UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-17550

In the Matter of

TOD A. DITOMMASO, ESQ.,

Respondent.

DIVISION OF ENFORCEMENT'S PRE-HEARING BRIEF

The Division of Enforcement ("Division") submits its pre-hearing brief as ordered in the Hearing Officer's December 14, 2016 Scheduling Order.

I. INTRODUCTION AND BACKGROUND FACTS

The Securities and Exchange Commission issued an Order Instituting Cease-And-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933 against Respondent Tod A. DiTommaso ("Respondent" or "DiTommaso") on September 16, 2016, alleging that Respondent violated Sections 5(a) and 5(c) of the Securities Act by issuing false attorney opinion letters, facilitating the sale of unregistered securities. The Hearing Officer granted the Division's Motion for Summary Disposition on March 21, 2017, finding that "Respondent Tod A DiTommaso, Esq., violated Sections 5(a) and 5(c) of the Securities Act of 1933 through his issuance of ten attorney opinion letters in 2012 and 2013 concerning the safe harbor of Securities Act Rule 144 for transactions in the stock of Fusion Pharm, Inc. (FSPM)." (March 21, 2017 Order at 1). This matter is set for a hearing

by video conference on May 10, 2017, on the remaining issue of sanctions, specifically disgoregement and penalty.[1]

DiTommaso issued ten attorney opinion letters incorrectly opining that FSPM stock could be issued without restriction because certain shareholders involved in the transactions—(1) Microcap Management LLC ("Microcap"), (2) Bayside Realty Holdings LLC ("Bayside"), and (3) Meadpoint Venture Partners, LLC ("Meadpoint")—were not affiliates of FSPM. "DiTommaso admits issuing each of the opinion letters set forth in paragraph 24 [of the OIP, Div. Exs. 5, 10, 18-22, 25, 35], except the August 13, 2013 opinion letter [Div. Ex. 29]." (Div. Ex. 1, Answer, at 11). While DiTommaso neither admits nor denies authoring the August 13, 2013 letter (*see* Declaration of Tod Anthony DiTommaso in Opposition to Motion for Summary Disposition at 7), DiTommaso's September 15, 2013 Invoice #00009 to FSPM counsel Guy Jean-Pierre reflects a $175 charge for an 8/13/2013 "FSPM – Meadpoint Opinion Letter." (Div. Ex. 30). Respondent does not dispute that Microcap, Bayside, and Meadpoint were affiliates of FSPM. (*See* March 21, 2017 Order at 4).

The evidence will show that DiTommaso received documents raising serious red flags as to whether Microcap, Bayside and Meadpoint were affiliates of FSPM. DiTommaso received documents showing that William Sears ("W. Sears") and Sandra Sears ("S. Sears"), W. Sears' mother, had controlling roles in FSPM. DiTommaso then received documents showing that W. Sears was the Managing Member of Microcap and Meadpoint and S. Sears was the Managing Member of Bayside.

[1] The Commission authorized the institution of follow-on public administrative proceedings against Respondent pursuant to Rule 102(e)(3) of the Commission's Rules of Practice at the same time that it authorized this proceeding.

DiTommaso's issuance of attorney opinion letters falsely claiming that Microcap, Bayside and Meadpoint were not affiliates of FSPM allowed FSPM shareholders to illegally sell 2,855,500 unrestricted FSPM shares into the market in violation of Section 5. A table of the relevant opinion letters and the resulting number of shares issued without restrictive legends is set forth below:

Div. Ex.	Date	Title	Shares
5	July 23, 2012	Fusion Pharm Inc.: Transferability (to Microcap) of Shares originally owned by Todd Abbott	40,000
10	January 4, 3013	FSPM-Bayside Realty Holdings, LLC	140,000
18	March 13, 2013	FSPM – Black Arch Opportunity Fund, LP	12,500
19	March 13, 2013	FSPM – SGI Group, LLC	12,500
20	March 13, 2013	FSPM – Starcity Capital, LLC	137,500
21	March 13, 2013	FSPM – Vera Group, LLC	12,500
22	March 13, 2013	FSPM – Alexandra Mauriello	25,500
25	March 31, 2013	FSPM – Meadpoint Venture Partners, LLC	475,000
29	August 13, 2013	FSPM – Meadpoint Venture Partners, LLC	500,000
35	August 26, 2013	FSPM – Richard Scholz, Sharryn Theyden, Myron Thayden	1,500,000
Total			2,855,500

II. ARGUMENT

A. DiTommaso Was In Possession of Numerous Red Flags Indicating that Microcap, Bayside and Meadpoint Were FSPM Affiliates.

The facts concerning DiTommaso's involvement with the opinion letters was succinctly summarized in the Hearing Officer's March 21, 2017 Order and are repeated here for context.

> DiTommaso's involvement with the opinion letters was as follows: A friend introduced DiTommaso to attorney Guy Jean-Pierre, who explained that he was in-house lawyer for various entities and would like an outside counsel to prepare attorney opinion letters concerning the companies; DiTommaso agreed to provide the letters at a discounted price in exchange for Jean-Pierre's 'ghostwriting' them. OTC had banned Jean-Pierre from rendering legal opinions and listed him on its Prohibited Attorney List as of April 21, 2010. DiTommaso was unaware of this or any other enforcement actions against Jean-Pierre until 2014, when the Division contacted him. In July 2011, Jean-Pierre contacted DiTommaso about issuing opinion letters concerning FSPM, and from July 2012 to August 2013, DiTommaso issued the letters that are the subject of this proceeding. Jean-Pierre 'ghostwrote' each letter and forwarded supporting documentation, such as certificates of officers of FSPM and the original securities holders that explicitly stated warranties and representations as to the non-affiliate status of the concerned parties. DiTommaso reviewed the supporting documentation to verify the predicate facts for establishing the Rule 144 safe harbor.

(March 21, 2017 Order at 4 (internal citations omitted)).

Prior to issuing any of the at issue opinion letters, DiTommaso received emails showing W. Sears' involvement with FSPM. (Div. Exs. 44, 45). In July 2011, DiTommaso received emails from Jean-Pierre forwarding emails sent by W. Sears, in which W. Sears was coordinating an in-person meeting between DiTommaso and FSPM President and Director Scott Dittman, as well as asking for information from the FSPM transfer agent as to stock issued and outstanding. *Id.* One of these two e-mails included W. Sears' FSPM email, wsears@fusionpharminc.com, in four separate places. (Div. Ex. 45). In addition, on June 11, 2012, Jean-Pierre forwarded to DiTommaso an email from FSPM's

accountant, copying W. Sears and also using W. Sears' FSPM email, wsears@fusionpharminc.com. (Div. Ex. 46; Div. Ex. 1 at ¶ 21). DiTommaso's testimony that "I never paid attention to this email" evidences his lack of diligence in rendering attorney opinion letters. (Div. Ex. 38 at 211:2-16).[2]

After receiving these emails, DiTommaso then received documents relating to the Microcap and Meadpoint transactions in which W. Sears signed as Microcap's and Meadpoint's Managing Member. (Div. Ex. 4 (September 11, 2011 Share Purchase Agreement between Abbott and Microcap, signed by W. Sears as Microcap's Managing Member)); (Div. Exs. 24 and 28 (Notices of Conversion from Meadpoint signed by W. Sears[3])); (Div. Exs. 32-34 (numerous Meadpoint documents signed by W. Sears as Meadpoint's Managing Member)). DiTommaso admits that W. Sears represented himself as Meadpoint's Managing Member. (Ex. 1 at ¶ 10).

Prior to issuing the Bayside-related opinion letters, as part of issuing prior opinion letters not at issue here, DiTommaso received from Jean-Pierre copies of at least seven FSPM stock certificates signed by "Sandra L. Sears" as President of FSPM. (Div. Exs. 48-51).[4] These FSPM stock certificates clearly showed that S. Sears was signing as FSPM's

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[2] Moreover, after issuing the first Meadpoint opinion letter, DiTommaso received an email from Dittman, copying W. Sears, stating that Gino Rodriguez, who had contacted DiTommaso about issuing an attorney opinion letter as to Rodriguez's FSPM shares, was not authorized to speak on behalf of FSPM. (Div. Ex. 47). Dittman's inclusion of W. Sears on an email about who could speak on behalf of FSPM was more evidence of W. Sears' involvement with FSPM.

[3] While these Meadpoint Notices of Conversion did not list W. Sears' typewritten name under his signature, the signature was the same as the signature that DiTommaso had seen when W. Sears signed for Microcap. (Compare Div. Ex. 4 with Div. Exs. 24 and 28).

[4] The attorney opinion letters that DiTommaso issued relating to these shareholders are not at issue here because either the shareholders ultimately did not sell those shares into the market or there was no Section 5 violation because the shareholders had held the shares for over a year and so met the relevant exemption.

President.[5] Then, for the Bayside transaction, DiTommaso received from Jean-Pierre three documents that listed S. Sears as the Managing Member for Bayside. (Div. Exs. 9, 52, 53). DiTommaso also received copies of the Securities Transfer Agreements between Bayside and each of the five investors purchasing the Bayside debt, all dated January 23, 2013, also listing S. Sears as the Managing Member of Bayside. (Div. Exs. 13-17).[6]

DiTommaso understood that if a person was a director or officer of FSPM, or otherwise controlled FSPM, he would be an affiliate. (Div. Ex. 38 at 29:8-18). DiTommaso's possession of emails indicating W. Sears' involvement with FSPM, coupled with documents listing W. Sears as the Managing Member of both Microcap and Meadpoint, clearly indicated that Microcap and Meadpoint were FSPM affiliates based on W. Sears' roles in FSPM, Microcap, and Meadpoint. Similarly, the FSPM stock certificates listing S. Sears as FSPM's President, along with the numerous documents S. Sears signed as Bayside's Managing Member, indicated that Bayside was also an FSPM affiliate. DiTommaso, however, failed to make any inquiry into W. Sears' or S. Sears' dual roles. (*See* Div. Ex. 38 at 115:21-116:7). Instead, DiTommaso just put Jean-Pierre's draft attorney opinion letter onto his own letterhead and issued the opinion letters under his own name.

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[5] There is no evidence that DiTommaso investigated how Dittman and S. Sears could both be FSPM's President.

[6] Moreover, on March 12, 2013, DiTommaso received an email from Jean-Pierre forwarding documents sent to Pacific Stock Transfer about these transactions, and the forwarded email chain contained emails from W. Sears, in which W. Sears told the Pacific Stock Transfer representative that he had instructed counsel to revise the FSPM attorney opinion letters. (Div. Ex. 54). This email should also have alerted DiTommaso to W. Sears' role in Bayside and these transactions.

B. Disgorgement and Prejudgment Interest

Section 8A(e) of the Securities Act provides that, in any cease-and-desist proceeding under subsection (a), the Commission may enter an order requiring disgorgement, including reasonable interest. 15 U.S.C. § 77h-1(e). Disgorgement is an equitable remedy that requires a violator to give up wrongfully obtained profits causally related to the proven wrongdoing. *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1230-32 (D.C. Cir. 1989). Because of the difficultly in many cases to separate "legal from illegal profit ... it is proper to assume that all profits gained while defendants were in violation of the law constituted ill-gotten gains." *SEC v Bilzerian*, 814 F. Supp. 116, 121 (D.D.C. 1993) (internal citations omitted); *see also SEC v. Drexel Burnham Lambert, Inc.*, 837 F. Supp. 587, 611-12 (S.D.N.Y. 1993), *aff'd*, 16 F.3d 520 (2d Cir. 1994). In the Hearing Officer's Order on the Division's Motion for Summary Disposition, Your Honor ruled that "any disgorgement would be limited to the $1,475 in fees that DiTommaso received for his role in the violation." (Order at 5). The Division respectfully requests that DiTommaso be ordered to disgorge that full amount so that he does not profit from his illegal conduct and others are deterred from following his practice of signing ghost written opinion letters and ignoring red flags. *See SEC v. Drexel Burnham Lambert, Inc.*, 837 F. Supp. 587, 611-12 (S.D.N.Y. 1993), aff'd, 16 F.3d 520 (2d Cir. 1994) ("'Disgorgement is an equitable remedy designed to deprive a wrongdoer of his unjust enrichment and to deter others from violating the securities laws.'"), quoting *First City*, 890 F.2d at 1231.

