UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 72186 / May 19, 2014
INVESTMENT COMPANY ACT OF 1940
Release No. 31049 / May 19, 2014
ADMINISTRATIVE PROCEEDING
File No. 3-15874

In the Matter of **Michael H. Johnson** **Respondent.**	**MICHAEL JOHNSON'S REPLY TO DIVISION OF ENFORCEMENT'S RESPONSE TO MOTION TO MODIFY THE BAR ORDER**

INTRODUCTION

The Division, in its response to the letter that Mr. Johnson submitted to the Commission on April 3, 2015, has taken a humble request by Mr. Johnson for consideration of his settlement order, which he believes was at least in part influenced by facts that the Division now concedes were not true, and turned that request into an adversarial proceeding whereby the Division attacks Mr. Johnson's motives and the sincerity of his remorse, and attempts to introduce new evidence and arguments without addressing the simple question Mr. Johnson raised in his letter. That question, which only the Commission can answer, is: Was the Commission's determination of the appropriateness of the sanctions agreed to under Mr. Johnson's settlement offer based, in part, on a misunderstanding that Penson Financial profited by millions of dollars as a result of its violations of Regulation SHO. If so, Mr. Johnson is merely asking that, based on fundamental fairness, his bar be reviewed taking into account facts which are, by everyone's agreement, materially different than those considered by the Commission over a year ago. If Penson's purported profiting by millions of dollars was not considered as relevant to Mr. Johnson's offer

of settlement, Mr. Johnson agrees that he has no legal basis for asking the Commission to review the bar. In making his request, Mr. Johnson is not attributing bad faith to the Division or the process by which his settlement offer was considered. He is only proposing that, despite the presumed good faith by all parties to the process, if the facts that were understood at the time are objectively and materially wrong, a re-review of the appropriateness of the sanctions resulting from those incorrect facts is fair.

REQUEST TO REVIEW MR. JOHNSON'S BAR

The Division argues that Mr. Johnson "assumes that, in connection with his settled order, the staff relied on an expert analysis from a separate administrative proceeding that calculated approximately $6 million in profits to Penson from its Rule 204 violations." Mr. Johnson does not make such an assumption.[1] Rather, Mr. Johnson only states in his letter that the Division argued, in negotiating his settlement terms, that Penson profited by millions of dollars as a result of its Regulation SHO violations. As a result, the Division insisted that in settlement Mr. Johnson's bar should be commensurate with the egregiousness of those violations, as evidenced in part by the level of Penson's illegal profits. The basis for the Division's belief that millions of dollars were illegally made by Penson is irrelevant to Mr. Johnson's plea. The only question is whether that belief was considered by the Commission in its acceptance of Mr. Johnson's offer. The Division has not addressed that question.

The Division's argument that Mr. Johnson successfully convinced the Division that Penson did not profit from its violations as evidenced by the fact that disgorgement was not ordered against him simply has no merit. Mr. Johnson did not understand at the time the he "fully prevailed" in arguing that Penson did not profit by the Regulation SHO violations. Rather,

[1] In fact, as Mr. Johnson states in footnote three of his letter, he specifically does not know if the expert was engaged by the time settlement discussions occurred.

Mr. Johnson understood only that he convinced the Division that disgorgement was not appropriate as there was no established nexus between Penson's profits, whatever they may have been, and Mr. Johnson's compensation. Thus, there were no established ill-gotten gains.[2]

The Division next argues that "Johnson's motive lies in his desire to avoid the costs of compliance." The Division then inappropriately seeks to introduce new evidence in support of this argument. Again, the Division misses the point. Mr. Johnson is not arguing that the Commission must find "motive" in order to impose appropriate sanctions. Mr. Johnson only asks that, if the Commission did consider profits to Penson as a possible "motive" for Penson's violation, and therefore an indication of egregiousness, the appropriateness of Mr. Johnson's bar should be reviewed under a more accurate understanding of the facts.[3]

The Division, in its most unnecessary and adversarial ad hominem attack, claims that Mr. Johnson "attempt[s] to minimize his misconduct" and "continues to fail to recognize the wrongful nature of his conduct." This simply is not true. Mr. Johnson did not argue in his letter that any of the facts in his settlement order were without basis, did not deny any of the findings, and did not minimize his responsibility. Indeed, Mr. Johnson stated in his letter that he "fully understands, and has always acknowledged his mistakes in connection with Penson's stock lending activities, and has learned valuable lessons as a result of this matter...." To argue otherwise is nothing more than a mischaracterization of Mr. Johnson's simple request.

