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SECURITIES AND EXCHANGE COMMISSION
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February 5, 2015

By United Parcel Service

Mr. Brent J. Fields, Secretary
Office of the Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549

RE: In the Matter of Thrasos Tommy Petrou
Admin Proc. File No. 3-16217

Dear Mr. Fields:

Enclosed please find for filing in the referenced proceeding the original and three copies of the following documents:

(1) The Division of Enforcement's Motion for Summary Disposition Pursuant to Commission Rule 250 and Supporting Memorandum of Law;

(2) Declaration of Richard G. Primoff dated February 5, 2015 with attached Exhibits A through C; and

(3) Declaration of Elzbieta Wraga dated February 4, 2014 with attached Exhibits A through C.

Each of the enclosed also attaches the original or copy of the Certificate of Service. Copies of the enclosed have also been served today on Respondent's counsel, and the Court, by email and by UPS overnight delivery.

Respectfully submitted,

Richard G. Primoff

cc.: The Hon. Cameron Elliot (By email and UPS)
Elliot Lutzker, Esq. (By email and UPS)

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

Administrative Proceeding
File No. 3-16217

In the Matter of	
THRASOS TOMMY PETROU,	
Respondent.	

THE DIVISION OF ENFORCEMENT'S MOTION FOR SUMMARY DISPOSITION PURSUANT TO COMMISSION RULE OF PRACTICE 250 AND SUPPORTING MEMORANDUM OF LAW

DIVISION OF ENFORCEMENT
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The Division of Enforcement (the "Division") moves, and respectfully submits this Memorandum of Law, together with the Declaration of Richard G. Primoff dated February 5, 2015 ("Primoff Dec.") and the Declaration of Elzbieta Wraga dated February 4, 2015 ("Wraga Dec."), in support of its motion, for summary disposition against Respondent pursuant to Commission Rule of Practice 250 and the Court's December 1, 2014 Scheduling Order.

PRELIMINARY STATEMENT

Respondent has admitted for purposes of this proceeding that from December 16, 2009 to January 12, 2012 (the "Relevant Period"), he violated Rule 105 of Regulation M of the Securities Exchange Act (the "Exchange Act"), 17 C.F.R. § 242.105 ("Rule 105") on twenty-eight occasions in connection with twenty separate covered stock offerings. He did so by selling short the stock of those issuers during the restricted period in advance of their offerings, and then obtaining stock in those same offerings.

The Commission, on consent, has censured Petrou for his unlawful conduct, and ordered him to cease and desist from future violations of Rule 105 of Regulation M of the Exchange Act, pursuant to the Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940, Making Findings, Imposing a Cease-and-Desist Order and Remedial Sanctions, and Notice of Hearing, dated October 27, 2014 (the "Order"). (Primoff Dec. Exh. A.) The only issues remaining for resolution by the Court are the appropriateness and amount of disgorgement, prejudgment interest and civil money penalties to be ordered under Section 21B(b) of the Exchange Act [15 U.S.C. § 78u-2(b)] and Section 203(i) of the Investment Advisers Act of 1940 (the "Advisers Act") [15 U.S.C. § 80b-3(i)].

These issues are appropriate for resolution by the Court on this motion. First, there is and can be no dispute as to the substantial amount of ill-gotten gains Petrou received from his violative trading. As discussed below, based on the price and quantities of his violative trades set forth in the Appendix to the Order – all of which are conceded by Respondent in this proceeding – Petrou obtained $ 254,855.66 in unlawful profits from his misconduct. The Division requests an order of disgorgement in this amount, and prejudgment interest thereon through February 28, 2015 in the amount of $42,982.77, or $43,738.00 through March 31, 2015.

The Court should also grant the Division's motion for summary disposition as to civil money penalties under Section 21B(a) of the Exchange Act, [15 U.S.C. § 78u-2(a)], and Section 203(i)(1) of the Advisers Act, [15 U.S.C. § 80b-3(i)(1)]. Scienter is not an element of a Rule 105 violation, but Petrou's testimonial admissions establish beyond dispute that for at least the sixteen of his twenty-eight violations that began on March 29, 2011, Petrou violated Rule 105 deliberately, or at minimum with reckless disregard for its regulatory requirements. For this reason, the Division requests that the Court impose maximum second-tier penalties of $75,000 for each of these sixteen trades ($1,200,000). As issues of fact may exist with respect to Petrou's scienter for the twelve violations occurring before March 29, 2011, the Division requests that the Court order maximum first-tier penalties of $7,500 per violation ($90,000), for a total civil money penalty of $1,290,000.

