Initial Decision Release No. 1393
Administrative Proceeding
File No. 3-19145

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

In the Matter of

Matthew R. Rossi and
SJL Capital, LLC

Initial Decision
December 23, 2019

Appearances: Daniel J. Hayes and Bradley N. Lewis
for the Division of Enforcement,
Securities and Exchange Commission

Matthew R. Rossi, pro se

Before: James E. Grimes, Administrative Law Judge

This is a partially settled proceeding against Respondents Matthew R. Rossi and SJL Capital, LLC. The Securities and Exchange Commission found that they violated the antifraud provisions of Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934, subsections (1), (2), and (4) of Section 206 of the Investment Advisers Act of 1940, Exchange Act Rule 10b-5, and Advisers Act Rule 206(4)-8. Under the terms of the settlement, Rossi and SJL are precluded from arguing that they did not commit these violations and have agreed to cease-and-desist orders, associational and investment-company bars for Rossi, and a censure for SJL. The only remaining issues are whether Respondents should be ordered to pay disgorgement plus interest and a civil monetary penalty, and if so, in what amounts.

Introduction

The Commission instituted this proceeding under Securities Act Section 8A, Exchange Act Section 21C, subsections (e), (f), and (k) of Advisers Act

Section 203, and Section 9(b) and the Investment Company Act of 1940.[1] The proceeding was instituted, based on Respondents' offers of settlement, to determine whether they should be ordered to pay disgorgement plus interest and a civil monetary penalty.[2]

In July 2019, I granted in part and denied in part the Division's motion for summary disposition and denied Rossi's motion for summary disposition.[3] I held that Rossi and SJL must disgorge $28,935 in pre-paid performance fees plus interest.[4] I also held that although the Division had met certain prerequisites necessary for the imposition of third-tier monetary penalties—conduct involving fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement and substantial losses—it would be premature to assess whether the public interest supported monetary penalties.[5] Finally, I held that Respondents had not carried their burden on summary disposition to show an inability to pay disgorgement or civil penalties.[6]

I held the merits hearing on August 21, 2019, in Brooklyn, New York. Rossi was the only witness who testified during the hearing. I admitted all of the parties' joint exhibits and two of Rossi's supplemental exhibits.

Findings of Fact

The OIP requires me to accept its factual findings as true.[7] I therefore base the following findings of fact and conclusions on the OIP's binding factual findings and on the entirety of the remaining record. Outside of the binding factual findings in the OIP, I have applied preponderance of the evidence as

---

1 *See* 15 U.S.C. §§ 77h-1, 78u-3, 80a-9(b), 80b-3(e), (f), (k).

2 Order Instituting Proceedings (OIP) at 2, 9.

3 *Matthew R. Rossi*, Admin. Proc. Rulings Release No. 6636, 2019 SEC LEXIS 1803 (ALJ July 23, 2019).

4 *Id.* at *6.

5 *Id.* at *12–14.

6 *Id.* at *18.

7 OIP at 9.

the standard of proof.[8] All arguments that are inconsistent with this decision are rejected.

Rossi, who holds a Series 65 license, founded SJL, a registered investment adviser, and was its managing partner and 80% majority owner.[9] SJL managed the MarketDNA Hedge Fund LP (the Fund) and served as the Fund's general partner.[10] Rossi made investment decisions for the Fund and for SJL.[11]

Rossi was responsible for SJL's private placement memorandum.[12] Through that document, oral representations, and other means, Rossi and SJL told investors that SJL would primarily invest in equities publicly traded in domestic markets and would select investments using SJL's "highly successful proprietary" MarketDNA algorithm (the Algorithm), which was "proven to bring [investors] substantially higher returns" and "included 'safety valves' or stop losses to limit downside risk."[13]

The OIP describes two sets of investors. Susan Ennis (Investor A), who is Rossi's friend; Patrick Walters (Investor B); Elizabeth Stiegler (Investor C), who was Rossi's girlfriend from 2013 through 2017; and an unidentified Investor D.[14] Each of these investors invested directly in the Fund.[15] Mr. Oldenkamp (SMA Client 1), his wife (SMA Client 2), and their church (SMA Client 3) owned separate, SJL-managed brokerage accounts.[16]

Ennis, Walters, and Stiegler invested in the Fund at some point between its launch in January 2016 and May 2016.[17] As of May 2016, Rossi allocated

---

8 *See Rita J. McConville*, Exchange Act Release No. 51950, 2005 WL 1560276, at *14 (June 30, 2005), *pet. denied*, 465 F.3d 780 (7th Cir. 2006).

9 OIP at 3.

10 *Id.*

11 *Id.*

12 *Id.* at 4.

13 *Id.* at 2, 4.

14 *Id.* at 4–5; Tr. 28–30.

