . as may be necessary to make the required statements, in the light of the circumstances under which they are made not misleading.”⁶⁶ PanAm’s omission was material because investors would have considered it important that an individual with Crow’s background had a significant role in the company.⁶⁷ PanAm acted with scienter because Clug’s and Crow’s knowledge is imputed to it.⁶⁸ Clug and Crow knew that Crow was barred from serving as an officer or director of a public company, that after Crow left DC Associates he planned a new venture in which Clug would serve as his “right hand man,” and that Crow played a significant policy making role at PanAm. As a result, they must have known of the risk that investors would be misled by the failure to disclose that Crow was an executive officer.⁶⁹

PanAm’s failure to disclose Crow’s role as an executive officer in its Forms 10-Q also violated Exchange Act Section 10(b) and Rule 10b-5(b). Although Form 10-Q does not require a company to disclose its executive officers, PanAm stated explicitly in its Forms 10-Q that its CEO and CFO, whom it named, “are the Company’s only employees.” This statement misled investors as to Crow’s significant role in policy making functions at the company.⁷⁰

Because we find PanAm’s failure to disclose that Crow was a de facto executive officer violated Exchange Act Section 10(b) and Rule 10b-5, we also find it filed misleading periodic reports in violation of Exchange Act Section 13(a) and Rules 12b-20, 13a-1, and 13a-13.⁷¹

⁶⁵ See *supra* note 51 and accompanying text.

⁶⁶ 17 C.F.R. § 240.12b-20.

⁶⁷ See *Enters. Sols., Inc.*, 142 F. Supp. 2d at 573 (“Given Cannon’s extensive history of criminal and regulatory violations, disclosure of his significant participation in the company would certainly have altered the ‘total mix’ of information available to a reasonable shareholder.”); see also *SEC v. Kimmes*, 799 F. Supp. 852, 856 (N.D. Ill. 1992) (finding the identify of a public company’s officers and directors to be material information), *aff’d sub nom. SEC v. Quinn*, 997 F.2d 287 (7th Cir. 1993); *Weeks*, 2004 WL 828, at *9 (finding petitioner’s “undisclosed, surreptitious control of [the company], and the fact that the purported officers and directors were mere figureheads would have been material to the reasonable investor”).

⁶⁸ See *supra* note 22 (discussing imputing scienter to a company).

⁶⁹ PanAm satisfies the other elements for antifraud liability. It acted through means of interstate commerce and “in connection with the purchase or sale” of securities because its material omissions coincided with its sale of securities. See *Zandford*, 535 U.S. at 819, 825.

⁷⁰ See, e.g., *SEC v. Curshen*, 372 F. App’x 872, 880 (10th Cir. 2010) (finding liability under Section 10(b) and Rule 10b-5 because “where a party without a duty [to speak] elects to disclose material facts, he must speak fully and truthfully, and provide complete and non-misleading information with respect to the subjects on which he undertakes to speak”).

⁷¹ *The Rockies Fund, Inc.*, Exchange Act Release No. 48590, 2003 WL 22273596, at *15 (Oct. 2, 2003) (“Based on our findings above that the Fund’s Form 10-K and Form 10-Q filings contained materially false and misleading information about its Premier holdings . . . we find that

We also find that Clug aided and abetted and caused PanAm's violations. To establish aiding and abetting liability, we must find: (i) a primary violation of the securities laws; (ii) substantial assistance in the primary violation; and (iii) scienter.⁷² Scienter means the person knew of or recklessly disregarded the "wrongdoing and his . . . role in furthering it."⁷³ One who aids and abets a primary violation is also a cause of that violation.⁷⁴ Here, Clug substantially assisted PanAm's primary violations. Clug oversaw PanAm's periodic filings that omitted Crow's role and background by providing instructions to Lana concerning the timing and content of the filings, signed the Form 10-K as a director, and signed and certified two Forms 10-Q as the CEO.⁷⁵ For the reasons discussed above, Clug acted with scienter. Because we find that Clug aided and abetted PanAm's primary violations, he caused them as well.⁷⁶

Clug contends that PanAm did not waive the ownership cap because, aside from 400,000 shares that Crow kept for himself, Crow did not receive or control the shares from the conversion; rather, the transfer agent distributed the shares to others in accordance with Ross's instructions. But Ross followed Crow's instructions for distributing the shares, which were distributed to Crow's family and people he owed money.

Clug contends further that even if the note conversion "would have made it a violation to fail to disclose Crow as a de facto officer, that disclosure violation would not be attributable to" Clug because he "was no longer CEO or responsible for PanAm's filings at the time." But Clug remained PanAm's chairman after Ross became CEO. And, at the time of the note conversion, Clug represented that he was the CEO by executing the backdated agreement to extend the note in that capacity on behalf of the company. In any case, Clug is held secondarily and not primarily liable for the failure to disclose Crow's status as a de facto executive officer. As discussed above, Clug substantially assisted PanAm's primary violation and did so with scienter.

Clug also contends that Brantl, PanAm's counsel, approved the note conversion because Lana testified that Brantl told him it was legal for Crow to make a "private sale . . . of shares that [Crow] would be converting." Although the ALJ found that the "requirements for an advice of counsel defense were satisfied" because Brantl advised Lana "that Crow's note conversation and sale of PanAm shares was a legal private transaction," our finding is not that Crow's note conversion and subsequent stock sales were illegal. Rather, our finding is that the circumstances

the Fund willfully violated Exchange Act Section 13(a) and Rules 12b-20, 13a-1 and 13a-13."), *aff'd in relevant part and vacated in part on other grounds*, 428 F.3d 1088 (D.C. Cir. 2005).

⁷² *Eric J. Brown*, Exchange Act Release No. 66469, 2012 WL 625874, at *11 (Feb. 27, 2012), *petition denied sub nom. Collins v. SEC*, 736 F.3d 521 (D.C. Cir. 2013).

⁷³ *Id.*

⁷⁴ *Id.*; *see also* Exchange Act Section 21C(a), 15 U.S.C. § 78u-3(a) (authorizing sanctions on any person who was a "cause" of a violation of the Exchange Act or rules thereunder).

⁷⁵ *See SEC v. Glob. Express Capital Real Estate Inv. Fund, I, LLC*, 289 F. App'x 183, 199 (9th Cir. 2008) (finding that defendant "substantially assisted Global Securities' violations by reviewing, approving, and certifying the Global Securities' misleading public filings").

⁷⁶ *See supra* note 74 and accompanying text.

surrounding the note conversion and subsequent sales support the conclusion that Crow was a de facto executive officer of PanAm. Clug does not contend, nor does the record show, that Brantl provided advice regarding Crow's status as a de facto officer or disclosures relating thereto.

3. Clug violated Exchange Act Rule 13a-14 by certifying the accuracy of Forms 10-Q that failed to disclose that Clug was a de facto executive officer.

Clug also violated Exchange Act Rule 13a-14(a)'s requirement that he certify PanAm's Form 10-Qs. "Rule 13a-14, like other rules promulgated under Section 13 of the Exchange Act, includes an implicit truthfulness requirement."⁷⁷ Clug, as PanAm's CEO, signed certifications for two Forms 10-Q that PanAm filed stating that the forms did "not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances made, not misleading." Yet Clug must have known it was misleading to state that the CEO and CFO were PanAm's only employees given Crow's role at PanAm; indeed, Clug knew that after Crow left DC Associates it was his intent to form a new venture where Clug would function as the CEO while operating as Crow's "right hand man." Accordingly, because it is "not enough for CEOs and CFOs to sign their names to a document certifying that SEC filings include no material misstatements or omissions without a sufficient basis to believe that the certification is accurate,"⁷⁸ we find that Clug violated Rule 13a-14.

C. PanAm violated, and Clug aided and abetted and caused PanAm's violations of, Exchange Act Section 10(b) and Rule 10b-5(b) thereunder by misrepresenting that Crow could convert a note into shares when he had already done so.

