INITIAL DECISION RELEASE NO. 1124
ADMINISTRATIVE PROCEEDING
File No. 3-17393

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

In the Matter of CURTIS A. PETERSON	INITIAL DECISION April 19, 2017

APPEARANCES: Russell Koonin and Glenn Gordon for the Division of Enforcement, Securities and Exchange Commission

Michael V. Miller and Paul K. Silverberg, of Silverberg & Weiss, P.A., for Respondent

BEFORE: Jason S. Patil, Administrative Law Judge

Summary

Respondent Curtis A. Peterson admitted to acting as an unregistered broker, in violation of Section 15(a)(1) of the Securities Exchange Act of 1934, by selling investments in JCS Enterprises, Inc., and T.B.T.I., Inc. This initial decision orders disgorgement of $569,250—the amount that Respondent earned in commissions through those sales, less what he repaid to investors—along with prejudgment interest.

Procedural Background

On August 23, 2016, the Securities and Exchange Commission, having accepted Respondent's offer of settlement, issued an order instituting proceedings (OIP) pursuant to Sections 15(b) and 21C of the Exchange Act. In the OIP, the Commission: (a) found that Respondent violated Exchange Act Section 15(a)(1); (b) ordered Respondent to cease and desist from committing or causing any violations and any future violations of Exchange Act Section 15(a)(1); (c) barred Respondent from the securities industry; (d) ordered Respondent to pay a civil money penalty of $7,500; (e) ordered that further proceedings be held before an administrative law judge to decide the appropriateness and amount of disgorgement; and (f) established a fair fund with the civil money penalty and any disgorgement and interest for the benefit of victims of the underlying Ponzi scheme. OIP at 3-6.

The parties agreed that this matter should be resolved by motion, *see Curtis A. Peterson*, Admin. Proc. Rulings Release No. 4231, 2016 SEC LEXIS 3798, at *1 (ALJ Oct. 6, 2016), and thereafter made the following submissions:

- On October 21, 2016, the Division of Enforcement moved for disgorgement of $584,550 plus prejudgment interest. Along with its opening brief, the Division submitted Respondent's executed offer of settlement (Mot. Ex. 1) and prejudgment interest calculations from April 1, 2013, through March 31, 2014.

- On November 21, Respondent submitted an opposition (Opp.), requesting that disgorgement and prejudgment interest be reduced or not imposed. Respondent attached his own affidavit of (Resp. Affidavit), a financial disclosure with supporting documents (Opp. Ex. A), an unsigned copy of the "Virtual Concierge Placement Contract and License Agreement," and information on JCS Enterprises. Respondent's financial disclosure included tax returns and financial statements, as well as information regarding Respondent's assets, liabilities, and income; such information is subject to the protective order I entered on November 17, 2016. *Curtis A. Peterson*, Admin. Proc. Rulings Release No. 4368, 2016 SEC LEXIS 4290.

- The Division replied on December 7. With its reply brief (Reply), the Division submitted the declaration of James Sallah (Sallah Decl.), the court-appointed receiver of JCS Enterprises and T.B.T.I. Attached to the declaration was a table summarizing the investment payments relating to T.B.T.I made both to and from Respondent and his companies (Reply Ex. A Table). Also attached were the underlying checks and wires reflecting Respondent's investments in T.B.T.I. (Reply Ex. A), as well as the checks reflecting T.B.T.I. payments to Respondent (Reply Ex. B).

Following this round of briefing, Respondent made an unopposed motion for oral argument, which I granted. *Curtis A. Peterson*, Admin. Proc. Rulings Release No. 4457, 2016 SEC LEXIS 4649 (ALJ Dec. 16, 2016). The oral argument occurred on December 28, 2016, and I granted leave for Respondent to file a post-argument brief addressing certain issues and for the Division to file a response. *Curtis A. Peterson*, Admin. Proc. Rulings Release No. 4493, 2016 SEC LEXIS 4842 (ALJ Dec. 29, 2016); *Curtis A. Peterson*, Admin. Proc. Rulings Release No. 4529, 2017 SEC LEXIS 150 (ALJ Jan. 17, 2017). The parties then made the following submissions:

- Respondent submitted his supplemental brief (Resp. Supp.) on January 12, 2017. He included checks reflecting Respondent's payments to two T.B.T.I. investors (Resp. Supp. Ex. A), as well as checks reflecting Respondent's investments in T.B.T.I. that were not in the Division's submissions (Resp. Supp. Ex. B).

