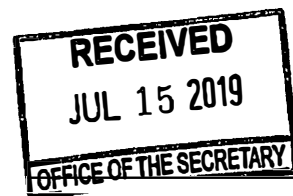


UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



ADMINISTRATIVE PROCEEDING
File No. 3-19145

In the Matter of

Matthew R. Rossi and
SJL Capital, LLC

THE DIVISION OF ENFORCEMENT'S
OPPOSITION TO RESPONDENTS'
MOTION FOR SUMMARY DISPOSITION
ON INABILITY TO PAY

REDACTED
PURSUANT TO PROTECTIVE ORDER

The Division of Enforcement (“Division”) respectfully submits this brief in opposition to the motion¹ filed by Respondent Matthew R. Rossi (“Rossi”) and his investment adviser firm, SJL Capital, LLC (“SJL”, together with Rossi, “Respondents”) for summary disposition on his claimed inability to pay monetary sanctions (“Respondents’ Motion”).

This Opposition is filed with redactions, out of an abundance of caution, pursuant to the **Protective Order entered on May 17, 2019**. In accordance with the terms of the Protective Order (p. 2) [designating as confidential information: “(b) individuals’ financial account statements, including statements for any bank account, credit card account, brokerage account, mortgage, student loan, or other loan”], Respondents’ confidential information contained in this Brief is surrounded by bold brackets—[].

¹ On June 7, 2019, Respondents provided eight documents to the Division including a signed Form D-A: Mr. Rossi’s federal tax returns from 2016 through 2018; his Connecticut tax returns for 2017 and 2018; his New York part-time resident tax return for 2018; an excel spreadsheet purportedly summarizing his income and expenses from June 2018 through May 2019 (“Spreadsheet”); and a Motion for Summary Disposition. (Respondents did not file a separate Statement of Undisputed Facts.) The Division’s instant opposition addresses Respondents’ June 7, 2019 filing collectively a Motion for Summary Disposition on Inability to Pay.

I. INTRODUCTION

Respondents' attempt to avoid monetary sanctions for the fraud that cost their clients over \$1.6 million should be rejected. Their argument that Rossi is unable to pay monetary penalties, or even disgorge his ill-gotten gains, is based on vague, unsubstantiated, and inconsistent assertions regarding his personal finances. Respondents have not met their burden of proving Rossi's inability to pay, and even if they could, monetary penalties are nevertheless appropriate in this case. Therefore, the Respondents' Motion should be denied.

II. ARGUMENT

A. Respondents Have Not Met Their Burden of Proving Inability to Pay.

1. Respondents Bear the Burden of Proving Their Inability to Pay.

"It is well settled that an applicant bears the burden of demonstrating inability to pay." *Steven E. Muth*, Rel. No. 8622, 2005 WL 2428336, at *19 (Oct. 3, 2005). That means the applicant must come forward with evidence explaining his claimed liabilities. *See Russell C. Schalk, Jr.*, SEC Rel. No. 958, 2016 WL 536129, at *6 (Feb. 10, 2016) ("Because Schalk bears the burden to prove inability to pay, his failure to explain how he incurred his credit card debt means that I will not consider that debt on his inability to pay."). "[V]ague and unsubstantiated" disclosures are "neither adequate nor credible as a basis for reducing disgorgement or penalty amounts." *David Henry Disraeli*, Rel. No. 8880, 2007 WL 4481515, at *19 (Dec. 21, 2007).

2. Respondents' Submission Contains Mostly Unsupported Assertions, Not Evidence.

Assertions of inability to pay, without evidence, cannot establish Respondents' inability to pay. Here, Rossi's financial submissions are unsubstantiated and inconsistent. Other than a few

years of his federal tax returns, he provided no documentation supporting his claimed expenses, assets, or income. For example,