15 OIP at 4; Tr. 26–29.

16 OIP at 2–8; Tr. 50.

17 OIP at 3–4.

the Fund's assets as: Ennis ($265,675.80), Walters ($50,000), Stiegler ($10,000) and Rossi ($92,000).[18]

It's not clear whether the Algorithm actually was, as Respondents claimed, "highly successful."[19] But by June 2016, Rossi decided that he "wasn't making enough income" from the Fund's use of the Algorithm to cover his personal expenses.[20] Contrary to what he had represented to the Fund's investors, he began engaging in unhedged options trading using Fund assets, resulting in substantial gains in June and July 2016.[21] Rossi had prior experience with options trading and, based on that experience, was aware of the risks involved.[22]

In early July 2016, Investor D invested $100,000 in the Fund.[23] Around that time, Rossi also solicited investment by the Oldenkamps.[24] Although the Oldenkamps did not want to invest directly in the Fund, they were interested in following the MarketDNA strategy and took comfort in both the alleged stop losses that Rossi told them about and the Fund's positive returns in June and July, which Rossi said resulted from use of the Algorithm.[25] In August 2016, Mrs. Oldenkamp appointed SJL as the investment adviser for her $150,000 brokerage account and authorized SJL to supervise and direct the investments in that account.[26]

Following SJL's gains in June and July, Rossi continued to engage in unhedged options trading.[27] This time, however, things did not go well. In all,

---

18 *Id.* at 4.

19 *Id.* at 2.

20 Tr. 100–01.

21 OIP at 4.

22 *Id.*

23 *Id.* at 5.

24 *Id.* at 6.

25 *Id.*

26 *Id.*

27 *Id.* at 5.

the Fund lost over $1 million—88% of its value—in August 2016.[28] While accruing these losses, Rossi told Investor D via e-mail that some recent trades notwithstanding, "the trading is doing well" and that the Fund was "down 4% then [back] to even."[29] By the time Investor D learned the truth and withdrew his investment, only $11,000 of his original $100,000 remained.[30]

As Rossi continued to use Fund assets to engage in unhedged options trading, the Fund continued to lose money. By November 2016, the Fund was down to its last $22,000, which Rossi transferred to SJL's brokerage account before writing himself checks totaling $1,000 and losing most of the remaining $21,000 in further options trading.[31]

Rossi covered up the losses.[32] He sent false account statements to Walters and false tax documents to both Ennis and Walters.[33] In total, Ennis, Walters, Stiegler, and Investor D lost in excess of $300,000.[34]

Rossi did not tell the Oldenkamps about the Fund's August losses.[35] And instead of using the Algorithm while trading in Mrs. Oldenkamp's account, he engaged in unhedged options trading that led to losses of over 8% between August and October 2016.[36] But Rossi told the Oldenkamps that Mrs. Oldenkamp's account was up 9%, so Mrs. Oldenkamp deposited an additional $50,000 and Mr. Oldenkamp deposited $200,000 in a brokerage account that he had given Rossi authority to manage.[37]

Around that time, Mr. Oldenkamp—using materials Rossi provided that showed returns of about 135% from May through August 2016—recommended

---

28 *Id.*

29 *Id.*

30 *Id.*

31 *Id.*

32 *Id.*

33 *Id.*

34 *Id.* at 3.

35 *Id.* at 6.

36 *Id.*

37 *Id.* at 6–7.

to his church that it also invest with Rossi and SJL.[38] Between December 2016 and February 2017, the church deposited $300,000 into a brokerage account Rossi and SJL managed.[39]

Based on the purported gains in his and Mrs. Oldenkamp's account, Rossi asked Mr. Oldenkamp to prepay "certain performance-based fees."[40] Mr. Oldenkamp agreed to make several payments, totaling $28,935, as a "gesture of good faith."[41] Rossi used the fees for his personal benefit, including additional unhedged options trading, a $6,000 check to Stiegler, and checks to himself and a family member.[42]

In January 2017, Rossi told Mr. Oldenkamp that the Algorithm's net return for 2016 was 186.44% and that the Fund was "#1 for Returns %" for "2016 YTD."[43] Neither of these statements were true; by that time, Rossi had lost all of the Fund's assets.[44] Not knowing the true facts, in late January 2017, Mrs. Oldenkamp deposited another $600,000 and, in early February, Mr. Oldenkamp deposited $499,000.[45]

But by mid-February, Mr. Oldenkamp noticed that he and Mrs. Oldenkamp had suffered large losses in their brokerage accounts.[46] When Mr. Oldenkamp confronted Rossi, Rossi blamed a fictitious "rogue trader" whom he said had caused "losses of nearly 58%" when Rossi supposedly underwent surgery, and claimed that his personal account was also affected.[47] In fact, the losses suffered by the Oldenkamps and the church—70% in February—were caused by Rossi's continued unhedged options trading, and most of the losses happened before the date Rossi said he'd given the rogue trader access to the

---

38 *Id.* at 7.

39 *Id.*

40 *Id.* at 8.

41 *Id.*; *see also Rossi*, 2019 SEC LEXIS 1803, at *4 & n.15, *6.