- The Division submitted its supplemental response (Div. Supp.) on January 26. This included QuickBooks entries concerning three T.B.T.I. payments to Respondent (Div. Supp. Ex. A), as well as a second version of the table summarizing the investment payments relating to T.B.T.I. made both to and from Respondent and his companies.

As permitted by the Commission, I have decided the issues in this proceeding "on the basis of affidavits, declarations, excerpts of sworn deposition or investigative testimony, and documentary evidence." OIP at 4. I have considered all of the evidence. Beyond the allegations in the OIP—which I must accept as true—I have applied preponderance of the evidence as the standard of proof. *See Steadman v. SEC*, 450 U.S. 91, 101-04 (1981).

Facts

As noted, the OIP's allegations "shall be accepted as and deemed true by the hearing officer" in this proceeding, and Respondent is "precluded from arguing that he did not violate the federal securities laws described in [the OIP]." OIP at 4. I do not recite all of the facts in the OIP, but incorporate them by reference.

In short, Respondent acted in 2013 as an unregistered broker-dealer in the offer and sale of securities by JCS Enterprises, Inc., and T.B.T.I., Inc. OIP at 2-3. In offering the securities, the principals of those companies falsely promised hundreds of investors nationwide that their funds would be used to purchase ATM-like machines called Virtual Concierge Machines that businesses could use to advertise products and services via touch screen and printable tickets or coupons. *Id.* at 2. However, the principals and their companies instead paid returns to earlier investors using money from newer investors, and failed to locate, place, and manage the purported machines. *Id.* Respondent, acting as an unregistered sales agent of JCS and T.B.T.I., offered and sold JCS's and T.B.T.I.'s investment contracts in JCS's Virtual Concierge program and earned transaction-based compensation from the sales, totaling $584,550. *Id.* at 2-3.

According to Respondent, he was initially unaware that the Virtual Concierge venture was a fraudulent Ponzi scheme. Resp. Affidavit ¶¶ 4-10, 12-13. Upon learning of the fraud, Respondent "had to inform investors, many of whom were family and friends, that they had lost their investments as a result of criminal fraud." *Id.* ¶ 12. Respondent states that "[t]he emotional and psychological toll this took on [him] was enormous and [he] lost close relationships as result" and "felt guilty and humiliated." *Id.* He further argues that he "would incur a financial hardship . . . to pay as disgorgement the entire gross amount of commissions [he] received." *Id.* ¶ 14. "[T]he majority of the commissions," Respondent claims, were "used primarily to better [his] family's life" and "were paid in taxes, in assisting [his] special needs son, and in doing home repairs." *Id.* Most of Respondent's assets are from an "inheritance and life insurance payment" in 2015. *Id.* He holds the resulting money jointly with his wife—along with a primary residence—and also owns real estate jointly with his siblings as a result of the inheritance. *Id.*; *see* Opp. Ex. A.

Disgorgement

Sections 21B(e) and 21C(e) of the Exchange Act authorize disgorgement, including reasonable interest, in this proceeding if appropriate. 15 U.S.C. §§ 78u-2(e), 78u-3(e); OIP at 4. "The paramount purpose of . . . ordering disgorgement is to make sure that wrongdoers will not profit from their wrongdoing." *Montford & Co.*, Investment Advisers Act of 1940 Release No. 3829, 2014 WL 1744130, at *22 (May 2, 2014) (quoting *SEC v. Tome*, 833 F.2d 1086, 1096 (2d Cir. 1987)), *pet. denied*, 793 F.3d 76 (D.C. Cir. 2015). That is, disgorgement "is an equitable

remedy designed to deprive a wrongdoer of his unjust enrichment and to deter others from violating the securities laws." *Id.* (quoting *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989)).

Disgorgement "need only be a reasonable approximation of profits causally connected to the violation" because "separating legal from illegal profits exactly may at times be a near-impossible task." *First City*, 890 F.2d at 1231. The Division bears the initial burden of demonstrating such reasonable approximation. *Montford & Co.*, 2014 WL 1744130, at *22; *Jay T. Comeaux*, Securities Act of 1933 Release No. 9633, 2014 WL 4160054, at *3 (Aug. 21, 2014). Once the Division does this, "[t]he burden then 'shifts to the respondent to demonstrate that the Division's estimate is not a reasonable approximation.'" *Jay T. Comeaux*, 2014 WL 4160054, at *3 (quoting *Gregory O. Trautman*, Securities Act Release No. 9088A, 2009 WL 6761741, at *22 (Dec. 15, 2009)).