Respondent should also be ordered to pay prejudgment interest. Prejudgment interest represents the amount of money the wrongdoer made or could have made by investing monies wrongfully obtained. *S.E.C. v. Koenig*, 557 F.3d 736, 745 (7th Cir.

2009). An award of prejudgment interest is not a punitive award but rather is compensatory in nature. *S.E.C. v. Lauer*, 478 F. Appx 550, 557 (11th Cir. 2012). While an award of prejudgment interest is within the Court's discretion, courts have routinely ordered the payment of prejudgment interest where disgorgement is also awarded. *S.E.C. v. Gordon*, 822 F. Supp. 2d 1144, 1162 (N.D. Ok. 2011); *S.E.C. v. O'Hagan*, 901 F. Supp. 1461, 1473 (D. Minn. 1995); *SEC v. Stephenson*, 732 F. Supp. 438, 439 (S.D.N.Y. 1990).

The prejudgment interest rate used by the Commission is the same rate used by the Internal Revenue Service to calculate underpayment penalties. *S.E.C. v. Gordon*, 822 F. Supp. 2d at 1161-62. That rate is defined as the Federal short term rate (also known as the period rate) plus three percentage points (also known as the annual rate). 26 U.S.C. § 6621(a)(2). Courts have upheld the use of this rate in Commission enforcement actions. *S.E.C. v. Gordon*, 822 F. Supp. 2d at 1161-1162; *see also S.E.C. v. First Jersey*, 101 F.3d 1450, 1476 (2nd Cir. 1996); *S.E.C. v. Drexel Burnham Lambert, Inc.*, 837 F. Supp. at 612 n.8.

Prejudgment interest on $1,475 from February 16, 2013 (the mid-point between the first and last opinion letters) to June 10, 2017 (the approximate date the initial order will issue) is $219.00. *See* Exhibit A.

C. Penalty

The Remedies Act provided the Commission with broad authority to seek penalties for any violation of the federal securities laws and added three tiers of penalties to the Securities Act. *See* Section 20(d) of the Securities Act. The Remedies Act also identified the aspects of a violation relevant to each of the three tiers. Section 8A(g)(2) of the Securities Act notes in sub-section (B) that a violation can qualify for the second

tier if it "involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement." 15 U.S.C. § 77h-1(g)(2)(B). For the third tier, the violation must have involved the same characteristics as the second and must have also "directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons." 15 U.S.C. § 77h-1(g)(2)(C).

The penalty provisions applicable in civil actions provide that a penalty of up to the amount of the applicable tier or the gross amount of pecuniary gain to the defendant, whichever is greater, may be imposed for each violation. For conduct occurring in 2012 and 2013, for a natural person such as Respondent, the maximum penalty is $7,500 per violation (first tier), $75,000 per violation (second tier), and $150,000 per violation (third tier). 15 U.S.C. § 787h-1(g)(2).

In determining whether a civil penalty should be imposed against an individual, and the amount of the penalty, if one is appropriate, courts look to a number of factors, including:

- the egregiousness of the defendant's conduct;
- the degree of the defendant's scienter;
- whether the defendant's conduct created substantial losses or the risk of substantial losses to other persons;
- whether the defendant's conduct was isolated or recurrent; and
- whether the penalty should be reduced due to the defendant's demonstrated current and future financial condition.

SEC v. Tourre, 4 F. Supp. 3d 579, 593 (S.D.N.Y. 2014) (citations omitted); *see also SEC v. Opulentica*, 479 F. Supp. 2d 319, 331 (S.D.N.Y. 2007); *SEC v. Haligiannis*, 470 F. Supp. 2d 373, 386 (S.D.N.Y. 2007).

While DiTommaso denies that he knew Microcap, Bayside, and Meadpoint were affiliates of FSPM, multiple documents found in his files and relied upon by him in his work for FSPM make clear that they were. DiTommaso was at least reckless in ignoring these documents and their implications. This is especially true given the suspicious nature of his ghost writing arrangement with Jean-Pierre.

Moreover, DiTommasso's recklessness facilitated the illegal issuance of nearly 3,000,000 FSPM shares on ten different occasions over the course of 13 months.[7] This egregious conduct and these significant share and dollar figures justify a significant penalty.

Penalties, as well as disgorgement and prejudgment interest, are warranted where an attorney issues false opinion letters. In *SEC v. Greenstone Holdings, Inc.*, 10-cv-01302-MGC, two attorneys that issued false opinion letters, among other things including Section 10b-5 violations, were ordered to pay $204,161.86 ($87,082.97 in disgorgement, $17,078.89 in prejudgment interest, and a $100,000 penalty) and $57,284.83 ($5,000 in disgorgement, $2,284.83 in interest, and a civil penalty of $50,000), respectively. Ex. B, November 25, 2015 Superseding Final Judgment as to Defendants John B. Frohling and Virginia K. Sourlis at 4. On appeal, in affirming the $204,161.86, the Second Circuit Court of Appeals noted:

> Frohling's acknowledgement that he did not 'say anywhere in [his 11 written or endorsed] opinion [letters] that' his opinion 'was not based on any personal knowledge of [his own]' and that he was 'simply relying on the opinions of other people'; and his continued insistence that he was entitled to give, approve, and concur in the opinions he gave without

[7] Brokerage statements reflect that these shares were valued in the millions of dollars. *See e.g.* Div. Ex. 36 at 4-7 (reflecting Richard Scholz's acquisition of 500,000 FSPM shares and sales at prices ranging from $0.23 to $0.40 per share); Div. Ex. 37 at SEC-MLPFS-E-0000225 (reflecting Myron Thaden's acquisition of 500,000 FSPM shares valued at $2,900,000) and SEC-MLPFS-E-0000583 (reflecting Sharryn Thaden's acquisition of 500,000 FSPM shares valued at $240,000).

> knowing, and without investigating to find out, whether they were true or false.

SEC v. Frohling, 851 F.3d 132, 139 (2nd Cir. 2016) (alterations in original). In affirming the judgment against attorney Sourlis, the Second Circuit saw

> no abuse of discretion here, given the record in this case as to Sourlis's lack of concern as to whether her representations of fact were true or false and her continued manifestation of a lack of concern for her responsibilities under the federal securities laws. (*See, e.g.*, Hearing Transcript, April 2, 2014, at 8, 13, 15 (district court's references to Sourlis's 'untruths,' her willingness to make statements—with 'absolutely no reason' to believe them correct—'on which other people's money depends,' and her 'failure to accept any responsibility').)

SEC v. Sourlis, 851 F.3d 139, 146 (2nd Cir. 2016).

In *SEC v. Spongetech Delivery Sys.*, attorney Pensley issued four baseless opinion letters authorizing removal of restrictive legends from approximately 12 million Spongetech shares and attorney Halperin issued ninety-two letters covering 922 million Spongetech shares. 2011 WL887940, at *3 (E.D.N.Y. Mar 14, 2011). Pensley was found "liable for disgorgement of $141,241, representing profits gained as a result of the conduct alleged in the Amended Complaint, together with prejudgment interest thereon in the amount of $33,307, and a civil penalty of $300,000." Ex. C, February 8, 2017 Final Judgment as to Defendant Joel Pensley. And Halperin was found "liable for disgorgement of $44,587, representing profits gained as a result of the conduct alleged in the Complaint, together with prejudgment interest thereon in the amount of $588, and a civil penalty in the amount of $100,000." Ex. D, April 7, 2016 Final Judgment as to Defendant Jack H. Halperin. [8]

In *SEC v. Zenergy Int'l, Inc.*, 13-cv-005511, attorney Diane Dalmy was given 4,000,000 shares of Zenergy stock for advising it regarding a reverse merger and issuing

[8] Pensley and Halperin were also found liable for Section 10(b) violations.

"several opinion letters" representing that post-merger shares of stock were exempt from the registration requirements of Section 5 of the Securities Act when they were not. Ex. E, September 30, 2015 Memorandum Opinion and Order at 7-8. She then sold 1,000,000 of those shares for $43,995. *Id.* at 9. Dalmy was ordered to disgorge the $43,995 in profits and $9,877.11 in prejudgment interest. Ex. F, September 20, 2016 Memorandum Opinion and Order at 9. A penalty has not yet been assessed.[9]

III. CONCLUSION

As these district court cases show, holding attorneys that issue false opinion letters accountable for their actions by imposing disgorgement, prejudgment interest, and penalties is appropriate to deprive these gatekeepers to our financial markets of their ill-gotten gains and to deter others from engaging in such conduct.[10] Respondent DiTommaso's reckless conduct here justifies the imposition of sanctions.

Dated: April 26, 2017

Respectfully Submitted,

Stephen C. McKenna, Esq.
Kim Greer, Esq.
Division of Enforcement
Securities and Exchange Commission
Denver Regional Office
1961 Stout Street, Ste. 1700
Denver, CO 80294

[9] The SEC's request for penalty is unresolved pending resolution of the SEC's Motion for Order Estopping Dalmy from Contesting Agency Findings (a 102(e) bar imposed by Chief Administrative Law Judge Murray ruling that Dalmy be permanently suspended from appearing or practicing before the Commission finding that Dalmy acted with scienter and egregiously).

[10] As noted in the Hearing Officer's April 19, 2017 Prehearing Order, Respondent plans to argue inability to pay at the upcoming hearing and is required to provide a Form D-A (17 C.F.R. § 209.1) by May 3, 2017. As Respondent has presented no evidence of an inability to pay at this time, the Division can not address any such argument in this brief and will do so at the hearing and in any allowed post-hearing briefing.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the Division of Enforcement's Prehearing Brief was served on the following on this 26th day of April, 2017, in the manner indicated below:

Securities and Exchange Commission
Brent Fields, Secretary
100 F Street, N.E.
Mail Stop 1090
Washington, D.C. 20549
(By Facsimile and original and three copies by UPS)

Hon. Judge Carol Fox Foelak
100 F Street, N.E.
Mail Stop 2557
Washington, D.C. 20549
(By Email)

Mr. Tod A. DiTommaso
Law Office of Tod A. DiTommaso
[redacted]
Sausalito, CA [redacted]
(By US Mail and Email: todanthonyditommaso@earthlink.net)

Nicole L. Nesvig
Senior Trial Paralegal

U.S. Securities and Exchange Commission

Division of Enforcement

Prejudgment Interest Report

DiTommaso PJI Report

Quarter Range	Annual Rate	Period Rate	Quarter Interest	Principal+Interest
Violation Amount				$1,475.00
03/01/2013-03/31/2013	3%	0.25%	$3.76	$1,478.76
04/01/2013-06/30/2013	3%	0.75%	$11.06	$1,489.82
07/01/2013-09/30/2013	3%	0.76%	$11.27	$1,501.09
10/01/2013-12/31/2013	3%	0.76%	$11.35	$1,512.44
01/01/2014-03/31/2014	3%	0.74%	$11.19	$1,523.63
04/01/2014-06/30/2014	3%	0.75%	$11.40	$1,535.03
07/01/2014-09/30/2014	3%	0.76%	$11.61	$1,546.64
10/01/2014-12/31/2014	3%	0.76%	$11.70	$1,558.34
01/01/2015-03/31/2015	3%	0.74%	$11.53	$1,569.87
04/01/2015-06/30/2015	3%	0.75%	$11.74	$1,581.61
07/01/2015-09/30/2015	3%	0.76%	$11.96	$1,593.57
10/01/2015-12/31/2015	3%	0.76%	$12.05	$1,605.62
01/01/2016-03/31/2016	3%	0.75%	$11.98	$1,617.60
04/01/2016-06/30/2016	4%	0.99%	$16.09	$1,633.69
07/01/2016-09/30/2016	4%	1.01%	$16.43	$1,650.12
10/01/2016-12/31/2016	4%	1.01%	$16.59	$1,666.71
01/01/2017-03/31/2017	4%	0.99%	$16.44	$1,683.15
04/01/2017-05/31/2017	4%	0.67%	$11.25	$1,694.40

Prejudgment Violation Range	Quarter Interest Total	Prejudgment Total
03/01/2013-05/31/2017	**$219.40**	**$1,694.40**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

- against -

GREENSTONE HOLDINGS, INC., et al.,

Defendants and Relief Defendants.