42 OIP at 8.

43 *Id.* at 7.

44 *Id.*

45 *Id.*

46 *Id.*

47 *Id.* at 7.

accounts.[48] Rossi tried to maintain the lie about the rogue trader, however, and asked Mr. Oldenkamp "to 'stick with us,' adding" that he "truly believe[d] we will recover a significant amount in March and the following months."[49]

After the Oldenkamps and the church lost another 56% in March 2017, they revoked Rossi's access to their accounts.[50] By that point, they had lost over $1.5 million.[51]

In light of these circumstances and the Commission's uncontested finding of liability against Respondents, the hearing in this matter primarily focused on Rossi's ability to pay a financial penalty and disgorgement. The hearing revealed that Rossi is a single parent, raising three daughters, two of whom are in college and one of whom is in high school.[52] Rossi pays his daughters' expenses, including tuition and activities' costs.[53]

Rossi testified that his net worth is negative $121,829.[54] According to his testimony and a financial declaration he submitted, he has about $3,000 in cash and owes almost $27,000 in auto loans, over $24,000 in credit card debt, and over $60,000 in other loans.[55] Rossi's financial declaration also describes his approximate annual expenses, including groceries and food ($22,200) and rent ($23,500).[56] Rossi presented a spreadsheet created from downloading entries from his bank accounts that itemized all of his expenses over the previous 12 months.[57]

---

48 *Id.* at 7–8.

49 *Id.* at 8.

50 *Id.* at 7–8.

51 *Id.* at 8.

52 Tr. 19–21.

53 Tr. 19, 21, 97–98; J. Ex. 9 at 96.

54 Tr. 12; *see* J. Ex. 9 at 91.

55 J. Ex. 9 at 94; *see* Tr. 12–13.

56 Tr. 53–54; J. Ex. 9 at 96.

57 *See* J. Ex. 10; Tr. 92–93.

Rossi is currently employed as a financial controller at a start-up company in New York City with an annual salary of $106,780 and a $10,000 bonus.[58]

Cross-examination revealed that Rossi failed to include assets in his declaration, including one vehicle worth $15,000.[59] And the $60,000 in loans listed in the declaration included about $32,000 owed to Rossi's father, over $21,300 owed to Ennis, and $2,200 owed to Stiegler—none of which are documented.[60] Rossi is not currently making payments on his father's loan, which carries no interest and is not collateralized, and entered into a repayment plan with Ennis only after he knew the Commission might initiate this proceeding.[61] Rossi is currently paying "[n]ominal amounts per month" on the Stiegler and Ennis loans, although he has paid $9,000 to Stiegler on what was originally a loan in excess of $11,000.[62]

Rossi conceded that he and his children "eat out a lot" for dinner and that he typically eats out for lunch in "one of the most expensive parts of the City," because he does not have time to pack one.[63] Rossi also explained that in order to generate extra income, he decided in early 2019 to try playing poker on-line, losing about $3,900 before stopping.[64]

Rossi has taken two recent trips, but paid for neither. He spent approximately six days at a national swimming event in April 2019, in

---

58 Tr. 17; J. Ex. 9 at 95.

59 Tr. 35–36.

60 Tr. 45–46, 48, 52.

61 Tr. 48–49, 70–71.

62 Tr. 49–50, 52. As noted, Rossi wrote a $6,000 check to Stiegler after receiving one of the Oldenkamps' performance-fee payments. OIP at 8.

63 Tr. 60–61.

64 Tr. 64, 89–92; *see* J. Ex. 10 at 7–8, 38; J. Ex. 34 at 1, 3, 7, 10–12; *see also* Tr. 63, 81–84 (explaining entries in J. Exs. 10 and 34); J. Exs. 6, 7. Although Rossi testified that he stopping gambling after two months when he realized he could not generate income from gambling, Tr. 64, the record shows that his foray into on-line gambling lasted from December 2018 to May 2019, during which time he spent about $5,400 and generated almost $1,500 in gambling income, *see* J. Ex. 10 at 7–8, 38; J. Ex. 34 at 1, 3, 7, 10–12; *see also* Tr. 63, 81–92; J. Ex. 6, 7.

Orlando, Florida, during which he stayed at a Disney World resort.[65] Rossi's father paid for flights and lodging.[66] And Rossi flew to California in January 2019 and stayed with Stiegler, who paid for his flight.[67]

Rossi has not tried to repay the Oldenkamps or their church.[68] When asked if he had offered to pay the church, he said that although he had not "spoken to the church[,] [i]f I could, I certainly would."[69] Rossi testified that he "tried to reach out to Mr. Oldenkamp," but was soon advised by counsel at the time to discontinue attempts to contact him.[70] He added that if Mr. Oldenkamp had "come to me at any point in time and asked me to start paying him back, I certainly would come [up] with a 100-dollar payment plan and start doing that. I [have] serious remorse for that."[71]