PanAm violated Exchange Act Section 10(b) and Rule 10b-5(b) by misrepresenting the status of Crow's convertible note.⁷⁹ As discussed above, PanAm's Form 10-K and three of its Forms 10-Q stated that Crow's convertible note "was modified to extend the maturity and note conversion deadline dates to September 10, 2015," and that prior to this date the noteholder could convert all or part of the note into up to 1,935,284 shares. This was misleading because PanAm omitted that Crow had already partially converted the note into 1,382,500 shares.

PanAm's failure to disclose Crow's partial conversion of the note into over 1 million shares was material because Crow's shares represented more than 16% of PanAm's outstanding shares—an ownership stake well in excess of the ownership cap. A reasonable investor would consider it important that a noteholder acquired so many shares because the conversion diluted the ownership rights of the other shareholders.⁸⁰ The testimony of PanAm's auditor that the conversion was material and should have been disclosed further supports our finding.

⁷⁷ *SEC v. Jensen*, 835 F.3d 1100, 1113 (9th Cir. 2016).

⁷⁸ *Id.*

⁷⁹ In light of our findings, we need not determine whether PanAm also violated Securities Act Section 17(a) as a result of this misrepresentation.

⁸⁰ *See Gruber v. Gilbertson*, No. 16cv9727, 2018 WL 1418188, at *9 (S.D.N.Y. Mar. 20, 2018) (finding that a misrepresentation that "no person [was] a beneficial owner of more than 5% of [the] common stock" was material); *cf.* 15 U.S.C. §§ 78m(d) & 78m(g) (requiring that

PanAm acted with scienter because Ross, its CEO at the time, signed the Form 10-K and Forms 10-Q even though he knew Crow had already partially converted the note into 1,382,500 shares.⁸¹ As discussed above, Crow had directed Ross to convert the note into shares.⁸² Ross must have known of the risk that investors would be misled by a statement that Crow had the right to convert when the note had been converted into over 1 million shares already.⁸³

We find that Clug aided and abetted and caused PanAm's violation. Clug substantially assisted the violations with scienter by creating and signing backdated documents to conceal the conversion from PanAm's auditor after the auditor questioned the status of the note. Because we find that Clug aided and abetted PanAm's primary violations, he caused them as well.⁸⁴

Clug offers myriad arguments against liability for these violations. First, Clug denies responsibility for PanAm's disclosures in the periodic reports. As discussed above, we hold Clug secondarily and not primarily liable for these violations. Clug cannot escape liability for creating, executing, and transmitting the backdated note extension agreement. This agreement facilitated PanAm's materially misleading disclosures. And Clug must have known he was facilitating misleading disclosures because he emailed Lana to ensure that the backdated agreement "has been reflected in the 10K."⁸⁵ Second, Clug argues that the conversion was "positive in many ways" for PanAm such as "reduc[ing] the debt on the balance sheet and increas[ing] the equity" and potentially increasing "liquidity of the company's shares." But Clug ignores the evidence that PanAm needed more funds and the testimony that PanAm could have used the \$75,000 raised for Crow. In any case, investors were entitled to know about the conversion and decide its ramifications for themselves.

Third, Clug asserts that "there was no benefit in hiding the conversion" because the Form 10-K disclosed "the total number of shares [Crow would receive] on a fully converted basis."

report be filed with the SEC when a person acquires beneficial ownership of more than 5% of a class of a company's shares); 17 C.F.R. § 240.13d-1 (same); *Filing and Disclosure Requirements Relating to Beneficial Ownership*, Exchange Act Release No. 15348, 1978 WL 171074, at *2 (Nov. 22, 1978) (stating that the legislative history for Exchange Act Section 13(d), 15 U.S.C. § 78m(d), "reveals that it was intended to provide information to the public and the affected issuer about rapid accumulations of its equity securities in the hands of persons who would then have the potential to change or influence control of the issuer").

⁸¹ See *supra* note 22 (discussing imputing scienter to a company).

⁸² The ALJ found that Lana, who also signed the forms, did not act with scienter. But the ALJ did not discuss Ross's scienter or the fact that Crow directed Ross to convert the note.

⁸³ PanAm satisfies the other elements for antifraud liability. It acted through means of interstate commerce and "in connection with the purchase or sale" of securities because its misrepresentations coincided with its sale of securities. See *Zandford*, 535 U.S. at 819, 825.

⁸⁴ See *supra* note 74 and accompanying text.

⁸⁵ In the same email, Clug also asked Lana if he was "able to do the notes for the 10Qs."

But a reasonable investor would want to know that this possibility had already occurred.⁸⁶ Fourth, Clug contends that the backdated extension agreement was “never filed or used with the auditors.” But the auditor testified that his firm “received th[e] extension from [PanAm].”

Finally, Clug cannot rely on the advice of counsel. Lana testified that he “never had a discussion with . . . Brantl about [PanAm] failing to disclose the conversion” in periodic filings.

V. The Corsair Violations

A. Corsair solicited investors to purchase securities and received compensation as a result.

Clug and Crow founded Corsair in 2011. They owned it in equal shares and stipulated that they controlled it. Clug and Crow did not register Corsair with the Commission as a broker.

On January 1, 2012, Corsair entered into a referral agreement with ABS Manager, LLC, an investment adviser that managed three investment funds. Under the agreement, Corsair would “introduce potential investors” to ABS and, “if an investment [wa]s made in” an ABS fund, ABS would pay Corsair a “fee equal to 3%” of the investment. Around this time, ABS also agreed to an investment structure whereby it would secure a line of credit from which investors could borrow up to 70% against the value of their ABS accounts to invest in Aurum. In an email to ABS’s principal on January 17, 2012 (and forwarded to Clug the following day), Crow stated that “we believe we can introduce for you” investments of \$10 million in the first three quarters of 2012, which is “what we need to execute our plan on what these people might choose to reinvest from their line.” Crow also stated that “[we] believe we can do a lot more . . . and might be able to get as much as \$25 million to you this year.”

Clug, Crow, and Lana organized a meeting for potential investors in February 2012, at which Clug pitched Aurum and ABS’s principal pitched ABS. Lana also advised his clients to invest with ABS and use the line of credit to invest in Aurum. Lana used a Corsair email address with a signature line that identified him as Corsair’s CFO. Lana induced nine investors to invest in an ABS fund, and Clug personally solicited two investors who invested in an ABS fund.

From January to June 2012, Corsair induced at least 11 investors to invest a total of \$1.7 million in an ABS fund. Corsair sent invoices to ABS, which Clug prepared in at least one instance, identifying investors that Corsair referred and calculated its fee based on the 3% formula in the referral agreement. Several of the investors that Corsair induced to invest in an ABS fund borrowed from ABS’s line of credit to invest in Aurum.

On June 1, 2012, ABS and Corsair entered into a new agreement under which ABS would pay Corsair \$5,000 per month to “act as [a] financial and management consultant . . . and to provide recommendations.” But the record does not show that Corsair provided such services

⁸⁶ See *Huddleston v. Herman & MacLean*, 640 F.2d 534, 544 (5th Cir. 1981) (stating that to “warn that the untoward may occur when the event is contingent is prudent; to caution that it is only possible for the unfavorable events to happen when they have already occurred is deceit”), *rev’d on other grounds*, 459 U.S. 375 (1983).

to ABS. Rather, it shows that the only service Corsair provided was to refer investors to ABS.⁸⁷ Seven of the investors that Corsair referred invested before the new agreement was signed, and four other investors invested by July 14, 2012. ABS paid Corsair a total of \$39,563.

Two investors testified that ABS stopped paying monthly returns on their investments by February 2013, when the Commission filed a suit against ABS for alleged antifraud violations. On July 30, 2015, ABS and its principal consented to final judgments enjoining them from antifraud violations and ordering them to pay disgorgement and civil penalties. In a follow-on proceeding, ABS's principal was barred from the securities industry.⁸⁸

B. Corsair violated, and Clug was a cause of Corsair's violation of, Exchange Act Section 15(a)(1) by acting as an unregistered broker.