It is undisputed, and I must accept as true, that Respondent received a total of $584,550 in transaction-based compensation as a result of his participation in the unregistered offer and sale of securities. OIP at 3; Mot. Ex, 1 at 3. This reflects a reasonable—if not precise—figure of Respondent's ill-gotten gains, and it is the amount articulated in the settlement that Respondent consented to. Respondent therefore carries the substantial burden of demonstrating the unreasonableness of disgorging this money. *See First City*, 890 F.2d at 1232; *Jay T. Comeaux*, 2014 WL 4160054, at *3. Indeed, a respondent's share of commissions from illegal activities "is a reasonable approximation of his ill-gotten gains." *E.g.*, *Ralph Calabro*, Securities Act Release No. 9798, 2015 WL 3439152, at *44-45 & n.233 (May 29, 2015); *Ronald S. Bloomfield*, Securities Act Release No. 9553, 2014 WL 768828, at *20-21 (Feb. 27, 2014) (ordering disgorgement of commissions for sale of unregistered securities), *partially vacated on other grounds*, *Robert Gorgia*, Securities Act Release No. 9743, 2015 WL 1546302 (Apr. 8, 2015), *pet. denied*, 649 F. App'x 546 (9th Cir. 2016).

Respondent contends disgorgement should be reduced for five principal reasons, addressed below. I also address issues raised following oral argument.

First, Respondent argues that disgorgement is not justified because his misconduct was not egregious, long-lasting, or fraudulent. Opp. at 7-10. This argument is unpersuasive, as the Commission has "reject[ed] [the] contention that, in determining disgorgement, [it] should apply the public interest factors" which "include the *egregiousness* of the respondent's actions, *the isolated or recurrent nature* of the infraction, [and] *the degree of scienter* involved." *Jay T. Comeaux*, 2014 WL 4160054, at *5 & n.38 (emphasis added). "Disgorgement is appropriate not only in cases of fraud . . . but also where a [respondent] violates the securities registration provisions . . . ." *SEC v. Rockwell Energy of Tex., LLC*, No. 09-cv-4080, 2012 WL 360191, at *6 (W.D. Tex. Feb. 1, 2012); *see, e.g.*, *SEC v. Martino*, 255 F. Supp. 2d 268, 289 (S.D.N.Y. 2003).

As to scienter specifically, Respondent asserts that at the time he was receiving illegal commissions he was not aware of the fraud underlying the Virtual Concierge scheme or that his unregistered brokering activity was unlawful. Opp. at 9; Tr. 5, 7. But disgorgement is intended to deprive a wrongdoer of illicit profits "connected to the violation." *Montford & Co.*, 2014 WL 1744130, at *22. And neither ignorance of the law nor a lack of fraudulent conduct break the

causal connection between Respondent's commissions and his violation of Exchange Act Section 15(a)(1), which does not require scienter.[1] *See Anthony Fields*, Securities Act Release No. 9727, 2015 WL 728005, at *17 (Feb. 20, 2015); OIP at 3. It would therefore be illogical to reduce disgorgement on that basis here. Commissions can be a proper measure of disgorgement not only in cases involving fraud, but also for violations that do not require scienter. *See Rockwell Energy*, 2012 WL 360191, at *6; *Ronald S. Bloomfield*, 2014 WL 768828, at *20-21. Accordingly, disgorgement of unlawful commissions would not be "punitive," Opp. at 11, and the authority Respondent cites, *McCarthy v. SEC*, 406 F.3d 179 (2d Cir. 2005)—which does not address disgorgement—does not support such a contention. *See Ralph Calabro*, 2015 WL 3439152, at *44 ("an order for disgorgement is not a punitive measure; it is intended primarily to prevent unjust enrichment" (internal quotation marks omitted)).

Second, Respondent's assertion that he "has been cooperative throughout this entire process," although generally true, is not true with respect to his refusal to disgorge the unlawful compensation he received. Opp. at 10; *see* Tr. 15. Cooperation in other aspects of the case, though assuredly better than obstruction, "is not sufficient to preclude disgorgement or reduce the disgorgement amount." *Jay T. Comeaux*, 2014 WL 4160054, at *5 (internal quotation marks omitted).

