SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 75894 / September 10, 2015

INVESTMENT COMPANY ACT OF 1940
Release No. 31818 / September 10, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-15874

In the Matter of MICHAEL H. JOHNSON	ORDER DENYING MOTION TO MODIFY SETTLED BAR ORDER

Michael H. Johnson, the former Senior Vice President of Penson Worldwide, Inc.'s ("PWI") Securities Lending Department, requests that we modify a May 2014 settled bar order to allow him to apply for reentry into the securities industry after one year instead of five years. He claims that "an error in the [Commission] staff's factual analysis of the case and, presumably, in the Commission's analysis of the appropriateness of the terms of [his] settlement" warrants such relief. The Division of Enforcement ("Division") opposes Johnson's motion. For the reasons set forth below, we find that Johnson has not demonstrated "compelling circumstances" that would justify modifying the bar order. Accordingly, the request is denied.

I. Background

A. In May 2014, Johnson consented to a bar based on allegations that he aided and abetted Penson's Regulation SHO violations and failed reasonably to supervise his subordinates.

This proceeding arose out of securities lending practices at PWI's broker-dealer subsidiary, Penson Financial Services, Inc. ("Penson"),[1] that resulted in systematic violations of the close-out requirements of Regulation SHO under the Securities Exchange Act of 1934.[2] On May 19, 2014,

[1] PWI and its subsidiaries filed for bankruptcy in 2013 and are no longer in business.

[2] 17 C.F.R. § 242.204 (requiring broker-dealers and clearing firms to take action to close out a failure to deliver position in an equity security within specified time frames).

we charged Johnson for his role in Penson's violations, and Johnson simultaneously agreed to settle the allegations against him.[3] Pursuant to his offer of settlement, we found, *inter alia*, that from October 2008 to November 2011, Johnson implemented procedures at Penson that he "knew or was reckless in not knowing" did not comply with Regulation SHO, and that he "willfully aided, abetted, and caused" Penson's violations of Regulation SHO.[4] We also found that Johnson failed reasonably to supervise his subordinates and that he "fostered and encouraged their misconduct by participating in it with them."[5] But we did not find that Penson or Johnson profited as a result of the Regulation SHO violations nor did we address Johnson's possible motives for his misconduct. Without admitting or denying our findings, except as to our jurisdiction over him and the subject matter of this proceeding, which were admitted, Johnson consented to be barred from the securities industry with a right to apply for reentry after five years and to pay a $125,000 civil money penalty. Johnson subsequently paid the penalty and left the industry.

B. Less than a year later, Johnson sought modification of the bar based on a factual error in the calculation of Penson's profit from the Regulation SHO violations.

In a letter dated April 3, 2015, Johnson sought modification of the bar based on a factual error in the calculation of Penson's profit from the Regulation SHO violations.[6] Specifically, Johnson pointed to a calculation error by the Division's expert in a separate, litigated proceeding against Penson's former president and chief compliance officer in connection with the Regulation SHO violations.[7] In that proceeding, the Division offered an expert's report and testimony to establish that the profit to Penson from the Regulation SHO violations was approximately $6.2 million, but when the expert testified at the hearing he acknowledged that the $6.2 million figure resulted from a calculation error.[8] The Division subsequently conceded that the total profit to Penson as a result of the Regulation SHO violations was $59,000.[9]

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3 *Michael H. Johnson*, Exchange Act Release No. 72186, 2014 WL 2038878, at *1 (May 19, 2014).

4 *Id*.

5 *Id.* at *6.

6 Johnson did not seek modification of the penalty.

7 *See Thomas R. Delaney II*, Initial Decision No. 755, 2015 WL 1223971, at *1 (Mar. 18, 2015) (finding that Penson's president did not fail reasonably to supervise subordinates but that its chief compliance officer was a cause of Penson's Rule 204 violations and imposing a cease-and-desist order and a $20,000 civil money penalty), *declared final*, Exchange Act Release No. 74843, 2015 WL 1939410 (Apr. 29, 2015). A fourth Penson officer agreed to settle charges that he caused Penson's Regulation SHO violations and consented to a censure and cease-and-desist order. *See Lindsey A. Wetzig*, Exchange Act Release No. 72187, 2014 WL 2038879, at *1 (May 19, 2014).

8 *See Delaney*, 2015 WL 1223971, at *25.