Finally, the Division points to the various "compelling factors" that the Commission has previously considered in requests for a modification of a settled order. Once again, Mr. Johnson

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[2] In fact, the allegations made by the Division in paragraph 23 of the Order Instituting Proceedings against Mr. Delaney and Mr. Yancey belies the claim that the Division was convinced that Penson did not profit by its Regulation SHO violations. As does, of course, the fact that the Division introduced an expert report claiming that Penson illegally profited by $6 million.

[3] The Division also fails to mention that it was never able to show any such "costs of compliance" despite its allegations. Rather, the Division and its expert "didn't bother" to quantify those costs. *Initial Decision*, at pg. 26.

does not disagree that those are the factors that the Commission has considered under normal circumstances. However, as Mr. Johnson states in his letter, this case is unique in that a fundamental fact on which the Commission may have based its decision has been conceded by the Division to be untrue. The compelling factors articulated by the Commission, and cited by the Division, do not address those circumstances. And so, once again, the Division's arguments do nothing to respond to the question of whether the Commission, in good faith, accepted Mr. Johnson's offer of settlement based on the mistaken understanding that Penson profited by millions of dollars. If so, it is only fair that the sanctions be reviewed. If not, Mr. Johnson concedes that he does not meet the burden for requesting a modification of his bar.

In his letter, Mr. Johnson cites to various cases previously brought by the Commission which indicate that his five-year bar is well beyond any applicable or analogous precedent. In fact, those cases show that an individual bar has been imposed in cases involving naked short selling and manipulation, facts even the Division does not argue exist here.[4] Mr. Johnson will not cite again to those or other cases, such as the case against Merrill Lynch recently brought by the Commission where no individuals were sanctioned.[5] Rather, Mr. Johnson refers the Commission back to the cases cited in his letter and his Wells Submission, and notes that the Division, despite the adversarial position taken in its Response, was not able to cite a single case to serve as precedent for the sanctions it required in Mr. Johnson's settled order. Nor did the Division address that precedent in light of the extraordinary cooperation Mr. Johnson provided to the staff as outlined in his Wells submission.

[4] The unprecedented remedies that the Division required for Mr. Johnson to settle this matter is another indication that the Division likely believed that Penson materially profited by its Regulation SHO violations.
[5] Release 34-75083

CONCLUSION

In writing his letter to the Commission, Mr. Johnson did not intend to start a battle with the Division over the facts found in the settled order, which are not in dispute, the good faith of the Division or the Commission, or the ability and responsibility of the Commission to enter orders it deems appropriate. Mr. Johnson did not, in fact, desire an adversarial process at all. He simply raised a question of whether the Commission made its decision based on a set of facts that all parties now concede was materially wrong. Mr. Johnson asks for nothing more than for the Commission to simply review its records to determine whether it was working with incorrect facts and, if so, determine whether a modification of Mr. Johnson's bar is appropriate. If the Commission determines that it made its decision based on accurate facts, a simple "one-line" order that there is no basis for modification will at least allow Mr. Johnson to move ahead knowing that he was treated fairly and that his bar was not the result of a "quite embarrassing" mistake.

DATED: June 19, 2015

[redacted]

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CERTIFICATE OF SERVICE

On June 19, 2015, the foregoing **MICHAEL JOHNSON'S REPLY TO DIVISION OF ENFORCEMENT'S RESPONSE TO MOTION TO MODIFY THE BAR ORDER** was sent to the following parties and other persons entitled to notice as follows:

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By [redacted]