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 POST-HEARING BRIEF

This Brief is being filed in redacted form, 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—**[ ]**—and redacted in the version filed in the public record.

Dated: September 23, 2019

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I. INTRODUCTION

As set forth in the Order Instituting Proceedings ("OIP"), Respondent Matthew Rossi ("Rossi") lied to investors and clients regarding the nature and performance of the investment strategy that he and his investment adviser firm, SJL Capital, LLC ("SJL," together with Rossi, "Respondents") employed. Rossi's investors and clients lost over $1.6 million from his unhedged options trading that did not follow his purported investment strategy. Rossi also sent his investors false account statements and false tax documents. The Court has ordered Respondents to disgorge the fees they received from their fraud, along with prejudgment interest. The only remaining issue before the Court is whether Respondents should pay civil penalties. Rossi alleges that his finances render him unable to pay, but as his testimony on August 21, 2019 confirmed, he cannot meet the burden of proof. First, Rossi failed to show that his purported debts to friends and family should count against his ability to pay civil penalties. Second, material omissions in Rossi's financial disclosures significantly understated his assets. Third, Rossi is only 51 years old and makes a substantial salary that should enable him to pay a civil penalty once he eliminates wasteful, nonessential, and non-recurrent expenses. Lastly, even if Respondents could meet their burden of proving inability to pay, which they cannot, it is in the public interest to enforce civil penalties against Respondents for their egregious conduct. Accordingly, the Division of Enforcement ("Division") respectfully requests that the Court order Respondents to pay, jointly and severally,[1] a

[1] The penalty (as well as the other monetary relief awarded) should be imposed jointly and severally against Respondents because Rossi owned and controlled SJL, was solely responsible for its decisions, and was effectively SJL's alter ego. (*See* OIP ¶¶ 7-9 ("Rossi was the founder, managing partner, and 80% majority owner of SJL"; "Rossi was the managing partner of SJL... and Rossi was solely responsible for ... SJL's investment decisions.").) *Walter V. Gerasimowicz et al.*, Rel. No. 496, 2013 WL 3487073, at *7 (July 12, 2013).

third-tier civil penalty for each of the three statutes Respondents admit they violated, for a total of $520,311.

II. FACTS

Rossi was the managing partner of SJL, responsible for investment decisions, and SJL was the general partner of the SJL MarketDNA Hedge Fund ("Fund"). (OIP at ¶ 9.) Rossi told investors in the Fund that he would invest their money in a diversified portfolio consisting primarily of publicly traded equity securities, which he claimed would be picked with the help of a successful proprietary algorithm Rossi supposedly developed known as MarketDNA. (*Id.* at ¶ 10.) According to Rossi, his MarketDNA algorithm had been refined over 20 years and included safety valves to limit downside risk. (*Id.*) Rossi also told his SMA Clients that he would use the same MarketDNA algorithm to invest the money in their separately managed accounts ("SMAs"). (*Id.* at ¶ 23.)

In fact, Rossi used his victims' money to make unhedged options trades which did not follow the purported MarketDNA strategy and did not include any safety valves or stop loss limits. (OIP ¶¶ 15, 17, 27.) Rossi lost 88% of the Fund's value in a single month—August 2016. (*Id.* at ¶ 17.) The Fund was wiped out completely by November 2016. (*Id.* at ¶ 20.)

Rossi hid the full extent of the losses from Fund investors by creating and distributing phony account statements and tax documents that falsely described the Fund's assets and the supposed returns generated by the MarketDNA strategy. (OIP ¶ 21.) Similarly, Rossi sent documents to his SMA Clients that falsely described the supposed returns generated by the strategy and concealed the losses suffered by the Fund. (*Id.* at ¶ 29.)