9 *Id.*

According to Johnson, during the Wells process and settlement discussions in his case, Division staff took the position that Penson profited by some $6 million from the Regulation SHO violations, that those violations were the result of intentional conduct by Penson employees, and that Johnson's misconduct was "particularly egregious," given his motive to profit both Penson and himself, and merited significant sanctions. While Johnson maintained throughout the parties' settlement discussions that there was "virtually no profit to Penson and absolutely none to himself" as a result of the Regulation SHO violations, he asserts that he "did not have available to him either the trading data or the resources to analyze it in order to prove to the staff that profit could not have been a motive." Johnson states that, as a result, he could not counter the staff's position and "agreed to settle the matter on the terms demanded by the staff as he was not in the position to litigate the matter."

By order dated May 29, 2015, we construed Johnson's letter as a motion to modify the terms of the bar and directed the parties to file opposing and reply briefs.[10] In its opposition brief, the Division argued that Johnson failed to demonstrate "compelling circumstances" that would support modification of the bar. According to the Division, the erroneous profit calculation had "no bearing" on Johnson's case because that calculation did not exist at the time the Commission issued the settled bar order as to Johnson. The Division and Johnson negotiated the terms of a settlement between August and December 2013, and Johnson submitted an offer of settlement, including a bar with a right to reapply after five years, in December 2013. The Commission accepted Johnson's offer and entered the bar in May 2014. Meanwhile, Penson's successor firm did not begin producing the data necessary for the expert's profit calculation until February 2014—after Johnson had submitted his offer of settlement—and did not finish production until July 2014, after the bar was imposed. The expert did not complete his calculation and provide it to the staff until September 2014. Thus, the Division argued, the expert's profit calculation did not and could not have played any role in the parties' settlement negotiations or the Commission's consideration of an appropriate sanction.

The Division also argued that the settled order contained extensive findings that Johnson engaged in "conscious misbehavior—that is, he knew what he was doing was wrong and did it anyway, irrespective of whether it benefitted him directly." Consequently, proof of motive was not required to establish Johnson's aiding and abetting liability.[11] The Division further argued that Johnson's motive was not "solely limited to potential profits to Penson," but also included a desire to "avoid or reduce the costs of compliance" with Regulation SHO.

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[10] *Michael H. Johnson*, Exchange Act Release No. 75074, 2015 WL 3439151, at *1 (May 29, 2015).

[11] *Cf. Donald L. Koch*, Exchange Act Release No. 72179, 2014 WL 1998524, at *14 (May 16, 2014) (stating that "proof of motive is not required where there is direct evidence of manipulative intent; it is only where direct evidence of scienter is lacking that circumstantial evidence of intent, such as motive, becomes critical"), *petition denied in part and granted in part on other grounds*, 793 F.3d 147 (D.C. Cir. July 14, 2015).

In his reply, Johnson asserted that he "did not intend to start a battle with the Division over the facts found in the settled order, which are not in dispute," and that he "did not, in fact, desire an adversarial process at all." Rather, Johnson asserted, he "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 [the] bar is appropriate."

II. Analysis

We have stated that, in reviewing motions to lift or modify administrative bar orders, we will determine whether, "under all the facts and circumstances presented, it is consistent with the public interest and investor protection to permit the petitioner to function in the industry without the safeguards provided by the bar."[12] Our longstanding approach to administrative bar orders has been that they will "remain in place in the usual case and be removed only in compelling circumstances."[13] "Preserving the status quo ensures that the Commission, in furtherance of the public interest and investor protection, retains its continuing control over such barred individuals' activities."[14]

Consideration of a range of factors guides the public interest and investor protection inquiry. Those factors include the nature of the misconduct at issue in the underlying matter; the time that has passed since issuance of the administrative bar; the compliance record of the petitioner since issuance of the administrative bar; the age and securities industry experience of the petitioner, and the extent to which the Commission has granted prior relief from the administrative bar; whether the petitioner has identified verifiable, unanticipated consequences of the bar; the position and persuasiveness of the Division's response to the request for relief; and whether there exists any other circumstance that would cause the requested relief to be inconsistent with the public interest or the protection of investors.[15] We have indicated that "[n]ot all of these factors will be relevant in determining the appropriateness of relief in a particular case, and no one factor is dispositive."[16]

A. Johnson presents no compelling circumstances that would justify modifying the bar.

Based on our consideration of all the facts and circumstances, we find no compelling circumstances that would justify modifying the bar and eliminating the protections it affords. The

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12 *Ciro Cozzolino*, Exchange Act Release No. 49001, 2003 WL 23094746, at *3 (Dec. 29, 2003).