On questioning, Rossi insisted that the Algorithm "actually works."[72] After admitting that he stopped following it only because he was personally not making enough money, he testified that he prepared false account statements and tax documents because, "with the algorithm being so good, I thought I could make up the losses."[73] After it was noted that he "never went back to the algorithm," Rossi claimed that he "continued to run" it to trade options, but he "didn't follow it in terms of just making sure I traded on equities."[74] As Rossi explained, the Algorithm doesn't work with options because although he could use it to predict *that* a relevant or material event

---

65 J. Ex. 10 at 41–43; Tr. 66.

66 Tr. 66, 96–97; *see* J. Ex. 10 at 42–44.

67 Tr. 98–99; *see* J. Ex. 34 at 5.

68 Tr. 73.

69 Tr. 73.

70 Tr. 73.

71 Tr. 73.

72 Tr. 99.

73 Tr. 102. Rossi provided a similar explanation for why he issued a false tax document. *See* Tr. 104.

74 Tr. 102; *see* Tr. 103.

would occur, it could not predict *when* that event would occur.[75] And this matters because options expire.[76]

Near the end of Rossi's affirmative presentation, he said that his "financial condition is extremely poor," his employment situation is uncertain, and he is "extremely remorseful for what happened" and "sad and upset with [him]self."[77] He added, "I've tried to apologize, and have, to as many people as I can."[78] At the conclusion of the hearing, Rossi said that he is "remorseful about what happened" and:

> if I can win the lottery right now and pay everyone back, I certainly would. I just -- I can only -- I can only give what I have. And it's -- I don't have any assets. I wish I could sell something, Your Honor. I wish I had stocks or [an] IRA I can liquidate to pay people back. I just don't. It's been a struggle for me.[79]

Issues

A. Whether Rossi and SJL should pay a civil monetary penalty as a result of their violations of the antifraud provisions.

B. Whether Respondents' liability should be reduced due to an inability to pay.

Discussion and Conclusions of Law

1. The public interest supports imposing third-tier monetary penalties.

As noted, the Division showed on summary disposition that (1) Respondents' conduct involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement, and (2) substantial losses to other individuals.[80] As a result, I granted the Division summary disposition on

---

75 Tr. 103.

76 Tr. 103.

77 Tr. 25.

78 Tr. 26.

79 Tr. 110.

80 *Rossi*, 2019 SEC LEXIS 1803, at *10–13.

the question of whether it met these two prerequisites for imposition of third-tier monetary penalties.[81] This leaves the third prerequisite, the public interest, which in this case includes consideration of Rossi's claimed inability to pay.[82]

In weighing the public interest, I must consider:

> (1) whether the act or omission for which such penalty is assessed involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement;
>
> (2) the harm to other persons resulting either directly or indirectly from such act or omission;
>
> (3) the extent to which any person was unjustly enriched, taking into account any restitution made to persons injured by such behavior;
>
> (4) whether such person previously has been found by [a regulator] to have violated … securities laws … or the rules of a self-regulatory organization … , has been enjoined by a court … from violations of such laws or rules, or has been convicted … of violations of such laws or of [certain] felon[ies] or misdemeanor[s];

---

[81] As noted in the summary disposition order, the statutes under which penalties are authorized in this proceeding "set out a three-tiered system, based on increasing degrees of culpability, for determining the maximum civil penalty for 'each … act or omission' constituting a securities violation." *Id.* at *9–10; *see* 15 U.S.C. §§ 77h-1(g)(2), 78u-2(b), 80b-3(i)(2). Third-tier penalties, *i.e.*, the most severe, may be imposed if in the public interest and if the violation in question involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement and substantial losses to other persons. *Rossi*, 2019 SEC LEXIS 1803, at *10–12. Although this proceeding was instituted under the Investment Company Act, the OIP does not authorize monetary sanctions under that Act. OIP at 1, 9. To the extent the summary disposition order referenced Investment Company Act Section 9(b) as a basis for monetary sanctions, I withdraw that provision as a basis for this analysis.

[82] *See Charles Trento*, Securities Act Release No. 8391, 2004 WL 329040, at *4 (Feb. 23, 2004).

(5) the need to deter such person and other persons from committing such acts or omissions; and

(6) such other matters as justice may require.[83]

Given the Commission's finding that Respondents violated Exchange Act Section 10(b), Advisers Act Section 206(1), and Exchange Act Rule 10b-5, Respondents necessarily acted with scienter.[84] Because scienter refers to the intent to deceive, manipulate, or defraud,[85] the first public-interest factor supports monetary penalties.

The Oldenkamps and their church together lost over $1.5 million after Rossi induced them to invest based on his material falsehoods about the Fund and its performance and how he would manage their investments. And the four individuals who invested directly in the Fund lost at least $300,000. Respondents are thus directly responsible for serious harm that resulted from their misconduct.[86]

The amount of unjust enrichment, $28,935 in advance performance fees to which Respondents were not entitled, is small compared to the total amount investors lost. And the Division presented no evidence of previous securities violations, injunctions, or convictions. So those two factors weigh in Respondents' favor.