We find that Corsair violated, and that Clug was a cause of its violation of, Exchange Act Section 15(a)(1). Exchange Act Section 15(a)(1) prohibits, through means of interstate commerce, any broker "to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security . . . unless such broker . . . is registered" with the Commission or is a natural person associated with a registered broker.⁸⁹ A violation of this provision does not require scienter.⁹⁰ A respondent is a "cause" of another's violation if the respondent "knew or should have known" that the respondent's act would contribute to the violation."⁹¹

Exchange Act Section 3(a)(4) defines a broker as "any person engaged in the business of effecting transactions in securities for the account of others."⁹² In determining whether a person falls within this definition, courts have considered whether the person solicited potential investors, advised as to the merits of investments, received transaction-based compensation, and participated in the negotiation or structuring of securities transactions.⁹³

⁸⁷ Crow testified that Corsair performed services for ABS such as "tighten[ing] up their process in terms of valuation of assets, monthly reporting, [and] getting it online." No evidence supports his testimony. Clug and Crow also testified that the switch to a flat fee in the new agreement resulted from a review by counsel, but Clug and Crow did not name the counsel, and Crow could not recall if the counsel worked for ABS or Corsair.

⁸⁸ *George Charles Cody Price*, Advisers Act Release No. 4631, 2017 WL 405511 (Jan. 30, 2017).

⁸⁹ 15 U.S.C. § 78o(a)(1).

⁹⁰ *E.g.*, *SEC v. Martino*, 255 F. Supp. 2d 268, 283-85 (S.D.N.Y. 2003), *remanded on other grounds*, 94 F. App'x 871 (2d Cir. 2004).

⁹¹ *Feeley & Willcox Asset Mgmt. Corp.*, Advisers Act Release No. 2143, 2003 WL 22680907, at *13 n.52 (July 10, 2003).

⁹² 15 U.S.C. § 78c(a)(4)(A).

⁹³ *Martino*, 255 F. Supp. 2d at 283; *see also SEC v. Helms*, No. A-13-CV-01036 ML, 2015 WL 6438872, at *3 (W.D. Tex. Oct. 20, 2015) ("Transaction-based compensation, or commissions are one of the hallmarks of being a broker-dealer.") (cleaned up).

Corsair acted as a broker from January to November 2012 by soliciting, advising, and inducing investors to invest in an ABS fund and receiving transaction-based compensation as a result.⁹⁴ Because Corsair was not registered as a broker when it solicited and induced the ABS investments, it violated Exchange Act Section 15(a)(1).⁹⁵ Clug helped structure the transaction that allowed investors to borrow against their ABS accounts to invest in Aurum, participated in a meeting with investors where he pitched Aurum and ABS's principal pitched ABS, and personally solicited two investors to invest in an ABS fund. Clug should have known that these acts would contribute to Corsair's violation of Exchange Act Section 15(a)(1) because he knew Corsair received transaction-based compensation from investments in ABS.⁹⁶ Accordingly, Clug was a cause of Corsair's violation of Exchange Act Section 15(a)(1).⁹⁷

Clug contends that Corsair "lacked the regularity of participation" in securities transactions necessary to be a broker because (i) "Lana was *not* an employee of Corsair, so his actions cannot be attributed to Corsair" (emphasis in original); (ii) Clug and Crow did not "refer[] even one person" to ABS "other than [Clug's] father"; and (iii) "within three months of receiving the first commission, Corsair nullified the agreement that called for it to receive transaction-based commissions." These contentions lack merit. Lana's actions are imputed to Corsair because he was its agent.⁹⁸ Indeed, the record shows that Corsair recruited Lana to act on its behalf to solicit investors for ABS; that Corsair directed Lana's work; that Lana used a Corsair email address for communicating with investors and ABS; that Clug told Lana to use that email address; that Lana represented in an email to ABS (copied to Clug and Crow) that he was

⁹⁴ See *SEC v. Kenton Capital, Ltd.*, 69 F. Supp. 2d 1, 13 (D.D.C. 1998) (finding that company acted as a broker when the president and people affiliated with the company solicited investors and induced twelve investors to invest about \$1.7 million); *SEC v. Nat'l Exec. Planners, Ltd.*, 503 F. Supp. 1066, 1073 (M.D.N.C. 1980) (finding that defendant was a broker because "[i]t solicited clients actively, and \$4,300,000.00 worth of [securities] were sold by it").

⁹⁵ Corsair acted by means of interstate commerce, and an ABS fund investment was a security.

⁹⁶ Clug contends that the referral "agreement was entered into by Crow without [Clug's] knowledge." The record does not support this contention. In any case, the record shows that Clug knew about the referral agreement after Corsair entered into it because he prepared at least one invoice that calculated Corsair's fee based on the 3% formula in the referral agreement.

⁹⁷ In light of our findings, we need not reach the Division's claim that Clug himself violated Exchange Act Section 15(a)(1). The Division also alleges that Crow violated Exchange Act Section 15(b)(6)(B) by associating with Corsair despite being barred from associating with a broker, and that Clug aided and abetted and caused that violation. Because Crow has now settled with the Commission, and we find that Clug caused Corsair's violation of Exchange Act Section 15(a)(1), we need not reach this alternative potential basis for Clug's liability.

⁹⁸ See *supra* footnote 22; see also Restatement (Third) of Agency § 1.01 (2006) ("Agency . . . arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.").

Corsair's CFO; and that Corsair received fees based on Lana's referrals to ABS.⁹⁹ The record also shows that Clug induced at least two investors (his father and another person) to invest a total of \$400,000 with ABS. Lana's referrals aside, these solicitations themselves support finding that Corsair was a broker.¹⁰⁰ As for the length of the referral agreement, it lasted at least five months and there is no evidence Corsair provided ABS services other than referring investors even after that five-month period; in any case, the three-month period Clug cites was enough for Corsair to be considered a broker.¹⁰¹

Clug also contends that Corsair falls under a "finder's exception" to the definition of broker (*i.e.*, for merely "bringing together the parties to transactions").¹⁰² The Commission has never recognized a "finders exception" to the definition of a broker.¹⁰³ Regardless, Corsair's activities went beyond bringing parties together given its participation in advising investors, structuring transactions with ABS, and receiving transaction-based compensation.

Clug contends further that "[a]t all times we had an attorney reviewing our contracts to make sure that we were not part of anything illegal or improper," which "is why when the attorney told us that it would be better to not receive a commission for referrals, we stopped that arrangement." No evidence shows that under the new agreement Corsair received compensation for anything other than referrals. In any case, there is also no evidence that counsel reviewed the referral agreement, provided any advice concerning Corsair's broker activities prior to the new agreement, or told Corsair that it would be better if it did not receive commissions for referrals.

⁹⁹ During oral argument, Clug contended that he allowed Lana to use a Corsair email address "temporarily" because Lana was having "a problem with his own email address," and that Clug never expected Lana to use the Corsair email address to conduct business for Corsair. But the record shows that from January 2012 through at least March 2012, Lana regularly used the Corsair email address to refer investors to ABS and copied Clug on those emails. Lana also identified himself in one of those emails as Corsair's CFO.

¹⁰⁰ See *Helms*, 2015 WL 6438872, at * 2 (rejecting argument that defendant was not "an unregistered broker because he was only involved in one transaction" and finding that defendant was a broker because he received a commission for soliciting one company to invest \$3,050,000 into a Ponzi scheme and acted as a link between agents for the company and the Ponzi scheme).

¹⁰¹ See *Kenton Capital, Ltd.*, 69 F. Supp. 2d at 5-7, 13 (finding that defendants acted as brokers over a three-month period).

¹⁰² *Helms*, 2015 WL 6438872, at * 3 (internal quotations and citation omitted).

