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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 2446/March 20, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16217

In the Matter of THRASOS TOMMY PETROU	ORDER ON MOTIONS FOR SUMMARY DISPOSITION, GRANTING PROTECTIVE ORDER, AND SETTING PREHEARING CONFERENCE

On October 27, 2014, the Securities and Exchange Commission (Commission) issued an Order Instituting Administrative and Cease-and-Desist Proceedings (OIP) against Respondent Thrasos Tommy Petrou (Petrou), pursuant to Section 21C of the Securities Exchange Act of 1934 (Exchange Act) and Section 203(f) of the Investment Advisers Act of 1940 (Advisers Act). The OIP alleges that between 2009 and 2012, Petrou violated Rule 105 of Regulation M under the Exchange Act (Rule 105). OIP at 2. Attached to the OIP is a chart (Appendix) listing twenty-eight trades made by Petrou in violation of Rule 105. Petrou has admitted making these trades in violation of Rule 105, but opposes the sanctions sought by the Division of Enforcement (Division).

On February 6, 2015, the Division filed its Motion for Summary Division (Div. Motion) and a Declaration of Richard G. Primoff, attached to which were an excerpt of Petrou's September 18, 2014, investigative testimony (Primoff Ex. B), and an excerpt of Petrou's October 8, 2013, investigative testimony (Primoff Ex. C). The Division also filed a Declaration of Elzbieta Wraga (Wraga Decl.), attached to which were a chart similar to the Appendix but with three additional columns (Wraga Ex. A), a copy of the Appendix, and a chart documenting prejudgment interest. Petrou timely filed an opposition to the Division's Motion, and the Division timely filed a reply.

Also on February 6, 2015, Petrou filed his Motion for Summary Division (Petrou Motion), to which were attached, among other documents, an Affidavit of Thrasos Tommy Petrou (Petrou Aff.) and a collection of Petrou's financial records (Petrou Ex. A). The Division timely filed an opposition to Petrou's Motion. Petrou timely filed a reply, to which were attached a second Affidavit of Thrasos Tommy Petrou, 2011 state and federal tax returns (Tax Returns), and a collection of documents associated with the 2014 sale of Petrou's home (Sale Documents) (collectively, Reply).

Discussion

A. Summary Disposition Standard

A motion for summary disposition may be granted if there is no genuine issue with regard to any material fact and the party making the motion is entitled to summary disposition as a matter of law. 17 C.F.R. § 201.250(b). The facts of the pleadings of the party against whom the motion is made shall be taken as true, except as modified by stipulations or admissions made by him, by uncontested affidavits, or by facts officially noticed pursuant to Rule 323. 17 C.F.R. § 201.250(a). The facts on summary disposition must be viewed in the light most favorable to the non-moving party. *See Jay T. Comeaux*, Exchange Act Release No. 72896, 2014 WL 4160054, at *2 (Aug. 21, 2014). However, once the moving party has carried its burden of establishing that it is entitled to summary disposition on the factual record, the opposing party may not rely on bare allegations or denials, but instead must present specific facts showing a genuine and material dispute for resolution at a hearing. *See id*. Such facts may be established by "affidavits or other specific evidence." *China-Biotics, Inc.*, Exchange Act Release No. 70800, 2013 WL 5883342, at *16 (Nov. 4, 2013).

