

PROPOSED CONCLUSIONS OF LAW

I. Scienter:

- A. Scienter, as used in connection with the securities fraud statutes, means *intent* to deceive, manipulate or defraud. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12, 96 S.Ct. 375, 1381 n.12 (1976).
- B. The government bears the burden of proof on the issue of scienter, including the burden of proving an absence of good faith. *U.S. v. Schlisser*, 168 Fed.Appx. 483, 585-86, 2006 WL 452005 at *1-2 (2d Cir. Feb. 24, 2006).

II. Respondeat Inferior: There is no legally-recognized doctrine of *respondeat inferior*.

III. § 10(b) and Rule 10b-5: A finding of liability under § 10(b) and Rule 10b-5 requires findings that the accused, "(1) made a material misrepresentation or a material omission as to which he had a duty to speak, or used a fraudulent device; (2) with scienter; (3) in connection with the purchase or sale of securities." *SEC v. Monarch Funding Corp.*, 192 F.3d 295, 308 (2d Cir. 1999); *see also Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 201 (1976) (no liability for innocent conduct); *SEC v. First Jersey Secs. Inc.*, 101 F.3d 1450, 1467 (2d Cir. 1996); *Lanza v. Drexel & Co.*, 479 F.2d 1277, 1306 (2d Cir.1973) ("proof of willful or reckless disregard for the truth is necessary to establish liability under Rule 10b-5"); *SEC v. Roanoke Technology Corp.*, 2006 WL 3813755 at *5 (M.D.Fla. Dec. 26, 2006).

- A. Mr. Sandhu did not make a misrepresentation of a material fact.
- B. Mr. Sandhu did not make an omission of a material fact.
- C. Mr. Sandhu did not have a duty to speak.
- D. No entity with which USXP was dealing saw, or if it saw, any writing signed by Mr. Sandhu, it has expressly stated that it did not rely thereon and was not mislead as to what the writing said.
- E. Due diligence in connection with a potential private transaction is not "in connection with the purchase or sale of securities" for purposes of § 10(b) and Rule 10b-5.
 - 1. Mr. Sandhu did not make a material misrepresentations or material omission in connection with the purchase or sale of securities.
- F. Mr. Sandhu did not use a fraudulent device.
- G. Mr. Sandhu did not commit any fraudulent or deceptive acts, and certainly

not with the requisite scienter (*Hochfelder*, 425 U.S. at 193 n.12).

1. Mr. Sandhu did not have an intent to deceive (*id.*).
2. Mr. Sandhu did not have an intent to manipulate (*id.*).
3. Mr. Sandhu did not have an intent to defraud (*id.*).
4. Mr. Sandhu did not engage in a willful or reckless disregard for truth (*Lanza*, 479 F.2d at 1306).

H. Mr. Sandhu did not violate § 10(b) and Rule 10b-5.

IV. § 17(a)(1) of the Securities Act of 1933 (15 U.S.C. § 77q(a)(1)): A finding of liability under § 17(a)(1) of the Securities Act of 1933 (15 U.S.C. § 77q(a)(1)), requires findings that the accused (1) used interstate commerce, and (2) made material false or misleading misrepresentations and omissions in the offer, purchase or sale of securities, (3) with scienter. *SEC v. First Jersey Secs., Inc.*, 101 F.3d 1450, 1466-67 (2d Cir. 1996) (17(a)(1) violation requires support of the same elements as 10(b)); *Savino v. E.F. Hutton & Co. Inc.*, 507 F. Supp. 1225, 1231 (S.D.N.Y. 1981) ("[s]ince Section 17(a), like Section 10(b), sounds in fraud, similar allegations are required to state a claim under that section"); *Roanoke Technology*, 2006 WL 3813755 at *5.