Preventing fraud, especially by investment advisers, lies at the heart of the Commission's investor-protection mission. Given the degree to which the industry and investors must, of necessity, rely on the integrity of industry professionals, especially investment advisers, the Commission's need to

---

[83] *See* 15 U.S.C. § 78u-2(c); *see also* 15 U.S.C. § 80b-3(i)(3). Unlike the other statutes, the Securities Act does not contain a statutory list of public-interest factors. But the statutory factors in the other statutes are an appropriate guide and the Commission relies on the other statutes' listed factors when assessing the public interest under the Securities Act. *See Barbara Duka*, Initial Decision Release No. 1167, 2017 WL 3725300, at *67 & n.66 (ALJ Aug. 29, 2017).

[84] *See SEC v. Steadman*, 967 F.2d 636, 641 & n.3 (D.C. Cir. 1992).

[85] *Aaron v. SEC*, 446 U.S. 680, 686 n.5 (1980).

[86] *See David E. Lynch*, Exchange Act Release No. 46439, 2002 WL 1997953, at *4 (Aug. 30, 2002) (finding that a respondent whose fraud cost customers "at least $1.85 million," had caused substantial losses).

promote honesty and to deter misconduct is high.[87] The fifth factor thus weighs against Respondents.

As to other matters, because they were investment advisers, Rossi and SJL were fiduciaries who owed their investment clients "an affirmative duty of 'utmost good faith, and full and fair disclosure of all material facts,' as well as an affirmative obligation 'to employ reasonable care to avoid misleading' [their] clients."[88] Given investment advisers' fiduciary responsibilities, the Commission has always viewed with particular opprobrium investment advisers who defraud their investment clients.[89]

Respondents thoroughly abused their fiduciary position by lying about the performance of the Fund, omitting that they were investing in a risky manner contrary to what investors had been told, and then covering up their misconduct with false account statements and more lies while they were running the Fund and investors' accounts into the ground.

Rossi knew unhedged options trading could result in significant losses; he "had generated significant losses through" "risky, unhedged options" "trading in the years preceding the launch of the Fund."[90] He also knew that the Algorithm wasn't designed for options trading. And he knew that, despite his representations, there were no stop losses. Yet, knowing the risks and without any notice to investors, Rossi placed the burden of serious losses on his investors' shoulders. And he did so not because he wanted to generate returns for them, but because he wanted to enrich himself so he could cover his personal expenses. Moreover, even if Rossi did not know that (1) unhedged options trading was risky, (2) the Algorithm should be used only for equities,

---

87 *See Montford & Co.*, Advisers Act Release No. 3829, 2014 WL 1744130, at *18 (May 2, 2014) ("Investors in the securities industry place a high degree of trust and confidence in the investment advisory relationship."), *pet. denied*, 793 F.3d 76 (D.C. Cir. 2015); *Alfred Clay Ludlum, III*, Advisers Act Release No. 3628, 2013 WL 3479060, at *4 (July 11, 2013) (holding that "defraud[ing] investors" and "violating the trust placed in a fiduciary amounts to egregious behavior").

88 *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 194 (1963) (footnotes omitted).

89 *See James C. Dawson*, Advisers Act Release No. 3057, 2010 WL 2886183, at *4 (July 23, 2010).

90 OIP at 4.

and (3) there were no stop losses, his ignorance would not excuse sending investors false account statements and tax documents.

Further, although Rossi mentioned remorse three times during the hearing,[91] his statements of contrition ring hollow. Rossi said that he "tried to apologize, and have, to as many people as" he could.[92] Oddly, these "many people" did not include his most aggrieved victims. Rossi claimed that he would like to pay the church back if he could, but it doesn't appear he tried very hard to do so. He also said that he "tried" to contact Mr. Oldenkamp, who ignored him, and that counsel advised him "not to engage anymore."[93]

Considering the foregoing, it is apparent that the public interest weighs in favor of monetary penalties. Because Respondents lied to induce investments and fund Rossi's undisclosed, risky trading and then worked to cover up their lies, maximum third-tier penalties are warranted. For the time period at issue, the maximum third-tier penalty for each violation of the Securities Act for a natural person is $173,437, and for an entity, $838,275.[94] For the Exchange Act and Advisers Act, the maximum amount for a natural person is $189,427, and for an entity, $947,130.[95]

The statutes state that a penalty may be imposed for "each act or omission," but do not define "the precise unit of violation."[96] Because Respondents' misconduct amounts to a continuing course of conduct, I might ordinarily impose penalties based on the number of defrauded investors.[97] Because seven investors were defrauded, the resulting penalty could be as

---

91 Tr. 25, 73, 110.

92 Tr. 26.

93 Tr. 73.

94 Adjustments to Civil Monetary Penalty Amounts, 84 Fed. Reg. 5122, 5123 (Feb. 20, 2019); *see* 17 C.F.R. § 201.1001, tbl.I.