¹⁰³ See also *SEC v. Collyard*, 861 F.3d 760, 767-68 (8th Cir. 2017) (rejecting argument that "there is a 'finder exception' or 'finder defense' to unregistered-broker liability"). Clug cites *SEC v. Kramer*, 778 F. Supp. 2d 1320 (M.D. Fla. 2011), as holding that there is a finder's exception, but as the Eighth Circuit stated in *Collyard*, the "so-called 'finder's exception'" referred to in *Kramer* "just means that individuals can engage in 'a narrow scope of activities without triggering the broker/dealer registration requirements'—not that there is a 'finder defense' available to those who are otherwise 'brokers.'" *Collyard*, 861 F.3d at 768.

VI. Sanctions

A. We bar Clug from associating in various capacities in the securities industry.

Exchange Act Section 15(b)(6) authorizes the Commission to bar a person who willfully violated the federal securities laws from association with an investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, and from participating in the offering of penny stock, if we find that at the time of the misconduct the person was associated with a broker and that such bars are in the public interest.¹⁰⁴ We find that Clug’s association with Corsair establishes that he was associated with a broker at the time he defrauded investors in Aurum.¹⁰⁵ Our finding that Clug acted with scienter is sufficient to establish that he acted willfully.¹⁰⁶

We consider, in determining what relief is appropriate in the public interest, the egregiousness of the respondent’s actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the respondent’s assurances against future violations, the respondent’s recognition of the wrongful nature of his conduct, and the likelihood that the respondent’s occupation will present opportunities for future violations.¹⁰⁷

1. The relevant factors establish that a bar is necessary to protect investors.

Clug’s misconduct was egregious, recurrent, and at least reckless. The Aurum antifraud violations alone were egregious and demonstrate that barring Clug is necessary to protect the public.¹⁰⁸ For more than two years, Clug misled investors regarding the company’s management, the conditions of its securities offerings, and its mining development prospects. By

¹⁰⁴ 15 U.S.C. § 78o(b)(6). Clug contends that we may impose penny stock bars only on persons participating in penny stock offerings, but he misreads Exchange Act Section 15(b)(6).

¹⁰⁵ See 15 U.S.C. § 78c(a)(18) (defining “person associated with a broker” to include “any person directly or indirectly controlling, controlled by, or under common control with” a broker).

¹⁰⁶ See, e.g., *Bennett Grp. Fin. Servs., LLC*, Exchange Act Release No. 80347, 2017 WL 1176053, at *4 n.30 (Mar. 30 2017) (“Our finding of scienter . . . demonstrates that Bennett’s violations were willful.”); see also *Robare v. SEC*, 922 F.3d 468, 479-80 (D.C. Cir. 2019) (holding that a finding of recklessness is sufficient to prove a violation of Section 207 of the Investment Advisers Act of 1940, which prohibits willfully omitting to state in an investment adviser registration application a material fact that is required to be stated therein).

¹⁰⁷ *Gary M. Kornman*, Exchange Act Release No. 59403, 2009 WL 367635, at *6 (Feb. 13, 2009) (citing *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979)), *petition denied*, 592 F.3d 173 (D.C. Cir. 2010).

¹⁰⁸ See, e.g., *David Henry Disraeli*, Advisers Act Release No. 2686, 2007 WL 4481515, at *15-16 (Dec. 21, 2007) (barring investment adviser for misrepresenting how offering proceeds would be used), *petition denied*, 334 F. App’x 334 (D.C. Cir. 2009).

the end of the fraud, investors had lost \$4 million, and Clug received net profits of \$286,810.01.¹⁰⁹

Clug cites certain circumstances that he claims are mitigating. He contends that “all of the investors were accredited investors, who knew the investments were very high risk, and that there was a serious possibility that the project would fail.” But “accredited investors . . . are also vulnerable to fraud,”¹¹⁰ and are as “entitled to the protection of the antifraud provisions of the securities laws” as other investors.¹¹¹ Clug also contends that the short duration of the Corsair violation mitigates that misconduct. But we find that the Aurum antifraud violations alone, which Clug committed while associated with Corsair, establish that the bars are necessary to protect the public. Clug contends further that the fact that he consulted with counsel mitigates his misconduct. As discussed above, Clug did not show that he made a full disclosure to counsel, received advice that his conduct was legal, or relied on any such advice in good faith.¹¹²

With respect to the remaining factors, Clug’s assurances against future violations and recognition of the wrongful nature of his misconduct do not outweigh the ongoing risk that he poses to the public. Clug states that he “made mistakes”; that he has “sleepless nights distraught about the losses to . . . investors”; and that he should “have been more conservative in making any statements to investors and would do so if given the opportunity in the future.” But Clug did not merely make overly optimistic statements to investors that could be tempered in the future; he lied to them and intentionally misrepresented crucial information. Clug also shifts blame to Crow for his own misconduct, stating that his “biggest mistake” and the “primary reason” he is “involved in this case” is that he “associated . . . with and trusted Crow,” who “had experience in the securities industry and should have known better.” Yet Clug knew Crow’s history before associating with Crow and himself made material misstatements to investors with scienter.

As to the likelihood that his occupation will present opportunities for future violations, Clug contends that he has “never been a member of the securities industry” or “engaged in a

¹⁰⁹ See *James S. Tagliaferri*, Exchange Act Release No. 80047, 2017 WL 632134, at *6 (Feb. 15, 2017) (“We also consider the degree of harm to investors and the marketplace resulting from the violation.”); *Allen M. Perres*, Exchange Act Release No. 79858, 2017 WL 280080, at *4 (Jan. 23, 2017) (finding that respondent’s misconduct was egregious “[i]n light of the nature of his violations, their duration, and his unjust enrichment”), *petition denied*, 695 F. App’x 980 (7th Cir. 2017). Clug contends that no investors complained that “they were misled or hurt by [his] actions.” The record contains very limited evidence regarding the affected investors or the particular circumstances surrounding their investments with Clug, but it establishes that he acted egregiously and caused harm regardless of whether or not they complained.

¹¹⁰ *Shreyans Desai*, Exchange Act Release No. 80129, 2017 WL 782152, at *6 (Mar. 1, 2017) (quoting *Ira William Scott*, Advisers Act Release No. 1752, 1998 WL 611726, at *4 (Sept. 15, 1998)).

¹¹¹ *Anthony Fields, CPA*, Exchange Act Release No. 74344, 2015 WL 728005, at *13 (Feb. 20, 2015) (internal quotations and citation omitted).

¹¹² See *supra* note 33 and accompanying text (discussing predicates for advice-of-counsel defense).

penny stock offering”; that he has no continued involvement with Crow or any of the business ventures; and that he “do[es] not intend to find employment having anything to do with the various issues in this case.” Clug’s employment history did not prevent him from committing the violations here or associating with an unregistered broker, and absent a bar Clug could reenter the securities industry at any time.¹¹³ Accordingly, we conclude that bars are necessary to remedy the continuing threat that Clug poses to investors.¹¹⁴

2. The additional considerations Clug cites do not obviate the need for a bar.

Clug contends that the ALJ’s assessment of his character is incompatible with the need to bar him. The ALJ stated: “There was no evidence that Clug lived lavishly or spent money recklessly. He appeared to be . . . a sincere individual who made regrettable decisions, in large part because he attempted to undertake endeavors that he was ill-equipped for. He strove committedly to ensure the businesses succeeded, in order to return money to investors, but was unable to do so. He appears to be a hard-working, generally good person.”¹¹⁵ But the ALJ barred Clug despite these comments, stating that he had “considerable concern for [Clug’s] future actions” because he repeatedly committed “egregious” fraud with “an extremely reckless disregard to the interests of investors.” We share the ALJ’s concerns about Clug’s future actions and agree with his conclusion that as a result Clug must be barred to protect the public.

Clug contends we should consider that he served in the military “with honor,” that he has no prior disciplinary history, that he and his family “have suffered greatly” as a result of this proceeding, and that the stigma from imposing bars would likely prevent him from “obtaining positions in unrelated fields.” We find that the need to protect investors from Clug greatly outweighs the mitigating impact of these factors.¹¹⁶

Accordingly, based on our application of the relevant factors and all of the considerations discussed above, we find that it is the public interest to bar Clug under Exchange Act Section

¹¹³ See, e.g., *Rockies Fund, Inc.*, 2006 WL 3542989, at *4 (“Although Respondents assert that they ‘voluntarily exited the line of business that involved the violations at issue here,’ there is nothing to preclude their entering the securities industry again at some future point.”).