- A. Mr. Sandhu did not make a material false or misleading misrepresentation.
- B. Mr. Sandhu did not make a material false or misleading omission.
- C. Mr. Sandhu had no duty to speak.
- D. No entity with which USXP was dealing saw, or if it saw, any writing signed by Mr. Sandhu, it has expressly stated that it did not rely thereon and was not mislead us to what the writing said.
- E. Due diligence in connection with a potential private transaction is not "in the offer, purchase or sale of securities" for purposes of § 17(a)(1) of the Securities Act of 1933 (15 U.S.C. § 77q(a)(1)).
 1. Mr. Sandhu did not make a material false or misleading misrepresentation or omission in the offer, purchase or sale of securities.
- F. Mr. Sandhu did not have scienter (*Hochfelder*, 425 U.S. at 193 n.12).
 1. Mr. Sandhu did not have an intent to deceive (*id.*).
 2. Mr. Sandhu did not have an intent to manipulate (*id.*).

3. Mr. Sandhu did not have an intent to defraud (*id.*).
4. Mr. Sandhu did not engage in a willful or reckless disregard for truth (*Lanza*, 479 F.2d at 1306).

G. Mr. Sandhu did not violate § 17(a)(1) of the Securities Act of 1933 (15 U.S.C. § 77q(a)(1)).

V. §17(a)(2) of the Securities Act of 1933 (15 U.S.C. § 77q(a)(2)): A finding of liability under §17(a)(2) of the Securities Act of 1933 (15 U.S.C. § 77q(a)(2)), requires findings that the accused used interstate commerce, in the offer or sale of securities, "to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading."

- A. Mr. Sandhu did not obtain money or property from USXP by means of an untrue statement of material fact or by omitting a material fact.
- B. Mr. Sandhu did not obtain money or property from any third person by means of an untrue statement of material fact or by omitting a material fact.
- C. Mr. Sandhu did not obtain money or property from Spiga's sales of USXP stock.
- D. Mr. Sandhu did not make an untrue statement of material fact.
- E. Mr. Sandhu did not omit to state a material fact necessary in order to make statements made, in light of the circumstances under which they were made, not misleading.
- F. Mr. Sandhu did not violate § 17(a)(2) of the Securities Act of 1933 (15 U.S.C. § 77q(a)(2)).**

VI. §17(a)(3) of the Securities Act of 1933 (15 U.S.C. §77q(a)(3)): A finding of liability under §17(a)(3) of the Securities Act of 1933 (15 U.S.C. §77q(a)(3)) requires findings that the accused used interstate commerce, in the offer or sale of securities, "to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser."

- A. Due diligence in connection with a potential private transaction is not "in the offer, purchase or sale of securities" for purposes of § 17(a)(1) of the Securities Act of 1933 (15 U.S.C. § 77q(a)(1)).
- B. Mr. Sandhu did not purchase USXP securities in his personal capacity.
- C. Mr. Sandhu did not sell USXP securities in his personal capacity.

- D. Mr. Sandhu did not, in the offer or sale of USXP securities, engage in any transaction, practice or course of business which operates or would operate as a fraud or deceit upon a purchaser of those securities.
- E. **Mr. Sandhu did not violate § 17(a)(3) of the Securities Act of 1933 (15 U.S.C. § 77q(a)(3)).**

VII. Fraud elements "realleged and incorporated by reference":

- A. Where the Complaint, in alleging violations of §§ 17(a)(2) and 17(a)(3), "realleged and incorporated by reference" prior paragraphs of the Complaint sounding in fraud, those fraud elements are deemed to be alleged and incorporated as elements of the claims alleged under §§ 17(a)(2) and 17(a)(3). *Hampshire Equity Partners II v. Teradyne, Inc.*, 2005 WL 736217 (S.D.N.Y. March 30, 2005).
- B. Where the Complaint, in alleging violations of §§ 17(a)(2) and 17(a)(3), "realleged and incorporated by reference" prior paragraphs of the Complaint sounding in fraud, and the claims under §§ 17(a)(2) and 17(a)(3) are based on the same facts that provide the basis for the preceding fraud claims, the scienter element(s) of those preceding fraud claims is made part of the claims alleged under §§ 17(a)(2) and 17(a)(3). *Hampshire Equity Partners II*, 2005 WL 736217 (S.D.N.Y. March 30, 2005).
- C. The Plaintiff in its Complaint "realleged and incorporated by reference" the facts of its previous claims under § 10(b) and Rule 10b-5 into its claims under §§ 17(a)(2) and 17(a)(3) claims.
- D. The Plaintiff's §§ 17(a)(2) and 17(a)(3) claims as pleaded in the Complaint require the same finding of scienter as do its claims under § 10(b) and Rule 10b-5.
- E. Mr. Sandhu did not have scienter (*Hochfelder*, 425 U.S. at 193 n.12).
 - 1. Mr. Sandhu did not have an intent to deceive (*id.*).
 - 2. Mr. Sandhu did not have an intent to manipulate (*id.*).
 - 3. Mr. Sandhu did not have an intent to defraud (*id.*).
 - 4. Mr. Sandhu did not engage in a willful or reckless disregard for truth (*Lanza*, 479 F.2d at 1306).
- F. **Mr. Sandhu did not violate §§ 17(a)(2) and 17(a)(3) of the Securities Act of 1933 (15 U.S.C. § 77q(a)(2), (3)).**