- In an Excel Spreadsheet Rossi created, he lists what appear to be [REDACTED] [REDACTED] with a total balance of approximately [REDACTED] owed to three individuals, including [REDACTED] on a supposed [REDACTED]. (See Div. Resp. to Stmt. of Facts ¶ 2.) He, however, provides no documentation evidencing the [REDACTED] or the amounts owed. He also does not explain what the [REDACTED] are for or when they were made. (*Id.*)
- In the same Spreadsheet, he lists as a liability a [REDACTED] but, once again, supplies no supporting documentation for this [REDACTED]. (*Id.*) Moreover, as a [REDACTED], he most likely does not need to pay it back. The outstanding [REDACTED] amount will, [REDACTED] [REDACTED] [REDACTED] [REDACTED]. Indeed, it appears from Rossi's Spreadsheet that he is making [REDACTED]. (Resp. to Stmt. of Facts ¶ 2.) Moreover, he likely has a contractual right to obtain further [REDACTED] [REDACTED]. *American Elec.*, 136 F. Supp. 2d at 767.
- Rossi also lists as liabilities alleged debt on [REDACTED]. (Resp. to Stmt. of Facts ¶ 2.) But, again, he did not provide any [REDACTED] with his submission, so it is impossible to determine whether Rossi's figures are accurate,

whether the [REDACTED] are in his name, whether he is incurring debt on luxury items or household necessities, or how much of the debt he has incurred since his fraud started. (*Id.*) It is Rossi's burden, not the Division's, to demonstrate his inability to pay. Unsubstantiated assertions in a spreadsheet Rossi created are not sufficient.

- In his Form D-A, Rossi lists (without any supporting documentation) [REDACTED] [REDACTED] as a liability, but lists no corresponding [REDACTED] asset. (Resp. to Stmt. of Facts ¶ 3.) He does not explain why he is paying [REDACTED] [REDACTED] without apparently owning any [REDACTED]. See *Philip A. Lehman*, Rel. No. 2565, 2006 WL 3054584, at *5-6 (Oct. 27, 2006) (disregarding assertions in Respondent's affidavit concerning value of [REDACTED] because they were inconsistent, conflicted with other evidence, and therefore unsupported).
- Similarly, he claims to owe [REDACTED] on [REDACTED] [REDACTED] [REDACTED]"; yet, he declares that he has [REDACTED] [REDACTED] assets. (Resp. to Stmt. of Facts ¶ 3.) What is the market value for these [REDACTED]? Moreover, the Division found evidence of other cars registered in Rossi's name. [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] (*Id.*) He did not list this [REDACTED] as an asset. (*Id.*)

As the party bearing the burden of proof on this issue, it was incumbent upon Rossi to demonstrate—through credible supporting documentation—his supposed inability to pay. His submission is woefully inadequate and should be disregarded as unsubstantiated and not credible.

Disraeli, 2007 WL 4481515, at *19 (“[V]ague and unsubstantiated” disclosures are “neither adequate nor credible as a basis for reducing disgorgement or penalty amounts.”).

3. Even if Rossi’s Unsubstantiated Financial Submission was Credited, It Does Not Demonstrate His Inability to Pay.

A mere claim of financial hardship does not establish an inability to pay. *Curtis A. Peterson*, Rel. No. 1124, 2017 WL 1397544, at *8 (Apr. 19, 2017). *Cf. Moshe Marc Cohen*, Rel. No. 10205, 2016 WL 4727517, at *15 (Sept. 9, 2016) (noting that a respondent’s claim of [REDACTED] does not provide a disgorgement defense), *vacated in part on other grounds*, 2019 WL 2913336 (July 8, 2019) (vacating certain associational bars because misconduct occurred prior to Dodd-Frank Act).

Rossi’s submission, even if properly supported, does not demonstrate that he would be unable to pay disgorgement, interest, and monetary penalties. First, Rossi has a steady job with bonuses. His primary source of income is apparently his employment at [REDACTED]. (Resp. to Stmt. of Facts ¶ 4.) Based on the Spreadsheet Rossi created, [REDACTED] paid him [REDACTED] for the twelve months ending May 31, 2019. (*Id.*) Importantly, he appears to have received a [REDACTED] [REDACTED]. (*Id.*) Annualized, that amounts to a 52-week income of [REDACTED]. (*Id.*) Moreover, on top of the considerable income Rossi was paid by [REDACTED], he received substantial additional income in the past year. Although he provides no support for these numbers, Rossi claims to have earned additional income of [REDACTED] over the same twelve month period ending May 31, 2019. (*Id.*)

Second, Rossi's Spreadsheet shows that, in addition to his income, he received over [REDACTED] in deposits—mostly unrelated to his employment with [REDACTED]—during the period from June 11, 2018 to May 28, 2019. (*Id.*) Approximately [REDACTED] was transferred to him from entities called [REDACTED].” (*Id.* ¶ 3.) Although Rossi supplies no documentation for these transfers, the companies appear to be [REDACTED]. (*Id.* and Ex. C.) Does he have undisclosed accounts containing digital assets with these companies?