¹¹⁴ See *Fields*, 2015 WL 728005, at *22 (imposing a bar from association in all of the capacities covered by Exchange Act Section 15(b)(6) because permitting Fields “to remain in the securities industry in any of the capacities covered by Exchange Act Section 15(b)(6)” would “present an unacceptably high risk of future violations”).

¹¹⁵ Clug contends that letters supporting him were sent to the ALJ’s office. But no such letters were offered or received into evidence at the hearing, or are a part of the record.

¹¹⁶ See, e.g., *Fields*, 2015 WL 728005, at *22 (finding that the hardship to Fields from a bar “is outweighed by the necessity of ensuring that public investors are protected from him”); *Toby G. Scammell*, Advisers Act Release No. 3961, 2014 WL 5493265, at *8 (Oct. 29, 2014) (finding that any mitigation from respondent’s lack of disciplinary history and the effect of the proceeding on his career were “outweighed by. . . the egregiousness of [his] conduct, his high degree of scienter, and his failure to recognize the seriousness of his violations”), *vacated in part on other grounds*, Advisers Act Release No. 5272, 2019 WL 2775920 (July 2, 2019).

15(b)(6) from association with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, and from participating in the offering of a penny stock. Section 9(b) of the Investment Company Act of 1940 authorizes us to prohibit a person 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 affiliate, if we find that the person willfully violated the federal securities laws and such prohibition is in the public interest.¹¹⁷ We bar Clug in these capacities for the same reasons we impose bars under Exchange Act Section 15(b)(6).

Exchange Act Section 15(b)(6)(C) provides that a bar from “participating in an offering of penny stock” includes “acting as any promoter, finder, consultant, agent, or other person who engages in activities with a broker, dealer, or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.”¹¹⁸ As a result, such a bar precludes the barred individual from trading penny stocks in their personal capacities for their own account. Section 15(b)(6)(C) provides further that we may by order exempt any person from any part of the definition of a bar from participating in the offering of penny stock.¹¹⁹ We exempt Clug from the penny stock bar to the extent it prohibits him from selling the shares of the penny stock that he owns currently.¹²⁰ Clug may do so without seeking relief from the penny stock bar that we impose today. However, as discussed below, in connection with his argument that he lacks the ability to pay monetary sanctions, Clug twice failed to disclose information regarding his ownership of the penny stock that he currently owns.¹²¹ This fact informs our determination that, at this time, Clug should not be wholly exempted from any of the restrictions of a penny stock bar. It is not in the public interest to wholly exempt Clug from the part of the penny stock bar that precludes trading penny stocks in his own account given his concealment of his ownership of a penny stock in such an account.¹²²

¹¹⁷ 15 U.S.C. § 80a-9(b).

¹¹⁸ 15 U.S.C. 78o(b)(6)(C).

¹¹⁹ *Id.*

¹²⁰ As discussed below, Clug owns shares of AVRA Medical Robotics, Inc., a penny stock. *See infra* notes 153-155 and accompanying text.

¹²¹ *See infra* notes 153-155 and accompanying text.

¹²² We would consider a request for exemptive relief to the extent Clug wishes to trade penny stocks that he does not currently own in his personal capacity in the future. *See generally Christopher Day*, Exchange Act Release No. 86818, 2019 WL 4073781 (Aug. 29, 2019) (ordering briefing on Day’s request that a bar order be modified due to his “fear of violating the penny stock bar if he sells a penny stock that he owns and that has appreciated in value”); *Christopher Day*, Exchange Act Release No. 87770, 2019 WL 6875397 (Dec. 17, 2019) (amending bar order to remove the bar from participating in the offering of a penny stock).

B. We impose cease-and-desist orders on all respondents.

Exchange Act Section 21C(a) authorizes us to issue a cease-and-desist order with respect to any person who has violated the Exchange Act.¹²³ In determining whether to issue such an order, we look to whether there is some risk of future violation.¹²⁴ The risk “need not be very great” and is ordinarily established by a single past violation absent evidence to the contrary.¹²⁵ We also consider whether other factors demonstrate a risk of future violations, including the factors discussed above and whether the violation is recent, the degree of harm to investors or the marketplace resulting from the violation, and the remedial function to be served by the cease-and-desist order in the context of any other sanctions being sought.¹²⁶

Here, we find that Aurum, PanAm, Corsair, and Clug all committed misconduct that establishes a risk of future violations. As discussed above, the antifraud violations that Aurum and Clug committed were egregious, recurrent, and at least reckless. The harm that investors suffered further establishes a risk of future violations. The same is true with respect to PanAm’s violations. PanAm misled investors about both Crow’s role at the company and the status of the convertible note it issued Crow. It acted at least recklessly. And investors lost over \$200,000. As to Corsair, the registration provision that it violated “is of the utmost importance in effecting the purposes of the [Exchange] Act because it enables the SEC to exercise discipline over those who may engage in the securities business and it establishes necessary standards with respect to training, experience, and records.”¹²⁷ Corsair’s arrangement with ABS also facilitated investments with Aurum. Corsair does not argue that there is no risk of future violations. Accordingly, we find it in the public interest to order that all respondents cease and desist from committing or causing violations of the provisions of the Exchange Act that they violated.

C. We decline to impose an officer-and-director bar on Clug.

Exchange Act Section 21C(f) authorizes us to bar a person from acting as an officer or director of any issuer that has a class of securities registered under Exchange Act Section 12, or that is required to file reports under Exchange Act Section 15(d), if we find that (i) the person violated Exchange Act Section 10(b) or the rules thereunder; and (ii) “the conduct of that person demonstrates unfitness to serve as an officer or director of any such issuer.”¹²⁸ The ALJ declined to impose an officer-and-director bar on Clug because he found that Clug was denied adequate notice and an opportunity to defend this issue. The OIP did not include an officer-and-director

¹²³ 15 U.S.C. § 78u-3(a).

¹²⁴ *Robert L. Burns*, Advisers Act Release No. 3260, 2011 WL 3407859, at *8 n.34 (Aug. 5, 2011).

¹²⁵ *KPMG Peat Marwick LLP*, Exchange Act Release No. 43862, 2001 WL 47245, at *24 (Jan. 19, 2001), *petition denied*, 289 F.3d 109 (D.C. Cir. 2002).

¹²⁶ *Id.* at *26.

¹²⁷ *SEC v. Benger*, 697 F. Supp. 2d 932, 944 (N.D. Ill. 2010) (internal quotations and citation omitted).

¹²⁸ 15 U.S.C. § 78u-3(f).

bar among the sanctions it stated were at issue or indicate that other sanctions might be at issue; and the Division did not request an officer-and-director bar until its post-hearing brief.¹²⁹ Under these circumstances, we also decline to impose an officer-and-director bar on Clug. As the ALJ stated, by not requesting the bar until after the close of evidence, Clug was deprived the opportunity of presenting “additional and perhaps even mitigating evidence, such as developing a record about his potential prior public company roles before the conduct at issue and calling favorable witnesses from those companies to testify in his defense.”¹³⁰

The Division acknowledges that omitting the request for an officer-and-director bar from its pre-hearing brief was an “unintentional oversight,” but contends that our rules do not provide that relief is waived if not disclosed in a pre-hearing brief. But the issue here is notice and not waiver. Under the circumstances, Clug would be denied fair notice were we to impose a bar now. We therefore decline to impose an officer-and-director bar on Clug.