95 84 Fed. Reg. at 5123–24.

96 *Anthony Fields, CPA*, Advisers Act Release No. 4028, 2015 WL 728005, *24 n.162 (Feb. 20, 2015).

97 *See Eric J. Brown*, Advisers Act Release No. 3376, 2012 WL 625874, at *17 (Feb. 27, 2012) ("we believe that imposing a penalty for each defrauded customer is appropriate"), *aff'd sub nom. Collins v. SEC*, 736 F.3d 521 (D.C. Cir. 2013); *Steven E. Muth*, Exchange Act Release No. 52551, 2005 WL 2428336, at *19 (Oct. 3, 2005) (same).

much as $1,325,989 for Rossi and $6,629,910 for SJL. But the Division asks that penalties be imposed based on only the number of statutes violated—three—and proposes basing penalties on the $173,437 figure for violations of the Securities Act by a natural person.[98] This calculation yields a figure of $520,311. Because this is all the Division requests, Respondents voice no objection to the Division's argument, and, as is discussed below, Respondents have not carried their burden to show an inability to pay, I will impose this amount jointly and severally on Rossi and SJL.

2. Rossi and SJL have not carried their burden to show that their liability should be reduced based on an inability to pay.

By statute, a respondent in Commission administrative proceedings may present evidence of his or her inability to pay a monetary penalty and the Commission may, in its discretion, consider that evidence in deciding whether the public interest supports imposing a penalty.[99] Commission Rule of Practice Rule 630(a) provides discretionary authority to "consider evidence concerning ability to pay in determining whether disgorgement, interest or a penalty is in the public interest."[100] Inability to pay, however, "is not dispositive" and "is only one factor that informs [the] determination" of penalties and disgorgement.[101] Respondents bear the burden to show inability to pay.[102]

As I noted in ruling on the parties' motions for summary disposition, although the Commission has not provided specific guidance about how to evaluate whether a respondent has shown an inability to pay, it has repeatedly held that it may decline to waive disgorgement or penalties "when the [relevant] misconduct is *sufficiently* egregious."[103] This means that a

---

98 Division Post-hr'g Br. at 11.

99 15 U.S.C. §§ 77h-1(g)(3), 78u-2(d), 80b-3(i)(4).

100 17 C.F.R. § 201.630(a).

101 *Thomas C. Bridge*, Securities Act Release No. 9068, 2009 WL 3100582, at *25 (Sept. 29, 2009), *pet. denied*, *Robles v. SEC*, 411 F. App'x 337 (D.C. Cir. 2010); *see SEC v. Warren*, 534 F.3d 1368, 1370 (11th Cir. 2008) ("At most, ability to pay is one factor to be considered in imposing a penalty.").

102 *Philip A. Lehman*, Exchange Act Release No. 54660, 2006 WL 3054584, at *4 & nn. 29–30 (Oct. 27, 2006).

103 *Rossi*, 2019 SEC LEXIS 1803, at *16; *see Gregory O. Trautman*, Exchange Act Release No. 61167A, 2009 WL 6761741, at *24 (Dec. 15, 2009) (declining

particularly deceitful respondent will face an uphill battle when seeking to reduce monetary liability based on an inability to pay.[104] But a respondent who shows an inability to pay and whose misconduct is less egregious, or not egregious at all, might succeed in convincing an administrative law judge to exercise his or her discretion to reduce disgorgement or a penalty.

Considering inability to pay thus involves a two-part inquiry. The first question is whether a respondent has shown an inability to pay the imposed disgorgement and penalties. Answering this question requires a comparison of the amounts imposed against the respondent's income, assets, liabilities, and any other factors, such as daily living expenses, that might bear on his or her ability to pay. If the respondent fails to show an inability to pay, the inquiry ends.

If the respondent shows an inability to pay, whether in whole or in part, the next question is whether to credit that inability. The Commission has not explained how to undertake this assessment but in light of the Commission's focus on the egregiousness of the misconduct involved, I've held that the assessment must involve weighing the seriousness or egregiousness of the violation in relation to the Commission's core mission of "'protecting investors[,] … safeguarding the integrity of the markets,'" and "making securities law violations unprofitable."[105]

Rossi fails at both steps.[106] Rossi is gainfully employed and earned more than $100,000 in the year preceding his filing of his Form D-A.[107] He testified that he is $121,000 under water, including obligations to repay personal loans totaling about $55,500.[108] But Rossi, who has the burden on this issue,

---

to reduce a penalty in light of the egregiousness of respondent's actions); *Lehman*, 2006 WL 3054584, at *4.

[104] *See Trento*, 2004 WL 329040, at *4 ("Even accepting Trento's financial report at face value, we find that the egregiousness of his conduct far outweighs any consideration of his present ability to pay a penalty.").

[105] *Rossi*, 2019 SEC LEXIS 1803, at *17 (quoting *Gordon Brent Pierce*, Securities Act Release No. 9555, 2014 WL 896757, at *19 (Mar. 7, 2014)).