VIII. §5 of the Securities Act of 1933 (15 U.S.C. § 77e):

- A. Section 4 of the Securities Act of 1933 (15 U.S.C. § 77d(1)) states that "the provisions of Section 5 shall not apply to: (1) transactions by any person other than an issuer, underwriter, or dealer." Mr. Sandhu is not an issuer, underwriter, or dealer.
1. Section 2(a)(4) of the Securities Act of 1933 (15 U.S.C. § 77(b)(4)) defines "issuer" to mean "every person who issues or proposes to issue any security".
- (A) Mr. Sandhu did not issue any security.
- (B) Mr. Sandhu did not propose to issue any security.
- (C) **Mr. Sandhu is not an "issuer" as that term is defined in 15 U.S.C. § 77(b)(4).**
2. The preliminary note to Rule 144 states that the term "underwriter" as defined in § 2(a)(11) of the Securities Act of 1933, means any person "who purchased from an issuer with a view to, or offers or sells for an issuer in connection with the distribution of any security."
- (A) Rule 140 defines "distribution" as follows: "A person, the chief part of whose business consists of the purchase of the securities of one issuer, or of two or more affiliated issuers, and the sale of its own securities, including the levying of assessments on its assessable stock and the resale of such stock upon the failure of the holder thereof to pay any assessment levied thereon, to furnish the proceeds with which to acquire the securities of such issuer or affiliated issuers, is to be regarded as engaged in the distribution of securities of such issuer or affiliated issuers within the meaning of section 2(11) of the Act."
- (1) **Mr. Sandhu was not engaged in the distribution of securities of USXP.**
- (B) Mr. Sandhu did not purchase securities of USXP.
- (C) Mr. Sandhu did not sell or offer to sell for USXP in connection with a distribution of any security.
- (D) Mr. Sandhu did not have a view to sell or offer to sell for USXP in connection with a distribution of any security.
- (E) **Mr. Sandhu was not an underwriter of USXP securities as that**

term is defined in 15 U.S.C. § 77(b)(11).

3. Section 2(a)(12) of the Securities Act of 1933 (15 U.S.C. § 77(b)(12)) defines "dealer" to mean "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, or selling, or otherwise dealing or trading in securities issued by another person."
 - (A) Mr. Sandhu was not engaged in the business of offering, buying selling, dealing, or trading in securities issued by USXP.
 - (B) **Mr. Sandhu is not a "dealer" as that term is defined in 15 U.S.C. § 77(b)(12).**
4. **Pursuant to § 4, the provisions of § 5 do not apply to Mr. Sandhu.**
5. Even if Spiga is deemed to be a "seller" under Section 5 of the 1933 Act, Mr. Sandhu's activities on behalf of Spiga, and his individual acts, and the exercise of the undisputed care and the inquiries he made of USXP, Altomare and Gunderson demonstrate that he did not know of any violation by them of Section 5 of the 1933 Act (Section 12(a)(12) of the 1933 Act; Gunderson Tr. II at 176:3-24). **No injunction may issue against Mr. Sandhu for any violation of Section 5 of the 1933 Act.**

B. "Effective" Registration Statements under § 5:

1. Section 5(a) imposes liability "unless a registration is in effect".
2. Section 8(a) of the Securities Act of 1933 (15 U.S.C. § 77h), states that "the effective date of a registration statement shall be the twentieth day after the filing thereof or such earlier date as the Commission may determine".
 - (A) USXP filed registration statements concerning the securities at issue in the Complaint with the Commission.
 - (B) More than 20 days elapsed since those statements were filed.
 - (C) The USXP registrations were by statute effective 20 days after filing.
3. Section 8(b) states that "if it appears to the Commission that a registration statement is on its face incomplete or inaccurate in any material respect" it may issue an order refusing to permit the registration to become effective until it has been amended in accordance with such order.