D. We order that respondents disgorge their ill-gotten gains.

Exchange Act Sections 21B(e) and 21C(e) and Investment Company Act Section 9(e) authorize us to order disgorgement in this proceeding.¹³¹ Disgorgement deprives wrongdoers of the net profits obtained from their violations.¹³² Calculating disgorgement requires only a reasonable approximation of net profits causally connected to the violation.¹³³ Once the Division shows that its disgorgement figure is a reasonable approximation of the amount of the net profits, the burden shifts to the respondent to demonstrate that the Division’s estimate is not a reasonable

¹²⁹ See *Jaffee & Co. v. SEC*, 446 F.2d 387, 392-94 (2d Cir 1971) (finding that respondent was denied adequate notice that it would be disciplined derivatively under Exchange Act Section 15(b) because the OIP focused on direct but not derivative liability, and because the Division of Enforcement “apparently never suggested that the Commission actually rely on [Section] 15(b)(5) for that purpose until it made the suggestion in a brief filed with the examiner after the conclusion of the hearing”); see also *Aloha Airlines, Inc. v. CAB*, 598 F.2d 250, 262 (D.C. Cir. 1979) (holding that, in administrative proceedings, the standard for determining whether notice is adequate is whether “the respondent understood the issue and was afforded full opportunity to justify [his] conduct during the course of the litigation”; “[t]hus, the question on review is not the adequacy of the [OIP] but is the fairness of the whole procedure”) (internal quotations omitted).

¹³⁰ See also *Jaffee & Co.*, 446 F.2d at 394 (stating that had respondent been afforded adequate notice “it would have had an opportunity, both to take action to lessen the attractiveness of invoking derivative sanctions and to introduce evidence before the hearing examiner tending to show that the use of such sanctions would not have been in the public interest”).

¹³¹ 15 U.S.C. §§ 78u-2(e), 78u-3(e), 80a-9(e).

¹³² *Montford and Co., Inc. v. SEC*, 793 F.3d 76, 83 (D.C. Cir. 2015); see also *Liu v. SEC*, 140 S. Ct. 1936, 1940, 1946 (2020) (holding that disgorgement of net profits may qualify as equitable relief for purposes of Exchange Act Section 21(d)(5)).

¹³³ *SEC v. First City Fin. Corp., Ltd.*, 890 F.2d 1215, 1231 (D.C. Cir. 1989).

approximation.¹³⁴ Where disgorgement cannot be exact, the burden of uncertainty in calculating net profits falls “on the wrongdoer whose illegal conduct created that uncertainty.”¹³⁵

In his post-hearing brief, Clug acknowledges that, if “it is determined that disgorgement is appropriate,” then “the appropriate amount would equate to \$286,810.01” that he received from Aurum through Corsair. This amount, as Clug clarified in his proposed findings of fact, excludes (*i.e.*, already incorporates a deduction for) “documented reimbursements [he received] for pre-paid expenses.” Thus, we order that Clug disgorge \$286,810.01. This is a reasonable approximation of Clug’s net profits casually connected to his violations.¹³⁶

We also order that Aurum, PanAm, and Corsair pay disgorgement. Aurum and PanAm must disgorge the proceeds they received after making the misstatements and omissions that violated the antifraud provisions of the securities laws—\$3,995,775 and \$230,000, respectively—and Corsair must disgorge the \$39,563 in fees it received from ABS. We provide no offset for expenses because the entities did not establish that any offsets for expenses were appropriate to reduce the disgorgement amount. In fact, because the entities did not seek offsets or make assertions concerning their expenses below, and because they did not respond to the Division’s cross-appeal, they have not carried their burden to show what, if any, expenses were legitimate and therefore properly subject to deduction from the disgorgement amount.¹³⁷ Nor can we discern from our review of the record what, if any, expenses should be considered legitimate.

However, we offset Aurum’s disgorgement by the amount we are ordering Clug to disgorge. We further offset the \$100,000 that Crow agreed to pay in disgorgement in settling this proceeding from the individual disgorgement amounts for all three entities, which we

¹³⁴ *Id.* at 1232.

¹³⁵ *Id.*; see also *SEC v. Razmilovic*, 738 F.3d 14, 31 (2d Cir. 2013) (“[B]ecause of the difficulty of determining with certainty the extent to which a defendant’s gains resulted from his frauds . . . the court need not determine the amount of such gains with exactitude.”); Restatement (Third) of Restitution § 51(5)(c)-(d) & cmt. I (2011) (stating that “the claimant has the burden of proving revenues and the defendant has the burden of proving deductions,” that if the claimant submits a reasonable approximation of the gain the “defendant is then free . . . to introduce evidence tending to show that the true extent of unjust enrichment is something less,” and that any “uncertainty in calculating net profit is assigned to the defendant” since “the uncertainty arises from the defendant’s wrong”) (emphasis added).

¹³⁶ See Restatement (Third) of Restitution § 51(4) (stating that disgorgement is a remedy that seeks to “eliminate profit from wrongdoing” and that the “unjust enrichment of a conscious wrongdoer . . . is the net profit attributable to the underlying wrong”).

¹³⁷ See *supra* notes 134-135 and accompanying text (concerning burden shifting); *optionsXpress, Inc.*, Exchange Act Release No. 78621, 2016 WL 4413227, at *36 & nn.131-32 (Aug. 18, 2016) (recognizing that even when a respondent may be “entitled to a deduction for all *marginal* costs incurred in producing the revenues that are subject to disgorgement,” the respondent has the burden to establish such an offset, since the “risk of uncertainty” properly falls on the wrongdoer) (quoting Restatement (Third) of Restitution § 51 cmt. H).

apportion proportionally \$93,000 for Aurum (93%), \$6,000 for PanAm (6%), and \$1,000 for Corsair (1%).¹³⁸ Thus, we order that (i) Aurum disgorge \$3,615,964.99 plus prejudgment interest; (ii) PanAm disgorge \$224,000 plus prejudgment interest; and (iii) Corsair disgorge \$38,563 plus prejudgment interest.

E. We order that Clug pay one third-tier civil money penalty.

Exchange Act Section 21B(a)(2) and Investment Company Act Section 9(d) authorize us to impose civil money penalties for willful violations of the securities laws when such penalties are in the public interest.¹³⁹ In determining the public interest, we consider: (1) whether the act or omission involved fraud; (2) whether the act or omission resulted in harm to others; (3) the extent to which any person was unjustly enriched; (4) whether the individual has committed previous violations; (5) the need to deter such person and others from committing violations; and (6) such other matters as justice may require.¹⁴⁰ A three-tier system establishes the maximum penalty we may impose on an individual: (1) a first-tier penalty up to \$7,500 for each act or omission; (2) a second-tier penalty up to \$75,000 for each act or omission involving fraud or reckless disregard of a regulatory requirement; and (3) a third-tier penalty up to \$150,000 for each act or omission involving fraud or reckless disregard of a regulatory requirement that, directly or indirectly, resulted in (or created a significant risk of) substantial losses to other persons or resulted in substantial gain to the wrongdoer.¹⁴¹

We find it in the public interest to impose a third-tier penalty of \$150,000 on Clug for the Aurum violations.¹⁴² Clug defrauded investors, caused substantial losses, and received substantial gains. The imposition of a civil penalty “is necessary for the deterrence of securities

¹³⁸ We base these percentages on the percentage of the total disgorgement amount to be paid by all three entities attributable to each individual entity.

¹³⁹ 15 U.S.C. §§ 78u-2(a)(1) & (2), 80a-9(d)(1).

¹⁴⁰ 15 U.S.C. § 80a-9(d)(c).

¹⁴¹ 15 U.S.C. § 78u-2(b), 80a-9(d)(2); 17 C.F.R. § 201.1001. These are the maximums for misconduct between March 4, 2009 and March 5, 2013. 17 C.F.R. § 201.1001, Table I.