10 Civ. 1302 (MGC)

~~[PROPOSED]~~ SUPERSEDING FINAL JUDGMENT AS TO DEFENDANTS JOHN B. FROHLING AND VIRGINIA K. SOURLIS

WHEREAS, on May 25, 2011, plaintiff Securities and Exchange Commission ("Commission") filed its Third Amended Complaint, which charges defendants John B. Frohling ("Frohling") and Virginia K. Sourlis ("Sourlis") with the following: (1) primary violations of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") (and Rule 10b-5 thereunder) against Frohling and Sourlis; (2) aiding-and-abetting violations of Section 10(b) and Rule 10b-5, pursuant to Exchange Act Section 20(e), against Frohling and Sourlis; (3) primary violations of Section 5 of the Securities Act of 1933 ("Securities Act") against Frohling and Sourlis; and (4) primary violations of Securities Act Section 17(a) against Frohling (DE 128);

WHEREAS, on March 28, 2012, the Court issued and Order granting the Commission's motion for partial summary judgment against Frohling for primary liability, holding him liable as a primary violator of Securities Act Sections 5 and 17(a); and as a primary violator of Exchange Act Section 10(b) and Rule 10b-5 thereunder (and leaving unresolved the Commission's Section 10(b) aiding-and-abetting claim against Frohling) (DE 192);

WHEREAS, on March 21, 2013, the Court held a hearing on the Commission's motion

seeking certain relief against defendant Frohling;

WHEREAS, on June 20, 2013, the Court issued a "Final Judgment" against Frohling, based on the above rulings and hearing, ordering certain relief against him (DE 258) (the "Frohling Final Judgment");

WHEREAS, on November 16, 2012, the Court held a hearing on the Commission's motion seeking partial summary judgment against Sourlis as a primary violator of Exchange Act Section 10(b) and Rule 10b-5 thereunder, and of Securities Act Section 5;

WHEREAS, on November 20, 2012, the Court issued an Order, based on the Court's oral opinion at the November 16, 2012 hearing: (1) holding Sourlis liable for aiding-and-abetting violations of Exchange Act Section 10(b) and Rule 10b-5 thereunder, pursuant to Exchange Act Section 20(e); and (2) denying the Commission's motion seeking primary liability against Sourlis under those provisions (but not dismissing that claim) (DE 226 & 227);

WHEREAS, on July 10, 2013, the Court granted the Commission's motion for summary judgment against Sourlis holding her liable as a primary violator of Securities Act Section 5 (DE 260);

WHEREAS, on April 2, 2014, the Court held a hearing on the Commission's motion seeking certain relief against defendant Sourlis;

WHEREAS, on June 19, 2014, the Court issued a "Final Judgment" against Sourlis based on the above rulings and hearings, ordering certain relief against her (DE 277) (the "Sourlis Final Judgment");

WHEREAS, defendants Frohling and Sourlis subsequently appealed the Frohling Final Judgment and the Sourlis Final Judgment to the United States Court of Appeals for the Second Circuit;

WHEREAS, the Commission cross-appealed the Court's denial of the Commission's motion for primary liability against Sourlis under Exchange Act Section 10(b) and Rule 10b-5 thereunder;

WHEREAS, on June 9, 2015, the Second Circuit issued an Order remanding the matter; requesting that this Court consider further the unresolved Exchange Act Section 10(b) and Section 20(e) claims against Frohling (for aiding-and-abetting liability) and Sourlis (for primary liability); and "for modification or supplementation of the record consistent with this order." *SEC v. Frohling, et al.*, Nos. 13-3191-cv, 14-2301-cv, 14-2937-cv (2nd Cir. June 9, 2015) ("Remand Order");

WHEREAS, on July 21, 2015, the Court held a hearing regarding the Remand Order and the unresolved Section 10(b) and Section 20(e) claims against Sourlis and Frohling;

WHEREAS, on August 14, 2015, the Court issued an Order (DE 303): (1) modifying the Sourlis Final Judgment such that Sourlis is liable as both a primary violator and an aider and abettor under Exchange Act Section 10(b), Rule 10b-5 thereunder, and Exchange Act Section 20(e) (and also as a primary violator under Securities Act Section 5); and (2) directing the Commission to either "pursue . . . to finality or dismiss . . . from the case" its pending Exchange Act Section 10(b) and 20(e) aiding-and-abetting claim against Frohling (the "Frohling Aiding and Abetting Claim");

WHEREAS, on October 8, 2015, the Commission filed a motion to dismiss voluntarily the Frohling Aiding and Abetting Claim (DE 305);

WHERAS, on November 12, 2015, the Court issued an Order granting the Commission's motion to dismiss, and dismissing, the Frohling Aiding and Abetting Claim (DE 307);

Based on the Court's findings of fact and conclusions of law set forth above, and in and

during the Court's March 28, 2012 Order (DE 192), March 21, 2013 hearing, November 16, 2012 hearing, November 20, 2012 Orders (DE 226 & 227), July 10, 2013 Order (DE 260), April 2, 2014 hearing, July 21, 2015 hearing, and August 14 and November 12, 2015 Orders (DE 303 & 307), all of which are incorporated in this Order with the same force and effect as if fully set forth herein;

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

I.

Defendants Frohling and Sourlis are permanently barred from participating in an offering of penny stock, including engaging in activities with a broker, dealer, or issuer for purposes of issuing, trading, or inducing or attempting to induce the purchase or sale of any penny stock. A penny stock is any equity security that has a price of less than five dollars, except as provided in Rule 3a51-1 under the Exchange Act [17 C.F.R. 240.3a51-1].

II.

Defendant Frohling is liable for disgorgement of $87,082.97, prejudgment interest thereon in the amount of $17,078.89, and a civil penalty in the amount of $100,000.00 pursuant to Section 20(d) of the Securities Act [15 U.S.C. § 77t(d)] and Section 21(d)(3) of the Exchange Act [15 U.S.C. § 78u(d)(3)]. Frohling shall satisfy this obligation by paying $204,161.86 to the Securities and Exchange Commission within 14 days after entry of this Final Judgment.

III

Defendant Sourlis is liable for disgorgement of $5,000.00, prejudgment interest thereon in the amount of $2,284.83, and a civil penalty in the amount of $50,000.00 pursuant to Section 20(d) of the Securities Act [15 U.S.C. § 77t(d)] and Section 21(d)(3) of the Exchange Act [15

U.S.C. § 78u(d)(3)]. Sourlis shall satisfy this obligation by paying $57,284.83 to the Securities and Exchange Commission within 14 days after entry of this Final Judgment.

IV.

Defendants Frohling and Sourlis may transmit payment of their disgorgement, prejudgment interest, and civil penalties electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request. Payment may also be made directly from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm. Defendants Frohling and Sourlis may also pay by certified check, bank cashier's check, or United States postal money order payable to the Securities and Exchange Commission, which shall be delivered or mailed to Enterprise Services Center, Accounts Receivable Branch, 6500 South MacArthur Boulevard, Oklahoma City, OK 73169, and shall be accompanied by a letter identifying the case title, civil action number, and name of this Court; John Frohling or Virginia Sourlis as a defendant in this action; and specifying that payment is made pursuant to this Final Judgment.

V.

This Final Judgment supersedes and replaces the June 20, 2013 Frohling Final Judgment (DE 258) and the June 19, 2014 Sourlis Final Judgment (DE 277).

VI.

This Court shall retain jurisdiction of this matter for the purposes of enforcing the terms of this Judgment.

Dated: November 25 2015

S/

The Honorable Miriam G. Cedarbaum
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

SPONGETECH DELIVERY SYSTEMS, INC., RM ENTERPRISES INTERNATIONAL, INC., STEVEN Y. MOSKOWITZ, MICHAEL E. METTER, GEORGE SPERANZA, JOEL PENSLEY, and JACK HALPERIN,

Defendants,

and

BLUE STAR MEDIA GROUP, INC., BUSINESSTALKRADIO.NET ACQUISITION CORP.

Relief Defendants.

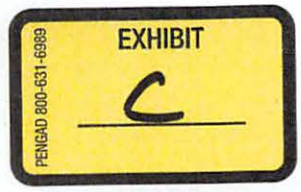
10-CV-2031 (DLI)~~(JMA)~~ (RML) dli 2/8/17

~~PROPOSED~~ dli 2/8/17

FINAL JUDGMENT AS TO DEFENDANT JOEL PENSLEY

Pursuant to the Judgment as to Defendant Joel Pensley entered on August 4, 2016 [Docket Entry 365], adopted and incorporated herein, but effective as of the date of its original entry, nunc pro tunc, Final Judgment is hereby entered against Defendant Joel Pensley ("Defendant") as follows:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendant is liable for disgorgement of $141,241, representing profits gained as a result of the conduct alleged in the Amended Complaint, together with prejudgment interest thereon in the amount of $33,307, and a civil penalty of $300,000, pursuant to Section 20(d) of the Securities Exchange Act of 1933 [15



U.S.C. § 15 U.S.C. § 77t(d)] and Section 21(d)(3) of the Securities Exchange Act of 1934 [15 U.S.C. § 78u(d)(3)]. Defendant shall satisfy this obligation by paying $474,548 to the Securities and Exchange Commission within 14 days after entry of this Final Judgment.

Defendant may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request. Payment may also be made directly from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm. Defendant may also pay by certified check, bank cashier's check, or United States postal money order payable to the Securities and Exchange Commission, which shall be delivered or mailed to

Enterprise Services Center
Accounts Receivable Branch
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

and shall be accompanied by a letter identifying the case title, civil action number, and name of this Court; Joel Pensley as a defendant in this action; and specifying that payment is made pursuant to this Final Judgment.

Defendant shall simultaneously transmit photocopies of evidence of payment and case identifying information to the Commission's counsel in this action. By making this payment, Defendant relinquishes all legal and equitable right, title, and interest in such funds and no part of the funds shall be returned to Defendant. The Commission shall send the funds paid pursuant to this Final Judgment to the United States Treasury.

The Commission may enforce the Court's judgment for disgorgement and prejudgment interest by moving for civil contempt (and/or through other collection procedures authorized by law) at any time after 14 days following entry of this Final Judgment. Defendant shall pay post judgment interest on any delinquent amounts pursuant to 28 U.S.C. § 1961.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that this Court shall retain jurisdiction of this matter for the purposes of enforcing the terms of this Final Judgment.

There being no just reason for delay, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the Clerk is ordered to enter this Final Judgment forthwith and without further notice.

Defendant Pensley's termination as a defendant in this action shall be noted on the docket.

Dated: Brooklyn, N.Y. February 8, 2017

s/Chief U.S.D, J. Irizarry

Chief
UNITED STATES DISTRICT JUDGE

D/R

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

SPONGETECH DELIVERY SYSTEMS, INC., RM ENTERPRISES INTERNATIONAL, INC., STEVEN Y. MOSKOWITZ, MICHAEL E. METTER, GEORGE SPERANZA, JOEL PENSLEY, and JACK HALPERIN,

Defendants,

and

BLUE STAR MEDIA GROUP, INC. and BUSINESSTALKRADIO.NET ACQUISITION CORP.,

Relief Defendants.

10-CV-2031 (DLI) (JMA)

FINAL JUDGMENT AS TO DEFENDANT JACK H. HALPERIN

The Securities and Exchange Commission ("Commission") having filed a Complaint and Defendant Jack H. Halperin having entered a general appearance; consented to the Court's jurisdiction over Defendant and the subject matter of this action; consented to entry of this Final Judgment without admitting or denying the allegations of the Complaint (except as to jurisdiction and except as otherwise provided herein in paragraph IX); waived findings of fact and conclusions of law; and waived any right to appeal from this Final Judgment:

I.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendant is permanently restrained and enjoined from violating, directly or indirectly, Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") [15 U.S.C. § 78j(b)] and Rule 10b-5 promulgated thereunder [17 C.F.R. § 240.10b-5], by using any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, in connection with the purchase or sale of any security:

(a) to employ any device, scheme, or artifice to defraud;

(b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or

(c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Final Judgment by personal service or otherwise: (a) Defendant's officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Defendant or with anyone described in (a).

II.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant is permanently restrained and enjoined from violating Section 17(a) of the Securities Act of 1933 (the "Securities Act") [15 U.S.C. § 77q(a)] in the offer or sale of any security by the use of any

means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly:

(a) to employ any device, scheme, or artifice to defraud;

(b) to obtain money or property by means of any untrue statement of a material fact or any omission of a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or

(c) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Final Judgment by personal service or otherwise: (a) Defendant's officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Defendant or with anyone described in (a).