- (A) The Commission issued no such order during the time period alleged in the Complaint.
 - (B) The USXP registrations were by statute effective 20 days after filing.
4. Section 8(d) states that "if it appears to the Commission at any time that the registration statement includes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, *the Commission may, after notice ... and opportunity for hearing ... issue a stop order suspending the effectiveness* of the registration statement." (Emphasis added.)
- (A) The Commission issued no such stop order suspending the effectiveness, by statute, of the USXP registration statements during the time period alleged in the Complaint.
 - (B) USXP's registration statements remained effective pursuant to §8(a) during the time period alleged in the Complaint.

5. Pursuant to § 8, the provisions of § 5 do not apply to Mr. Sandhu.

C. "Effective" Registration Pursuant to Section 12 of the Securities Exchange Act of 1934

For securities that are not already listed and registered on a national securities exchange, an issuer that has total assets exceeding \$1,000,000 and a class of equity security (other than an exempted security) held of record by five hundred or more persons, can register its securities by filing a registration statement with the Commission. "Each such registration statement shall become effective sixty days after filing with the Commission..." (Section 12(g)(1)(A), (B) and 12(g)(2)(A) of the Securities Exchange Act of 1934.)

Section 5 of the Securities Act of 1933 applies only to new offerings. Here, the issuer (USXP) took the position that it was filing under § 12(g) of the Securities Exchange Act of 1934. (See, e.g., Sandhu Exh. 66; Gunderson Tr. II at 129:20 - 131:25; 142:10-23; 176:3-24.) Section 12(g) is a registration provision, commonly referred to as a " '34 Act registration" for securities. As a purported 12(g) filer, USXP is subject to the provisions of § 12(g), and the provisions of § 5 are inapplicable. The company, USXP, made this clear when it filed its § 12(g) registrations and its Forms 10-KSB referring thereto, claiming on their face that the company was registering under § 12(g) additional shares each time, and the SEC never rejected that during the time period alleged in the Complaint. Mr. Sandhu -- and the world at large -- had a right to rely on that. Mr. Sandhu cannot be held liable under § 5, which simply does not apply here.

Under Section 12(j) of the Securities Exchange Act of 1934, after notice and an opportunity for a hearing, the Commission is authorized to deny, suspend the effective date of, suspend for a twelve-month period, or revoke the registration of any security.

Under Section 12(k) of the Securities Exchange Act of 1934, upon notice to and approval by the President, the Commission is authorized to summarily suspend trading in any security for ten days, or trading in a security on a national exchange for ninety days, and it may issue "emergency orders" "to alter, supplement, suspend, or impose requirements or restrictions with respect to any matter or action subject to regulation by the Commission or a self-regulatory organization under this title..." (Sections 12(k)(1), (2)(A) of the Securities Exchange Act of 1934.)

- (1) USXP filed registration statements for its shares under Section 12(g) of the Securities Exchange Act of 1934. (*See, e.g.,* Sandhu Exh. 66; Gunderson Tr. II at 129:20 - 131:25; 142:10-23; 176:3-24.)
- (2) USXP's §12(g) registration statements became effective by statute sixty days after filing.
- (3) Registrations under §12(g) are exceptions to § 5, and render § 5 inapplicable here.
- (4) There is no evidence that, pursuant to Section 12(j), the Commission denied, suspended, or revoke USXP's 12(d)(1) or 12(g) statutory registrations during the time period alleged in the Complaint.
- (5) There is no evidence that, pursuant to Section 12(k)(1), the Commission on notice to the President summarily suspended trading in USXP for ten days or summarily suspended trading in USXP on any national exchange for ninety days, during the time period alleged in the Complaint.
- (6) There is no evidence that, pursuant to Section 12(k)(2), the Commission issued an emergency order altering, supplementing, suspending, or imposing requirements or restrictions with respect to USXP securities during the time period alleged in the Complaint.
- (7) **USXP's securities were statutorily registered, and those registrations were effective by statute. (Sections 12(g)(1)(A), 12(g)(1)(B) of the Securities Exchange Act of 1934.)**
- (8) In light of USXP's 12(g) filings, which the Plaintiff SEC did not challenge under Sections 12(j) or 12(k) or any other provision of the securities laws,