[106] Respondents presented no evidence about SJL's ability to pay.

[107] J. Ex. 9 at 95.

[108] Tr. 12–13, 45–46.

provided nothing to document these personal loans.[109] This matters because the loans are from a parent and two friends; they are not the result of arms-length transactions between neutral parties. These circumstances raise questions about the validity of the loans.[110] But there are other reasons to question them, as well.

For starters, Rossi's supposed creditors have been quite generous, continuing to pay for his trips.[111] It is safe to say that neutral parties who are owed money on legitimate loans do not typically afford their debtors such generosity. Moreover, Rossi admitted that as of the time of the hearing, he was not making payments on his father's loan, which carries no interest and is not collateralized.[112] And Rossi only entered into a repayment plan with Ennis after he knew the Commission might initiate this proceeding.[113] On this record, Rossi has not carried his burden to show that these undocumented and uncollateralized loans are valid. I therefore cannot credit these loans.[114]

Adding to the difficulty of crediting Rossi's alleged inability to pay is the fact that Rossi's claimed efforts to limit his spending are best described as half-hearted. For example, Rossi admitted that he normally does not pack a lunch and that he and his daughters "eat out a lot."[115] These expenses are arguably "beyond ordinary, day-to-day living expenses" that might be considered in

---

[109] *See* Tr. 46, 48, 52.

[110] *Cf. Commodity Futures Trading Comm'n v. Wellington Precious Metals, Inc.*, 950 F.2d 1525, 1530 (11th Cir. 1992) (characterizing uncollateralized loans to friends and family as suspicious).

[111] Tr. 96–99.

[112] Tr. 48–49.

[113] Tr. 70–71.

[114] *Cf. Russell C. Schalk, Jr.*, Exchange Act Release No. 32279, 2016 WL 5219501, at *4 (Sept. 21, 2016) (declining to consider alleged out-of-pocket expenses absent supporting documentation); *David Henry Disraeli*, Advisers Act Release No. 2686, 2007 WL 4481515, at *19 (Dec. 21, 2007) ("The vague and unsubstantiated nature of Disraeli's disclosures renders them neither adequate nor credible as a basis for reducing the disgorgement or penalty amounts.").

[115] Tr. 25, 60–61.

determining a respondent's ability to pay.[116] No doubt those he defrauded would rather Rossi forgo expensive meals in favor of making them whole.

Rossi also claims that he owes about $24,000 in credit card debt.[117] He has, however, provided no evidence concerning how he incurred that debt. Because Rossi bears the burden of proof, this failure means there is no basis to consider that debt on the question of his ability to pay.[118]

In addition, cross-examination revealed that Rossi's schedule of assets and liabilities is not completely reliable. Rossi listed as liabilities a loan against a life insurance policy and an auto loan, but failed to list the insurance policy or the car as assets.[119] Rossi also listed expenses for his daughters who are currently in college.[120] But these are necessarily expenses that—every parent hopes—won't last forever.[121]

Finally, I cannot ignore the thousands Rossi spent gambling. This behavior is reminiscent of Rossi's decision, despite his previous experience, to engage in risky options trading. Discounting Rossi's assets by the amount he lost gambling would encourage others to follow Rossi's reckless example.[122]

Rossi thus failed to present sufficient evidence to show that he is unable to pay. And given that Respondents presented no evidence about SJL's ability to pay, Respondents have failed to carry their burden on this issue.

---

[116] *See Schalk*, 2016 WL 5219501, at *3 (noting that Schalk's "credit card debt includes charges beyond ordinary, day-to-day living expenses").

[117] J. Ex. 9 at 94.

[118] *Cf. Schalk*, 2016 WL 5219501, at *3 (declining to consider credit card expenses because Schalk failed to explain the nature of charges reflected in statements).

[119] Tr. 35–39.

[120] J. Ex. 9 at 96; Tr. 95–96.

[121] The parties have not discussed whether or how college expenses for a respondent's children should be weighed in the ability-to-pay analysis. I therefore express no opinion on the issue.

[122] *Cf. Schalk*, 2016 WL 5219501, at *3 (noting that Schalk's "credit card debt includes charges beyond ordinary, day-to-day living expenses, such as thousands of dollars spent at Pimlico Race Course").

But even assuming Respondents had shown an inability to pay, they would fare no better. Under the second step in the inability-to-pay analysis, I would decline to credit Rossi's alleged inability to pay after weighing the seriousness or egregiousness of the violations in relation to the Commission's core mission.[123] Rossi and SJL owed their investment clients a "duty of 'utmost good faith, and full and fair disclosure of all material facts.'"[124] Respondents abused that fiduciary duty and defrauded their investment clients. They lied about the Fund's performance, engaged in risky trading with their clients' funds, and provided false information to cover up their losses, thus dissuading investors from taking action to protect themselves from additional losses. Indeed, Rossi's lies in January 2017, after he had squandered all of the Fund's assets, induced the Oldenkamps to invest an additional $1 million, most of which Rossi promptly wasted through reckless trading. And Respondents engaged in risky trading not in a foolhardy attempt to help their clients, but rather in a reckless attempt to generate more money *for Rossi*.