III.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant is permanently restrained and enjoined from violating Section 5 of the Securities Act [15 U.S.C. § 77e] by, directly or indirectly, in the absence of any applicable exemption:

(a) Unless a registration statement is in effect as to a security, making use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise;

(b) Unless a registration statement is in effect as to a security, carrying or causing to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale; or

(c) Making use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed with the Commission as to such security, or while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under Section 8 of the Securities Act [15 U.S.C. § 77h].

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Final Judgment by personal service or otherwise: (a) Defendant's officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Defendant or with anyone described in (a).

IV.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant is permanently barred from participating in an offering of penny stock, including engaging in activities with a broker, dealer, or issuer for purposes of issuing, trading, or inducing or attempting to induce the purchase or sale of any penny stock. A penny stock is any equity

security that has a price of less than five dollars, except as provided in Rule 3a51-1 under the Exchange Act [17 C.F.R. § 240.3a51-1].

V.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant is permanently barred from directly or indirectly providing professional legal services to any person or entity in connection with the offer or sale of securities pursuant to, or claiming, an exemption under Securities Act Section 4(a)(1), predicated on Securities Act Rule 144, or any other exemption from the registration provisions of the Securities Act, including, without limitation, participating in the preparation or issuance of any opinion letter relating to such offering or sale.

VI.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant is liable for disgorgement of $44,587, representing profits gained as a result of the conduct alleged in the Complaint, together with prejudgment interest thereon in the amount of $588, and a civil penalty in the amount of $100,000, pursuant to Section 20(d) of the Securities Act [15 U.S.C. § 77t(d)] and Section 21(d)(3) of the Exchange Act [15 U.S.C. § 78u(d)(3)]. Defendant shall satisfy this obligation by paying $145,175 to the Securities and Exchange Commission pursuant to the terms of the payment schedule set forth in paragraph XI below after entry of this Final Judgment.

Defendant may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request. Payment may also be made directly

from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm. Defendant may also pay by certified check, bank cashier's check, or United States postal money order payable to the Securities and Exchange Commission, which shall be delivered or mailed to

Enterprise Services Center
Accounts Receivable Branch
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

and shall be accompanied by a letter identifying the case title, civil action number, and name of this Court; Jack H. Halperin as a defendant in this action; and specifying that payment is made pursuant to this Final Judgment.

Defendant shall simultaneously transmit photocopies of evidence of payments and case identifying information to the Commission's counsel in this action. By making this payment, Defendant relinquishes all legal and equitable right, title, and interest in such funds and no part of the funds shall be returned to Defendant.

The Commission may enforce the Court's judgment for disgorgement and prejudgment interest by moving for civil contempt (and/or through other collection procedures authorized by law) at any time after 14 days following entry of this Final Judgment. Defendant shall pay post judgment interest on any delinquent amounts pursuant to 28 U.S.C. § 1961. The Commission shall hold the funds, together with any interest and income earned thereon (collectively, the "Fund"), pending further order of the Court.

The Commission may propose a plan to distribute the Fund subject to the Court's approval. Such a plan may provide that the Fund shall be distributed pursuant to the Fair Fund provisions of Section 308(a) of the Sarbanes-Oxley Act of 2002. The Court shall retain

jurisdiction over the administration of any distribution of the Fund. If the Commission staff determines that the Fund will not be distributed, the Commission shall send the funds paid pursuant to this Final Judgment to the United States Treasury.

Regardless of whether any such Fair Fund distribution is made, amounts ordered to be paid as civil penalties pursuant to this Judgment shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Defendant shall not, after offset or reduction of any award of compensatory damages in any Related Investor Action based on Defendant's payment of disgorgement in this action, argue that he is entitled to, nor shall he further benefit by, offset or reduction of such compensatory damages award by the amount of any part of Defendant's payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Defendant shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the United States Treasury or to a Fair Fund, as the Commission directs. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this Judgment. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against Defendant by or on behalf of one or more investors based on substantially the same facts as alleged in the Complaint in this action.

VII.

Defendant Jack H. Halperin shall pay the total of disgorgement, prejudgment interest, and penalty due of $145,175 in installments to the Commission according to the following schedule: (1) $45,175 within 10 days of entry of this Final Judgment; (2) $35,000 within 60

days of entry of Final Judgment; (3) $35,000 within 180 days of entry of this Final Judgment; (4) $30,000 within 350 days of entry of this Final Judgment. Payments shall be deemed made on the date they are received by the Commission and shall be applied first to post judgment interest, which accrues pursuant to 28 U.S.C. § 1961 on any unpaid amounts due after 14 days of the entry of Final Judgment. Prior to making the final payment set forth herein, Jack H. Halperin shall contact the staff of the Commission for the amount due for the final payment.

If Jack H. Halperin fails to make any payment by the date agreed and/or in the amount agreed according to the schedule set forth above, all outstanding payments under this Final Judgment, including post-judgment interest, minus any payments made, shall become due and payable immediately at the discretion of the staff of the Commission without further application to the Court.

VIII.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Consent of Jack H. Halperin is incorporated herein with the same force and effect as if fully set forth herein, and that Defendant shall comply with all of the undertakings and agreements set forth therein.

IX.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, solely for purposes of exceptions to discharge set forth in Section 523 of the Bankruptcy Code, 11 U.S.C. §523, the allegations in the complaint are true and admitted by Defendant, and further, any debt for disgorgement, prejudgment interest, civil penalty or other amounts due by Defendant under this Final Judgment or any other judgment, order, consent order, decree or settlement agreement entered in connection with this proceeding, is a debt for the violation by Defendant of the federal

securities laws or any regulation or order issued under such laws, as set forth in Section 523(a)(19) of the Bankruptcy Code, 11 U.S.C. §523(a)(19).

X.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that this Court shall retain jurisdiction of this matter for the purposes of enforcing the terms of this Final Judgment.

XI.

There being no just reason for delay, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the Clerk is ordered to enter this Final Judgment forthwith and without further notice.

Dated: Brooklyn, NY
May 13, 2016

s/
Judge DLI
CHIEF UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SECURITIES AND EXCHANGE COMMISSION,	)	
Plaintiff,	)	Case No. 13-cv-5511
v.	)	Judge Joan B. Gottschall
ZENERGY INTERNATIONAL, INC., *et al.*,	)	
Defendants.	)	

MEMORANDUM OPINION & ORDER

This case is part of the fall-out of a penny-stock pump-and-dump scheme. In June 2009, defendant Bosko R. Gasich ("Gasich") and other individuals associated with Zenergy International, Inc. ("Zenergy") acquired the publicly traded stock of Paradigm Tactical Products, Inc. ("Paradigm") through a reverse-merger. In connection with the merger, Gasich assigned convertible debt securities that he had received from Zenergy to several of his friends, family members, and business associates, who subsequently converted the assigned securities into 300 million shares of Zenergy stock. Gasich and others then organized a campaign to promote Zenergy in press releases and over the Internet. Between June 2, 2009 and mid-August 2009, the price per share of Zenergy stock increased approximately tenfold. As the share price increased, Gasich's assignees sold their stock to unsuspecting investors. The assignees generated $4.4 million in profits.

On August 1, 2013, the SEC brought this action against Gasich, Zenergy, and other persons for alleged violations of federal securities laws. Now before the court is the SEC's

motion for partial summary judgment against defendant Diane D. Dalmy ("Dalmy") for her alleged violation of Section 5 of the Securities Act of 1933, 15 U.S.C. § 77e ("Section 5"). Dalmy was one Gasich's assignees who sold shares of Zenergy stock. She was also the transaction attorney who advised the principals of Zenergy and Paradigm as they executed the reverse merger.

For the reasons set forth herein, the court agrees with the SEC that no genuine issue of fact exists as to Dalmy's liability under Section 5. The SEC's motion is therefore granted.

I. FACTS[1]

A. Zenergy

Zenergy was incorporated as a purported biofuels company in July 2006. Its original founders were Gasich, defendant Robert J. Luiten ("Luiten"), and their now-deceased business partner, Martin McIntyre ("McIntyre"). Each individual owned one-third of Zenergy's stock, which equated to 10 million shares, respectively.

Zenergy was initially financed through capital contributions by Gasich and McIntyre. Gasich also loaned $30,000 to Zenergy in April 2008 in exchange for convertible debt securities, according to a promissory note that Gasich prepared. The convertible debt securities purportedly gave Gasich the right to convert $0.001 (par value of the stock) of debt into one share of Zenergy. If fully exercised, Gasich could convert the debt securities into 30 million Zenergy shares.

Through most of Zenergy's existence, Gasich, Luiten, and McIntyre all participated in managing the company either as officers or paid consultants. From July 2006 to 2010, Luiten served as Zenergy's Chief Executive Officer, Chairman of the Board, and sole director.

[1] Citations to the SEC's Local Rule 56.1 Statement of Facts are noted as "SEC SOF ¶ __."

Notwithstanding these formal titles, Luiten shared his responsibilities with Gasich and McIntyre. Gasich had access to Zenergy's bank accounts, and Zenergy's office address was a site that Gasich maintained. Moreover, Gasich consulted Zenergy through his company, Market Ideas, Inc. Gasich was the President, Chief Executive Officer, and sole shareholder of Market Ideas. In 2006, Market Ideas "provided capital investment and advisory services" in connection with the founding of Zenergy. (*See* SEC Ex. 7, Gasich Aff. ¶ 3). Thereafter Market Ideas advised Zenergy with respect to its "corporate development, deal negotiations, capital structure, locating and procuring key management, site procurement, and engaging institutional investors." (*Id.* ¶ 4).

B. McIntyre's Death

McIntyre died in June 2008. Although his widow inherited his stock, she did not assume his role in the company or otherwise participate in Zenergy's operation. Instead, Luiten and Gasich effectively co-managed the company.

C. Zenergy's Reverse Merger with Paradigm

Sometime between 2008 and early 2009, Gasich and Luiten decided to pursue external funding. Rather than appeal directly to investors, they looked for publicly traded shell companies to merge with Zenergy so that Zenergy could issue stock. Both the SEC and Zalmy refer to the type of transaction Gasich and Luiten desired as "a reverse merger." As stated on Zalmy's website,

> A reverse merger is a method by which an active privately-owned operating company goes public by completing a transaction with a public shell company, with the public company surviving the transaction but having issued a controlling share of the company's stock to the owners of the privately-owned operating company. The public shell company then typically changes its name to reflect the operating business of the privately-owned operating company. Most public

> companies that enter into reverse mergers are shell companies, which are companies that have no significant operations or assets.[2]

(SEC SOF ¶ 19).

On or about March 23, 2009, defendant Scott H. Wilding ("Wilding") and Gasich began discussing a reverse merger transaction between Zenergy and Paradigm.[3] Wilding had been marketing Paradigm, a supposed seller of handheld security devices, to companies seeking access to publicly traded shares.[4] During the SEC's investigation that preceded this suit, Wilding testified and explained the rationale for merging two companies with different businesses: "There is no rationale: one is a shell, there is nothing there, and one wanted to go public." (SEC SOF ¶ 22).

Wilding was not alone in understanding the purpose of the Zenergy-Paradigm reverse merger: other participants in the transaction also viewed Paradigm as a "shell" company that had the ability to issue public shares. Paradigm's Chief Executive Officer, Vincent Cammarata, admitted that Paradigm "had zero operating capital" at the time of its reverse merger with Zenergy. (SEC SOF ¶ 28). Gasich averred that his company, Market Ideas, "assisted Zenergy in locating" Paradigm as "a merger candidate" so that Zenergy could "becom[e] a public company"

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[2] Dalmy challenges the admissibility of the SEC's citation to her website for lack of authentication. The court notes that Dalmy's website, or at least a website advertising her legal services and identifying her email address, still displays this same explanation of a reverse merger that the SEC incorporated into its Statement of Facts. Regardless of the authenticity of the website, the court cites its explanation of a reverse merger solely for context.

[3] On February 17, 2004, Administrate Law Judge Brenda P. Murray ordered Wilding to cease and desist from violating Sections 5(a) and (c) of the Securities Act. *See In re Research Investment Group*, Securities Act Release No. 83871 (Feb. 17, 2004) (http://www.sec.gov/litigation-admin/33-8387.htm).