Unaware of the Fund's massive August 2016 losses and its ultimate collapse in November, the SMA Clients, including a church, invested nearly $1.8 million with Respondents from August 12, 2016 through February 3, 2017. (OIP ¶¶ 25-32.) In February 2017, Rossi lost more than 70% of

the SMA Clients' money through more unhedged options trading. (*Id.* at ¶¶ 33-34.) When the SMA Clients discovered the losses, Rossi lied again, claiming a fictitious rogue trader was to blame. (*Id.*) In total, Rossi's investors and clients lost over $1.6 million. (*Id.* at ¶¶ 18, 35.)

On March 21, 2019, Respondents submitted a signed Offer of Settlement to the Commission evidencing their consent to the entry of the OIP, which the Commission issued on April 17, 2019. For purposes of this proceeding, Respondents do not (and cannot) contest the allegations in the OIP. (OIP § IV.)

The OIP found that Respondents willfully violated the Securities Act of 1933 ("Securities Act"), Section 17(a); the Securities Exchange Act of 1934 ("Exchange Act"), Section 10(b) and Rule 10b-5 thereunder; and the Investment Advisers Act of 1940 ("Advisers Act"), Sections 206(1), 206(2), and 206(4) and Rule 206(4)-8 thereunder. (OIP ¶¶ 40-44.) In the OIP, the Commission also entered a cease-and-desist order against Respondents, censured SJL, and ordered that Rossi be subject to an industry bar. (OIP § V.)

The OIP also ordered additional proceedings solely to determine the appropriate amounts of disgorgement, prejudgment interest on that disgorgement, and civil penalties against Respondents. (OIP §§ IV, VI.) For purposes of determining the appropriate remedies against Respondents, the OIP's factual findings—including those detailing their fraud—are deemed true. (OIP § IV.)

On July 23, 2019, the Court ruled on the parties cross motions for summary disposition, entering an order granting in part and denying in part the Division's motion, and denying Respondents' motion. (Op. 5, 7, 9.) The Court granted the Division's request for disgorgement and

prejudgment interest.[2] (Op. 5.) The Court, however, denied the Division's request for summary disposition on the issue of civil penalties. (Op. 7.)

On August 21, 2019, the Court held a hearing and Rossi gave testimony regarding his alleged inability to pay civil penalties requested by the Division.[3]

III. LEGAL ANALYSIS

The Court has found that Respondents' conduct meets the "threshold requirements for third tier penalties—fraud, deceit, or manipulation plus substantial losses...." (Op. 7.) Such penalties are appropriate in this case because Rossi's testimony at the hearing failed to meet the burden of proving Respondents' inability to pay, and because third-tier penalties against Respondents are in the public interest.

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

"It is well settled that an applicant bears the burden of demonstrating inability to pay." *Steven E. Muth et al.*, Rel. No. 8622, 2005 WL 2428336, at *19 (Oct. 3, 2005). "[V]ague and unsubstantiated" disclosures are "neither adequate nor credible as a basis for reducing ... penalty amounts." *David Henry Disraeli et al.*, Rel. No. 8880, 2007 WL 4481515, at *19 (Dec. 21, 2007). Incredible, thinly-supported assertions cannot establish Respondents' inability to pay. *Id.*

Here, Rossi claims a net worth in the negative six figures and an income that barely covers expenses. Under questioning however, Rossi admitted that his financial distress is overblown. His

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[2] As requested by the Court, the Division has re-calculated the prejudgment interest total to through the date of this filing to be $3,718.04. Respondents received performance fees from SMA Client 1 and SMA Client 2 in three installments: $5,281 on November 11, 2016, $4,446 on January 6, 2017, and $19,208 on February 2, 2017. Attached as Exhibit A is the documentation of these calculations.

[3] The transcript ("Tr.") of this hearing is attached as Exhibit B.

claimed liabilities are unproven, his assets are understated, and some of his expenses—notably [redacted], travel, and college costs for his adult children—are, respectively, wasteful, unnecessary, and temporary.