In the alternative, should the Court, notwithstanding the foregoing, decline to award second-tier penalties on this motion for summary disposition, the Division requests that the Court impose the maximum first-tier penalty for each of the twenty-eight violations at issue, for a total civil penalty in the amount of $210,000.

RULE 105

The fundamental goal of Rule 105 is "protecting the independent pricing mechanism of the securities market so that offering prices result from the natural forces of supply and demand unencumbered by artificial forces." *Short Selling in Connection with a Public Offering,* Exchange Act Release No. 34-56206, 72 Fed. Reg. 45094, 2007 SEC LEXIS 1744, at *1-2 (Aug. 6, 2007). The Commission has observed, for example, that "the offering prices of follow-on and secondary offerings are priced at a discount to a stock's closing price prior to pricing," which "provides a motivation for a person who has a high expectation of receiving offering shares to capture this discount by aggressively short selling just prior to pricing and then covering the person's short sales at the lower offering prices with securities received through an allocation." *Id.* at *20.[1] Such short selling "can artificially depress market prices which can lead to lower than anticipated offering prices, thus causing an issuer's offering proceeds to be reduced." *Id.* at *2.

Rule 105 is intended to prevent the potential for such manipulation, and therefore makes it unlawful for a person to purchase equity securities in a covered public offering from an underwriter or broker or dealer participating in the offering, if that person sold short the security that is the subject of the offering during the defined restricted period. 17 C.F.R. § 242.105; *see also Short Selling*, *supra*, 2007 SEC LEXIS 1744, at *63. The restricted period is the shorter of the period: (1) beginning five business days before the pricing of the offered securities and

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[1] "A secondary offering – also referred to as a 'follow-on offering' – is an issuance of shares by a company that already has had an initial public offering. Shares from secondary offerings are often sold to buyers, such as institutional investors or retail networks, through a 'syndicate,' consisting of lead managers ('book runners') among other members. The syndicate members are broker-dealers who underwrite the secondary offering." *SEC v. Colonial Inv. Mgmt. LLC*, 659 F. Supp. 2d 467, 471 (S.D.N.Y. 2009), *aff'd*, 09 Civ. 3503, 381 Fed. App'x 27, 2010 U.S. App. LEXIS 12394 (2d Cir. 2010).

ending with such pricing; or (2) beginning with the initial filing of a registration statement or notification on Exchange Act Form 1-A or Form 1-E and ending with the pricing. 17 C.F.R. § 242.105; 2007 SEC LEXIS 1744, at *63-64.

"Rule 105's prohibitions are prophylactic and apply irrespective of a short seller's intent in effecting the short sale." *Colonial Inv. Mgmt.*, 659 F. Supp. 2d at 499 (noting that the Commission determined that "'a prophylactic approach to anti-manipulation regulation is the most effective means to protect the integrity of the offering process by precluding activities that could influence artificially the market for the offered security'" (quoting *Anti-Manipulation Rules Concerning Securities Offerings*, Securities Act Release No. 33-7375, Exchange Act Release No. 34-38067, Investment Company Act Release No. IC-22412, 62 Fed. Reg. 520, 1996 SEC LEXIS 3482, at *6 (Dec. 20, 1996))); *see also Short Selling, supra,* 2007 SEC LEXIS 1744, at *2 ("Rule 105 is prophylactic. Thus, its provisions apply irrespective of a short seller's intent.").

STATEMENT OF UNDISPUTED FACTS[2]

Petrou, age 41, is a resident of Brooklyn, New York. From approximately April 2008 to January 2012, Petrou traded securities for Worldwide Capital, Inc. ("Worldwide"), and from approximately September 2010 to February 2013, he traded securities for an unregistered investment fund managed by War Chest Capital Partners LLC ("War Chest"). (Order ¶ 2.)

During the Relevant Period, Worldwide was a Delaware corporation with its principal place of business in Nassau County, New York, and the *alter ego* of Jeffrey W. Lynn, who formed it for the purpose of trading his own capital. Worldwide and Lynn were the subjects of a recent settled Commission action against them for their violations of Rule 105. *Worldwide*

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[2] The following statement of facts is based on the stipulated factual record set forth in the Order, as well as the testimonial admissions of Respondent.

Capital, Inc., File No. 3-15772, Exchange Act Release No. 34-71653, 108 SEC Docket 8, 2014 SEC LEXIS 831 (Mar. 5, 2014). (Worldwide and Lynn are collectively referred to hereafter as Worldwide.) (Order ¶ 3.)

War Chest was a Delaware limited liability company with its principal place of business in New York, New York. At all relevant times, War Chest provided investment advisory services to one unregistered domestic investment fund with total assets under management of approximately $8 million ("the War Chest fund"). War Chest was the subject of a Commission enforcement action for its violations of Rule 105, *War Chest Capital Partners LLC*, File No. 3-15486, Exchange Act Release No. 70411, 2013 SEC LEXIS 2778 (Sept. 16, 2013). (Order ¶ 4.)