[4] Before conferring with Gasich, Wilding attempted to negotiate a reverse merger between Paradigm and Naturally Splendid Enterprises, Ltd., an alleged seller of nutritional supplements. Zalmy worked with Wilding on this transaction, which evidently failed to materialize.

via a reverse merger. (SEC Ex. 7, Gasich Aff. ¶ 5). Luiten also understood that Gasich had identified Paradigm as a shell company "for the purpose of entering a reverse merger." (SEC Ex. 3 ¶ 6). Dalmy testified that she first became involved in the deal in March 2009, after Wilding contacted her to obtain "legal services related to a reverse stock split. . . ." (Dalmy Ex. 6, Dalmy Dep. 35:1-8). She admits that she understood that Paradigm would deliver "zero" assets and liabilities at closing. (*See* SEC Ex. 30, Dalmy Dep. 145:1-8).

The transaction itself commenced on March 31, 2009, when Zenergy and Paradigm entered into a memorandum of understanding. The memorandum specified that Paradigm would "deliver at closing 0/0 assets/liabilities." (SEC SOF ¶ 32). Zenergy and Paradigm then entered into a Share Exchange Agreement on or about May 28, 2009. Pursuant to this agreement, which Dalmy prepared with Gasich's assistance, Zenergy was to merge into Paradigm to allow Zenergy's shareholders to gain control over Paradigm. Both companies approved the Share Exchange Agreement on or about June 8-9, 2015.

On or about June 12, 2009, Zenergy shareholders received 216,232,100 restricted shares pursuant to the Share Exchange Agreement. The shares gave Zenergy shareholders a 91.5% stake in Paradigm. Gasich, Luiten, and McIntyre's widow each received approximately 67 million shares, based on the interests they held in Zenergy before the reverse merger.[5]

[5] Dalmy challenges the notion that Gasich received 67 million shares through the merger. She contends that those shares were technically issued to a company, The Spire Group, LLC ("Spire Group"), and that the SEC has failed to submit admissible evidence verifying that Gasich was the sole owner of the Spire Group. But Dalmy misses the point. Ultimately, the issue is whether Gasich exercised control over the shares that he directed to the Spire Group. *See infra* at 11-14. Two undisputed facts show that Gasich exercised complete control over those shares. First, Gasich himself stated that he was directing the shares to which he was entitled, based on his pre-merger ownership interest in Zenergy, to the Spire Group. On June 5, 2009, Gasich wrote an email to Luiten indicating that he "just had a call" with Dalmy "in terms of format" for the division of shares Zenergy would receive pursuant to the Share Exchange Agreement. *See* SEC Ex. 46. Gasich provided a "break down" of the distribution of the 216,232,100 shares in his

D. The Gasich Assignment

In connection with the reverse merger, Paradigm agreed to assume the $30,000 worth of convertible debt that Zenergy purportedly owed to Gasich. However, the value of the debt changed: rather than equal $0.001 per share, the conversion rate was revised to $0.0001 per share. The new conversion rate meant Gasich could convert his securities into 300 million shares of Zenergy stock instead of 30 million shares.

Gasich assigned portions of his debt securities to members of his family, his friends, associates of Paradigm, Dalmy, and others. The assignees subsequently converted their assigned debt into hundreds of millions of shares of stock. Dalmy received 4 million shares for her role as counsel for the reverse merger.

E. The Public Sale of Zenergy's Post-Merger Shares

From June 2009 to December 2009, Gasich, Wilding and others promoted Zenergy by issuing press releases and posting information on internet message boards. The following chart reflects the increase in share price and volume activity of Zenergy stock between January 2009 and July 2010.

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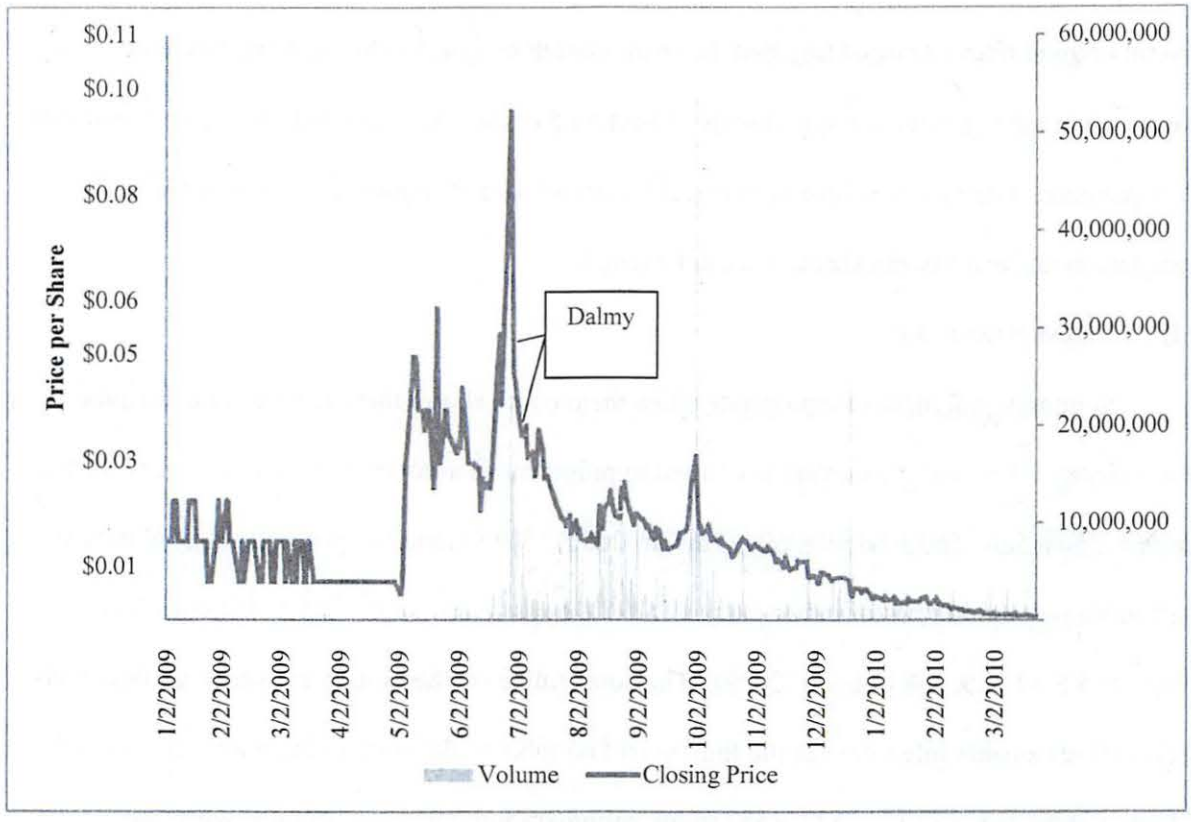
email to Luiten. *Id.* Although Gasich's name is not listed among the recipients of shares, he stated the following: "The Spire Group, LLC 66,663,331 shares (*converting my shares to corporation*)." *Id.* (emphasis added). Thus, the Spire Group served as a repository in which Gasich deposited the shares he was due. Second, even if there is no authenticated paperwork establishing Gasich's sole ownership of the Spire Group, Dalmy does not dispute that he was entitled to receive those shares before he transferred them to the Spire Group. It is undisputed that Gasich (a) held a one-third ownership interest in Zenergy before the merger, and (b) was due an amount of shares in the post-merger Zenergy proportionate to what his co-owners, Luiten and McIntyre's widow, obtained. Luiten and McIntyre both received approximately 67 million shares. Gasich was thus entitled to receive a similar amount. It is thus no coincidence that Gasich directed approximately 67 million shares to the Spire Group. That amount is what he owned. Thus, regardless of how Gasich used or transferred those shares, the upshot is he, alone, controlled their distribution.

Zenergy Share Price and Volume Activity (January 2009 to July 2010)



Gasich's assignees obtained at least $4.4 million from their sales. Dalmy deposited her 4 million Zenergy shares into her personal account at Scottrade on or about August 12, 2009. She then sent Scottrade one of her opinion letters, the convertible note, and other documents to show that her shares could be sold as unrestricted stock to the public. Between August 12 and August 18, 2009, she sold 1 million Zenergy shares to public investors for $43,995. She deposited the proceeds into her Scottrade account and subsequently used them for personal expenses.

F. Dalmy's Role in the Reverse Merger

Dalmy performed a variety of services as the transaction attorney for the reverse merger between Zenergy and Paradigm. She advised the parties regarding implementing the transaction

and prepared its essential documents, including the Share Exchange Agreement, board resolutions, and other corporate filings. Then, following the reverse merger, Dalmy prepared several opinion letters representing that the stock Gasich assigned to her and other assignees was exempt from the registration requirements of Section 5 of the Securities Act. It is undisputed that no registration statement was filed or in effect for any of sales of Zenergy shares that Gasich's assignees made, and that the shares were not exempt.

II. LEGAL STANDARD

Summary judgment is appropriate when the movant shows there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *Smith v. Hope Sch.*, 560 F.3d 694, 699 (7th Cir. 2009). "[A] factual dispute is 'genuine' only if a reasonable jury could find for either party." *SMS Demag Aktiengesellschaft v. Material Scis. Corp.*, 565 F.3d 365, 368 (7th Cir. 2009). The court ruling on the motion construes all facts and makes all reasonable inferences in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Summary judgment is warranted when the nonmoving party cannot establish an essential element of its case on which it will bear the burden of proof at trial. *Kidwell v. Eisenhauer*, 679 F.3d 957, 964 (7th Cir. 2012).

III. DISCUSSION

"Section 5 of the Securities Act of 1933 requires a valid registration statement before securities are sold in or by means of interstate commerce. . . ." *United States v. Dokich*, 614 F.3d 314, 321 (7th Cir. 2010) (citing 15 U.S.C. § 77e). The SEC can establish a prima facie violation of Section 5 by showing that (1) the defendant directly or indirectly sold or offered to sell securities, (2) no registration statement was in effect or filed as to the securities involved, and (3) the offer or sale was made through the use of interstate facilities or the mails. *See S.E.C. v.*

Randy, 38 F. Supp. 2d 657, 667 (N.D. Ill. 1999) (citing *SEC v. Continental Tobacco Co.*, 463 F.2d 137, 155–56 (5th Cir.1972)). "A person not directly engaged in the transfer of the title of a security can be held liable if he has 'engaged in steps necessary to the distribution of [unregistered] security issues.'" *S.E.C. v. Greenstone Holdings, Inc.*, No. 10-cv-1302, 2012 WL 1038570, at *11 (S.D.N.Y. Mar. 28, 2012) (quoting *SEC v. Chinese Consol. Benevolent Ass'n, Inc.*, 120 F.2d 738, 741 (2d Cir.1941)). The defendant's "participation must be substantial, not *de minimis*," to be found liable as an indirect seller. *Greenstone Holdings*, 2012 WL 1038570, at *11.

Here, Dalmy does not dispute that she violated Section 5. She directly sold one million shares of Zenergy stock for $43,995. Nor does she contest the SEC's argument that she acted as an indirect seller in the sales of Zenergy stock by Gasich's assignees by virtue of the opinion letters she issued. *See Greenstone* Holdings, 2012 WL 1038570, at *11 ("As general counsel, Frohling wrote and approved opinion letters without which CST would not have issued any unregistered shares. Such conduct is sufficient to hold an attorney liable under Section 5."); *accord S.E.C. v. Gendarme Capital Corp.*, No. 11-cv-0053, 2012 WL 346457, at *4 (E.D. Cal. Jan. 31, 2012).

The sole disputed issue in this case is whether Dalmy and Gasich's other assignees' sales of Zenergy stock were exempt from the registration requirements of Section 5.[6] If no exemption applies to Dalmy's and the other assignees' sales of unregistered Zenergy securities, then Dalmy is liable under Section 5, and the SEC is entitled to partial summary judgment.

[6] Dalmy argues that she sold her shares and issued her advisory opinions in good faith, but scienter is not an element of a violation of Section 5. *See SEC v. Calvo*, 378 F.3d 1211, 1215 (11th Cir. 2004) (per curiam). Dalmy's purported good faith belief that the Zenergy shares were exempt from registration is thus not a defense to liability under Section 5.

The only exemption that Dalmy invokes is Section 4(1) of the Securities Act, 15 U.S.C. § 77d(1) ("Section 4(1)"). Section 4(1) provides an exemption to the registration requirements of Section 5 "for transactions by any person other than an issuer, underwriter, or dealer." 15 U.S.C. § 77d(1)).[7] "The term 'issuer' means every person who issues or proposes to issue any security. . . ." 15 U.S.C. § 77b(a)(4). An "underwriter" is "any person who has purchased from an issuer with a view to . . . the distribution of any security." *Id.* § 77b(a)(11). And a "dealer" is "any person who engages either for all or part of his time, directly or indirectly, as agent, broker, or principal, in the business of offering, buying, selling, or otherwise dealing or trading in securities issued by another person." *Id.* § 77b(a)(12).