Third, Respondent contends that, "out of the commissions," he "paid approximately two hundred and fifty thousand dollars ($250,000.00) in taxes," though his 2013 return does not definitively establish this fact.[2] Opp. at 11-12; *see* Opp. Ex. A at PDF pages 77-78, 81, 96-97, 110-14; *see also* OIP at 3 (Respondent received the commissions in 2013). I am sympathetic to Respondent's general point, but the Commission holds that "it is well settled that disgorgement will not be reduced because the wrongdoer has paid an ordinary tax liability," even if the tax was paid "on those ill-gotten gains." *Larry C. Grossman*, Securities Act Release No. 10227, 2016 WL 5571616, at *23 (Sept. 30, 2016), *stayed in part*, Securities Act Release No. 10244, 2016 WL 6441565 (Nov. 1, 2016), *appeal held in abeyance and briefing stayed*, No. 16-16907 (11th Cir Jan. 17, 2017); *see Laurie Jones Canady*, Exchange Act Release No. 41250, 1999 WL 183600, at *10 (Apr. 5, 1999) (respondent not "entitled" to reduction in disgorgement "based upon taxes she has paid . . . in connection with transactions here"), *pet. denied*, 230 F.3d 362 (D.C. Cir. 2000). And other authority is in accord.[3] I am thus bound to reject Respondent's argument.

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[1] Respondent's claim that that his actions "did not result" in investor losses because he did not act fraudulently rehashes his argument concerning scienter. Opp. at 10. Additionally, disgorgement is concerned with a respondent's profits "connected to the violation" rather than investor losses specifically. *See Montford & Co.*, 2014 WL 1744130, at *22. And Respondent cannot dispute that he received commissions "in exchange for soliciting and securing investors" in the Virtual Concierge program, which turned out to be a Ponzi scheme. OIP at 3.

[2] This approximate total tax liability for 2013 appears to include taxes on some other income. *See* Opp. Ex. A at PDF page 77.

[3] *See SEC v. Kahlon*, No. 4:12-CV-517, 2016 WL 5661642, at *4 (E.D. Tex. Sept. 30, 2016); *SEC v. Razmilovic*, 822 F.Supp.2d 234, 277 (E.D.N.Y. 2011) *aff'd in relevant part, vacated in*

However, the notion that paid taxes should never offset the amount disgorged is debatable. The Commission's holding in *Larry C. Grossman*, for example, relied on a more limited ruling in *SEC v. U.S. Pension Trust Corp.*, 444 F. App'x 435, 437 (11th Cir. 2011). *See* 2016 WL 5571616, at *23 n.187. In *U.S. Pension Trust*, the Eleventh Circuit did not lay down a bright-line rule, but merely held that a district court's refusal to offset disgorgement by the illicit gains paid toward income taxes was not "clearly erroneous" because such an offset was not "requir[ed]" by precedent. 444 F. App'x at 437. This language leaves open the possibility that a court could, in its discretion, allow such an offset even if not "required" to do so. *Id.*; *see also SEC v. Merch. Capital, LLC*, 486 F. App'x 93, 96 (11th Cir. 2012) (district court not "required to take into account the amount of income taxes paid"). Indeed, in at least some other contexts, these reductions are permitted. *Fendi Adele S.R.L. v. Burlington Coat Factory Warehouse Corp.*, 642 F. Supp. 2d 276, 281-82 (S.D.N.Y. 2009) (noting courts "have permitted credit [toward disgorgement] for income taxes paid" in "the trademark context and in contempt proceedings").

Further, the precedent informing the Eleventh Circuit's decision in *U.S. Pension Trust* concerned disgorgement of money used to pay taxes wholly unrelated to the ill-gotten gains. 444 F. App'x at 437 n.1; *see SEC v. Huff*, No. 08-60315-CIV, 2011 WL 1102777, at *6 (S.D. Fla. Mar. 23, 2011) (illicit profits used to pay for a relief defendant's taxes on unrelated income); *SEC v. Utsick*, No. 06-20975-CIV, 2009 WL 1404726, at *7 (S.D. Fla. May 19, 2009) (corporate defendant made payments to IRS for individual defendant's personal income taxes). But there may be a categorical distinction between using illicit gains to pay an unrelated tax liability—which "bestows a benefit" because "the person receiving the [unrelated] income would have [otherwise] had to have paid the taxes on the sum"—and using illicit gains to pay taxes on those very same gains (i.e., tax liabilities that would not exist but for the illicit gains). *Huff*, 2011 WL 1102777, at *6. *But see id.* (indicating the latter circumstance would weigh further in favor of full disgorgement).

