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BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, DC

In the Matter of the Application of

Positron Corporation

For Review of Denial of Company-Related Action by

FINRA

File No. 3-15837

FINRA'S SUPPLEMENTAL BRIEF IN OPPOSITION TO POSITRON CORPORATION'S APPLICATION FOR REVIEW

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July 31, 2014

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FINRA respectfully requests that the Commission grant it leave to file this supplemental brief in opposition to Positron Corporation's ("Positron") application for review. The supplemental brief is necessary, and should be accepted by the Commission, because of arguments raised by Positron for the first time in its reply brief. Specifically, Positron relies on new authority issued in the federal civil action that served, in part, as the basis for FINRA's denial of the firm's request for FINRA to process documentation related to a 1-100 reverse stock split and change in domicile from Texas to Delaware (the "Company-Related Action").[1]

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[1] "RP" refers to the record page in the certified record. "Reply Br." refers to the referenced page in Positron's reply brief. On January 24, 2014, Positron filed an application with FINRA to process the Company-Related Action. RP 47-52. On March 27, 2014, FINRA denied Positron's application based on FINRA Rule 6490(d)(3)(3). RP 351-355. FINRA provided two bases under FINRA Rule 6490(d)(3)(3) to deny Positron's request. RP 352-353. First, FINRA had actual knowledge that the Commission had filed a federal civil action (the "Federal Civil Action") in the United States District Court for the Northern District of Illinois (the "District Court") against Positron's Chairman and CEO, Patrick G. Rooney ("Rooney"), and the investment adviser that Rooney founded, owned, and managed, Solaris Management, LLC ("Solaris Management"). RP 352-353. Second, FINRA had actual knowledge that the Commission had instituted administrative proceedings (the "SEC Regulatory Action") against Rooney pursuant to Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") to

[Footnote Continued on Next Page]

Positron argues that a Memorandum Opinion (the "Memorandum Opinion") issued by the District Court in the Federal Civil Action on July 14, 2014 renders FINRA's denial moot.[2] Reply Br. at 2.

Positron's argument is deeply flawed. The Memorandum Opinion, which ordered Rooney to pay disgorgement, jointly and severally with Solaris Management, to pay an individual civil penalty, and to serve a conditional officer and director bar, does not undermine the bases for FINRA's denial of the Company-Related Action. Rather, the District Court's Memorandum Opinion serves only to bolster the public interest aspects of FINRA's decision and demonstrates that Positron's proposed Company-Related Action poses a substantial risk to the investing public.

A. The District Court's Memorandum Opinion in the Federal <u>Civil Action</u>

In the Memorandum Opinion, the District Court found that Rooney deceived investors by abandoning Solaris Opportunity Fund LP's ("Solaris Opportunity Fund") non-directional strategy and funneling over $3 million of the hedge fund's invested funds into Positron, "where Rooney served as Chairman since 2004 and [CEO] since 2009." *See* Memorandum Opinion at 2. The District Court explained that Rooney funneled the funds from Solaris Opportunity Fund to

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[Cont'd]

determine whether Rooney should be subjected to a suspension or bar as an investment adviser. RP 353. The SEC Regulatory Action is pending before the Commission. *See Patrick G. Rooney*, Administrative Proceedings Rulings Release No. 1352, 2014 SEC LEXIS 1149, at *1 (Apr. 1, 2014); *Patrick G. Rooney*, Investment Advisers Release No. 3751, 2014 SEC LEXIS 102, at *1 (Jan. 8, 2014).

[2] The Memorandum Opinion is attached as Appendix A.

Positron in the form of undisclosed loans, which he later converted into Positron preferred stock. *See* Memorandum Opinion at 2.

The District Court noted that Rooney received a salary and compensation from Positron, Rooney failed to disclose the conflict of interest that stemmed from his roles as Positron's Chairman and CEO and Solaris Opportunity Fund's investment adviser, and Rooney failed to file the proper notification with the Commission once Solaris Opportunity Fund became a majority shareholder of Positron. *See* Memorandum Opinion at 2. The District Court also stressed that Rooney's misconduct not only deprived Solaris Opportunity Fund and its investors of impartial advice, but also helped Positron maintain viability as a public company, despite the company's severe debt. *See* Memorandum Opinion at 2-3.