From approximately April 2008 to January 2012, Petrou was one of a number of individuals who traded for Worldwide.[3] Under the terms of his arrangement with Worldwide, Worldwide funded Petrou's trading and the two shared equally in the profits and were equally liable for the losses generated by that trading. (Order ¶ 7.)

Petrou's and Worldwide's principal investment strategy was to obtain the maximum allocations possible for short-term trading in initial public offerings, as well as follow-on and secondary offerings. Accordingly, Petrou opened numerous accounts at large broker-dealers in the name of a corporate entity he created, owned and controlled, and used those accounts to purchase offered shares. By contrast, many of Petrou's sales of equity securities, including short

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[3] Five of those individuals were also the subjects of recent settled Commission enforcement actions for violations of Rule 105 committed while trading for Worldwide. *See Derek W. Bakarich*, File No. 3-15957, Exchange Act Release No. 72517, 109 SEC Docket 5, 2014 SEC LEXIS 2389 (July 2, 2014); *Carmela Brocco*, File No. 3-15958, Exchange Act Release No. 34-72518, 109 SEC Docket 5, 2014 SEC LEXIS 2390 (July 2, 2014); *Tina M. Lizzio*, File No. 3-15959, Exchange Act Release No. 34-72519, 109 SEC Docket 5, 2014 SEC LEXIS 2391 (July 2, 2014); *Steven J. Niemis*, File No. 3-15960, Exchange Act Release No. 34-72520, 109 SEC Docket 5, 2014 SEC LEXIS 2392 (July 2, 2014); *William W. Vowell*, File No. 3-15961, Exchange Act Release No. 34-72521, 109 SEC Docket 5, 2014 SEC LEXIS 2393 (July 2, 2014).

sales, were executed through an account in Worldwide's name at one of several smaller broker-dealers that catered to small institutional customers and professional traders. Regardless of the account in which the purchase or sale was executed, all of Petrou's trades for Worldwide were funded by Lynn, and executed, cleared and settled in a Worldwide master account at Worldwide's prime broker. (Order ¶ 8.)

From September 2010 to February 2013, Petrou was also one of a number of individuals who traded for the War Chest fund. War Chest retained Petrou as a trader through a pass-through entity created, owned, and controlled by another War Chest (and Worldwide) trader. The War Chest fund financed Petrou's trading and the two shared equally in the profits and were equally liable for the losses generated by that trading. (Order ¶ 9.) Petrou's strategy at War Chest was substantially the same as at Worldwide: Petrou opened multiple accounts at large broker-dealers in the names of multiple corporate entities he created, owned and controlled, and in the names of several of his relatives. It was through those accounts that Petrou purchased shares in covered offerings, after having sold short the offered securities during the restricted period through one master account in the name of the War Chest fund at one of several smaller broker-dealers. (Order ¶ 10.)

As reflected in the Appendix to the Order, from December 2009 to January 2012, Petrou committed twenty-eight violations of Rule 105 in connection with twenty offerings of public companies, by purchasing offering shares from an underwriter or broker or dealer participating in a covered offering, after having sold short the same security during the restricted period. With respect to eight of the offerings, the violations occurred in connection with his trading for both Worldwide and the War Chest fund. With respect to eleven of the offerings, the violations occurred solely in connection with his trading for Worldwide, and with respect to one offering,

the violations occurred solely in connection with his trading for the War Chest fund. (Order ¶ 11.) Petrou received ill-gotten gains produced by the violative trades, and they were substantial: The violative trades generated a total of $509,711.31 in unlawful profits, of which Petrou's share (50% of the total), was $254,855.56. (Order ¶ 12; Wraga Dec. ¶ 7, Exh. A thereto.)

Although fact issues may exist with respect to Petrou's state of mind before February 2011, there can be no dispute that after February 2011 (at the latest), he violated Rule 105 with full knowledge that his conduct was unlawful, or at a minimum with reckless disregard for the regulatory requirements of Rule 105. Petrou has claimed that Lynn, the principal of Worldwide, assured him that shorting stock in advance of participating in a covered offering would not violate Rule 105 if separate accounts were used to short and participate in the deals and if he did not use deal stock to cover his short position.[4] But Petrou has also admitted, repeatedly and without prompting, that between September 20, 2010 and February 2011 at the latest, War Chest's principal, Howard Blum, warned him that War Chest did not want him to short the stock of issuers from whom he was obtaining shares in secondary offerings, because doing so would violate Rule 105.[5]

Thus, at his October 2013 testimony, after volunteering the fact that trading activities at War Chest differed from those at Worldwide, Petrou was asked to expand on the point:

> Q. And I may have misinterpreted, but you started to say that there was a difference between the trading you did for War Chest and the trading you did for Worldwide?
>
> A. Yeah.
>
> Q. Can you expand on that?