A number of relevant decisions—including *Laurie Jones Canady*—refuse to offset disgorgement in this manner partly because "business expenses" and "overhead" are likewise excluded as offsets. 1999 WL 183600, at *10 n.35; *see, e.g.*, *Merch. Capital*, 486 F. App'x at 96; *Kahlon*, 2016 WL 5661642, at *4. But again, there are distinctions between using illicit gains to pay third parties by choice for general business and overhead expenses versus paying taxes owed by law on those same gains to the United States government—the very party that is seeking disgorgement via the Commission. It is unclear why such distinctions are less significant than others that *do* permit discretionary disgorgement reductions for certain "direct transaction costs."[4] Perhaps it is because direct transactions costs are simpler to segregate and

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part, remanded, 738 F.3d 14 (2d Cir.2013); *SEC v. DiBella*, No. 3:04cv1342, 2008 WL 6965807, at *3 (D. Conn. Mar. 13, 2008), *aff'd*, 587 F.3d 553 (2d Cir. 2009); *SEC v. Koenig*, 532 F. Supp. 2d 987, 994 (N.D. Ill. 2007), *aff'd in part and remanded*, 557 F.3d 736 (7th Cir. 2009); *SEC v. Shaoulian*, No. 00-4614, 2003 WL 26085847, at *6 (C.D. Cal. May 12, 2003).

[4] *SEC v. Syndicated Food Serv. Int'l, Inc.*, No. 04-CV-1303, 2014 WL 1311442, at *19 (E.D.N.Y. Mar. 28, 2014) (adopting position "that taxes are not among the direct transaction costs that courts may, in their discretion, deduct from the disgorgement amount"); *see also, e.g.*,

prove than tax costs attributable to illicit gains. *See Donell v. Kowell*, 533 F.3d 762, 779 (9th Cir. 2008) (offsetting disgorgement with taxes paid "would introduce complex problems of proof and tracing into each case"); *SEC v. World Gambling Corp.*, 555 F. Supp. 930, 935 (S.D.N.Y. 1983) (in refusing offset, observing there was "no indication of . . . what impact would have resulted in taxes if these transactions were eliminated, or what rights [the defendant] has to offset its . . . disgorgement in future tax years"), *aff'd*, 742 F.2d 1440 (2d Cir. 1983) (unpublished table decision). Or perhaps it is because direct transaction costs occur immediately, whereas "respondents often have the use of [illicit gains] for many months, until taxes, if any, are paid." Rules of Practice, Exchange Act Release No. 33163, 58 Fed. Reg. 61732, 61770 (Nov. 22, 1993) (Commission rejecting proposal from its "Task Force on Administrative Proceedings," which suggested that "disgorgement and prejudgment interest owed should be offset against the amount of taxes a respondent had paid on ill-gotten gains"). But it is not readily apparent why such considerations should be dispositive on the issue of a judge's discretion on this topic.

Moreover, the inability to ever reduce disgorgable gains by the taxes paid on them potentially implicates equitable concerns. In disallowing these offsets, the Commission has stated that a respondent "must seek from the IRS, not us, any relief from the taxes he says he paid on the ill-gotten gains that we . . . order[] disgorged." *Larry C. Grossman*, 2016 WL 5571616, at *23. Such relief would presumably come via Section 162 of the Internal Revenue Code, 26 U.S.C. § 162, which permits deductions for trade or business expenses. But one is prohibited under that section from deducting "any fine or similar penalty paid to a government for the violation of any law." 26 U.S.C. § 162(f). Although the Commission—in the statute-of-limitations context—does not view disgorgement as a fine or penalty,[5] *see Bernerd E. Young*, Securities Act Release No. 10060, 2016 WL 1168564, at *21 (Mar. 24, 2016), the IRS Office of Chief Counsel advises that "disgorgement in federal securities law cases can be primarily compensatory or primarily punitive for federal tax law purposes depending on the facts and circumstances of a particular case," and that "primarily punitive" disgorgement is "not deductible." IRS Office of the Chief Counsel Mem. 201619008, at 8, 10 (May 6, 2016), https://www.irs.gov/pub/irs-wd/201619008.pdf (IRS Mem.). These asymmetrical views could deprive a respondent not only of his pretax profits in full (by Commission-ordered disgorgement), but also the taxes he paid on those profits (by a subsequent IRS denial of the deduction), leaving the respondent worse off than had he never profited in the first place.