1. Rossi Claims Liabilities that He Cannot Prove.

Rossi asserts that his plans to pay back [redacted] of undocumented, unsecured, interest-free purported loans from friends and family should excuse him from paying civil penalties. Rossi cannot produce evidence proving that the money—received from his father, a long-time friend, and former girlfriend—were loan proceeds and not gifts. (J.Ex. 9 p. 94; J.Ex. 10 rows 4-6; Tr. 45-46, 48-50, 52, 70-72.) The purported loans are undocumented. (Tr. 48, 52 ("There's no loan documentation. That's correct.").) In lieu of evidence, Rossi recently made a chart listing his purported creditors and a few terms—including 0% interest—and submitted a payment schedule that he created for these proceedings. (J.Ex. 10 rows 4-6; J.Ex 16; Tr. 70 ("Q: You prepared this for this hearing? A: That's correct.").) Rossi is not currently making payments on the loans to his father, pays his ex-girlfriend "if I have extra cash," and only began making "nominal" payments to his longtime friend in February 2019, weeks before settling with the SEC and more than two years after he first received money from her. (Tr. 48, 50, 52, 70-71; J.Ex. 16.) It may be true that Rossi intends to pay each of these individuals the amount he claims (Tr. 87), and it may even be likely that Rossi would prefer to pay his friends and family instead of paying civil penalties. But Rossi has provided no evidence that these alleged loans are legal obligations, and they should not serve as a basis for avoiding the consequences of his fraud.

2. Rossi Omitted [redacted] in Assets from His Financial Disclosures.

Respondents' Form D-A represents that Rossi owns a little over [redacted] in assets, but under questioning, Rossi admitted that he did not list other assets worth a combined [redacted].

(J.Ex. 9 p. 91; Tr. 31-32, 38-39.) In a spreadsheet Rossi filed as a supplement to the Form D-A, he included a loan against his life insurance policy but failed to supply a copy of the policy itself. (J.Ex. 10 row 9; Tr. 39.) At the hearing, Rossi admitted that the policy is worth over [ ] and that he did not have to pay the loan back. (Tr. 38 ("Q: ... [Y]ou don't have to pay back that loan at all, currently? A: I don't have to. What it does, it just keeps accruing against the value."); *see also* J.Ex 20). *See American Elec. Power, Inc. et al. v. United States*, 136 F. Supp. 2d 762, 767 (S.D. Ohio 2001) ("If the insured dies before the loan is repaid, the amount of the loan and accrued interest is deducted from the death benefit payable under the policy."). The effect of including this loan as a liability but excluding the value of the asset that secures the loan, in this case the life insurance policy, is to understate Rossi's net worth by [ ].

Similarly, Respondents' financial disclosures included automobile loans but failed to account for the value of the cars the loans financed. (J. Ex. 9 p. 94; J.Ex. 10 rows 7, 8.) Rossi claims one of the cars is worthless, but admitted that his 2017 Hyundai Santa Fe Sport "is worth, approximately, [ ]." (Tr. 31-32.) Nevertheless, Respondents reported [ ] in automobile assets. (J. Ex. 9 p. 94.) Accounting for these missing assets, Rossi's actual net worth is [ ] more he reported. This understatement should cast doubt on the credibility of his alleged inability to pay.

3. Rossi's Income is Sufficient to Cover His Financial Obligations.

Rossi claims that his annual income is barely sufficient to support his lifestyle. Monetary sanctions, including third-tier penalties, are appropriate "despite a defendant's inability to pay, [when] the defendant may subsequently acquire the means to satisfy the judgment." *SEC v. Robinson & Cellular Video Car Alarms, Inc.*, 2002 WL 1552049, at *8-13 (S.D.N.Y. July 16,

2002) (rejecting defendant's inability to pay argument and ordering defendant to pay disgorgement, prejudgment interest and third-tier civil penalties).