13 *Id.*

14 *Id.*

15 *Id.*

16 *Kenneth W. Haver, CPA*, Exchange Act Release No. 54824, 2006 WL 3421789, at *3 (Nov. 28, 2006) (denying motion to reopen proceeding or vacate suspension).

settled order found serious violations of the federal securities laws. Only sixteen months have passed since entry of the bar. "That is hardly enough time to conclude that its continuation is no longer required in the public interest."[17] While it appears that Johnson has had no disciplinary record subsequent to the bar, we have said that "a clean disciplinary record is not determinative in our consideration of sanctions."[18] We also have said that "[w]e generally first grant incremental relief in our cases vacating bars."[19] Johnson has not sought prior incremental relief from the bar. As a result, we do not have a sufficient basis for concluding that modification of the bar would be consistent with the public interest. Finally, Johnson has not identified verifiable, unanticipated consequences of the bar or provided additional factors that would support the requested relief from the bar.[20]

Johnson argues that modification of the bar would make his sanction consistent with the sanctions imposed in other Regulation SHO cases.[21] But it is well-established that whether a particular sanction is excessive cannot be determined by comparison with the sanctions imposed on respondents in other cases.[22] Johnson also argues that modification would be appropriate

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[17] *William H. Pike*, Investment Company Act Release No. 20417, 1994 WL 389872, at *2 (July 20, 1994) (denying motion to vacate order), *petition denied*, 52 F.3d 1122 (D.C. Cir. 1995) (per curiam).

[18] *John Gardner Black*, Advisers Act Release No. 3015, 2010 WL 1474294, at *4 n.17 (Apr. 13, 2010) (denying in part and granting in part petition to set aside bar order), *petition denied*, 462 F. App'x 6 (D.C. Cir. 2013).

[19] *Jesse M. Townsley, Jr.*, Exchange Act Release No. 52161, 2005 WL 1963783, at *2 (July 29, 2005) (denying in part petition to vacate bar order) (citing *Salim B. Lewis*, Exchange Act Release No. 51817, 2005 WL 1384087, at *4 (June 10, 2005)).

[20] Johnson argues that the bar has placed "unique and severe difficulties" on him and his family. He states that he "was forced out of the industry nearly two years ago as a result of receiving the staff's Wells notice"; that he "sold his home, relocated from St. Louis to Dallas, and moved his family into a smaller, more affordable home"; that he suffers from Parkinson's disease; and that he has "lost his ability to properly care for the medical conditions both he and his wife endure." While we are sympathetic, Johnson's stated difficulties do not render the settled order inequitable. Rather, they are among a range of natural and foreseeable consequences that flow from a bar on employment in the securities industry as a result of the settled order. *See Pike*, 1994 WL 389872, at *2.

[21] For support, Johnson cites to settled orders in *Peter J. Bottini*, Exchange Act Release No. 66814, 2012 WL 1264509 (Apr. 16, 2012); *Gary S. Bell*, Exchange Act Release No. 65941, 2011 WL 6184476 (Dec. 13, 2011); *Jeffrey A. Wolfson*, Exchange Act Release No. 67450, 2012 WL 2914902 (July 17, 2012); and *Hazan Capital Mgmt., LLC*, Exchange Act Release No. 60441, 2009 WL 2392842 (Aug. 5, 2009).

[22] *See, e.g., Butz v. Glover Lifestock Comm'n Co.*, 411 U.S. 182, 187 (1973) (stating that "[t]he (continued . . .)

because he "went above and beyond in cooperating with the staff during its investigation," he "acknowledged his mistakes" in connection with Penson's securities lending practices, and he "has learned valuable lessons as a result." We have previously considered and rejected a respondent's assertion that he cooperated with Commission staff when raised in mitigation of the violations or sanctions, and we see no basis for crediting that assertion here.[23] Moreover, even if we were to credit Johnson's assertion of remorse, that assertion does not alter our conclusion that modification would be inconsistent with the public interest and investor protection.