DiBella, 2008 WL 6965807, at *3 (same); *SEC v. Universal Express, Inc.*, 646 F. Supp. 2d 552, 564 (S.D.N.Y. 2009) ("direct transaction costs" that "plainly reduce the wrongdoer's actual profit" may offset disgorgement), *aff'd*, 438 F. App'x 23 (2d Cir. 2011); *SEC v. Zwick*, No. 03Civ. 2742, 2007 WL 831812, at *24 (S.D.N.Y. Mar. 16, 2007) ("income taxes [do] not fall within the class of deductions occasionally allowed for transaction-specific costs"), *aff'd*, 317 F. App'x 34 (2d Cir. 2008); *SEC v. Svoboda*, 409 F. Supp. 2d 331, 345 (S.D.N.Y. 2006) (same, noting lack of legal authority for reducing disgorgement based on paid taxes).

[5] Under 28 U.S.C. § 2462, there is a five-year statute of limitations period for "an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise." The Supreme Court is currently considering whether disgorgement constitutes such a "fine, penalty, or forfeiture" subject to this limitations period. *SEC v. Kokesh*, 834 F.3d 1158 (10th Cir. 2016), *cert. granted*, 137 S. Ct. 810 (Jan. 13, 2017) (argued April 18, 2017).

Although the "risk of uncertainty in calculating disgorgement should fall on the wrongdoer whose illegal conduct created that uncertainty," *Montford & Co.*, 2014 WL 1744130, at *22, the uncertainty stemming from differing views of government agencies is also noteworthy.

However, the OIP's creation of a fair fund to compensate aggrieved investors with any ordered disgorgement, *see* OIP at 5-6 ("[a]ll funds paid by Respondent pursuant to this Order shall . . . be distributed for the benefit of investor victims"), may be helpful to Respondent should he claim a tax deduction with the IRS. *See* IRS Mem. at 9 (placing disgorgement in a fair fund is a "fact relevant to determining whether the disgorgement is primarily compensatory or primarily punitive for tax purposes").

Fourth, Respondent contends that the rest of his compensation "went primarily towards the treatment of his special needs son and home repair." Opp. at 12. Although spending money on a family's health and home is important as a general matter, the fact that Respondent spent his unlawful compensation on something benefitting his family does not excuse disgorgement. *E.g.*, *Edgar R. Page*, Advisers Act Release No. 4400, 2016 WL 3030845, at *12 n.68 (May 27, 2016) ("We apply the rule that how a [respondent] chooses to spend his ill-gotten gains, whether it be for business expenses, personal use, or otherwise is immaterial to disgorgement." (internal quotation marks omitted)).

Fifth, Respondent essentially asserts the defense of inability to pay. *See* Opp. at 11-12 (arguing disgorgement would be "excessive based upon [his] factual and financial circumstances" and that his financial disclosures "establish that the ability to pay [full disgorgement with interest] would be financially unjustified"). Inability to pay may be considered in determining disgorgement. 17 C.F.R. § 201.630(a). I have carefully reviewed Respondent's financial submissions, and find that his available assets greatly exceed the amount sought by the Division.[6] *See* Opp. Ex. A. Indeed, Respondent's own affidavit merely contends that the payment would be a "financial hardship" but does not establish that he would be unable to pay the amount sought, or that the payment would then leave his family unable to meet their needs and obligations. Resp. Aff. ¶ 14. *Cf. Moshe Marc Cohen*, Securities Act Release No. 10205, 2016 WL 4727517, at *15 (Sept. 9, 2016) (noting that a respondent's claim of financial

[6] Respondent argues that because his current net worth is primarily a result of an inheritance in 2015, "the financial[s] of today should not be utilized" and that it is more appropriate to use "his ability [to pay] as if it was . . . at the time of the downfall of the Ponzi scheme." Tr. 6; *see* Opp. at 12; Resp. Supp. at 3-4. But Respondent offers no authority for reducing disgorgement on this basis. *See* Tr. 25. Nor is his representation that the inheritance is held in joint accounts with his wife, Resp. Supp. at 4, a basis for reducing disgorgement. Indeed, his wife is an officer of VC Capital Corp and authorized member of Miami Sun ATM LLC, companies through which Respondent received Virtual Concierge investment payments. Reply Ex. A Table; Reply Ex. B at PDF pages 25-32, 34-39; http://bit.ly/2my0m3j (Florida Division of Corporations online record for VC Capital Corp); http://bit.ly/2mNuNmN (same, as to Miami Sun ATM LLC); *see* 17 C.F.R. § 201.323 (permitting official notice of any material fact which might be judicially noticed by a district court); Fed. R. Evid. 201(b)(2).

hardship does not provide a disgorgement defense). Because Respondent's evidence does not demonstrate he is unable to pay, decreasing disgorgement is not justified on that basis.