In imposing the sanctions for Rooney's and Solaris Management's misconduct, the District Court underscored the reasons for the permanent injunction that the District Court imposed against Rooney on December 19, 2013. The District Court prohibited Rooney from operating any private investment fund, and it conditionally barred him from serving as an officer or director of any public company, except for Positron. *See* Memorandum Opinion at 1, 10-13; RP 27-32. The District Court also ordered Rooney and Solaris Management to pay, jointly and severally, disgorgement of $715,700 and prejudgment interest of $166,476, and ordered Rooney to pay a "third tier" civil penalty of $715,700. *See* Memorandum Opinion at 1.

B. The Adjudication of the Federal Civil Action Does Not Render FINRA's Action Moot

In its reply brief, Positron argues that the Federal Civil Action has been fully adjudicated, and the District Court did not bar Rooney from acting as an officer or director of Positron. Positron therefore asserts that the bases of FINRA's denial of the Company-Related Action are moot. Reply Br. at 2.

Positron misconstrues FINRA's action. As an initial matter, FINRA's decision to deny Positron's Company-Related Action imposes no sanction or penalty upon Positron, Rooney, or any individual associated with Positron. Although FINRA's action denied Positron's request to process the Company-Related Action, it did not prohibit Rooney from serving as an officer or director of *any* company, including Positron. *Cf. Eric J. Weiss*, Exchange Act Release No. 69177, 2013 SEC LEXIS 837, at *45 (Mar. 19, 2013) (stating that FINRA's decision imposes no penalty because "Weiss remains free to restart the association process with a different firm at any time.").

FINRA's decision also did not prohibit or prevent Positron from undertaking any Company-Related Action permitted by and consistent with the federal securities laws and FINRA's rules. *Cf. Eagle Supply Group, Inc.*, 53 S.E.C. 480, 485 n. 12 (1998) ("Eagle argues that the NASD has effectively established a rule . . . that prevents an entity's securities from being listed if an officer or director engaged in prior criminal or civil violations of the federal securities laws. We disagree."). In short, to the extent that the District Court's Memorandum Opinion permits Rooney to remain as an officer or director of Positron, that decision has no bearing on this case.

C. This Case Remains Ripe for the Commission's Adjudication

The Memorandum Opinion does not render FINRA's denial of the proposed Company-Related Action moot. The Commission must determine whether FINRA properly exercised its discretion under FINRA Rule 6490(d)(3)(3) to deny Positron's request for the Company-Related Action based on the then-pending, now final, Federal Civil Action. *See* FINRA Rule 6490(d)(3)(3) (permitting FINRA to exercise discretion and deny an issuer's request for Company-Related Action when "FINRA has actual knowledge that the issuer, associated persons, officers, directors . . . are the subject of a pending, adjudicated or settled regulatory action or . . . a civil or criminal action related to fraud or securities laws violations . . . ."). The Commission also must determine whether FINRA properly exercised its discretion under FINRA Rule 6490(d)(3)(3) to deny Positron's application based on the pending SEC Regulatory Action, which may result in Rooney's suspension or bar as an investment adviser under Section 203(f) of the Investment Advisers Act of 1940. *See* 15 U.S.C. § 80b-3(f). Although the District Court's Memorandum Opinion resolved the matter pending before that court, it did not resolve the matter concerning FINRA's denial of the company's request for the Company-Related Action.

The resolution of the Federal Civil Action also did not vindicate or otherwise absolve Rooney of liability for fraud and securities laws violations that served as the basis, in part, for FINRA's action. To the contrary, the District Court concluded that Rooney, the CEO and Chairman of Positron, violated the federal securities laws and engaged in fraud to benefit himself and Positron, and it imposed a conditional bar and substantial amounts in disgorgement, prejudgment interest, and civil penalties to emphasize the seriousness of Rooney's misconduct.[3] Indeed, highlighting the risks to the investing public that remain present here, the District Court explained, "Rooney engaged in 'fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement,' and the violation 'resulted in substantial losses or created a significant risk of substantial losses to other persons.'" Memorandum Opinion at 7 (quoting 15 U.S.C. §§ 77t(d)(2)(c), 78u(d)(3)(B)(iii) (2014)).

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3 The District Court stressed that Rooney's and Solaris Management's misconduct benefitted Positron. *See* Memorandum Opinion at 6. The District Court explained that, "Absent Defendants' misconduct, it is unlikely Positron would have even existed in 2008 because of the millions of dollars' worth of debt that the company began to accumulate from 2005 to 2008. It was these debts that Defendants attempted to satisfy when they made the decision to improperly funnel over $3 million dollars of the Fund's assets into Positron." Memorandum Opinion at 6.