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[4] September 18, 2014 Testimony Transcript of Thrasos Tommy Petrou ("2014 Petrou Tr.") (Primoff Dec. Exh. B) at 19:18-21:24. The Division reserves its right to contest this assertion in the event the Court determines a hearing is necessary.

[5] *See* 2014 Petrou Tr. at 13:18-14:21; October 6, 2013 Petrou Test. ("2013 Petrou Tr.") (Primoff Dec. Exh. C) at 105:11-18 (identifying Blum (misspelled Bloom) as the owner of War Chest, and Petrou's boss).

A. At Worldwide, we were told that as long as -- you can short a stock as long as you do not cover that stock with syndicate, meaning stock that you get from brokers. As long as you short a stock and buy it back yourself, that there is nothing wrong with that.

Q. And what was the difference with War Chest?

A. War Chest did not want shorting, shorting a deal and covering it. They didn't deem it proper.

Q. I still don't understand the difference between the policy at War Chest and the policy at Worldwide.

A. I couldn't -- I could not short anything at War Chest.

Q. Okay.

MR. LUTZKER: Can I ask a question?

MS. KAZON: Sure.

MR. LUTZKER: During what period of time?

THE WITNESS: During what period of time?

MR. LUTZKER: Could you not short.

THE WITNESS: As soon as I started working for War Chest.

Q. And that was September 2010?

A. Yeah.

(2013 Petrou Tr. at 33:12-34:16.)

Petrou reiterated this point at his 2014 testimony session:

Q. And then, when you started working for Warchest in September 2010, did you understand what Warchest's position was on that?

A. Yes.

Q. What was their position?

A. They didn't want us shorting any deals.

* * *

Q. But did you understand from Mr. Bloom that Warchest did not want you to be selling short a deal in advance of getting the stock?

A. Yes.

Q. And did he explain why?

A. Rule 105.

Q. So he told you that it was Warchest's view that doing so, that selling a deal short before you got the stock in a deal-

A. I would have been fired.

Q. It was his view and Warchest's view that that would be a violation of Rule 105?

A. From what I remember, yes.

(2014 Petrou Tr. at 21:25-22:5; 28:1-13; *see also* 2014 Petrou Tr. at 19:18-24; 2013 Petrou Tr. at 106:11-107:4; 109:2-18.)

Petrou, moreover, has conceded that after receiving this warning from War Chest, he became concerned about whether Worldwide's policy was correct, a concern he shared with no one. (2013 Petrou Test. at 110:11-17.)[6] Despite this explicit warning, and despite his own admitted concern that his conduct might have been unlawful, Petrou continued to trade in

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[6] This purported advice from Lynn was in fact not correct. Before its amendment in 2007, Rule 105's explicit prohibition was against the *covering* of a short sale effected during a pre-offering restricted period, with securities obtained in that offering. *See Short Selling*, *supra*, 2007 SEC LEXIS 1744, at *3. But the Commission became concerned over the proliferation of deceptive trading "strategies used to disguise Rule 105 violations" and "obfuscate the prohibited covering," but which "accomplish the economic equivalent of the activity that the rule seeks to prevent," (*id.* at *4), *e.g.*, the strategy that Lynn purportedly advised Petrou to follow. Thus, the 2007 amendments to Rule 105 eliminated the incentives for such subterfuge. Effective October 9, 2007, the amended Rule 105, which was in place before Petrou ever started trading with either Worldwide or War Chest, "change[d] the prohibited activity from *covering* to *purchasing* the offered security....", where the trader had also shorted the stock during the pre-offering restricted period. *Id.* at *19 (emphasis added).

violation of Rule 105 at Worldwide *and at War Chest*. Even disregarding Petrou's violative trades before March 29, 2011 (nearly a full month after the latest possible date Petrou conceded his conversation with Blum occurred), Petrou committed eight additional violations at Worldwide, and eight additional violations at War Chest, from March 29, 2011 through January 2012. (*See* Wraga Dec. Exh. A.)[7]

ARGUMENT

THE COURT SHOULD GRANT THE DIVISION SUMMARY DISPOSITION AND ORDER RESPONDENT TO PAY DISGORGEMENT, PREJUDGMENT INTEREST AND CIVIL MONEY PENALTIES

A. Summary Disposition Standard

Commission Rule of Practice 250(a) permits a party, with leave of the hearing officer, to move for summary disposition of any or all of the OIP's allegations.[8] Rule 250(b) provides that a summary disposition motion should be granted if there is "no genuine issue with regard to any material fact" and the moving party is entitled to judgment "as a matter of law." 17 C.F.R. § 201.250(b).