Issues Addressed Following Oral Argument. To further justify full disgorgement of Respondent's $584,550 in commissions, the Division submitted evidence on reply that—in addition to his commissions—Respondent, his wife, and his companies made $176,940 in profit on their investment in the Virtual Concierge program before the Ponzi scheme collapsed. Reply at 3; Sallah Decl. ¶¶ 13-15 (noting a total of $650,940 received off of $474,000 invested); Reply Ex. A Table at 2; *see generally* Reply Exs. A & B. Following oral argument, I provided Respondent an opportunity to rebut this evidence and address what funds, if any, he had paid to compensate investors' losses associated with the Virtual Concierge scheme. *Curtis A. Peterson*, Admin. Proc. Rulings Release No. 4493, 2016 SEC LEXIS 4842 (ALJ Dec. 29, 2016).

In his post-argument submission, Respondent claims that the Division's calculation of his investment profits wrongly includes three T.B.T.I. payments to him—check numbers 4741, 4742, and 4746, totaling $56,540; he argues these payments were not for his Virtual Concierge investment but rather for "unrelated matters." Resp. Supp. at 2; *see* Reply Ex. A Table at 1. More broadly, Respondent contends that he "invested $450,000.00 and his return . . . was $416,400.00 resulting in a net [investment] loss of $33,600.00." Resp. Supp. at 2. As to the three checks, the T.B.T.I. QuickBooks entries for each include the note "VC," which suggests the payments related to Respondent's Virtual Concierge investment. Div. Supp. Ex. A. Counting these payments as Virtual Concierge investment income more than offsets Respondent's asserted investment loss of $33,600. But more to the point, whereas significant evidence accompanies the Division's determination that Respondent's investment profits were $176,940, there is little evidence supporting Respondent's figures except for four checks evidencing $42,000 of his investments in T.B.T.I. that the Division did not account for. *Compare* Resp. Supp. at 2, *and* Resp. Supp. Ex. B, *with* Div. Supp. at 2-3, Reply Ex. A Table, *and* Reply Exs. A & B; *see also* Div. Supp. at 3 (even crediting Respondent's evidence regarding the $56,540 in T.B.T.I. payments and $42,000 in checks, the Division's otherwise unrefuted evidence still shows that he made an investment profit of $78,400). And any investment loss Respondent suffered, even had he established it, would not change the amount he received in illicit *commissions*. *See* OIP at 3-4.

Respondent further argues that disgorgement should be reduced because defendants in related civil cases "settled for less than one hundred percent (100%) of what they received in profits from the underlying scheme." Resp. Supp. at 4-5; *see* Tr. 45-47. But the Commission rejects this line of argument, reasoning that "settlements are not precedent." *E.g.*, *Rodney R. Schoemann*, Securities Act Release No. 9076, 2009 WL 3413043, at *13 n.55 (Oct. 23, 2009), *aff'd*, 398 F. App'x. 603 (D.C. Cir. 2010).

Lastly, Respondent asserts that he "compensated the first two aggrieved investors that contacted him" a total of $15,300. Resp. Supp. at 1-2. In support, he provides two checks written in February 2014 to those two individuals—a $3,300 check with the memo "Fronted January 2014 commissions," and a $12,000 check with the memo "Fronted TBTI late commission payment." Resp. Supp. Ex. A. The Division responds that, based on the checks' memo lines, these payments were not refunds to the investors but simply the "monthly

commissions they were entitled to." Div. Supp. at 2. If Respondent's records showed he paid or was "fronting" money to investors in this way before the Ponzi scheme collapsed, the Division's argument might carry more weight. But Respondent paid these two investors in February 2014, after the Ponzi scheme collapsed and investors stopped receiving payments; so he had no realistic expectation of getting the money back. OIP at 3. Though the verbiage on the checks says "commissions," the circumstances reveal a different story and effect. Disgorgement is an equitable remedy, and account should be made for the fact that after all payments ceased—to these two investors and others—Respondent gave them money. *David Henry Disraeli*, Securities Act Release No. 8880, 2007 WL 4481515, at *17 & n.106 (Dec. 21, 2007) (repayments to investors can offset disgorgement), *pet. denied*, 334 F. App'x. 334 (D.C. Cir. 2009). Accordingly, I will reduce the disgorgement amount by $15,300.

Prejudgment Interest

The OIP mandates that "[i]f disgorgement is ordered, Respondent shall pay prejudgment interest thereon, calculated from March 19, 2013 through April 7, 2014." OIP at 4. Therefore, because I am ordering disgorgement, I must also order prejudgment interest. *Id.*; *see also* Tr. 15-16 (Respondent's counsel conceding that the OIP's language is "clear" on this point).