B. Pertinent Findings

1. Petrou's Knowledge

Rule 105 prohibits buying an equity security that is the subject of a covered public offering from an underwriter or broker or dealer participating in the offering, after having sold short the same security during the restricted period. OIP at 2-3 (citing 17 C.F.R. § 242.105). A careful review of the record evidence that may be considered under Rule 250(a) establishes that there is a genuine issue of material fact as to Petrou's state of mind at all relevant times. In particular, Petrou testified in both 2013 and 2014 that he could not remember exactly when Howard Bloom (Bloom)[1] told him that short selling in advance of an offering was illegal. Primoff Ex. B at 30, 32; Primoff Ex. C at 108; *cf.* Primoff Ex. C at 106, 109 (Bloom told Petrou War Chest Capital Partners LLC had a "policy" against short selling in advance of an offering). This is consistent with Petrou's affidavit, in which he states that he "do[es] not have a clear recollection of when the conversation [with Bloom] actually took place." Petrou Aff. at 2. To be sure, Petrou also testified that the conversation took place earlier, while he was still trading in violation of Rule 105. *E.g.*, Primoff Ex. B at 22-23. But viewing the evidence in the light most favorable to Petrou, as I must when considering the Division's Motion, the latest possible date that Petrou could have known that short selling in advance of an offering was illegal was January 2012, when Petrou left Worldwide Capital, Inc. (Worldwide). *See Jay T. Comeaux*, 2014 WL 4160054, at *2; Primoff Ex. C at 108 ("I had already moved from Worldwide at that time, I think."); OIP at 2 (Petrou traded securities for Worldwide until approximately January 2012). Because his last violative trade occurred on January 12, 2012, it is possible that his conversation with Bloom occurred after his last violative trade, and that Petrou was not previously on notice that his trades had violated Rule 105. OIP at 2, Appendix.

[1] This Order spells Bloom's name as it is spelled in the investigative transcripts.

Accordingly, the Division has not shown the lack of a genuine issue of material fact regarding when, or even whether, Petrou knowingly or recklessly violated Rule 105. The "sham affidavit doctrine" is not clearly applicable here because the inconsistent facts are all found in Petrou's investigative testimony. *See Jiminez v. All Am. Rathskeller, Inc.*, 503 F.3d 247, 253 (3d Cir. 2007). I am therefore prepared to find that first-tier civil penalties are appropriate as to all twenty-eight violative trades, but if the Division continues to seek second-tier (or third-tier) civil penalties, additional proceedings will be necessary. *See* 15 U.S.C. § 78u-2(b) (second- and third-tier civil penalties are warranted where, among other prerequisites, a respondent acted with "deliberate or reckless disregard of a regulatory requirement"); 15 U.S.C. § 80b-3(i)(2) (same). Specifically, it seems likely that a live hearing on this subject will be necessary.

2. Disgorgement and Overage Trades

Respondent argues that "the public interest evaluation heavily weighs in not sanctioning" him beyond the censure and cease-and-desist order imposed in the OIP. Petrou Motion at 5-8. But disgorgement is not subject to any public interest test. *See Jay T. Comeaux*, 2014 WL 4160054, at *3 & n.18, *5. "[I]n essence, disgorgement is always in the public interest." *Ambassador Capital Mgmt., LLC*, Initial Decision Release No. 672, 2014 WL 4656408, at *81 (Sept. 19, 2014), *finality notice*, Advisers Act Release No. 3979, 2014 WL 6985132 (Dec. 11, 2014).

The Division has the initial burden of demonstrating "a reasonable approximation of profits causally connected to the violation." *Jay T. Comeaux*, 2014 WL 4160054, at *3; *SEC v. Halek*, 537 F. App'x 576, 581 (5th Cir. 2013). The Division need only show but-for causation between a defendant's violations and profits. *Jay T. Comeaux*, 2014 WL 4160054, at *3; *SEC v. Teo*, 746 F.3d 90, 105-07 (3d Cir. 2014). The 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; *see Halek*, 537 F.3d at 581. The burden of uncertainty as to the amount of unjust enrichment falls on the wrongdoer, and any such uncertainty does not bar disgorgement. *See SEC v. First City Fin. Corp., Ltd.*, 890 F.2d 1215, 1232 (D.C. Cir. 1989); *Jay T. Comeaux*, 2014 WL 4160054, at *3.

Rule 105 is a prophylactic measure designed to prevent manipulative short selling, thereby "foster[ing] secondary and follow-on offering prices that are determined by independent market dynamics and not by potentially manipulative activity." *Short Selling in Connection with a Public Offering*, 72 Fed. Reg. 45094, 45096 (Aug. 10, 2007). Purchasing a quantity of a covered offering that matches the quantity of securities sold short during the restricted period violates Rule 105, and it is entirely reasonable to measure disgorgement as if the purchased securities were used to cover the short sale, even if they were not so used. *See, e.g.*, *SEC v. Colonial Investment Mgmt. LLC*, 659 F. Supp. 2d 467, 486, 491 (S.D.N.Y. 2009) ("Colonial realized a profit of approximately $7,783.23 on the portion of its restricted period short position that it covered with the offered shares."), *aff'd*, 381 F. App'x 81 (2d Cir. 2010).