¹⁴² *Cf. Timothy S. Dembski*, Exchange Act Release No. 80306, 2017 WL 1103685, at *16 (Mar. 24, 2017) (imposing “one maximum \$150,000 third-tier civil penalty for the oral misrepresentations and one maximum \$150,000 third-tier penalty for the written misrepresentation”), *petition denied*, 726 F. App’x 841 (2d Cir. 2018). Although the relevant securities laws “specify that penalties can be imposed ‘for each act or omission’ in violation of the federal securities laws,” which means that “a higher penalty could be calculated on the basis of several discrete violations,” we exercise our discretion to impose a single penalty for the misconduct Clug engaged in at Aurum. *See id.* (noting that the penalties imposed “are less than we are authorized to impose: a maximum third-tier penalty of \$150,000 for each fraudulent misrepresentation that Dembski made”); *see also Dennis J. Malouf*, Exchange Act Release No. 78429, 2016 WL 4035575, at *27-28 (July 27, 2016) (imposing a single penalty for the totality of the misconduct), *aff’d*, 933 F.3d 1248 (10th Cir. 2019); *cf. Guy P. Riordan*, Exchange Act Release No. 61153, 2009 WL 4731397, at *21-22 (Dec. 11, 2009) (imposing a penalty for each violative transaction), *petition denied*, 627 F.3d 1230 (D.C. Cir. 2010).

law violations” because otherwise Clug would be “required merely to give back his gains with interest, leaving him no worse off financially than if he had not violated the law.”¹⁴³

Clug contends that, in settling with Crow, the Commission “reduce[d] Crow’s financial penalty by almost 90%, from the \$900,000.00 ordered by ALJ Patil to \$100,000.” To the extent Clug is arguing that it is unfair to impose a higher penalty on him than we imposed on Crow, we have long held that the remedies imposed in settled actions are inappropriate comparisons because pragmatic considerations justify accepting lesser remedies in a settlement.¹⁴⁴ Indeed, we have held that “respondents who offer to settle may properly receive lesser sanctions than they otherwise might have received” and that as a result it is not unfair if a litigated proceeding results in greater sanctions on a respondent who is less culpable than on the settling co-respondent.¹⁴⁵

We also note that Crow and Clug are not similarly situated. Only Clug appealed the initial decision. As discussed above, both Crow and Clug were given the opportunity for a new hearing before an ALJ that had not participated in the matter previously after the Supreme Court issued its decision in *Lucia v. SEC*.¹⁴⁶ Crow waived his right to a new hearing and instead settled with the Commission.¹⁴⁷ As a result, the Commission did not have to hold a new hearing with respect to a respondent who had not appealed the initial decision, and Crow was ordered to pay total monetary sanctions of \$100,000 rather than the monetary sanctions ordered in the initial decision. Clug also waived his right to a new hearing but asked that the Commission “decide the issues raised in” the petition for review of the initial decision that he had filed without “taking new evidence.” With respect to Clug, the initial decision had imposed total monetary sanctions of \$50,000. Under all of these circumstances, we do not believe it is appropriate to compare the sanctions imposed on Crow in his settlement and the sanctions imposed on Clug in this decision.

To the extent Clug is arguing that he is being penalized because he chose to appeal the ALJ’s initial decision rather than settle the proceeding, the facts of this case do not support that conclusion. Although we recognize that we are imposing greater monetary sanctions on Clug

¹⁴³ *SEC v. Coates*, 137 F. Supp. 2d 413, 429 (S.D.N.Y. 2001) (citation omitted).

¹⁴⁴ See, e.g., *Michael C. Pattison, CPA*, Exchange Act Release No. 67900, 2012 WL 4320146, at *11-12 (Sept. 20, 2012) (recognizing that sanctions in litigated cases cannot be compared to sanctions in settled cases because settlements avoid “time-and-manpower consuming adversary proceedings” and thus may result in lesser sanctions); *Anthony A. Adonnino*, Exchange Act Release No. 48618, 2003 WL 22321935, at *9 (Oct. 9, 2003) (same), *aff’d*, 111 F. App’x 46 (2d Cir. 2004). Clug repeats many of the same public interest arguments with respect to civil penalties as he did with respect to the bars. We find that a civil penalty is warranted notwithstanding these considerations for the same reasons that we found the bars warranted notwithstanding these considerations.

¹⁴⁵ *Leslie A. Arouh*, Exchange Act Release No. 50889, 2004 WL 2964652, at *11 (Dec. 20, 2004) (rejecting argument that it was unfair to impose a bar, cease-and-desist order, and third-tier civil money penalty on respondent where settling co-respondent who respondent claimed was “more culpable” was sanctioned only with a cease-and desist order).

¹⁴⁶ See *supra* note 12 and accompanying text.

¹⁴⁷ See *Crow*, 2018 WL 6722724.

than did the initial decision, it is not because Clug filed a petition for review, but rather because the record, including the ALJ's findings, supports such sanctions.

In the initial decision, the ALJ stated that he would have imposed disgorgement of \$386,810.01 on Clug but that he would discount the amount to \$50,000 based on Clug's showing of an inability to pay.¹⁴⁸ The ALJ also cited Clug's inability to pay in declining to impose a civil money penalty. As discussed below, however, the record indicates that Clug has an ability to pay and that he did not fully disclose his assets when the case was pending before the ALJ. Nonetheless, we impose disgorgement on Clug in the amount of \$286,810.01, rather than the \$386,810.01 that the law judge said he would have imposed but for an inability to pay. As to the civil money penalty, we impose it not because Clug appealed the initial decision but because the factors discussed above indicate that a civil money penalty is in the public interest and the record now before the Commission reveals that he has the ability to pay.

F. We find that Clug has not established an inability to pay the monetary sanctions.

We reject Clug's asserted inability to pay disgorgement or civil penalties.¹⁴⁹ "The burden of proving financial inability to pay . . . falls upon the respondent."¹⁵⁰ Here, Clug has repeatedly failed to disclose significant financial information relevant to such a defense.¹⁵¹

In August 2015, Clug filed a financial disclosure statement to demonstrate his inability to pay. Although Rule of Practice 630(b) required that he keep his statement current,¹⁵² Clug did not disclose that he purchased a home in an all-cash transaction in December 2015 using money loaned from a family member either before the ALJ issued the initial decision in 2016 or when Clug subsequently filed his petition for review and supporting briefs. The Division discovered the purchase and disclosed it on January 8, 2018.

¹⁴⁸ As discussed above, on remand the ALJ later increased Clug's disgorgement to \$67,000.

¹⁴⁹ The ALJ did not impose monetary penalties on Aurum, PanAm, or Corsair because he found that "each of the entities is without money (according to the Division's own summary analysis)." For this reason, we also decline to impose civil penalties on those entities. But even when a respondent "demonstrates an inability to pay, we have discretion not to waive . . . disgorgement . . . particularly when the misconduct is sufficiently egregious." *Gregory O. Trautman*, Securities Act Release No. 9088A, 2009 WL 6761741, at *24 (Dec. 15, 2009). As discussed above, Aurum's and PanAm's antifraud violations were egregious, and Corsair's arrangement with ABS facilitated investments with Aurum. We find civil penalties on Aurum, PanAm, and Corsair to be inappropriate in light of their financial circumstances, but the misconduct at issue leads us to conclude that a waiver of disgorgement is not appropriate.

¹⁵⁰ *Terry T. Steen*, Exchange Act Release No. 40055, 1998 WL 278994, at *6 (June 2, 1998).

¹⁵¹ Because it appears that the ALJ did not have all the information relevant to Clug's asserted inability to pay, we do not place significant weight on his finding that Clug demonstrated an inability to pay sufficient to impose lesser monetary sanctions than do we.

¹⁵² 17 C.F.R. § 201.630(b).

On January 31, 2018, Clug filed an updated financial disclosure statement. Although Clug disclosed that he had obtained employment in 2016 at AVRA Medical Robotics, Inc., he omitted that he was the beneficial owner of more than 1 million AVRA shares.¹⁵³ When the Division discovered this information, Clug did not deny it and responded only that AVRA “has no trading symbol and is thus not listed on any exchange.” In January 2019, Clug disclosed in a supplemental brief that he had resigned as AVRA’s Vice President of Global Business Development in July 2018. Clug did not disclose that (i) some of the AVRA shares had been transferred to his wife,¹⁵⁴ and that (ii) AVRA was then trading on the over-the-counter market (at a price of about \$3 per share in January 2019, the month of Clug’s filing).¹⁵⁵ Thus, Clug repeatedly failed to disclose that he and his wife were the beneficial owners of AVRA shares that appear to have been worth more than \$3 million in January 2019.