Courts and the Commission routinely grant summary disposition even where a respondent's scienter must be determined, where the material facts, as here, are undisputed. *E.g., S.W. Hatfield, CPA*, File No. 3-15012, Exchange Act Release No. 34-73763, 110 SEC Docket 7, 2014 SEC LEXIS 4691, at *9-13, 42-48 (Dec. 5, 2014) (Commission Opinion) (reversing denial

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[7] After unequivocally affirming more than once that War Chest's warning occurred by February 2011 at the latest, Petrou later sought in self-serving, half-hearted and inherently incredible fashion to suggest he was less than certain as to the timing of the conversation. (*See* 2014 Petrou Tr. at 29:13-30:13; 2013 Petrou Tr. at 108:1-13.) But even in the midst of that attempt, Petrou acknowledged that the conversation with Blum had to have occurred "early" in his tenure at War Chest, and that there was a period of time in between the warning from Blum and the time he left Worldwide (a fact confirmed by the Appendix to the Order). (2014 Petrou Tr. at 30:14-22; 31:11-22; 2013 Petrou Tr. at 109:2-110:10.)

[8] The Court granted the Division leave to file the instant motion pursuant to Rule 250(a) in its December 1, 2014 Scheduling Order.

of summary disposition and finding Respondent liable for intentional and reckless violation of Exchange Act Rule 10b-5, and ordering disgorgement, prejudgment interest, and second-tier civil money penalties); *Joseph P. Doxey*, File No. 3-15619, Initial Decision Release No. 598, 2014 SEC LEXIS 1668, at *39-47 (May 15, 2014) (granting summary disposition against respondents for violation of, inter alia, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder and Section 17 of the Securities Act, and determining the requisite scienter was established through investigative testimony).

In the instant case, Petrou has admitted for purposes of this proceeding that he willfully violated Rule 105 on twenty-eight separate occasions, and that he obtained ill-gotten gains from those violations. The only issue for the Court to decide on this motion is the appropriateness and amount of disgorgement and prejudgment interest, and the appropriateness and amount of civil penalties. In determining whether a particular sanction recommended by the Division is in the public interest, the Commission considers:

> [T]he egregiousness of the respondent's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the respondent's assurances against future violations, the respondent's recognition of the wrongful nature of his or her conduct, and the likelihood that the respondent's occupation will present opportunities for future violations.

Vladimir Boris Bugarski, No. 3-14496, Exchange Act Release No. 34-66842, 103 SEC Docket 1699, 2012 SEC LEXIS 1267, at *10-11 (Apr. 20, 2012) (Commission Opinion) (citing *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd*, 450 U.S. 91 (1981)). The Commission also considers whether the sanction will have a deterrent effect, *id.,* as well as the age of the violation and the degree of harm to investors and the marketplace as a result of the violations. *Marshall E. Melton,* File No. 3-9865, Advisers Act Release No. IA-2151, Exchange Act Release No. 34-48228, 80 SEC Docket 2812, 2003 SEC LEXIS 1767, at *4-5 (July 25,

2003) (Commission Opinion). The inquiry is a "flexible one, and no one factor is dispositive." *Bugarski, supra*, 2012 SEC LEXIS 1267, at *11.

As discussed below, there are no genuine issues of material fact in dispute relevant to the determination of the remedies the Division seeks through the instant motion, and the Division is entitled to the relief sought.

B. Disgorgement and Prejudgment Interest

Sections 21B(e) and 21C(e) of the Exchange Act [15 U.S.C. §§ 78u-2(e) and 78u-3(e)], and Section 203(j) of the Advisors Act [15 U.S.C. § 80b-3(j)] authorize disgorgement of ill-gotten gains from Respondent. Disgorgement is an equitable remedy that requires a violator to give up wrongfully-obtained profits causally related to the proven wrongdoing. *See SEC v. First Jersey Securities, Inc.*, 101 F.3d 1450, 1474 (2d Cir. 1996), *cert. denied*, 522 U.S. 812 (1997); *SEC v. First City Fin. Corp., Ltd.*, 890 F.2d 1215, 1230-32 (D.C. Cir. 1989). "The effective enforcement of the federal securities laws requires that the SEC be able to make violations unprofitable. The deterrent effect of an SEC enforcement action would be greatly undermined if securities law violators were not required to disgorge illicit profits." *First Jersey Sec., supra,* 101 F.3d at 1474 (citations omitted).