Thus, disgorgement of at least $225,684.66, representing the trading profits from the matched portions of all twenty-eight trades, plus prejudgment interest, is warranted. *See* Wraga Ex. A; 17 C.F.R. § 201.600(a) ("Prejudgment interest shall be due on any sum required to be

paid pursuant to an order of disgorgement."). But the Division also seeks disgorgement of trading profits from the "overage" portions of violative trades, that is, the portions of offerings that Petrou purchased that exceeded the quantity of securities sold short during the restricted period. Div. Motion at 13-14; Wraga Decl. at 3. There are two problems with the Division's position. First, Petrou has not conceded the accuracy of his trading profits on overage shares; he has only conceded the accuracy of the volume weighted average price (VWAP) corresponding to each offering. *See* Appendix; *cf.* Div. Motion at 14.

Second, the most natural measure of disgorgement for profits on unlawful trading is the difference between actual sale price and actual purchase price. *See, e.g.*, *Colonial Investment Mgmt.*, 659 F. Supp. 2d at 491 (after covering short sales, "Colonial had a long position of 24,500, which it sold [16 days after it purchased the offering] to flatten its position," resulting in a total gain of approximately $137,000). The VWAPs listed in the Appendix, although undisputed, do not appear to be the actual sale prices of any overage securities. Wraga Decl. at 3 (Wraga obtained the VWAP "for each issuer by consulting Bloomberg price information"). Instead, they appear to be the securities' market prices. *Id*. ("the price at which Petrou purchased those offering shares [are] typically at a discount to the [VWAP]"). That Petrou may have had arbitrage opportunities arising from the differences between offering and market prices does not mean that he took advantage of those opportunities. It may be that every overage sale actually produced a loss, in which case Petrou had no ill-gotten gains at all from his overage trades.

In short, although there is no genuine issue of material fact about the appropriate disgorgement and prejudgment interest arising from the matched portions of all twenty-eight trades, I am not satisfied that the Division has carried its initial burden of showing a reasonable approximation of profits causally connected to the violative purchases of overage securities. If the Division seeks disgorgement for the overage trades, additional proceedings will be necessary, although a live hearing on this subject may not be needed.

3. Petrou's Inability to Pay

Petrou contends that he has "little to no ability to pay sanctions." Petrou Motion at 10. Petrou bears the burden of proving inability to pay. *See Philip A. Lehman*, Advisers Act Release No. 2565, 2006 WL 3054584, at *4 (Oct. 27, 2006). In support of his contention, Petrou has submitted extensive financial information. *See generally* Petrou Ex. A; Reply.

Nevertheless, there exists a genuine issue of material fact on this issue. Among other issues, Petrou currently lacks full time employment, but earned a substantial gross income in 2014 by trading securities under an arrangement similar to the one he had with Worldwide. *See* Petrou Aff. at 2-3. Not only is this evidence inconsistent with Petrou's statement that his "ability to trade securities has been severely limited as a result of the Commission's proceedings," it seemingly refutes it. *Id*. at 3. Accordingly, if Petrou continues to seek to prove an inability to pay monetary sanctions, additional proceedings will be necessary, although a live hearing on this subject may not be needed.

4. Protective Order

Petrou requests that the two documents attached to the second Affidavit of Thrasos Tommy Petrou be sealed. These documents contain sensitive financial and personally identifiable information, and the harm resulting from their disclosure would outweigh the benefits of their disclosure. *See* 17 C.F.R. § 201.322(b). Accordingly, they shall be sealed.

Order

It is ORDERED that the Division's Motion and Petrou's Motion are GRANTED IN PART and DENIED IN PART as outlined above.

It is further ORDERED that a telephonic prehearing conference will be held on Friday, March 27, 2015, at 10:00 a.m. EDT, to discuss what additional proceedings may be necessary. If the parties desire a different time for the prehearing conference, they should confer and file a joint motion to change the prehearing conference date or time.

It is further ORDERED that the Tax Returns and Sales Documents attached to the second Affidavit of Thrasos Tommy Petrou shall be disclosed only to Commissioners, employees, and agents of the Commission.

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Cameron Elliot
Administrative Law Judge