This appeal focuses on FINRA Rule 6490 and FINRA's discretion in the processing of Company-Related Actions pursuant to the rule. FINRA properly exercised its discretion under FINRA Rule 6490 to monitor and root out a proposed Company-Related Actions for which there were indicators of potential fraud. In this instance, Rooney, Positron's Chairman and CEO, was the subject of a pending, adjudicated, and settled Federal Civil Action and SEC Regulatory Action. The adjudicated Federal Civil Action and pending SEC Regulatory Action each invoked FINRA Rule 6490(d)(3)(3), and FINRA properly exercised its judgment under the rule to deny Positron's request for the Company-Related Action. The Commission therefore should dismiss Positron's application for review.

Respectfully Submitted,

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July 31, 2014

APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,	)	
Plaintiff,	)	
v.	)	11 C 8264
PATRICK G. ROONEY and SOLARIS MANAGEMENT, LLC,	)	
Defendants.	)	

MEMORANDUM OPINION

CHARLES P. KOCORAS, District Judge:

This matter comes before the Court on the motion for disgorgement, penalties and other relief of Plaintiff United States Securities and Exchange Commission ("SEC") against Defendants Patrick G. Rooney ("Rooney") and Solaris Management, LLC ("Solaris Management") (collectively "Defendants"). For the following reasons, the Court orders disgorgement of $715,700 plus prejudgment interest of $166,476 against Defendants on a joint and several basis, a civil penalty of $715,700 against Rooney, and a conditional officer and director bar against Rooney.

BACKGROUND

The following facts are drawn from the SEC's complaint, which Defendants agreed they would not contest pursuant to the consent judgment. According to the complaint, Rooney is the founder, sole owner, and managing partner of Solaris

Management. Solaris Management served as the investment adviser to Solaris Opportunity Fund, and the Solaris Offshore Fund (collectively the "Fund"). The Fund was promoted and sold to investors as a "non-directional" fund, meaning its strategy was to use options and futures to offset risk and capitalize on shorter timeframes.

The complaint states that Rooney deceived investors by abandoning the Fund's non-directional strategy and funneling all the Fund's money into a publicly owned penny stock company called Positron Corporation ("Positron"), where Rooney served as Chairman since 2004 and Chief Executive Officer since 2009. Rooney received a salary and compensation from Positron. However, Rooney failed to disclose his roles at Positron to the Fund's investors.

Beginning in February 2005 and continuing through November 2008, Rooney funneled over $3 million of undisclosed loans into Positron, many of which Rooney later converted into Positron preferred stock. In 2007 and 2008, Rooney significantly increased the Fund's investment in Positron. Rooney did all of this without disclosing to investors that he was deviating from the non-directional strategy or that he had a conflict of interest. By November 2008, the Fund owned sixty percent of Positron's shares. Rooney failed to file the proper notification with the SEC once the Fund became a majority shareholder of Positron.

Defendants' misconduct not only deprived the Fund and its investors of impartial advice, but also helped maintain Positron's viability as a public company even though the company was in severe debt. During the time of the Fund's investments, Positron reported significant losses—a \$3.8 million net loss in 2005, a \$6.6 million net loss in 2006, a \$7.8 million net loss in 2007, and a \$8.9 million net loss in 2008.

On November 18, 2011, the SEC brought this lawsuit against Defendants alleging violations of the antifraud provisions of the Investment Advisers Act of 1940 (the "Advisers Act"), the Securities Act of 1933 (the "Securities Act"), and the Securities Exchange Act of 1934 (the "Exchange Act"). On December 19, 2013, this Court entered a partial judgment against Defendants permanently enjoining Defendants from violating securities laws. The consent judgment also provides that the Court shall determine: (i) whether it is appropriate to order disgorgement of ill-gotten gains and a civil penalty from Defendants, and if so, the amounts of disgorgement and civil penalty; and (ii) whether Rooney should be prohibited from acting as an officer and director of a public company. The consent judgment further provides that Defendants are precluded from: (i) arguing that they did not violate securities laws as alleged in the complaint; (ii) challenging the validity of the consent judgment; (iii) contesting the allegations in the complaint for purposes of this disgorgement motion.