Because the OIP is clear, Respondent is incorrect in arguing that I have "broad discretion" regarding whether to impose prejudgment interest.[7] Opp. at 12-13. Even if I had such discretion, Respondent's focus on the "significantly diminished" importance of prejudgment interest "where the wronged party will not receive the damages being collected" is misplaced. Opp. at 13. The OIP created a fair fund to distribute "disgorgement, *interest* and penalties" to aggrieved investors. *See* OIP at 5 (emphasis added, citing Section 308(a) of the Sarbanes-Oxley Act of 2002, as amended). Although actual investor losses may have been many times greater than the amount sought from Respondent, OIP at 3, the amount that he received in commissions is one small but significant source of funds that can help compensate the wronged investors for at least some of the losses they suffered.

Respondent also argues that his ignorance that his activities were unlawful should excuse the payment of prejudgment interest. Opp. at 12-13. However, ignorance is not a sufficient justification to provide Respondent, with what is, in essence, an interest-free loan. *See Terence Michael Coxon*, Securities Act Release No. 8271, 2003 WL 21991359, at *14 (Aug. 21, 2003) ("[E]xcept in the most unique and compelling circumstances, prejudgment interest should be awarded on disgorgement, among other things, in order to deny a wrongdoer the equivalent of an interest free loan from the wrongdoer's victims."), *aff'd*, 137 F. App'x 975 (9th Cir. 2005). Here, prejudgment interest will prevent Respondent from enjoying that unwarranted benefit.

Accordingly, prejudgment interest will be ordered.

[7] It would also be inappropriate to order prejudgment interest but "back [it] out" by subtracting it from any ordered disgorgement, Tr. 16, as doing so would, in substance, be an end-run around the OIP's express direction.

Order

I ORDER that, pursuant to Sections 21B(e) and 21C(e) of the Securities Exchange Act of 1934, Curtis A. Peterson shall PAY DISGORGEMENT in the amount of $569,250, plus prejudgment interest.

As provided in the OIP, prejudgment interest shall be "calculated from March 19, 2013 through April 7, 2014."[8] OIP at 4. Prejudgment interest shall be calculated at the underpayment rate of interest established under Section 6621(a)(2) of the Internal Revenue Code, 26 U.S.C. § 6621(a)(2), and shall be compounded quarterly. 17 C.F.R. § 201.600(b); OIP at 4.

Payment of disgorgement and prejudgment interest shall be made no later than twenty-one days following the day this initial decision becomes final, unless the Commission directs otherwise. Payment shall be made in one of the following ways: (1) transmitted electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request; (2) direct payments from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or (3) by certified check, bank cashier's check, United States postal money order, or bank money order made payable to the Securities and Exchange Commission and hand-delivered or mailed to the following address alongside a cover letter identifying Respondent and Administrative Proceeding No. 3-17393: Enterprise Services Center, Accounts Receivable Branch, HQ Bldg., Room 181, AMZ-341, 6500 South MacArthur Blvd., Oklahoma City, Oklahoma 73169. A copy of the cover letter and instrument of payment shall be sent to the Commission's Division of Enforcement, directed to the attention of counsel of record, U.S. Securities and Exchange Commission, 801 Brickell Avenue, Miami, Florida, 33131.

This initial decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice, 17 C.F.R. § 201.360. Pursuant to that rule, a party may file a petition for review of this initial decision within twenty-one days after service of the initial decision. A party may also file a motion to correct a manifest error of fact within ten days of the initial decision, pursuant to Rule 111 of the Commission's Rules of Practice, 17 C.F.R. § 201.111. If a motion to correct a manifest error of fact is filed by a party, then a party shall have twenty-one days to file a petition for review from the date of the undersigned's order resolving such motion to correct a manifest error of fact.

The initial decision will not become final until the Commission enters an order of finality. The Commission will enter an order of finality unless a party files a petition for review or motion to correct a manifest error of fact or the Commission determines on its own initiative

[8] Typically, under the Commission's Rules of Practice, prejudgment interest is "due from the first day of the month following each such violation through the last day of the month preceding the month in which payment of disgorgement is made." 17 C.F.R. § 201.600(a). However, the Commission may order in a particular proceeding that "an alternative procedure shall apply" rather than the Rules of Practice. 17 C.F.R. § 201.100(c). I interpret that to be the case here.

to review the initial decision as to a party. If any of these events occur, the initial decision shall not become final as to that party.

Jason S. Patil
Administrative Law Judge