Here, the applicability of the term "underwriter" is at issue.[8] It is undisputed that Dalmy acquired her Zenergy stock from Gasich. The SEC asserts that Dalmy is ineligible for the Section 4(1) exemption because Gasich was an "underwriter" to the reverse merger. Dalmy agrees that if Gasich qualifies as an underwriter to Zenergy's distribution of unregistered securities, then his assignment of shares to her and her subsequent resale were not exempt from registration.

The General Rules and Regulations to the Securities Act of 1933 provide guidance for understanding the term, "underwriter," for the purpose of "determining whether or not the Section 4(1) exemption from registration is available for the sale of [unregistered] securities." *See* 17 C.F.R. § 230.144. This rule, referred to as "Rule 144," "creates a safe harbor from the Section 2(a)(11) definition of 'underwriter.'" *Id.* Essentially, if a person satisfies the criteria of

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[7] Stated differently, stock sales by "issuers," "underwriters," and "dealers" *are* subject to the registration requirements of Section 5.

[8] The SEC does not contend that Gasich acted as an "issuer," as Paradigm (renamed Zenergy) issued the shares. Nor does the SEC claim that Gasich was a "dealer" when he assigned his shares.

the Rule 144 safe harbor, then that person "is deemed *not* to be engaged in a distribution of the securities and therefore not an underwriter of the securities for purposes of Section 2(a)(11)." *Id.* (emphasis added).

The critical inquiry here is whether Gasich satisfies all of the conditions of the Rule 144 safe harbor; if he does not, Dalmy acknowledges that the SEC must prevail in its Section 5 claim against her.

Both the SEC and Dalmy focus on two conditions under Rule 144. First, Rule 144 imposes a one-year holding period requirement. *See* § 230.144(d)(1)(ii). That is, a minimum of one year must elapse between the later of (1) the date of the acquisition of the securities from the issuer, *or from an affiliate of the issuer*, and (2) any resale of such securities. *Id.* (emphasis added). Second, the Rule 144 safe harbor is unavailable to securities issued by shell companies. § 230.144(i). A shell company is defined as an issuer "with no or nominal operations and no or nominal non-cash assets." *Id.*

The court first analyzes whether Dalmy's public sale of Zenergy stock was subject to the holding period requirement. If this requirement applied to Dalmy's sale of Zenergy shares, it is undisputed that she did not comply with it because she acquired her stock from Gasich in June 2009 and sold it to the public in August 2009.[9] The only question is whether Gasich was an "affiliate of the issuer," Zenergy. If he was, then the holding requirement applies, and Dalmy would be ineligible for the Rule 144 safe harbor and the Section 4(1) exemption.

Rule 144 defines an "affiliate of an issuer" as "a person that directly, or indirectly through one or more intermediaries, *controls*, or is controlled by, or is under common control

[9] The same analysis applies to Gasich's other assignees. All of their resales took place less than a year before the one-year holding period expired. So, if Gasich qualifies as an affiliate of Zenergy, then Dalmy also violated Section 5 by serving as an indirect seller to the other assignees' sales.

with, such issuer." § 230.144(a)(1) (emphasis added). Although "Rule 144 fails to define 'control,' Rule 405 of Regulation C establishes a definition of 'affiliate' identical to that of Rule 144 and defines 'control' as 'the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person whether through the ownership of voting securities, by contract, or otherwise.'" *S.E.C. v. Kern*, 425 F.3d 143, 149 (2d Cir. 2005) (quoting § 230.405); *see also United States v. Corr*, 543 F.2d 1042, 1050 (2d Cir. 1976) (holding that control "depends upon the totality of the circumstances including an appraisal of the influence upon management and policies of a corporation by the person involved"). "A person may be in control even though he does not own a majority of the voting stock, and such control may rest with more than one person at the same time or from time to time. . . ." *Corr*, 543 F.2d at 1050 (citations omitted). "Although there is no bright-line rule declaring how much stock ownership constitutes 'control' and makes one an 'affiliate' under Section 4(1), some commentators have suggested that ownership of something between ten and twenty percent is enough, especially if other factors suggest actual control." *S.E.C. v. Cavanagh*, 445 F.3d 105, 114 n. 19 (2d Cir. 2006).

The undisputed facts in this case show that Gasich exerted sufficient control over Zenergy to qualify as an affiliate.[10] First, Gasich possessed the power to direct Zenergy's policies through his stock ownership and by contract. As was one of Zenergy's principal founders, he owned approximately 10 million shares of the company's outstanding stock, as did its other founders, Luiten and McIntyre. But Gasich owned something that Luiten and McIntyre did not: convertible debt securities. These securities gave Gasich the contractual power to

[10] Given the court's ruling that Dalmy failed to comply with the one-year holding requirement, it is unnecessary for the court to resolve whether Zenergy or Paradigm were shell companies as understood in the Rule 144 context.

convert the $30,000 he loaned to Zenergy into an additional 30 million shares of Zenergy stock, a conversion that would have given him a majority stake in the company before it merged with Paradigm.

After the merger, Gasich's ownership control increased. He, Luiten, and McIntyre's widow all received approximately 66 million shares in the post-merger Zenergy. These shares corresponded to the one-third interest each of them held in the company. In an email dated June 5, 2009, Gasich emailed Luiten with a "break down" of the 216,232,100 shares that Zenergy received through the reverse merger. *Id.* Although Gasich did not include himself among the list of recipients, he stated that he "convert[ed] [his] shares to [the] corporation," the Spire Group. The 66,663,331 shares Gasich "converted" to the Spire group roughly equaled the number of shares that his Zenergy co-founders, Luiten and McIntyre, received.[11]

Gasich subsequently received even more shares when he exercised his right to convert his debt securities. Gasich converted his $30,000 worth of debt securities into 300 million post-merger shares. He then assigned those shares to members of his family, his friends, associates of Paradigm, Dalmy, and others. If the shares Gasich held in the Spire Group are combined with the 300 million shares he assigned, Gasich controlled 366,663,331 out of the 536 million shares outstanding.

Additionally, separate from his ownership interests, Gasich possessed sufficient influence over Zenergy to confirm his status as an affiliate. Before the merger, Zenergy's CEO, Luiten, shared managerial responsibilities with Gasich. While both principals weighed in on the company's major strategic decisions, Gasich spearheaded its merger with Paradigm. Gasich's company, Market Ideas, "assisted Zenergy in locating" Paradigm as "a merger candidate" so that

[11] Luiten acquired 66,663,331 shares, and McIntyre's widow obtained 66,615,338 shares

Zenergy could go public. (SEC Ex. 7, Gasich Aff. ¶ 5). During the transaction, Dalmy's primary contacts were Wilding on behalf of Paradigm and Gasich on behalf of Zenergy. Dalmy acknowledges that Gasich assisted her in drafting the documents necessary to effectuate the transaction. In Dalmy's own words, "Gasich had significant involvement" in the negotiations on behalf of Zenergy. (*See* Dalmy's Resp. to SEC's SOF ¶ 46). Gasich and Luiten jointly approved the merger agreement and board resolutions on Zenergy's behalf. After executing the reverse merger, Gasich, Wilding and others promoted Zenergy by issuing press releases and by posting on internet message boards. Gasich thereafter controlled the distribution of approximately 366 million shares, or 68% of the total number of shares outstanding.

In sum, Gasich was an "affiliate" of Zenergy because Zenergy was under Gasich's control. Consequently, because of Gasich's affiliate status, Rule 144 required Dalmy to wait a year before she sold her Zenergy stock, since she acquired her shares from Gasich. She did not do so. Because Dalmy failed to comply with the one-year holding requirement, she cannot invoke the Rule 144 safe harbor or the Section 4(1) exemption.

IV. Conclusion

For the reasons set forth herein, the court finds that Dalmy is liable for selling unregistered securities in violation of Section 5. Accordingly, the SEC's motion for partial summary judgment is granted.

ENTER:

/s/
JOAN B. GOTTSCHALL
United States District Judge

DATED: September 30, 2015

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SECURITIES AND EXCHANGE COMMISSION,	)	
	)	Case No. 13-CV-5511
Plaintiff,	)	
vs.	)	Judge Joan B. Gottschall
ZENERGY INTERNATIONAL, INC., et al.,	)	
Defendants.	)	

MEMORANDUM OPINION & ORDER

Before the court is the SEC's motion for award of monetary remedies and for entry of final judgments as to Defendants Bosko R. Gasich ("Gasich"), Market Ideas, Inc. ("Market Ideas"), Robert J. Luiten ("Luiten"), Scott H. Wilding ("Wilding"), and Skyline Capital Investments, Inc. ("Skyline Capital") (collectively, the "Settling Defendants") [ECF No. 87.] Also before the court is the SEC's motion for award of remedies and for entry of final judgments as to Defendants Diane D. Dalmy ("Dalmy") and Ronald Martino ("Martino"). [ECF No. 89.] For the following reasons, the SEC's motions are granted.

I. INTRODUCTION

The SEC's Complaint alleges that the Settling Defendants, Martino, and Dalmy devised and implemented a "pump-and-dump" scheme involving the stock of Zenergy International, Inc. ("Zenergy").[1] [Complaint, ECF No. 1.] The SEC's Complaint generally seeks two categories of relief against the defendants: injunctions and monetary remedies. Soon after the SEC filed its Complaint, the Settling Defendants entered into "bifurcated" settlements, by which they

[1] The facts in this case are more thoroughly addressed in this court's September 30, 2015 Order granting partial summary judgment in favor of the SEC against Dalmy. [9/30/15 Order, pp. 2-8, ECF No. 84.]

consented to the injunctive relief sought by the SEC.[2] Pursuant to those settlement agreements, the Court entered partial consent judgments ("Consent Judgments") imposing the injunctive relief sought by the SEC. In addition to entering injunctive relief, the Consent Judgments also provide a mechanism for resolving, by motion, the SEC's remaining claims for monetary relief. As a result, the SEC has filed the instant motion for monetary relief—disgorgement, prejudgment interest, and civil penalties.[3]

Specifically, the Consent Judgments state that the Settling Defendants "shall pay ... disgorgement of ill-gotten gains and pre-judgment interest thereon; [and] the amount of the disgorgement shall be determined by the court upon motion of the Commission[.]" [*See, e.g.*, Memo. of Law in Supp. of Mot. for Award Against Settling Defs., Ex. 5 § VI, ECF No. 88-6.] With respect to civil penalties, the Consent Judgments for Gasich and Luiten provide that "the Court shall determine whether a civil penalty ... is appropriate and, if so, the amount of the penalty." [*Id.*, Ex. 5 § VI; Ex. 7 § V.] The Consent Judgment for Wilding and Skyline Capital, however, provides that they "shall pay ... a civil penalty" in an amount "determined by the Court." [*Id.*, Ex. 6 § III (emphasis added).] The Consent Judgments further provide that, in connection with the SEC's motion: (a) the Settling Defendants are "precluded from arguing that they did not violate the federal securities laws as alleged in the Complaint" and (b) "the allegations of the Complaint shall be accepted as and deemed true by the Court." [*Id.*]

Accordingly, the only issues remaining for the court to decide with respect to the Settling Defendants are the amounts of disgorgement, prejudgment interest and civil penalties to be

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[2] Individual Consents signed by the Settling Defendants: Gasich and Market Ideas [ECF No. 4-1]; Wilding and Skyline Capital [ECF No. 8.]; Luiten [ECF No. 26.].

[3] Consent Judgments by the Settling Defendants: Gasich and Market Ideas [ECF No. 11.]; Wilding and Skyline Capital [ECF No. 12]; Luiten [ECF No. 32].

imposed. In making this determination, the court will accept as true the allegations in the Complaint.

The SEC has also filed its motion for monetary relief against Defendants Martino and Dalmy. On September 30, 2015, in separate orders, the Court granted the SEC's partial motions for summary judgment against Defendants Martino [9/30/15 Order, ECF No. 85] and Dalmy [9/30/15 Order, ECF No. 84]. The SEC alleges that Martino and Dalmy were participants in the "pump-and-dump" scheme involving the stock of Zenergy. In its September 30, 2015 orders, the court held Dalmy, a securities lawyer, liable for violating the registration requirements of Section 5 of the Securities Act of 1933 ("Securities Act"), both by selling her own Zenergy stock and by writing false attorney opinion letters, which enabled numerous other scheme participants to sell their Zenergy stock. In a separate order, the court also found Martino liable for violating Section 17(b) of the Securities Act by failing to disclose the compensation he was promised or received for publicly touting Zenergy's stock.