In the instant motion, the SEC seeks a final order for the following: (i) disgorgement of \$715,700 against Defendants on a joint and several basis; (ii) prejudgment interest of \$166,476 against Defendants on a joint and several basis;

(iii) a civil penalty of $715,700 against Rooney; and (iv) an officer and director bar against Rooney.

DISCUSSION

I. Disgorgement Plus Prejudgment Interest

Pursuant to the consent judgment, the Court will accept the allegations in the complaint as true for the purpose of determining appropriate relief. The SEC seeks disgorgement of $715,700 against Defendants jointly and severally for fees paid by the Fund to Defendants since January 1, 2008 (the "Fees"). Disgorgement plus interest are remedies available to prevent defendants from profiting from their illegal securities activities. 15 U.S.C. §§ 77t(d), 78u(d)(3). Disgorgement is an equitable remedy that takes ill-gotten gains from a wrongdoer so that he does not profit from his misconduct. *See SEC v. Lipson*, 278 F.3d 656, 662-63 (7th Cir. 2002). "The simple question is whether the profits, fees, and other compensation derived from wrongdoing." *SEC v. Capital Solutions Monthly Income Fund, LP*, CIV. 10-3995 DWF/JJK, 2014 WL 2922644 (D. Minn. June 27, 2014) (internal quotation marks and citations omitted). The SEC bears the burden of proving that its disgorgement figure reasonably approximates the amount of profits causally connected to the violation. *SEC v. Michel*, 521 F. Supp. 2d 795, 830-31 (N.D. Ill. 2007). The burden shifts to Defendants to prove the approximation is inaccurate. *SEC v. Black*, 04 C 7377, 2009 WL 1181480, at *2 (N.D. Ill. Apr. 30, 2009).

Defendants insist that the SEC does not satisfy its burden of establishing that the Fees are related, or causally connected, to Defendants' alleged misconduct because Solaris Management was entitled to the Fees regardless of what investments the Fund made. Defendants also contest the $715,700 amount and claim that Solaris Management only collected part of its 2007 fees that year and thus, the remainder of the 2007 fees should be subtracted because they were paid to Solaris Management in 2008 instead. Based on these calculations, Defendants state that $224,666 is the most they should be required to disgorge.

Moreover, Defendants assert that the Positron investment did not generate any additional management or incentive fees that Solaris Management would not have received otherwise. Defendants also aver that the SEC provides no evidence that indicates that the Solaris Management investors would have refused to pay the management and incentive fees had they learned earlier about the Positron investments. In other words, Defendants maintain that the disgorged profits that the SEC seeks are unrelated to alleged fraud.

Defendants' arguments fail. It is clear that the $715,700 amount reasonably approximates the profits sought by the SEC and derived from Defendants' wrongdoing. With respect to Defendants' request for this Court to decrease the disgorgement amount to $224,666, the SEC could have requested all fees received by Defendants generated as a result of their undisclosed conflict of interest or all money invested in the Fund that was obtained through Defendants' misrepresentations.

However, the SEC acted reasonably when it limited the disgorgement amount to reflect the Fees paid by the Fund to Defendants since January 1, 2008. The $715,700 disgorgement amount is deemed reasonable and will stand.

As for whether the $715,700 is causally connected to Defendants' violations, Defendants' misrepresentations to investors about the Fund's strategy, in addition to the undisclosed conflict of interest between Defendants and Positron, did not have this merely incidental effect that Defendants unsuccessfully attempt to convey in their response. Absent Defendants' misconduct, it is unlikely Positron would have even existed in 2008 because of the millions of dollars' worth of debt that the company began to accumulate from 2005 to 2008. It was these debts that Defendants attempted to satisfy when they made the decision to improperly funnel over $3 million dollars of the Fund's assets into Positron. If Defendants elected to abide by federal securities laws, this Court is convinced that they would have not have acquired these ill-gotten gains that they now claim are unrelated to the alleged fraud. Also, it is important to remember that Rooney benefited from having the Fund invest money into Positron, which paid him a salary and other forms of compensation. Therefore, this Court finds that disgorgement is appropriate and that the SEC has sufficiently shown that the profits were causally connected to the fraud. Defendants fail to show that the approximation is inaccurate.