Accordingly, we find that Clug has not established an inability to pay because (i) his repeated failures to disclose significant financial information make his claim not credible;¹⁵⁶ and (ii) the evidence suggests that his net worth is in excess of the monetary sanctions we impose.¹⁵⁷

In any case, we would impose the monetary sanctions even if Clug established an inability to pay. Inability to pay is only one factor that informs our determination and is not dispositive.¹⁵⁸ We have discretion not to waive monetary sanctions “particularly when the misconduct is sufficiently egregious.”¹⁵⁹ As discussed above, Clug’s misrepresentations

¹⁵³ AVRA’s Form S-1/A filed on July 13, 2017, stated that Clug owned 150,000 shares and 300,000 stock options and had voting and dispositive control of 1,000,000 shares held by The Mustang Trust of which he was the trustee. We take official notice of this EDGAR filing pursuant to Rule of Practice 323, 17 C.F.R. § 201.323 (permitting the Commission to take official notice of “any matter in the public official records of the Commission”).

¹⁵⁴ An amendment to AVRA’s Form S-1A, filed on December 7, 2018, stated that Clug owned 300,000 stock options and his wife owned 150,000 shares and had voting and dispositive control of 890,000 shares held by The Mustang Trust of which she was the trustee.

¹⁵⁵ We take official notice of AVRA’s share price history at <https://www.nasdaq.com/symbol/avmr/historical>. See *Richard A. Holman*, Exchange Act Release No. 6931, 1962 WL 69563 (Nov. 6, 1962) (taking official notice of OTC stock price quotations).

¹⁵⁶ See *William J. Murphy*, Exchange Act Release No. 69923, 2013 WL 3327752, at *26 (July 2, 2013) (finding that respondent’s financial submission in support of inability-to-pay defense was “unreliable” because of its “gaps, inconsistencies, and seeming inaccuracies”), *petition denied*, 751 F.3d 472 (7th Cir. 2014).

¹⁵⁷ See *Burns*, 2011 WL 3407859, at *12 (finding that respondent did not demonstrate inability to pay monetary sanctions of \$249,000 because his purported net worth of \$277,000 was “sufficient to pay” the sanctions); *Lehman*, 2006 WL 3054584, at *9 (finding that respondent did not demonstrate an inability to pay a \$55,000 penalty because the “record evidence suggests that his net worth is well in excess of that amount”).

¹⁵⁸ *Trautman*, 2009 WL 6761741, at *24.

¹⁵⁹ *Lehman*, 2006 WL 3054584, at *4.

regarding Aurum yielded significant pecuniary gains for himself while causing significant harm to investors. In these circumstances, allowing Clug to retain the amount by which he was unjustly enriched or pay only that amount and not a penalty would not be in the public interest.

G. Fair Fund

Based on the facts of this case, we find that it is appropriate to order that the disgorgement, prejudgment interest, and civil penalty be used to create a Fair Fund for the benefit of investors harmed by Respondents' violations.¹⁶⁰

An appropriate order will issue.¹⁶¹

By the Commission (Chairman CLAYTON and Commissioners PEIRCE, ROISMAN, LEE, and CRENSHAW).

Vanessa A. Countryman
Secretary

¹⁶⁰ 17 C.F.R. § 201.1100. Aurum had about 35 investors and PanAm had about 15 investors. The Division has not expressed a view on whether to create a Fair Fund here, but the statutory and regulatory scheme vests the Commission with the discretionary authority to create one in "any administrative proceeding in which a final order is entered against a respondent requiring disgorgement and payment of a civil money penalty." *Adoption of Amendments to the Rules of Practice*, Exchange Act Release No. 49412, 2004 WL 503739, at *5 (March 12, 2004); *see also* 15 U.S.C. § 7246(a) (providing for creation of Fair Fund "at the direction" of the Commission); *Official Comm. of Unsecured Creditors of WorldCom, Inc. v. SEC*, 467 F.3d 73, 82-85 (2d Cir. 2006) (recognizing Commission's discretion regarding creation and terms of a Fair Fund).

¹⁶¹ We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion. Rule of Practice 451(d) permits a member of the Commission who was not present at oral argument to participate in the decision of that proceeding if that member has reviewed the transcript of that argument prior to such participation. Here, the required review has been made.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 10886 / November 9, 2020

SECURITIES EXCHANGE ACT OF 1934
Release No. 90385 / November 9, 2020

INVESTMENT COMPANY ACT OF 1940
Release No. 34089 / November 9, 2020

Admin. Proc. File No. 3-16318

In the Matter of

ALEXANDRE S. CLUG,
AURUM MINING, LLC,
PANAM TERRA, INC., and
THE CORSAIR GROUP, INC.

ORDER IMPOSING REMEDIAL SANCTIONS

On the basis of the Commission's opinion issued this day, it is

ORDERED that Alexandre S. Clug cease and desist from committing or causing any violations or future violations of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5(b) thereunder; Exchange Act Section 13(a) and Rules 12b-20, 13a-1, 13a-13, and 13a-14(a) thereunder; and Exchange Act Section 15(a)(1); and it is further

ORDERED that Aurum Mining, LLC cease and desist from committing or causing any violations or future violations of Exchange Act Section 10(b) and Rule 10b-5(b) thereunder; that PanAm Terra, Inc. cease and desist from committing or causing any violations or future violations of Exchange Act Sections 10(b) and 13(a) and Rules 10b-5(b), 12b-20, 13a-1, and 13a-13 thereunder; and that The Corsair Group, Inc. cease and desist from committing or causing any violations or future violations of Exchange Act Section 15(a)(1); and it is further

ORDERED that Alexandre S. Clug is barred from associating with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization; barred from acting as a promoter, finder, consultant, or agent, or otherwise engaging in activities with a broker, dealer, or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock, with the exception discussed in the above opinion; and prohibited permanently 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 it is further

ORDERED that Alexandre S. Clug disgorge \$286,810.01, plus prejudgment interest of \$90,221.23, such prejudgment interest calculated beginning from December 1, 2013, with such interest continuing to accrue on funds owed until they are paid, in accordance with Rule of Practice 600, 17 C.F.R. § 201.600; and it is further

ORDERED that Aurum Mining, LLC disgorge \$3,615,964.99, plus prejudgment interest of \$1,137,466.41, such prejudgment interest calculated beginning from December 1, 2013, with such interest continuing to accrue on funds owed until they are paid, in accordance with Rule of Practice 600, 17 C.F.R. § 201.600; that PanAm Terra, Inc. disgorge \$224,000, plus prejudgment interest of \$76,432.05, such prejudgment interest calculated beginning from April 1, 2013, with such interest continuing to accrue on funds owed until they are paid, in accordance with Rule of Practice 600, 17 C.F.R. § 201.600; and that The Corsair Group, Inc. disgorge \$38,563, plus prejudgment interest of \$12,130.69, such prejudgment interest calculated beginning from December 1, 2013, with such interest continuing to accrue on funds owed until they are paid, in accordance with Rule of Practice 600, 17 C.F.R. § 201.600; and it is further

ORDERED that Alexandre S. Clug pay a civil money penalty of \$150,000.

ORDERED that the disgorgement, prejudgment interest, and civil money penalty amounts be used to create a Fair Fund for the benefit of investors harmed by Respondents' violations pursuant to Rules of Practice 1100-1106.

Payment of civil money penalties and disgorgement plus prejudgment interest shall be (i) made by United States postal money order, certified check, bank cashier's check, or bank money order; (ii) made payable to the Securities and Exchange Commission; (iii) mailed to Enterprises Services Center, Accounts Receivable Branch, HQ Bldg., Room 181, 6500 South MacArthur Blvd., Oklahoma City, OK 73169; and (iv) submitted under cover letter that identifies the respondent and the file number of this proceeding.

By the Commission.

Vanessa A. Countryman
Secretary