The SEC now seeks an Order imposing remedies for the violations of Martino and Dalmy and for entry of final judgment. Specifically, the SEC requests an Order (1) holding Martino and Dalmy liable for disgorgement of their ill-gotten gains; (2) awarding prejudgment interest; and (3) imposing civil penalties. In addition to monetary relief, the SEC also seeks to permanently enjoin Martino and Dalmy from engaging in conduct that violates the federal securities laws and also seeks to bar Martino and Dalmy from penny stocks. Despite the fact that Martino did not settle with the SEC, he did not respond to the SEC's motion for remedies and final judgment. Accordingly, there is no evidence to rebut the claims SEC for monetary and injunctive as to Martino. *S.E.C. v. Cook*, 2015 WL 5022152, at *27 (S.D. Ind. Aug. 24, 2015) ("We note that [Defendant] has interposed no response or other objection to the SEC's request for permanent

injunction."). Dalmy, however, has responded to the SEC's motion for monetary and injunctive relief.

II. THE SEC'S COMPLAINT

As noted, the facts of this case are more thoroughly laid out in this court's September 30, 2015 Order granting partial summary judgment in favor of the SEC against Dalmy. Therefore, the court will assume familiarity with the facts. However, in the interest of identifying each of the parties at issue in this order, the court will briefly recite the facts as laid out in the Complaint. Zenergy was founded by Gasich, Luiten, and a third person who died before the events giving rise to this case. [Complaint, ¶¶ 20, 21, ECF No. 1.] Luiten was Zenergy's Chairman and CEO and managed its day-to-day operations. Gasich, however, participated in the management of Zenergy as a controlling shareholder and pursuant to consulting agreements. Luiten and Gasich were the only two individuals operating Zenergy. [*Id.*] According to the SEC, Zenergy had no revenue or income, nor any assets of consequence and it did not observe corporate formalities. [*Id.* ¶ 22.]

In late 2008, Zenergy decided to merge with a publicly traded shell entity to access publicly traded stock. [*Id.* ¶ 24.] In early 2009, Gasich identified Paradigm for this purpose. [*Id.*] At the time, Paradigm purported to be in the unrelated business of selling handheld metal detectors and had no operations or assets. [*Id.* ¶ 25.] Gasich handled the merger negotiations for Zenergy, and Wilding negotiated for Paradigm. [*Id.* ¶ 26.] Wilding, a stock promoter, was previously ordered by the SEC to cease and desist from violating the federal securities laws prohibiting the sale of unregistered securities. [*Id.* ¶ 14.] Zenergy and Paradigm entered into a share exchange agreement, where by Zenergy would be merged into Paradigm. Through this "reverse merger," Zenergy's shareholders assumed control of Paradigm. [*Id.* ¶ 32.]

In connection with the reverse merger, Gasich, together with Wilding and others, planned to distribute 300 million shares of purportedly unrestricted stock to Gasich's family and friends, promoters and touters, and associates of Paradigm. [*Id.* ¶ 34.] As partial consideration for the merger, Paradigm agreed to assume $30,000 of convertible debt purportedly owed by Zenergy. [*Id.* ¶ 35.] Gasich agreed to assign portions of the debt, which the assignees would then convert into shares to be sold in connection with a promotional campaign. [*Id.* ¶ 36.]

To memorialize the supposed convertible debt, Gasich prepared a backdated convertible note. [*Id.* ¶ 37.] On May 17, 2009, pursuant to Gasich's request, Defendant Diane Dalmy sent Gasich a template for a "standard convertible note." [*Id.*] On May 27, 2009, Gasich returned to Dalmy an executed note that followed Dalmy's template. [*Id.*] Days after the share exchange agreement was signed, Gasich assigned portions of the convertible debt to his family and friends, promoters, associates of Paradigm, and Dalmy, all of whom immediately exercised the option to convert the debt into shares of Paradigm stock. [*Id.* ¶ 39.] From June 19 to 23, 2009, Paradigm—Zenergy's predecessor entity—issued 300 million shares to Gasich's assignees. [*Id.* ¶ 40.] Wilding, through his company Skyline Capital, received 38 million shares. [*Id.*] The Zenergy stock received by Gasich's assignees was designated as restricted and could not be freely sold to the public. [*Id.* ¶ 134.] To get the restriction removed, Dalmy prepared and submitted to transfer agents numerous attorney opinion letters that falsely represented that the assignees' Zenergy stock, including her own shares, could be reissued and sold without restriction pursuant to Rule 144 under the Securities Act. [*Id.* ¶¶ 137-54.]

From June 2009 to August 2009, Zenergy and Paradigm issued a number of press releases designed to generate interest in Zenergy securities. [*Id.* ¶ 47.] These press releases were initiated by Gasich, who reviewed, edited, approved, and distributed them. [*Id.* ¶ 48.] Luiten

also reviewed and approved all or nearly all of the press releases. [*Id.*] In several of these press releases, Gasich and Luiten misrepresented or omitted material facts about Zenergy. [*Id.* ¶ 49.]

In early September 2009, OTC Markets (formerly Pink OTC Markets Group, Inc.) identified Zenergy's securities with a caveat emptor label and blocked quotations of Zenergy until Zenergy submitted a disclosure statement containing information about its ownership, operations, and financial condition. [*Id.* ¶ 81.] On or about September 15, 2009, Zenergy posted to the OTC Markets website an information and disclosure statement (the "Statement"). [*Id.* ¶ 82.] The Statement was drafted, reviewed, and approved by Luiten and Gasich. [*Id.* ¶ 83.] Zenergy's Statement contained numerous misstatements and omissions. [*Id.* ¶ 84.] Among other things, the Statement misrepresented or omitted to disclose material information about the control of Zenergy, as well as its operations and assets. Because the Statement did not contain any financial statements, OTC Markets refused to change or remove the caveat emptor label. Accordingly, on or about October 21, 2009, Zenergy posted financial statements dated September 30, 2009 as a supplement to the Statement. [*Id.* ¶ 92.] These financial statements were prepared and approved by Gasich and Luiten. [*Id.* ¶ 93.] The financial statements, however, contained several materially false statements and omissions designed to give Zenergy the appearance of legitimacy. [*Id.* ¶¶ 94, 95.] After the financial statements were posted on the OTC Markets website, OTC Markets removed the caveat emptor label and replaced it with a "limited information" emblem. [*Id.* ¶ 100.]

With the removal of the caveat emptor label, Gasich and Luiten caused Zenergy to issue another series releases designed to inflate the price of Zenergy's stock. Gasich also coordinated waves of touting activity in connection with Zenergy's press releases. Wilding retained a

number of touters, including Ronald Martino, to publicly promote Zenergy in emails, on message boards, and newsletters.

In total, the Gasich assignees and their transferees obtained trading profits of approximately $4.4 million of their sales of the assigned shares into the public market. [*Id.* ¶ 155.] No registration statement was filed or in effect for any of the transactions during the relevant time period. As detailed below, the Settling Defendants, Martino, and Dalmy profited from this illegal scheme.

III. THE SEC'S REQUEST FOR RELIEF

A. Disgorgement and Prejudgment Interest

The SEC seeks disgorgement and an assessment of prejudgment interest from the Settling Defendants, Martino, and Dalmy. As noted, the Settling Defendants and Martino have interposed no specific response or objection to the SEC's request for disgorgement and prejudgment interest.

"Disgorgement is a form of restitution." *SEC v. Lipson*, 278 F.3d 656, 662–63 (7th Cir. 2002). The authority of a federal court to order disgorgement in an SEC enforcement action is well-established. *See, e.g., SEC v. Patel*, 61 F.3d 137, 139–40 (2d Cir. 1995); *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1229–30 (D.C. Cir. 1989). Courts have broad discretion in determining whether to order disgorgement, and in calculating the amount of disgorgement. *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1474–75 (2d Cir. 1996). The amount ordered need only be a "reasonable approximation" of profits "causally connected" to the wrongdoing. *Patel*, 61 F.3d at 139. Any risk of uncertainty in calculating disgorgement falls on the defendants whose conduct created the uncertainty. *See Id.* at 140.

The court agrees with the SEC that the Settling Defendants, Martino, and Dalmy must be required to disgorge the ill-gotten gains of their fraud, to wit, the amounts they made selling Zenergy shares on the open market and to private investors while misrepresenting the company. No hearing is necessary before deciding this issue because the existing record is sufficient to permit an accurate calculation of this amount, plus prejudgment interest thereon. *See, e.g., United States v. Di Mucci*, 879 F.2d 1488, 1497 (7th Cir. 1989) (hearing on damages unnecessary if figure can be ascertained from definite figures contained in the documentary evidence or in detailed affidavits); *Shavers*, 2014 WL 4652121, at *10–11 (ordering disgorgement without a hearing based on summary judgment record). The declaration of the SEC's staff accountant, Timothy T. Tatman, supports a calculation of the amount of disgorgement and prejudgment interest, without necessity of an evidentiary hearing. [*See* Memo. of Law in Supp. of Mot. for Award Against Settling Defs., Tatman Declaration, Ex. 11, ECF No. 88-12; Memo of Law in Supp. of Mot. for Award Against Martino and Dalmy, Tatman Declaration, Ex. 16, ECF No. 90-17.]

Courts have "wide discretion" in awarding prejudgment interest, which helps assure that defendants do not profit from their fraud. *SEC v. Lauer*, 478 Fed. Appx. 550, 557 (11th Cir. 2012); *see SEC v. Sargent*, 329 F.3d 34, 40 (1st Cir. 2003) ("Prejudgment interest, like disgorgement, prevents a defendant from profiting from his securities violations."). Prejudgment interest is appropriate on disgorgement amounts based on the IRS underpayment rate. *SEC v. Koenig*, 532 F.Supp.2d 987, 995 (N.D. Ill. 2007). The prejudgment interest figures cited below were calculated in accordance with the delinquent tax rate established by the IRS, 26 U.S.C. § 6621(a)(2), and were assessed on a quarterly basis, following the date of each defendants' last receipt of ill-gotten gains.

The court therefore orders, based on the undisputed evidence[4] and the IRS underpayment rate, the following:

- Bosko R. Gasich disgorge, jointly and severally with Market Ideas, the amount of $633,518 in profits, and $79,732.37 in prejudgment interest, derived from the sales of Zenergy stock. [Complaint ¶ 159, ECF No. 1; Tatman Declaration ¶¶ 7, 8, Ex. 11, ECF No. 88-12.]

- Scott H. Wilding disgorge, jointly and severally with Skyline Capital, the amount of $1,331,365 in profits, and $192,778,45 in prejudgment interest, derived from the sales of Zenergy stock. [Complaint ¶ 155, ECF No. 1; Tatman Declaration ¶ 10, Ex. 11, ECF No. 88-12.]

- Robert Luiten disgorge the amount of $11,800 in profits and $1,709.51 in prejudgment interest from the sales of Zenergy stock. [Tatman Declaration ¶¶ 11, 12, Ex. 11, ECF No. 88-12.]

- Ronald Martino disgorge the amount of $22,993 in profits and $4,428.78 in prejudgment interest from the sales of and payment for touting Zenergy stock. [Tatman Declaration ¶¶ 9, 10, Ex. 16, ECF No. 90-17.]

- Dalmy disgorge the amount of $43,995 in profits and $9,877.11 in prejudgment interest from the sales of Zenergy stock. [Tatman Declaration ¶ 8, Ex. 16, ECF No. 90-17.]