an objectively reasonable person would have believed that USXP's shares were registered and effective, and would have been entitled to rely thereon. (*See, e.g.,* Gunderson Tr. II at 176:3-24.)

(9) **Mr. Sandhu reasonably believed that USXP's share were registered and that those registrations were effective.** (*See, e.g.,* Gunderson Tr. II at 176:3-24.)

(10) Pursuant to Section 12 of the Securities Exchange Act of 1934, Mr. Sandhu is not liable under §5 of the Securities Act of 1933.

D. Mr. Sandhu did not violate §5.

IX. Spiga and Target were bona fide purchasers of USXP stock for value.

X. Section 11(a) of the Securities Act of 1933 makes it clear that liability for false registration statements applies to persons who signed the registration statement, directors or similar persons at the issuer, partners in the issuer, professionals like accountants who certify the registration statement, and underwriters of such security.

A. Mr. Sandhu did not sign USXP's registration statements.

B. Mr. Sandhu was not a director or similar person at USXP.

C. Mr. Sandhu was not a partner in USXP.

D. Mr. Sandhu did not certify USXP's registration statements.

E. Mr. Sandhu was not an underwriter of USXP securities.

F. Mr. Sandhu is not liable for the content of USXP's registration statements.

XI. Rule 144(d) states in relevant part: "If the securities sold are restricted securities, the following provisions apply:

(1) *General Rule.* A minimum of one year must elapse between the later of the date of the acquisition of the securities of the issuer or from an affiliate of the issuer, and any resale of such securities in reliance on this section for the account of either the acquiror or any subsequent holder of those securities."

A. Spiga and Target held the USXP restricted securities for one year or more, and therefore, after the one year holding period, those shares could be freely sold through a broker without a registration statement being filed or effective.

B. Bear Stearns' back office and Legal Department conducted their own inquiry as to

the status of the restricted shares and determined that the restrictive legends could be removed and the shares lawfully sold.

- C. Spiga's Rule 144 shares were lawfully sold.
- D. Target's Rule 144 shares were lawfully sold.
- E. **Mr. Sandhu is not liable for the sales of Spiga's or Target's Rule 144 shares of USXP.**

XII. Injunctive Relief 15 U.S.C. §78u(d)(1):

- A. To obtain an injunction, among other things, the SEC must demonstrate that (1) the defendant violated securities laws with whatever state of mind is required by those laws; (2) a reasonable likelihood that the defendant will repeat the demonstrated violations; (3) the existence of past violations; and (4) the degree of scienter involved. *SEC v. Tome*, 638 F. Supp. 596 (S.D.N.Y. 1986) (once SEC has proven defendant's violations of securities laws, it still must prove a reasonable likelihood that the wrong will be repeated); *SEC v. Commonwealth Chem. Secs., Inc.*, 574 F.2d 90, 99 (2d Cir. 1978) (SEC must prove both that the defendant has engaged in violations of the relevant statutory provisions and that there is, once violations have been established, a reasonable likelihood of further violations in the future); *Aaron*, 446 U.S. at 1959 ("this dispute . . . may be much ado about nothing. This is so because of the requirement in injunctive proceedings of a showing that 'there is a reasonable likelihood that the wrong will be repeated' (citations omitted). To make such a showing, it will *almost always be necessary for the [SEC] to demonstrate that the defendant's past sins have been the result of more than mere negligence . . . defendants whose past actions have been in good faith are not likely to be enjoined.*") (emphasis added); *SEC v. Monarch Fund*, 608 F.2d 938 (2d Cir. 1979) (when SEC failed to put forth any evidence that defendant committed any prior violations of securities laws, injunction was inappropriate). Simply alleging that other defendants may commit future violations is not enough to satisfy this requirement. *SEC v. Patel*, 61 F.3d 137 (2d Cir. 1995); *Teicher v. SEC*, 177 F.3d 1016 (D.C. Cir. 1999); *SEC v. Todd*, 2007 WL 1574756 (S.D.Cal. May 30, 2007).
- B. Injunctions under § 20(b) of the 1933 Act and/or § 21(d) of the 1934 Act require "at a minimum, proof that a person is engaged in or is about to engage in a substantive violation..." *Aaron v. S.E.C.*, 446 U.S. 680, 700-01 (1980).
- C. "[W]hen scienter is an element of the substantive violation sought to be enjoined, it must be proved before an injunction may issue." *Aaron*, 446 U.S. at 701.
- D. To obtain an injunction under provisions that do not require a showing of scienter, such as § 17(a)(2) and § 17 (a) (3), "the Commission must establish a sufficient evidentiary predicate to show that such future violation may occur. An important