Rossi's submission, even if properly supported, does not demonstrate that he would be unable to pay civil penalties. Rossi is only [redacted] years old and has a steady job with bonuses. He makes over [redacted] a week as a financial controller at [redacted]. (Tr. 17; J.Ex. 10 rows 45-64.) Annualized, that amounts to a 52-week income of over [redacted] (not including the [redacted] bonus he received from [redacted]). (J.Ex. 9 p. 95.)

Not only does Rossi earn a significant salary, some of the purported expenses he claims are not recurrent and others are not expenses and they should not be considered as such in determining his ability to pay. Notably, Rossi's expense total included at least [redacted] in costs associated with [redacted] (Tr. 63 ("In order for me to try to make more income because I couldn't survive, I decided that I would try to play [redacted] Rossi's [redacted] is not a necessary expense and should not help him avoid a civil penalty. Additionally, Rossi claimed one-time expenses of [redacted] in SEC-related legal fees and [redacted] to purchase a car. (J.Ex. 9 p. 96; J.Ex. 10 row 1422; Tr. 54.) However, Rossi is representing himself in this proceeding, and he should have no need to purchase another car. Rossi also reported [redacted] in college expenses and support for his two adult children and a [redacted]. (J.Ex. 9 p. 96; Tr. 20-22.) These costs are not perpetual, indeed Rossi's oldest child is in her final year of college. (Tr. 22 ("One more year of tuition? Mr. Rossi: Yes, one more year. Thank goodness.").) Therefore, support for his children is not a long-term expense that will meaningfully undermine Rossi's ability to pay a civil penalty once they have graduated.

Rossi also spent money on a YMCA membership, at least [redacted] on a vacation to swim in Orlando, and [redacted] on "Volleyball" for his daughter. (J.Ex. 9 p. 96; Tr. 16, 66, 97-98.) These optional expenditures can and should be eliminated in the near future.

Thus, even putting aside the unsubstantiated loans in Rossi's financial submission, he admittedly has significant employment income which he can use in the years to come to pay a civil penalty. 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 case 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 ... penalty amounts.").

B. Even if Respondents Could Establish Their Inability to Pay, Civil Penalties Are in the Public Interest.

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 ... a penalty is in the public interest." 17 C.F.R. § 201.630(a) (emphasis added). Ability to pay may be considered, but "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..., 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); *Edgar R.*

Page et al., Rel. No. 822, 2015 WL 3898161, at *12 (June 25, 2015) (citations omitted), aff'd in part, modified in part, vacated in part, Rel. No. 4400, 2016 WL 3030845 (May 27, 2016).

Here, Respondents' conduct was particularly egregious. Respondents—acting through Rossi—lied throughout their entire relationship with their investors and clients. 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. He lied about his Fund's trading and hid his massive trading losses. He created phony account statements and tax documents. He defrauded a church, including by creating fake marketing materials touting the Fund's supposed returns. He made up a bogus story about a rogue trader in order to hide his ongoing fraud. When all was said and done, Respondents' fraud caused his investors and clients to suffer over $1.6 million in losses.

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 [redacted], travel, and college costs for his adult children.

C. Respondents Should Be Ordered To Pay a Third-Tier Penalty for each Act Violated.

In its summary disposition order, the Court noted that, under the present circumstances, the applicable securities laws provide for maximum third-tier penalties against an individual—for each violation—of $173,437 (Securities Act) and $189,427 (Exchange Act and Advisers Act).[4] (Op. 6.)

[4] The Court also notes that the maximum third-tier penalties against an entity are $838,275 (Securities Act) and $947,130 (Exchange Act and Advisers Act). (Op. 6.)