The primary purpose of disgorgement is to deprive violators of their ill-gotten gains, thereby maintaining the deterrent effect of the federal securities laws. *Id.* The amount of disgorgement ordered "need only be a reasonable approximation of profits causally connected to the violation," and "any risk of uncertainty [in calculating disgorgement] should fall on the wrongdoer whose illegal conduct created that uncertainty." *Id.* at 1475 (citations omitted). *See also Joseph John VanCook*, File No. 3-12753, Exchange Act Release No. 34-61039A, 97 SEC Docket 761, 2009 SEC LEXIS 3872, at *67 (Nov. 20, 2009) (Commission Opinion); *Thomas C.*

Bridge, File No. 3-12626, Securities Act Release No. 33-9068, Exchange Act Release No. 34-60736, 96 SEC Docket 2485, 2009 SEC LEXIS 3367, at *93 (Sept. 29, 2009) (Commission Opinion) ("The disgorged amount must be causally connected to the violation, but it need not be figured with exactitude."), *petition for review denied sub nom Roble v. SEC*, 09 Civ. 1293, 411 Fed. App'x 337, 2010 U.S. App. LEXIS 26537 (D. C. Cir. Dec. 30, 2010); *John A. Carley*, Securities Act Release No. 33-8888, Exchange Act Release No. 34-57246, 92 SEC Docket 1693, 2008 SEC LEXIS 222, at *104 (Jan. 31, 2008) (Commission Opinion), *petition for review denied in relevant part and granted on other grounds sub nom. Zacharias v. SEC,* 569 F.3d 468 (D.C. Cir. 2009); *SEC v. Jones*, 476 F. Supp.2d 374, 386 (S.D.N.Y. 2007) ("a court need not determine the precise amount of funds a defendant acquired as a result of his misconduct").

Once the Division shows that its disgorgement figure is a reasonable approximation of the amount of unjust enrichment, the burden shifts to the respondent to demonstrate that the Division's disgorgement figure is not a reasonable approximation. *Joseph John VanCook*, 2009 SEC LEXIS 3872, at *67; *John A. Carley,* 2008 SEC LEXIS 222, at *104 ; *SEC v. Opulentica, LLC*, 479 F. Supp.2d 319, 330 (S.D.N.Y. 2007) (once the SEC has made a "reasonable showing" then "the burden shifts to the defendant to show that the disgorgement figure was not a reasonable approximation"). Where disgorgement cannot be exact, any risk of uncertainty should fall on the wrongdoer whose illegal conduct created that uncertainty. *John A. Carley,* 2008 SEC LEXIS 222, at *104.

Here, the disgorgement the Division seeks against Respondent – $254,855.66 – consists of the illicit profits Petrou concedes he received specifically from trades that violated Rule 105- and from no other trades he engaged in during his association with Worldwide and War Chest. Further, these profit figures are based directly on the material terms of those violative trades,

which, for purposes of this proceeding, Respondent has conceded are correct.[9] Federal courts and the Commission have recognized this to be an appropriate measure of disgorgement for violations of Rule 105. *See Colonial Inv. Mgmt.*, *supra*, 659 F. Supp.2d at 486-498, 501 (ordering disgorgement of $1,478,036.76 against defendants, which represented the net profits obtained on eighteen trades in violation of Rule 105); *see also Worldwide Capital*, *supra*, and settled enforcement cases cited in note 3, *supra*.

As with disgorgement, an award of prejudgment interest is within the discretion of the Court, and is appropriate here, using the rate employed by the Internal Revenue Service to calculate underpayment penalties. *See First Jersey Sec.,* 101 F.3d at 1476; *SEC v. Drexel Burnham Lambert, Inc.*, 837 F. Supp. 587, 612 n.8 (S.D.N.Y. 1993), *SEC v. Gordon*, 822 F. Supp. 2d 1144, 1161-1162 (N.D. OK. 2011). Using that method, the Division has calculated the appropriate amount of prejudgment interest to be $42,982.77 (through February 28, 2015), or $43,738.00 (through March 31, 2015). (Wraga Dec. ¶ 9, Exh. C.)

