UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15858

In the Matter of

STANLEY JONATHAN FORTENBERRY,

Respondent.

DIVISION OF ENFORCEMENT'S MEMORANDUM IN OPPOSITION TO RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

The Division of Enforcement (the "Division") respectfully submits this memorandum in opposition to Respondent Stanley Jonathan Fortenberry's ("Fortenberry") Motion for Summary Disposition (the "Motion"). As set forth below, Fortenberry's Motion is procedurally improper and depends upon misstatements of both the law and the relevant facts. The Division has complied with 15 U.S.C. § 78d-5(a) and, in any event, the remedy Fortenberry now seeks is not authorized by the law and contravenes established precedent.[1] Consequently, the Motion should be denied.

INTRODUCTION

Fortenberry is a recidivist securities laws violator. Notwithstanding cease-and-desist orders issued by the Pennsylvania Securities Commission and the Texas State Securities Board, starting in 2010, Fortenberry solicited investors for his Premier

[1] The relevant statute is alternatively referred to as Dodd-Frank Act Section 929U, Exchange Act Section 4(E), and 15 U.S.C. § 78d-5. For consistency, the Division will refer to the statute only by the latter.

Investment Fund L.P. ("Premier"), which he marketed as a vehicle to invest in various country music-themed social media and entertainment ventures. As alleged in the Order Instituting Proceedings, Fortenberry, orally and in the Premier offering materials that he drafted and distributed, guaranteed to investors returns of at least 12% per annum, and he provided at least one investor with monthly account statements showing falsely that the fund was meeting its projections and that its investments were turning a profit. Based on his representations, the Premier offering materials, and account statements he prepared, Fortenberry raised hundreds of thousands of dollars for Premier. In reality, however, Fortenberry simply looted the fund. Unbeknownst to his investors, Fortenberry withdrew approximately half of the money entrusted to him. And despite the fact that Premier had no profits—indeed, no income whatsoever—Fortenberry wrote checks to himself for tens of thousands of dollars in unauthorized "management fees," and he also spent the fund's assets on his living expenses, mortgage, utilities, credit card bills, personal travel, and purchases at various gas stations and liquor stores. And based on such conduct, the Division alleges that Fortenberry willfully violated Section 17(a) of the Securities Act of 1933 (the "Securities Act"), Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") and Rule 10b-5 thereunder, and Sections 206(1), 206(2), and 206(4) of the Investment Advisers Act of 1940 (the "Advisers Act") and Rule 206(4)-8 thereunder.

Even though this proceeding has only recently been initiated, Fortenberry now moves this Court for summary disposition on all counts. While the precise contours of his arguments are unclear, it appears that Fortenberry contends that dismissal is

appropriate because he believes that the Division has not complied with the 180-day time period set forth in 15 U.S.C. § 78d-5(a).

Fortenberry's Motion, however, has both procedural and substantive flaws, and those flaws are fatal. Because the Division has been denied an opportunity to "complete[] presentation of its case in chief" and he has not obtained leave, Fortenberry has failed to comply with Rule 250(a) of the Commission's Rules of Practice. Moreover, the filing of the instant Order Instituting Proceedings in this matter was not untimely, and, in any event, federal courts and the Commission have unequivocally held that 15 U.S.C. §78d-5(a) "does not impose a limit on the Commission's jurisdiction to bring these administrative proceedings." *Montford & Co.*, Investment Advisers Act Rel. No. 3829, 2014 WL 1744130, *9 (May 2, 2014). *See also SEC v. NIR Group, LLC*, 2013 WL 5288962, *5 (E.D.N.Y. Mar. 24, 2013). Fortenberry's Motion, therefore, must be denied.

BACKGROUND

Much of Fortenberry's Motion is devoted to a retelling of the Division's supposed tardiness in filing the instant proceeding. Curiously absent from the respondent's recitation, however, is Fortenberry's substantial role in any delay.