B. Civil Penalties

The SEC requests that the Court also impose substantial civil penalties against the Settling Defendants, Martino, and Dalmy. As with the disgorgement and prejudgment interest requests by the SEC, the Settling Defendants and Martino did not respond to this request for imposition of a civil penalty. Dalmy filed a response in opposition to the SEC's motion and

[4] Dalmy does not object to the disgorgement of $43,995 but does object to the prejudgment interest amount of $9,877.11. Dalmy claims that prejudgment interest is not justified because she "kept the sale proceeds in an account since 2010" where the "funds have remained earning almost no interest rate," and that she did not spend the funds. [Dalmy Resp., p. 13, ECF No. 99.] However, Dalmy admits in her response to the SEC's Rule 56.1 Statement of Facts that she used the Zenergy stock sale proceeds for her personal expenses. [Memo of Law in Supp. of Mot. for Award Against Martino and Dalmy, Ex. 3, ¶ 80, ECF No. 90-4.] Further, the purportedly low interest earned in Dalmy's account is not supported by any evidence. Therefore, the court will rely on the SEC's prejudgment interest calculations.

requests that the court impose a penalty no greater than $7,500, the maximum tier one penalty, as described below.

The Securities and Exchange Act authorizes district courts to award a civil penalty in SEC enforcement cases. *See* 15 U.S.C. §§ 77t(d), 78u(d)(3). A civil penalty serves to punish and deter wrongdoers because disgorgement "does not result in any actual economic penalty or act as financial disincentive to engage in securities fraud." *SEC v. Moran*, 944 F.Supp. 286, 296 (S.D. N.Y. 1996) (quoting H.R.Rep. No. 101–616 (1990)).

The Securities and Exchange Act creates three penalty "tiers" based on a defendant's culpability and the extent of the harm resulting from the violation. 15 U.S.C. §§ 77t(d), 78u(d)(3). Tier one penalties are limited to $7,500 for a natural person or the gross amount of the pecuniary gain. Second tier penalties are limited to $75,000 for a natural person or the gross amount of the pecuniary gain and are appropriate in case of "fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement." *Id.* The third (and highest) tier is reserved for conduct that (1) involves fraud, deceit, or manipulation, and (2) resulted in substantial losses (or created a risk of such losses) to others. *Id.* §§ 78u(d)(3)(B)(iii). For natural persons, the maximum third-tier penalty for "each such violation" during the relevant time is set at the greater of $150,000 or the "gross amount of pecuniary gain" to such person. *Id.*; 17 C.F.R. § 201.1004. With regard to gross pecuniary gain, "many courts have imposed a single penalty equal to the amount of disgorgement." *See SEC v. Graulich*, 2013 WL 3146862, at *7 (D. N.J. June 19, 2013) (citing cases). The exact amount of the penalty is for the Court's discretion. *See, e.g.*, 15 U.S.C. § 78u(d)(3)(B)(i) (stating that the court shall determine the amount of penalties "in light of the facts and circumstances").

In determining what the penalties should be, the court should consider the following: (1) the seriousness of the violations; (2) the defendant's scienter; (3) the repeated nature of the violations; (4) whether the defendant has admitted wrongdoing; (5) the losses or risk of losses caused by the conduct; (6) any cooperation provided to enforcement authorities; and (7) ability to pay. *See SEC v. Rooney*, 2014 WL 3500301, at *3 (N.D. Ill. July 14, 2014); *SEC v. Church Extension of the Church of God, Inc.*, 429 F. Supp. 2d 1045, 1050-51 (S.D. Ind. 2005).

Following the statutory language, courts have assessed penalties on a per violation basis, such that each separate instance of misconduct factors in the computation of the dollar amount of the fine. *See, e.g., SEC v. Colonial Inv. Mgmt. LLC*, 659 F. Supp. 2d 467, 503 (S.D.N.Y. 2009) (court found 18 violations of same regulation and imposed penalty of 18 times the statutory penalty amount); *SEC v. Coates*, 137 F. Supp. 2d 413, 430 (S.D.N.Y. 2001) (court calculated penalty by multiplying number of misrepresentations by statutory penalty amount); *SEC v. Kenton Capital, Ltd.*, 69 F. Supp. 2d 1, 17 n.15 (D.D.C. 1998) (court assessed third-tier penalty of $1.2 million by multiplying maximum statutory penalty amount ($100,000 at the time) by number of defrauded investors (twelve)).

Courts also have exercised their discretion to impose penalties in amounts equal to the gross pecuniary gain of the defendant(s). *See, e.g., SEC v. Locke Capital Mgmt., Inc.*, 794 F. Supp. 2d 355, 371 (D.R.I. 2011) (court found multiple statutory violations and imposed penalty equal to pecuniary gain of nearly $1.8 million); *SEC v. Haligiannis*, 470 F. Supp. 2d 373, 386 (S.D.N.Y 2007) (court imposed penalty equal to $15 million of ill-gotten gains); *SEC v. Invest Better 2001*, 2005 WL 2385452, at *5 (S.D.N.Y. May 4, 2005) (ordering civil penalty equal to disgorgement amount because number of violations difficult to determine).

i. Gasich

The SEC requests that substantial penalties be imposed on Gasich because of his "egregious" conduct. Gasich, along with Wilding, orchestrated and implemented the pump-and-dump scheme that defrauded innocent investors out of more than $4 million. The SEC has offered evidence that Gasich assisted in drafting and issuing numerous false press releases designed to inflate the price of Zenergy's largely worthless stock, which he and his assignees then dumped on innocent investors. The SEC argues that Gasich's conduct was fraudulent, deceitful, and manipulative, and resulted in Gasich's gain of more than $600,000. [Tatman Declaration ¶¶ 7, Ex. 11, ECF No. 88-12.] Further, the SEC has sufficiently proven that Gasich acted with scienter and that his scheme spanned over six months, involved numerous illegal acts, and resulted in multiple violations of federal securities laws. Moreover, there is no evidence of Gasich's inability to pay a civil penalty.

Although not explicitly argued in its motion, the allegations in the SEC's memorandum and the legal authority cited therein direct the court to impose a third-tier civil penalty. The court finds that a penalty equal to the gross amount of gain—$633,518—is appropriate. *SEC v. Seven Palm Investments, LLC*, 2014 WL 1292377, at *3 (N.D. Ill. Mar. 31, 2014) (Finding that a third-tier penalty was justified based on the egregious nature of Defendant's actions and the fact that Defendant was the "central player" in the misconduct and profited in a large way.")

ii. Wilding and Skyline Capital[5]

Along with Gasich, Wilding played a key role in the scheme that defrauded investors of over $4 million. This is underscored by the fact that Wilding profited more than anyone from the fraud. Gasich and Wilding were the driving forces behind the reverse merger between Zenergy and Paradigm that gave birth to the fraudulent scheme. In addition, Wilding helped Gasich

[5] The Consent Judgment entered against Wilding and Skyline Capital provides they "shall pay, *jointly and severally*," disgorgement, prejudgment interest, and a civil penalty. [*See* Memo. of Law in Supp. of Mot. for Award Against Settling Defs., Consent Judgment, Ex. 6, ECF No. 88-7 (emphasis added).]

coordinate the promotional campaign that artificially inflated the price of Zenergy's stock, in part by hiring all of the touters who published glowing (and false) posts about Zenergy's stock. The SEC has also submitted evidence that Wilding acted with scienter, is an experienced stock promoter, and has previously been sanctioned by the SEC for participating in unregistered offerings. The SEC states that Wilding is a recidivist securities violator who not only violated Section 5 of the Securities Act, but also violated the SEC's prior cease-and-desist order. [*See* Memo. of Law in Supp. of Mot. for Award Against Settling Defs., p. 18, ECF No. 88.] Like Gasich, the SEC argues that Wilding is deserving of "the most severe civil penalty" the court will permit. [*Id.*] For the same reasons detailed above, the court finds that a civil penalty equaling Wilding's gross amount of gain—$1,331,365—is appropriate. This is especially true given Wilding's repeated violations of the Securities Act and of the SEC's prior cease-and-desist order. A severe penalty is required in order to both punish and deter Wilding (and others) from engaging in these acts in the future.

iii. Luiten

Although Luiten is a founder of Zenergy, the record demonstrates that his activities in furthering the scheme and his profits from the scheme are far less than his cohorts. Nevertheless, Luiten reviewed and approved Zenergy's false press releases and false disclosure statement. Luiten's actions, and inactions as corporate officer and director of Zenergy, contributed to the losses suffered by investors. Therefore, the court finds that a tier one penalty of $7,500 is appropriate.

iv. Martino

The unrefuted evidence submitted by the SEC demonstrates that Martino touted Zenergy stock on message boards with the intention of driving up the company's stock. Martino did so

without disclosing that he was being compensated for his touting activities. Moreover, Martino lied to the SEC regarding the number of posts he made during the relevant time period. Although he claimed to have made only three posts, Martino in fact posted dozens of times. Under the circumstances, the court finds that a civil penalty equaling his ill-gotten gains of $22,993 is appropriate.

v. Dalmy

The SEC argues that Dalmy is a "pervasive offender" who, in this case alone, committed at least eleven separate violations of the securities laws. Dalmy, on the other hand, argues that her "only transgression was opining incorrectly that the shares at issue did not need registration. The public does not need protection from that." [Dalmy Resp. in Opp. p. 9, ECF No. 99.]

As noted in its order on September 15, 2016, the court is unaccustomed to deciding issues like scienter and good faith without a hearing. Therefore, the court reserves ruling on the SEC's motion for civil penalties against Dalmy until a hearing on the matter is conducted. A status hearing is set for September 28, 2016 at 9:30 a.m. in order to schedule an evidentiary hearing to resolve this issue.

C. Permanent Injunction

The Securities and Exchange Act authorizes district courts to grant injunctive relief in SEC enforcement cases. 15 U.S.C. §§ 77t(b), 78u(d). Permanent injunctions are "primarily intended to protect the investing public from future misconduct." *SEC v. Youmans*, 729 F.2d 413, 415 (6th Cir. 1984). To obtain permanent injunctive relief once a violation has been demonstrated, the SEC "need only show that there is a reasonable likelihood of future violations." *SEC v. Holschuh*, 694 F.2d 130, 144 (7th Cir. 1982). Courts must assess the totality of the circumstances in determining the likelihood of future violations, and should consider: (1)

the gravity of harm caused by the offense; (2) the extent of the defendant's participation and his degree of scienter; (3) the isolated or recurrent nature of the infraction and the likelihood that the defendant's customary business activities might again involve him in such transactions; (4) the defendant's recognition of his own culpability; and (5) the sincerity of his assurances against future violations. *Id.*

Injunctive relief against Martino is appropriate here.[6] The violations that occurred in the instant case are not minor. Moreover, Martino fails to recognize the gravity of his misconduct. It is clear that Martino lied under oath regarding the extent of his touting activities. A permanent injunction prohibiting Martino from future violations of federal securities laws is appropriate here, especially considering the possibility, indeed, the likelihood of future violations. *Cook*, 2015 WL 5022152 at *27 (citing *Shavers*, 2014 WL 4652121 at *10).

Like the civil penalty that the SEC seeks against Dalmy, this issue will be resolved once a hearing is conducted.

D. Penny Stock Bar

The Securities and Exchange Act also authorizes district courts to impose a penny-stock bar "against any person participating in, or, at the time of the alleged misconduct, who was participating in, an offering of penny stock." 15 U.S.C. §§ 77t(g), 78u(d)(6). A "penny stock" is an equity security bearing a price of less than five dollars except as provided in 17 C.F.R. § 240.3a51–1. The SEC represents that the Zenergy stock meets the definition of "penny stock" under those provisions and the Defendants offer no response.

The factors for a penny stock bar are similar to those for an injunction. In determining whether a defendant should be permanently enjoined for violations of the securities laws, courts consider a number of non-exclusive, interrelated factors, which include: (1) the "egregiousness"

[6] Again, the court notes that Martino has not responded to the SEC's motion.

of the underlying securities law violation; (2) whether the defendant is a "repeat offender"; (3) the defendant's role or position when he engaged in the securities law violation; (4) the defendant's degree of scienter; (5) the defendant's economic stake in the violation; and (6) the reasonable likelihood that misconduct will recur. *SEC v. Benger*, 64 F.Supp.3d 1136, 1138-39 (N.D. Ill. 2014) (citing *S.E.C. v. Patel*, 61 F.3d 137, 141 (2nd Cir. 1995)). For the reasons stated above, the court finds that a penny stock bar is appropriate for Martino. Again, the court reserves ruling on a penny stock bar against Dalmy until after a hearing is conducted.

IV. CONCLUSION

For the reasons stated above, the SEC's motions for award of remedies and entry of final judgments [87] [89] are granted in part. A status hearing is scheduled for September 28, 2016 in order to set an evidentiary hearing regarding Dalmy's scienter.

Date: September 20, 2016

/s/
Joan B. Gottschall
United States District Judge