B. Johnson forfeited any claim that the Commission was working with incorrect facts when he consented to the bar.

We have a "strong interest" in the finality of our settlement orders.[24] "Public policy considerations favor the expeditious disposition of litigation, and a respondent cannot be permitted to [follow] one course of action and, upon an unfavorable [result], to try another course of action."[25] "If sanctioned parties easily are able to reopen consent decrees years later, the SEC would have little incentive to enter into such agreements. There would always remain open the possibility of litigation on the merits at some time in the distant future when memories have faded and records have been destroyed."[26]

Moreover, Rule 240 of our Rules of Practice provides that a settling respondent waives all hearings, the filing of proposed findings of fact and conclusions of law, proceedings before and an

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(. . . continued)
employment of a sanction within the authority of an administrative agency is . . . not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases"); *Geiger v. SEC*, 363 F.3d 481, 488 (D.C. Cir. 2004) (stating that, because "[t]he Commission is not obligated to make its sanctions uniform," court would not compare sanction imposed in case to those imposed in previous cases); *Lewis*, 2005 WL 1384087, at *4 n.42 (rejecting respondent's argument to vacate bar because lesser sanctions were imposed in similar cases and citing *Butz*).

[23] *See, e.g.*, *Montford & Co., Inc.*, Advisers Act Release No. 3829, 2014 WL 1744130, at *19 & 20 (May 2, 2014) (rejecting respondent's cooperation with the Division in mitigation of sanctions and according considerable weight to law judge's finding that respondent's expressions of remorse were not credible because they stemmed from "the results to him personally and professionally" and "not from any genuine regret for his wrongdoing"), *petition denied*, 793 F.3d 76 (D.C. Cir. July 10, 2015).

[24] *Haver*, 2006 WL 3421789, at *3 (substitutions in original) (quoting *Putnam Inv. Mgmt*, LLC, Exchange Act Release No. 50039, 2004 WL 1619113, at *2 (July 20, 2004)).

[25] *Id.* (quoting *David T. Fleischman*, Exchange Act Release No. 8187, 1967 WL 87757, at *3 (Nov. 1, 1967)).

[26] *Id.* (quoting *Miller v. SEC*, 998 F.2d 62, 65 (2d Cir. 1993)).

initial decision by a hearing officer, all post-hearing procedures, and judicial review by a court.[27] "The Rule requires each offer of settlement to recite or incorporate as part of the offer the [waiver] provisions of paragraphs (c)(4) and (5)."[28]

Johnson does not dispute that his offer of settlement waived all post-hearing procedures, as required by Rule 240, nor does he suggest that his consent to the bar was "not voluntary, knowing, or informed."[29] Johnson admits that he "elected to settle the matter and did not develop the matter further."[30] Consequently, Johnson "forfeited the opportunity to adduce" evidence of the calculation error,[31] and he "may not now complain that the record is inaccurate or incomplete."[32]

For the foregoing reasons, we find that the public interest and investor protection will not be served if Johnson is permitted to function in the industry without the safeguards provided by the bar order. We therefore decline to modify the settled bar order to allow Johnson to apply for reentry to the securities industry after one year instead of five years.

Accordingly, IT IS ORDERED that the motion of Michael H. Johnson to modify the bar imposed on him on May 19, 2014, be, and it hereby is, DENIED.

By the Commission.

Brent J. Fields
Secretary

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27 17 C.F.R. § 201.240(c)(4).

28 17 C.F.R. § 201.240 (Comment).

29 *Haver*, 2006 WL 3421789, at *3; *cf. Sargent v. Dep't of Health & Human Servs.*, 229 F.3d 1088, 1091 (Fed. Cir. 2000) (stating that "[i]t is well-established that in order to set aside a settlement, an applicant must show that the agreement is unlawful, was involuntary, or was the result of fraud or mutual mistake").

30 *Haver*, 2006 WL 3421789, at *3.

31 *Pike*, 1994 WL 389872, at *2.

32 *Haver*, 2006 WL 3421789, at *3 n.19; *see Edward I. Frankel*, Exchange Act Release No. 38379, 1997 WL 103785, at *2 n.5 (Mar. 10, 1997) (in rejecting petition to vacate bar order where petitioner contended that bar order "relied upon erroneous information," stating that respondent "elected to settle the matter and did not develop the record further" and thus could not "now complain that the record is inaccurate or incomplete").