Further, Rossi's actions—or lack of actions—speak louder than his words of contrition. He said that he would have attempted to pay Mr. Oldenkamp back, *if* Mr. Oldenkamp had asked him to do so.[125] But Mr. Oldenkamp is the victim and the onus should not be on him to ask Rossi to make him whole, particularly because Rossi claims to be remorseful. The same goes for the church. Rossi said that although he had not "spoken to the church[,] *[i]f I could, I certainly would*."[126] But because there is nothing evident that might have stopped him from speaking to a representative of the church, it is apparent that Rossi's professed remorse is meaningless.

Fraudulent conduct by investment advisers typically calls for severe sanctions.[127] Such is the case here.[128] Given the egregiousness of Respondents' conduct, the Commission's mission would be advanced—even if Respondents

---

123 *See Rossi*, 2019 SEC LEXIS 1803, at *17.

124 *Capital Gains*, 375 U.S. at 194 (footnotes omitted).

125 Tr. 73.

126 Tr. 73.

127 *See Dawson*, 2010 WL 2886183, at *6.

128 *Cf. id.* (noting that Dawson "defrauded his advisory clients of more than $300,000 … in a manner designed to avoid detection").

had shown an inability to pay—through the decision to not exercise discretion to credit Respondents' alleged inability to pay.

Record Certification

I certify that the record includes the items set forth in the record index issued by the Secretary of the Commission on December 5, 2019, supplemented by the following filings:[129]

December 11, 2019:	Second Post-hearing Protective Order (AP-6717)
	Joint Exhibits 2, 9–10, 16, and 30–31 (REDACTED)
	Division's redacted version of Rossi Exhibit 3
	Division's redacted version of the hearing transcript
December 19, 2019:	Transcript of December 3, 2019, telephonic post-hearing conference, pages 1–30

Order

Under Section 8A(g) of the Securities Act of 1933, Section 21B of the Securities Exchange Act of 1934, and Section 203(i) of the Investment Advisers Act of 1940, Matthew R. Rossi and SJL Capital, LLC, must jointly and severally PAY A CIVIL MONEY PENALTY in the amount of $520,311.

Under Section 8A(e) of the Securities Act of 1933, Sections 21B(e) and 21C(e) of the Securities Exchange Act of 1934, and Section 203(j) of the Investment Advisers Act of 1940, Matthew R. Rossi and SJL Capital, LLC, must jointly and severally DISGORGE $28,935, plus prejudgment interest. The prejudgment interest owed will be calculated from March 1, 2017, to the last day of the month preceding the month in which payment of disgorgement is made.[130] Prejudgment interest will be computed at the underpayment rate

---

[129] *See* 17 C.F.R. § 201.351(b).

[130] *See* 17 C.F.R. § 201.600(a); OIP at 8 (detailing months Respondents received performance-based fees); *see also Terence Michael Coxon*, Advisers Act Release No. 2161, 2003 WL 21991359, at *14 (Aug. 21, 2003) (ordering "that

of interest established under Section 6621(a)(2) of the Internal Revenue Code, 26 U.S.C. § 6621(a)(2), and compounded quarterly.[131]

Under Commission Rule of Practice 1100, any funds recovered by way of disgorgement, prejudgment interest, or penalties must be placed in a fair fund for the benefit of investors harmed by the violations.[132]

Payment of civil penalties, disgorgement, and interest must be made no later than 21 days following the day this initial decision becomes final, unless the Commission directs otherwise. Payment must 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/ofm; or (3) by certified check, bank cashier's check, bank money order, or United States postal 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(s) and Administrative Proceeding No. 3-19145: 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 must be sent to the Commission's Division of Enforcement, directed to the attention of counsel of record.

This initial decision will become effective in accordance with and subject to the provisions of Rule of Practice 360.[133] Under that rule, a party may file a petition for review of this initial decision within 21 days after service of the initial decision. Under Rule of Practice 111, a party may also file a motion to correct a manifest error of fact within ten days of the initial decision.[134] If a motion to correct a manifest error of fact is filed by a party, then a party has 21 days to file a petition for review from the date of the order resolving such motion to correct a manifest error of fact.

This 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

---

the interest run from the date of the last violation"), *aff'd*, 137 F. App'x 975 (9th Cir. 2005).

131 17 C.F.R. § 201.600(b).

132 17 C.F.R. § 201.1100.

133 17 C.F.R. § 201.360.

134 *See* 17 C.F.R. § 201.111.

files a petition for review or motion to correct a manifest error of fact or the Commission determines on its own initiative to review the initial decision as to a party. If any of these events occur, the initial decision will not become final as to that party.

_____

James E. Grimes
Administrative Law Judge