C. Civil Penalties

Section 21B(a)(1) of the Exchange Act, [15 U.S.C. § 78u-2(a)(1)], provides that a civil penalty may be imposed in any proceeding instituted pursuant to Section 15(b)(4) of the

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[9]The Division understands that Respondent, simultaneously with the Division's filing of the instant motion, may seek relief from the imposition of disgorgement, pre-judgment interest and civil money penalties under SEC Rule of Practice 630. The Division intends to address that issue, if raised, in its responsive papers. With respect to the Division's request for disgorgement and prejudgment interest, however, Petrou's purported current inability to pay is no bar to the imposition of this remedy. *SEC v. McCaskey*, 98 Civ. 6153 (SWK), 2002 U.S. Dist. LEXIS 4915, at *16 (S.D.N.Y. Mar. 26, 2002); *see also SEC v. Grossman*, 97 Civ. 1031 (SWK), 1997 U.S. Dist. LEXIS 6225, at *28-29 (S.D.N.Y. May 6, 1997) ("there is no legal support for [defendant's] assertion that his financial hardship precludes the imposition of an order of disgorgement"), *aff'd in part, vacated in part on other grounds sub nom SEC v. Hirshberg*, 173 F.3d 846 (2d Cir. 1999); *cf. SEC v. Inorganic Recycling*, 99 Civ. 10159 (GEL), 2002 U.S. Dist. LEXIS 15817, at *12 (S.D.N.Y. Aug. 22, 2002) ("[C]laims of poverty cannot defeat the imposition of a disgorgement order or civil penalty.").

Exchange Act on any person who has willfully violated the federal securities laws if such a penalty is in the public interest, and Section 203(i)(1) of the Advisers Act, [15 U.S.C. § 80b-3(i)(1)], authorizes the Commission to impose a civil penalty against any one that has willfully violated any provision of, among other things, the Exchange Act or the rules or regulations thereunder.[10]

Under the three-tier system provided by the Act, the second-tier applies to conduct involving a "deliberate or reckless disregard of a regulatory requirement," and the third (highest) tier is reserved for conduct involving a "deliberate or reckless disregard of a regulatory requirement," where "such act or omission . . . created a significant risk of substantial losses to other persons" or "resulted in substantial pecuniary gain to the person who committed the act or omission." 15 U.S.C. § 80b-3(i)(1)(B)(2)(C)(i) and (ii).[11]

Six statutory factors are considered when determining appropriate penalties:

> (1) whether the violation involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement, (2) the resulting harm to other persons, (3) any unjust enrichment and prior restitution, (4) the respondent's prior regulatory record, (5) the need to deter the respondent and other persons, and (6) such other matters as justice may require.

See 15 U.S.C. § 78u-2(c); 15 U.S.C. § 80b-3(i)(1)(B)(3).[12] "Not all factors may be relevant in a given case, and the factors need not all carry equal weight." *Robert G. Weeks*, File No. 3-9952,

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[10] Section 21B(a)(2) of the Exchange Act [15 U.S.C. § 78u-2(a)(2)], furthermore, provides that in any proceeding instituted under Section 21C of the Exchange Act, the Commission may impose a civil penalty against any person who is violating or has violated any provision of the Exchange Act, or is or was a cause of the violation of any provision of the Exchange Act.

[11] Although the Division does not seek it in the instant motion, in view of Petrou's substantial and unlawful gains, statutory authority exists here for the imposition of third-tier civil penalties.

[12] The first tier of civil penalties for conduct in the period in question (in which no showing of scienter is required) provides for penalties with respect to a natural person in the amount of up to $7,500 per act or omission. The second tier provides for penalties of up to $75,000 per act or

unreasonable' conduct, 'which represents "an extreme departure from the standards of ordinary care . . . to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it."'" *Timbervest,* File No. 3-15519, Initial Decision Release No. 658, 109 SEC Docket 12, 2014 SEC LEXIS 2990, at *126 (Aug. 20, 2014) (Initial Decision) (quoting *Rolf v. Blyth, Eastman Dillon & Co.*, 570 F.2d 38, 47 (2d Cir. 1978) (citations omitted)), *petition for review granted*, Advisers Act Release No. IA-3942; Investment Company Act Release No. IC-31273, 109 SEC Docket 18, 2014 SEC LEXIS 3676 (Sept. 30, 2014); *see also Howard v. SEC*, 376 F.3d 1136, 1143 (D.C. Cir. 2004); *S.W. Hatfield,* File No. 3-14795, Exchange Act Release No. 69930, 106 SEC Docket 13, 2013 SEC LEXIS 1954, at *77 (July 3, 2013).[13]

Petrou committed these violations with a high degree of scienter, and those violations were recent, carried out repeatedly over a multi-year period, and were part of a conscious trading strategy from which he derived hundreds of thousands of dollars in admittedly unlawful profits. Even had Petrou continued to violate Rule 105 after this warning with only his Worldwide trades, while adhering to War Chest's proscriptions on such activities, Petrou's conduct would have been egregious. But Petrou acted even more brazenly, as he flouted War Chest's warnings even at War Chest, and committed eight violations of Rule 105 there well after he was warned not to do so.