As for the prejudgment interest, Defendants' consent judgment provides that in the event disgorgement is ordered, they would pay prejudgment interest based on the

IRS rate for underpayment of taxes calculated from August 1, 2008. Since disgorgement is appropriate, prejudgment interest will be also ordered. This Court adopts the SEC's computations of $715,700 in disgorgement and $166,476 in prejudgment interest (which the SEC accurately changed in its reply to reflect Defendants' objection to the calculations found in the SEC's initial motion).

II. Civil Penalty

The second issue for the Court to consider is whether the imposition of a civil penalty against Rooney is appropriate, and if awarded, the proper amount. The SEC asks for a third tier penalty equivalent to the amount of disgorgement sought, $715,700. The SEC is authorized to seek, and the Court is authorized to impose "upon a proper showing" civil penalties for the securities law violations. 15 U.S.C. §§ 77t(d)(1), 78u(d)(3)(A). A third tier penalty can be imposed by the court if Rooney engaged in "fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement," and the violation "resulted in substantial losses or created a significant risk of substantial losses to other persons." 15 U.S.C. §§ 77t(d)(2)(C), 78u(d)(3)(B)(iii). When deciding whether to impose civil penalties and the amount of such penalties, a court often will consider several factors, including: (i) the egregiousness of the defendant's conduct; (ii) the degree of the defendant's scienter; (iii) whether the defendant's conduct created substantial losses or the risk of substantial losses to another person; and (iv) whether the penalty should be reduced due to the defendant's demonstrated current and future financial condition. *SEC v. Milligan*, 436 F. App'x 1, 3 (2d Cir. 2011) (citation omitted).

A third tier civil penalty is appropriate. The conduct by Rooney clearly constituted fraud, deceit and manipulation, resulting in substantial losses to investors who now own an illiquid investment. Although Defendants claim that there is a "realistic possibility" that the Fund's investors could break even on their investments if the Fund liquidates its Positron position at $0.015, the Court refuses to allow this conjecture distract it from focusing on the facts in the complaint that detail the significant losses the Fund's investors endured because of Defendants' misconduct. Rooney's claim of poverty is a factor that has been considered, however this Court refuses to reduce the penalty since Rooney will be permitted to continue working at Positron as detailed in Part IV, *infra*. The Court acknowledges the substantial nature of a $715,700 civil penalty against Rooney, but his financial condition is merely one factor in the Court's analysis.

III. Joint and Several Liability

The SEC asks that Defendants be held jointly and severally liable for the disgorgement. Defendants ask that if penalties and disgorgement are awarded, that they be apportioned between Solaris Management and Rooney because Solaris Management is a validly formed limited liability company and the SEC has failed to establish why the Court should disregard its corporate entity status.

Joint and several liability for disgorgement is proper when two or more persons cooperate with, and aid each other in the commission of illegal conduct. *SEC v.* Calvo, 378 F.3d 1211, 1215 (11th Cir. 2004). When such cooperation is established the court can hold all such tortfeasors jointly and severally liable for the entire amount of damages caused by all, unless liability can be reasonably apportioned. *SEC v. Homa*, 99 C 6895, 2004 WL 1474580, at *1 (N.D. Ill. June 28, 2004). The burden is on the tortfeasor to establish that the liability is capable of apportionment. *United States v. Acan Aluminum Corp.*, 964 F.2d 252, 269 (3d Cir. 1992). Generally, apportionment is difficult or even practically impossible because the defendants have engaged in complex and heavily disguised transactions. *SEC v. Hughes Capital Corp.*, 124 F.3d 449, 455 (3d Cir. 1997). Very often the defendants move funds through various accounts to avoid detection, use several nominees to hold securities or improperly deprived profits, or intentionally fail to keep accurate records and refuse to cooperate with investigators in identifying the illegal profits. *Id.*

In the instant matter, Defendants fail to meet their burden of establishing that the liability can be apportioned. In fact, throughout their response, Defendants reiterate that the SEC has not presented argument or supportive authority as to why the Court should disregard Solaris Management's corporate entity status. However, it is Defendants' burden to establish the manner in which liability should properly be apportioned. Besides their mere assertion that the civil penalty should be split based on the limited liability status of Solaris Management, Defendants do not provide any evidence for this Court to reasonably allocate the blame between Solaris Management and Rooney. Rooney is the founder, sole owner, and managing partner of Solaris Management. This Court is not persuaded by Defendants' assertion that there is a meaningful difference between Rooney and Solaris Management's liability. Therefore, this Court refuses to split the disgorgement amount, prejudgment interest, or the civil penalty (imposed against Rooney only) between Defendants. Defendants are joint and severally liable for the full amount of disgorgement plus prejudgment interest. Rooney is liable for the full amount of the civil penalty.