On September 24, 2010, pursuant to Section 20(a) of the Securities Act and Section 21(a) of the Exchange Act, the Commission issued an Order Directing Private Investigation and Designating Officers to Take Testimony in an investigation entitled *In the Matter of Breadstreet.com, Inc.*, SEC File No. HO-11450.[2] Fortenberry was the founder

[2] *See* Declaration of Corey A. Schuster ("Schuster Decla."), ¶ 3, which is filed contemporaneously herewith and incorporated herein by reference.

and principal of Breadstreet.com, Inc. On March 23, 2011, the Commission issued administrative subpoenas to Fortenberry and other individuals associated with Breadstreet.com.[3] After negotiating with Fortenberry's counsel regarding the dates for Fortenberry's testimony, the Commission issued an amended set of administrative subpoenas to Fortenberry and others on April 5, 2011.[4]

On April 12, 2011, Fortenberry, through counsel, advised the Commission that he would not comply with the Commission's subpoena, ostensibly on the grounds that the Commission lacked "personal jurisdiction" over him.[5] On June 29, 2011, Fortenberry also refused to comply with an administrative subpoena served by the Commission on Premier, the entity that is the subject of the instant proceeding. Again, Fortenberry's refusal was a supposed lack of "personal jurisdiction."[6]

On December 9, 2011, the Commission filed a subpoena enforcement action in the United States District Court for the District of Columbia. *See SEC v. Fortenberry, et al.*, Case No. 1:11-mc-00671.[7] On August 22, 2012, the District Court issued an Order to Show Cause to Fortenberry and, on October 5, 2012, ordered Fortenberry to comply with the Commission's subpoenas.[8] Fortenberry finally provided testimony to the Commission on November 1, 2012—approximately 18 months after the date set forth in the Commission's March 23, 2011 administrative subpoena.[9]

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[3] *See* id. at ¶ 5.
[4] *See* id. at ¶ 6.
[5] *See* id. at ¶¶ 7-8.
[6] *See* id. at ¶ 10.
[7] *See also* id. at ¶ 12.
[8] *See* id. at ¶¶ 13-16 and Exhibit I thereto.
[9] *See* id. at ¶ 17.

Far from complying with the district court's order, Fortenberry has admittedly withheld and/or destroyed documentation responsive to the Commission's subpoenas.[10] He has also refused to provide the Division with a privilege log, and he has declined to comply fully with a subsequent administrative subpoena, dated February 25, 2013, which called for his production of additional records related to another suspected fraud.[11]

On August 5, 2013, the Division sent to Fortenberry a formal, written Wells notice, after orally providing notice to his counsel a few days earlier.[12] Fortenberry responded to the Wells notice on August 19, 2013, and the parties thereafter engaged in protracted settlement negotiations that lasted for several months.[13] On December 12, 2013, however, Fortenberry abruptly and unexpectedly terminated all settlement discussions.[14]

On December 13, 2013, the Division requested an extension of the 180-day filing deadline created by Section 929U of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 [15 U.S.C. § 78d-5].[15] On December 23, 2013, the authorized designee of the Division's Director approved an extension, until May 2, 2014.[16] On April 28, 2014, the instant Order Instituting Proceedings was issued.

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[10] *See* id. at ¶ 17.
[11] *See* id. at ¶¶ 18-20.
[12] *See* id. at ¶ 21.
[13] *See* id. at ¶¶ 23, 27.
[14] *See* id. at ¶ 28.
[15] *See* id. at ¶ 29.
[16] *See* id. at ¶ 30.

ARGUMENT

I. Fortenberry's Motion Is Procedurally Flawed.

Rule 250 of the Commission's Rules of Practice permits either the respondent or the Division to move this Court for summary disposition at any time after the respondent's answer has been filed and discovery has been made available to the respondent. However, if such motion is made by a respondent before the Division has "completed presentation of its case in chief," the respondent must first seek the leave of the hearing officer. *See* Rule 250(a).[17]

Here, the Division has not "completed presentation of its case in chief"—indeed, it has only just initiated this proceeding. Fortenberry also has neither received nor sought leave to file his Motion. Consequently, Fortenberry's Motion is improper, and it should be denied as such.

II. This Proceeding Was Not Untimely Filed.

The central thrust of Fortenberry's Motion appears to be that "the [Order Instituting Proceedings] was filed more than 180 days after the [E]nforcement [D]ivision provided Respondent a Wells Notice" and that, as a result, the instant proceeding is untimely and must be dismissed pursuant to 15 U.S.C. § 78d-5(a). Motion, p. 8. The factual premise underlying Fortenberry's Motion, however, is wrong. This proceeding was filed well within the statutory time period.