factor in this regard is the degree of intentional wrong doing evident in a defendant's past conduct. Moreover, as the Commission recognizes, a district court may consider scienter or lack of it as one of the aggravating or mitigating factors to be taken into account in exercising its equitable discretion in deciding whether or not to grant injunctive relief". *Aaron*, 446 U.S. at 701.

- E. Mr. Sandhu did not violate the securities laws.
- F. Mr. Sandhu acted in good faith.
- G. Mr. Sandhu did not act with scienter. (*Hochfelder*, 425 U.S. at 193 n.12.)
- H. There is no reasonable likelihood that Mr. Sandhu would repeat the violations alleged, if he had committed them.
- I. Mr. Sandhu has never been accused of or sanctioned for any past securities violations.
- E. An injunction is not warranted against Mr. Sandhu.**

XIII. Officer and Director Bar

- A. An officer and director bar is only authorized for violations of § 10b or § 17(a)(1). 15 U.S.C. § 77t(e); 15 U.S.C. § 78u(d)(2); *SEC v. Todd*, 2007 WL 1574756 at *17 (S.D.Cal. May 30, 2007).
- B. The factors to be considered where an officer and director bar is authorized are:
 - (1) the egregiousness of the underlying violation; (2) the defendant's "repeat offender" status; (3) the defendant's role or position during the underlying events; (4) the defendant's degree of scienter; (5) the defendant's economic stake in the violation; and (6) the likelihood that the violation misconduct will recur. *Todd*, 2007 WL 1574756 at *17.
- C. Mr. Sandhu did not violate § 10b.
- D. Mr. Sandhu did not violate § 17(a)(1).
- E. The facts as to Mr. Sandhu's conduct do not demonstrate egregiousness.
- F. Mr. Sandhu has never been accused of or sanctioned for any past securities violations; he is not a "repeat offender".
- G. Mr. Sandhu was not an officer, director, owner, or employee of USXP or Spiga.
- H. Mr. Sandhu did not receive any money or securities from USXP.

- I. Mr. Sandhu did not receive any money from the sale of USXP securities.
- J. Mr. Sandhu did not have scienter. (*Hochfelder*, 425 U.S. 193n.12; *Todd*, 2007 WL 1574756 at *17.)
- K. There is no reasonable likelihood that Mr. Sandhu would repeat the violations alleged, if he had committed them.
- L. An officer and director bar is nor warranted against Mr. Sandhu.**