Third, a portion of Rossi's claimed expenses are more properly categorized as nonrecurring one-time expenses or optional expenses that will be or should be eliminated going forward. For example, he lists [REDACTED] in [REDACTED] and [REDACTED] to purchase [REDACTED]. (*Id.* ¶ 4.) He is representing himself in this proceeding, and he should have no need to purchase another [REDACTED]. Also, he reported spending at least [REDACTED] on vacations and [REDACTED]. (*Id.*) These one-time and optional expenses can and should be eliminated, especially when his fraud caused his investors and clients, including a church, to lose over \$1.6 million.

Thus, even putting aside the unsubstantiated and inconsistent assertions in Rossi's financial submission, he admittedly has substantial employment income and other sources of revenue from which he can pay disgorgement, prejudgment interest, and a civil penalty.

B. Even if Respondents Could Establish Their Inability to Pay, Monetary Remedies Are Nevertheless Appropriate As a Matter of Law.

Rule of Practice 630(a) states, in relevant part: “The Commission *may*, in its discretion, or the hearing officer *may*, in his or her discretion, consider evidence concerning ability to pay in determining whether disgorgement, interest or a penalty is in the public interest.” 17 C.F.R. § 201.630(a) (emphasis added). And although ability to pay may be considered, “it is only one factor” and “[c]onsidering it is also discretionary.” *Johnny Clifton*, Rel. No. 9417, 2013 WL

3487076, at *16, n. 116 (July 10, 2013). “Even when a respondent demonstrates an inability to pay, we have discretion not to waive the penalty, [disgorgement, or interest], particularly when the misconduct is sufficiently egregious.” *Gregory O. Trautman*, Rel. No. 9088A, 2009 WL 6761741, at *24, n.115 (Dec. 15, 2009) (internal quotes and cite omitted) (refusing to order discretionary waiver of disgorgement, prejudgment interest, and/or penalties because of the egregiousness of respondent’s market timing and late trading scheme).

Here, Respondents’ conduct was particularly egregious. Respondents—acting through Rossi—lied throughout their entire relationship with their investors and clients. *See* Division Summ. Disp. Memo. at 5-11. To lure in the investors and clients, Rossi lied about his investment strategy and the existence of supposed safety valves that would limit their downside risk. *Id.* at 5. He lied about his Fund’s trading and hid his massive trading losses. *Id.* at 6-7. He created phony account statements and tax documents. *Id.* at 7. He defrauded a church, including by creating fake marketing materials touting the Fund’s supposed returns. *Id.* at 9. He made up a bogus story about a rogue trader in order to hide his ongoing fraud. *Id.* at 10-11. When all was said and done, Respondents’ fraud caused his investors and clients to suffer over \$1.6 million in losses. *Id.* at 6-7, 10-11.

As the Division stated in its initial brief, policy arguments favor discounting evidence of inability to pay. This is especially true here, where Rossi has engaged in deplorable conduct, he has substantial income, and a significant portion of his claimed expenses are non-recurring, optional, or temporary—such as the college costs for his adult children.

The Division respectfully requests that the Court impose, jointly and severally against Respondents, full disgorgement, pre-judgment interest, and a third-tier civil penalty of \$160,000

for each of the three anti-fraud statutes Respondents' admittedly violated. Even then, the total award would be just a fraction of the total losses investors suffered as Rossi's hands.

III. CONCLUSION

The Division respectfully requests that the Court deny Respondents' Motion in its entirety and grant summary disposition in favor of the Division.

Dated: July 11, 2019

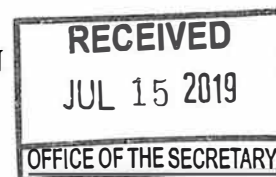
Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned attorney certifies that he served the Redacted Version of **Division's Opposition to Respondents' Motion for Summary Disposition on Inability to Pay** and this **Certificate of Service** on the following parties, on July 12, 2019, via email:

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