The Court has considerable discretion to determine the magnitude of the total civil penalty imposed, as the tiered statutory maximum amounts are not overall limitations but only limitations for each violation. *John A. Carley et al.*, Rel. No. 292, 2005 WL 1750288, at *68 (July 18, 2005). The Court also has discretion to determine what constitutes "each" violative act on Respondents' part, and then order them to pay a total civil penalty that is multiplied by each violation. *J.S. Oliver Capital Mgmt., LP et al.*, Rel. No. 4431, 2016 WL 3361166, at *14-15 (June 17, 2016) ("This variation in calculating the number of acts or omissions sanctioned in particular cases is a feature of the discretion granted to us in the penalty regime that Congress created."). Given the wide flexibility authorized by Congress, both the Commission and federal courts have used a variety of methods for calculating the number of sanctionable violations. *Id.* at *15 (listing various methods utilized by the Commission and federal courts). Those methods include, but are not limited to, the following:

- Counting each individual act of misconduct as a separate violation. *See id.* at *17; *SEC v. Pentagon Capital Mgmt. PLC*, 725 F.3d 279, 288 n.7 (2d Cir. 2013) (affirming district court's imposition of third-tier penalties by counting each late trade as a separate violation).
- Counting each investor who was defrauded. *See SEC v. Kenton Capital, Ltd. et al.*, 69 F. Supp. 2d 1, 17 n.15 (D.D.C. 1998) ("multiplying the maximum third tier penalty for natural persons . . . by the number of investors who actually sent money to [defendant]").
- Counting the number of statutes defendant violated. *SEC v. Shehyn*, 2010 WL 3290977, at *2, *8 (S.D.N.Y. Aug. 9, 2010) (court found that the defendant "committed 5

[statutory] violations" and awarded "$120,000 for each violation: Section 10(b), Rule 10b–5, Section 17(a), Section 20(a) and Section 15(a)"); *SEC v. Johnson*, 2006 WL 2053379, at *10 (S.D.N.Y. Jul. 24, 2006) ("Because the jury found Johnson liable for four violations of securities fraud, civil penalties will be ordered for these four violations.").

Here, the Division requests that the Court impose on Respondents, jointly and severally, a separate third-tier penalty of $173,437 for each of the three statutes Respondents violated: the Securities Act, the Exchange Act, and the Investment Advisers Act. *See Shehyn*, 2010 WL 3290977, at *2, *8 (calculating number of violations based on number of statutes violated); *Johnson*, 2006 WL 2053379, at *10 (same). In this case, that would amount to a penalty of $520,311. Although significant, it amounts to approximately 29% of the approximately $1.6 million in total losses suffered by Respondents' victims as a direct result of their fraudulent conduct.

A total penalty of $520,311 is much less than the Court has discretion to impose. For example, if the Court calculated each violation based on the number of false statements Respondents made—at least seven (7)—the total civil penalty would be $1,214,059. (OIP ¶¶ 12, 13, 18, 21, 26-27, 30, 33.) Or, if calculated by the number of investors/clients who suffered losses as a result of Respondents' fraud—four (4)—the total civil penalty would be $693,748. (*Id.* ¶¶ 12, 25, 28, 30.) A civil penalty of $520,311 is also fair considering the amount of harm Respondents caused—over $1.6 million. *See J.S. Oliver*, 2016 WL 3361166, at *21 (assessing total penalties that "are somewhat more than one-half" of the sum of the total harm that Respondents caused plus the amount of disgorgement ordered). And, it is equal to approximately 18 times the amount of

disgorgement ordered ($28,935), which places it well within the range of multiples of disgorgement that the D.C. Court of Appeals identified as being imposed in administrative proceedings. *Collins v. SEC*, 736 F.3d 521, 525 (D.C. Cir. 2013) (observing that civil penalties in administrative proceedings "rang[e] from roughly one-half of the disgorgement amount ... to about 25 times" disgorgement, but sustaining a penalty on an individual that was 100 times disgorgement) (cited with approval by *J.S. Oliver*, 2016 WL 3361166, at *21).

IV. CONCLUSION

For these reasons, the Division respectfully requests that the Court impose civil penalties against Respondents, jointly and severally, in the amount of $520,311.

Dated: September 23, 2019

Respectfully submitted,

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