IV. Officer and Director Bar

The SEC requests that this Court permanently bar Rooney from serving as an officer of director of a public company. Section 21(d)(1) of the Exchange Act, 15 U.S.C. § 78u(d)(1), gives courts the authority to prohibit individuals from serving as officers and directors of public companies. The section provides:

> Whenever it shall appear to the Commission that any person is engaged or is about to engage in acts or practices constituting a violation of any provision of this chapter, the rules or regulations thereunder ... it may in its discretion bring an action ... to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond.

15 U.S.C. § 78u(d)(1). A court may impose an officer and director bar "if the person's conduct demonstrates unfitness to serve as an officer or director." 15 U.S.C. § 78u(d)(2). The bar may be conditional or unconditional, and permanent or for a period of time. *Id.*

Rooney asks this Court not to implement an officer and director bar because his conduct fails to satisfy the six-factor test. In determining a defendant's fitness as an officer or director, a court may consider: "(1) the 'egregiousness' of the underlying securities law violation; (2) the defendant's 'repeat offender' status; (3) the defendant's 'role' or position when he engaged in the fraud; (4) the defendant's degree of scienter; (5) the defendant's economic stake in the violation; and (6) the likelihood that misconduct will recur." *SEC v. Black*, 04 C 7377, 2008 WL 4394891, at *21 (N.D. Ill. Sept. 24, 2008) (citing *SEC v. First Pac. Bancorp*, 142 F.3d 1186, 1194 (9th Cir. 1998) and quoting *SEC v. Patel*, 61 F.3d 137, 141 (2d Cir. 1995)). These factors are not exclusive, nor is it necessary to apply all of these factors in every case. *Patel*, 61 F.3d at 141. "A district court should be afforded substantial discretion in deciding whether to impose a bar to employment in a public company." *Id.* The Second Circuit reminded other courts that "before imposing a permanent bar, a court should also 'consider whether a conditional bar (e.g. a bar limited to a particular industry) and/or a bar limited in time (e.g. a bar of five years) might be sufficient, especially where there is no prior history of unfitness." *Id.* at 142.

This Court concludes that a permanent officer and director bar in this case is not warranted. *See U.S. SEC v. Boey*, 07-CV-39-SM, 2013 WL 3805127 (D.N.H. July 22, 2013) ("A lifetime bar. . . is an extraordinary remedy, usually reserved for those defendants who engaged in prior securities violations, and under circumstances suggesting the likelihood of future violations.") (citations omitted). Rather, this Court finds that a conditional bar is sufficient. Rooney is prohibited from operating another private fund and barred from serving as an officer or director of any other public company except for Positron.

The SEC argues that the Court should be concerned with Rooney's checkered history in the industry and his attempts to sanitize his misconduct. In the past, Rooney has been fined by the Chicago Board Options Exchange ("CBOE"). However, these CBOE violations did not occur when Rooney was serving as an officer or director and technically are not federal securities law violations. Additionally, even though Rooney acted with a high level of scienter and his conduct of funneling over $3 million of the Fund's assets into Positron while he served the important role as investment adviser was quite egregious, the Court concludes that the likelihood of recidivism is low. Rooney has consented to a permanent injunction from violating the securities laws and he has made assurances that he will not commit any future violations. The Court will hold him to both the consent judgment and his word.

Since the *Patel* factors are not exclusive, the Court has considered other reasons for its imposition of a conditional bar as opposed to a permanent bar. As for the status of Positron as a viable public company, a permanent bar prohibiting Rooney from continuing to attempt to stabilize Positron would surely impair the company's future, as well as negatively affect its shareholders' interests. Furthermore, based on Rooney's status as the father of three dependent sons and the caretaker of his ailing domestic partner, this Court finds that Rooney should be able to continue to support his family with the salary he earns at Positron while simultaneously satisfying disgorgement plus prejudgment interest and the civil penalty ordered by this Court.

CONCLUSION

For the foregoing reasons, the Court orders disgorgement of $715,700 plus prejudgment interest of $166,476 against Defendants on a joint and several basis, a civil penalty of $715,700 against Rooney, and a conditional officer and director bar against Rooney.

Charles P. Kocoras

Charles P. Kocoras
United States District Judge

Dated: July 14, 2014