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[17] Specifically, Rule 250(a) provides in relevant part as follows:

> . . . If the interested division has not completed presentation of its case in chief, *a motion for summary disposition shall be made only with leave of the hearing officer.* (emphasis added).

Admittedly, more than 180 days passed between the Division's Wells notice to Fortenberry (August 5, 2013) and the initiation of this proceeding (April 28, 2014). But, as Fortenberry's own Motion concedes, the 180-day deadline contained in 15 U.S.C. § 78d-5(a)(1) may be extended for an additional 180 days. *See* Motion, pp. 8-9. Specifically, the statute provides as follows:

> [I]f the Director of the Division of Enforcement of the Commission or the Director's designee determines that a particular enforcement investigation is sufficiently complex such that a determination regarding the filing of an action against a person cannot be completed within the deadline specified in paragraph (1), the Director of the Division of Enforcement of the Commission or *the Director's designee may*, after providing notice to the Chairman of the Commission, *extend such deadline as needed for one additional 180-day period*. . . .

15 U.S.C. § 78d-5(a)(2) (emphasis added).

Here, as discussed above, on December 13, 2013, the Division sought and received from the Director's designee[18] an extension of the deadline, until May 2, 2014.[19] The Order Instituting Proceedings was then issued on April 28, 2014, well within the as-extended deadline. Consequently, because Fortenberry's argument depends upon a false factual premise, the Motion should be denied. This proceeding was, in fact, timely initiated.

III. Section 929U of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 [15 U.S.C. § 78d-5] Does Not Limit the Division's Ability to Initiate

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[18] As the Commission has recently noted, 15 U.S.C. § 78d-5 "commits the decision to extend the deadline to the sole discretion of the Division Director. There is no statutory requirement that the Director articulate the reasoning or basis for granting the extension. . . ." *Montford*, 2014 WL 1744130 at *13.

[19] *See* Schuster Decla. at ¶ 30.

this Proceeding.

Finally, even assuming (counterfactually) that the Division did not comply with the 180-day time-period, Fortenberry's Motion still fails because it misconstrues and misunderstands the statute on which it purports to be based. Fortenberry repeatedly refers to 15 U.S.C. § 78d-5 as a "statute of limitations," and he contends that "[f]ailure to comply with the statute of limitations requirements of [the statute] violates Respondent's constitutional due process rights." Motion, p. 15.

Fortenberry is fundamentally mistaken. As the Commission and several district courts have previously held, 15 U.S.C. § 78d-5 "prescribe[s] internal time periods for federal agency action." *Montford*, 2014 WL 1744130 at *11. It is not a statute of limitations. *See, e.g., id.; NIR Group*, 2013 WL 5288962 at *5 ("Every relevant authority supports the conclusion that expiration of the 180-day deadline imposed by section 929U does not create a jurisdictional bar to SEC enforcement actions."); *SEC v. Levin*, 2013 WL 594736, *13 (S.D. Fla. Feb. 13, 2013) ("Section 4E imposes only an internal deadline on the SEC, not a private right to be free from agency action occurring beyond the internal deadline."); *cf., SEC v. Yorkville Advisors, LLC*, 2013 WL 3989054, *1 (S.D.N.Y. Aug. 2, 2013) ("Defendants also argue that the complaint must be dismissed under Rule 12(b)(1) for failure to plead compliance with Section 929U of the Dodd Frank Act. That argument is unavailing.").

Because 15 U.S.C. § 78d-5 is not a statute of limitation, it "does not create a jurisdictional bar to SEC enforcement actions." *NIR Group*, 2013 WL 5288962 at*5. The statute simply does not "impose a limit on the Commission's jurisdiction to bring these

administrative proceedings." *Montford*, 2014 WL 1744130 at *9. And for this reason, Fortenberry's legal arguments in favor of dismissal are unavailing. He has no such affirmative defense, and Fortenberry's Motion must be denied.

CONCLUSION

For the foregoing reasons, Fortenberry's Motion For Summary Disposition should be denied.

Dated: May 19, 2014 Respectfully Submitted,

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