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[13] Petrou's self-serving and inherently incredible attempts to walk back his admissions (see note 8, *supra*) are insufficient to preclude summary disposition on this point. *See Jeffreys v. City of N.Y.*, 426 F.3d 549, 555 (2d Cir. 2005) (testimony in opposition to summary judgment properly disregarded where it was "largely unsubstantiated by any other direct evidence" and "so replete with inconsistencies and improbabilities that no reasonable juror would undertake the suspension of disbelief necessary to credit the allegations"); *Schmidt v. Tremmel*, 93 Civ. 8588 (JSM), 1995 U.S. Dist. LEXIS 97, at *10 (S.D.N.Y. 1995) ("[I]ssues of credibility sufficient to defeat a motion for summary judgment are not created if the contradicting or impeaching evidence is too incredible to be believed").

The need for deterrence also weighs in favor of the Division's request for maximum second-tier penalties on these sixteen transactions. Petrou need not be employed in the securities industry to engage in future violations of Rule 105, and, as discussed above, he violated the law despite clear instructions from the principal of one of his trading firms not to do so. The penalties the Division requests thus will deter him – and others – from engaging in similar misconduct. *ZPR, supra*, 2014 SEC LEXIS 1797, at *180-81; *see also SEC v. Lipson*, 129 F. Supp. 2d 1148, 1159 (N.D. Ill. 2001) ("Removing all profit from the illegal transaction, however, provides no deterrent. It merely places the offender in the same position he would have been in had he not committed the offense"), *aff'd*, 278 F.3d 656 (7th Cir. 2002); *Alchemy Ventures*, File No. 3-14720, Initial Decision Release No. 473, 105 SEC Docket 61198, 2012 SEC LEXIS 3658, at *14 (Nov. 28, 2012) ("the need to deter others from acting as unregistered broker-dealers is strong and effectively achieved through civil penalties") (citing *SEC v. Lipson, supra).*

Case law under Rule 105 is also consistent with the Division's request. In *Colonial Investments,* the court imposed second-tier penalties on defendants, the principal traders and advisers to a hedge fund who engaged in eighteen Rule 105 violations (while the pre-amendment Rule 105 was in effect). The court found the defendants acted with scienter, and rejected defendants' excuses that they "did not have a clear understanding" of the rule's purpose, or that a subset of the transactions were no longer exempted from the rule. *Colonial Investments,* 659 F. Supp.2d at 498. The court imposed second-tier civil penalties in the amount of $25,000 per violation, which represented approximately 42% of the $60,000 statutory maximum in place at that time.

Applying that same formula to the instant case would result in the imposition of $31,500 for each of Petrou's violations committed after he was warned his conduct was unlawful, which

would result in a civil penalty in the amount of $504,000 for these sixteen transactions, and total penalties of $594,000, when added to the twelve transactions for which the Division seeks first-tier penalties. The Division believes Petrou's mental state was more egregious than that of the defendants in *Colonial Investments*: Unlike in *Colonial Investments*, Petrou carried out the majority of his violative trades after being explicitly warned they violated Rule 105, and while harboring a concern that his actions were unlawful.

Courts and the Commission, moreover, have not hesitated to impose substantial second-tier penalties in other cases with the requisite scienter that do not involve fraud or evidence of harm to investors or the marketplace. *See, e.g., Ronald S. Bloomfield,* File No. 3-13871, Securities Act Release No. 33-9553, Exchange Act Release No. 34-71632, 108 SEC Docket 7, 2014 SEC LEXIS 4543, at *90-91 (Feb. 27, 2014) (Commission Opinion) (imposing maximum second-tier penalties of $65,000 on individuals for each of the nine securities underlying their primary violations of Section 5 of the Securities Act, where they acted in brazen disregard of registration requirements, notwithstanding the absence of specific harm to others, and that the penalties imposed vastly exceeded the unlawful profits they obtained); *Alchemy Ventures, supra,* 2012 SEC LEXIS 3658 at *13-14 (imposing second-tier penalty of $50,000 on individual who recklessly disregarded the broker registration requirements under Section 15(a) of the Exchange Act, notwithstanding the lack of harm to others, because of the need to deter others from similar violations).[14]

[14] Should the Court conclude that issues of fact regarding Petrou's mental state preclude the imposition of second-tier penalties on this motion for summary disposition, the Division requests that that first-tier penalties in the amount of $7,500 for each of the 28 violative trades ($210,000 in total) be ordered against Respondent.

CONCLUSION

For the foregoing reasons, as well as those set forth in the accompanying declarations and exhibits attached thereto, the Division requests that the relief requested herein be granted in its entirety.

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