XIV. Penny Stock Bar (15 U.S.C. § 78o(b)(6)):

- A. An injunction is not warranted against Mr. Sandhu (see above).
- B. A bar is not warranted against Mr. Sandhu (see above).
- C. The Complaint does not allege a Penny Stock violation against Mr. Sandhu.
- D. The Complaint does not allege facts showing that at the time(s) in question USXP was a "penny stock" as defined by the law.
- E. Mr. Sandhu is neither a broker nor a dealer. (Section 3(51)(A) of the Securities Exchange Act of 1934; 15 U.S.C. §78o(g); SEC Rule 3a51-1; SEC Rule 15g.)
- F. The SEC has not shown, and the Complaint does not allege, that any of the brokers connected to this case, like Bear Stearns, were not exempt from the Penny Stock Rule even when they were selling stocks that were trading below \$5.00. (*See id.*)
- G. The SEC has not shown, and the Complaint has not alleged, any of the requirements of the Penny Stock Rule, other than the mere price of USXP's stock, which does not prove a violation of the Penny Stock Rule in-and-of-itself. (*See id.*)
- H. Mr. Sandhu did not have scienter (*Hochfelder*, 425 U.S. 193 n. 12; *Todd*, 2007 WL 1574756 at *17).
- I. The facts as to Mr. Sandhu do not demonstrate egregiousness.
- J. Mr. Sandhu has never been accused of or sanctioned for any past securities violations, including penny stock violations.
- K. Mr. Sandhu did not receive any securities or money from USXP.
- L. Mr. Sandhu did not receive any money from the sale of USXP securities.

- M. There is no reasonable likelihood that Mr. Sandhu will commit any penny stock violations in the future.
- N. Mr. Sandhu has not violated the Penny Stock laws, even had such an allegation been made against him.

O. A Penny Stock Bar is not warranted against Mr. Sandhu.

XV. Disgorgement: "Disgorgement is an equitable remedy that seeks to deprive the defendants of their ill-gotten gains to effectuate the deterrence objectives of the securities laws and force a defendant to give up the amount by which he was unjustly enriched." *SEC v. Svoboda*, 409 F. Supp. 2d 331, 344 (S.D.N.Y. 2006) (citations and internal quotes omitted); *SEC v. Todd*, 2007 WL 1574756 at *18 (S.D.Cal. May 30, 2007).

- A. Mr. Sandhu did not obtain money or property from USXP.
- B. Mr. Sandhu did not obtain money or property from Spiga's sales of USXP stock.
- C. Mr. Sandhu did not purchase or receive any securities from USXP.
- D. Mr. Sandhu did not obtain any "ill-gotten gains".
- E. Mr. Sandhu was not "unjustly enriched".
- F. Mr. Sandhu did not act with scienter.
- G. The deterrence objectives of the securities laws would not be advanced by disgorgement.
- H. The Court has already entered a default judgment against Spiga for the full amount of its USXP stock sales sought by Plaintiff.
- I. There is no legally-cognizable claim for *respondent inferior*.
- J. Disgorgement would award the Plaintiff an impermissible double recovery against Spiga and Mr. Sandhu.
- K. There is no legally permissible way to calculate the amount of disgorgement against Mr. Sandhu if the Court were to order disgorgement.

L. Disgorgement is not warranted against Mr. Sandhu.

XVI. "Third Tier" Penalties: Pursuant to § 20(d)(2)(C) of the Securities Act of 1933 (15 U.S.C. § 77t(d)(2)(c)); 15 U.S.C. § 78u(d)(3)(B)(iii): "third tier" penalties may only apply when the violation "involved fraud, deceit, manipulation, or deliberate or reckless

disregard of a regulatory requirement," and "such violation directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons." The first element fundamentally requires that the SEC establish that the defendant acted with scienter. See *SEC v. Invest Better 2001*, No. 01 Civ. 11427 (BSJ), 2005 WL 2385452 at *4 (S.D.N.Y. May 4, 2005) ("Tier 3, for *intent* plus substantial loss or significant risk of loss to the victims ...") (emphasis added); *SEC v. Todd*, 2007 WL 1574756 at *18 (S.D.Cal. May 30, 2007).

- A. Mr. Sandhu did not have scienter (*Hochfelder*, 425 U.S. at 193 n.12).
 - 1. Mr. Sandhu did not have an intent to defraud (*id.*).
 - 2. Mr. Sandhu did not have an intent to deceive (*id.*).
 - 3. Mr. Sandhu did not have an intent to manipulate (*id.*).
 - 4. Mr. Sandhu did not deliberately disregard a regulatory requirement (*id.*).
 - 5. Mr. Sandhu did not recklessly disregard a regulatory requirement.
- B. Mr. Sandhu did not cause other persons to suffer substantial losses.
- C. Mr. Sandhu did not create a significant risk of substantial losses to other persons.
- D. **"Third Tier" Penalties are not warranted against Mr. Sandhu.**