IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, vs. PETER WARREN and EXO-BRAIN, INC. (formerly E-BRAIN SOLUTIONS, LLC), Defendants.	:	CIVIL ACTION NO. 1:04-CV-2403-CC

ORDER

Plaintiff Securities and Exchange Commission (the "Commission" or the "SEC") has filed a Complaint in the above-styled action. Defendants Peter Warren (referred to herein "Warren") and Exo-Brain, Inc. (referred to herein as "Exo-Brain," "E-Brain," "E-Brain LLC," or "E-Brain Solutions, LLC") (collectively referred to herein as "Defendants") have previously entered their general appearances and have admitted the in personam jurisdiction of this Court over them and the jurisdiction of this Court over the subject matter of the action.

By Orders of this Court entered February 11 and 17, 2005, Warren and Exo-Brain were permanently enjoined from further violations of the registration and anti-fraud provisions of the federal securities laws. Those Orders also directed Warren and Exo-Brain "shall pay disgorgement and pre-judgment interest in an amount to be resolved upon motion of the Commission at a later date." (Doc. No. 6 at p. 4 and Doc. No. 7 at p. 4.) In addition, the Orders provided that Warren and Exo-Brain "shall pay a civil penalty in an amount to be resolved upon motion of the Commission at a later date." (Id.) The Orders further provided, that for purposes of the Commission's motion to set disgorgement, pre-judgment interest and to impose civil penalties, the allegations of the Commission's complaint shall be

deemed to be true and that Warren and Exo-Brian may not by way of defense contend that disgorgement, pre-judgment interest and a civil penalty should not be imposed. (Id.) Warren stipulated to the terms of the February 17, 2005 Order against him. (See Doc. No. 7.) Exo-Brain stipulated to the terms of the February 11, 2005 Order against it. (See Doc. No. 6.)

The Commission's Renewed Motion for Summary Judgment and to Order Disgorgement, Prejudgment Interest and Civil Penalties Against Defendants Warren and Exo-Brain is currently before the Court.[1] All of the allegations of the Commission's Complaint are deemed to be true for purposes of this Renewed Motion for Summary Judgment. The Commission's Motion is also based upon other admissions of the parties, which authenticate various private placement and other securities offering materials. Finally, the Commission's Motion is based upon certain sworn testimony and the Declaration of William C. Woodward, which includes the Commission's pre-judgment interest calculation.

Also pending before the Court are Defendant Peter Warren's Objection to SEC's Footnote 6 and Motion to Strike and Defendant Peter Warren's Second Objection and Motion to Strike SEC's Unsupported Argumentation. Upon consideration of Warren's Objection to Footnote 6 of the Commission's

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[1] The Court notes that the Commission initially filed a Motion for Summary Judgment in this matter on November 10, 2005, at a time when no party had filed an answer or responsive pleading. After the motion was filed, Defendant Warren retained his current counsel. The Commission withdrew its Motion for Summary Judgment, Warren filed his Answer, and discovery commenced. The Commission has now filed the instant Renewed Motion.

The Court also notes that Defendant Exo-Brain, Inc. has failed altogether to respond to the Commission's Renewed Motion for Summary Judgment. The Renewed Motion for Summary Judgment is therefore deemed unopposed by Defendant Exo-Brain, Inc., see LR 7.1(B), and any arguments made by Defendant Warren with respect to the status or financial condition of Defendant Exo-Brain, Inc. are disregarded by the Court.

Memorandum of Law in Support of its Renewed Motion, the Court finds that the objection is due to be sustained, as the statements in the footnote are not supported by admissible evidence. Further, as the Court agrees with Warren that certain factual statements set forth in the Commission's reply brief are not supported by evidence and violate Federal Rule of Civil Procedure 56(e), as well as this Court's Local Rules, the Court also sustains Warren's objection to the unsupported factual statements set forth in the Commission's reply brief.[2] Notwithstanding the foregoing, the Court will not strike Footnote 6 of the Commission's Memorandum of Law or the factual statements in the Commission's reply brief, as Warren has not cited legal authority establishing that striking the statements is a proper remedy.

II. FINDINGS OF FACT[3]

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[2] The Court overrules Warren's objection to the Commission's statement that Warren has not produced any evidence of his current ability or inability to pay. The record speaks for itself in this regard.

[3] The Court derives the facts from the SEC's Statement of Material Facts to Which No Genuine Issue Exists in Support of its Renewed Motion for Summary Judgment and to Set Disgorgement, Prejudgment Interest and a Civil Penalty Against Peter Warren and Exo-Brain, Inc. ("SEC's Statement of Material Facts"). Defendant Peter Warren has responded to the SEC's Statement of Material Facts, but the response does not comply with Local Rule 56.1(B)(2). Specifically, the response does not contain "individually numbered, concise, nonargumentative responses corresponding to each of the movant's numbered undisputed material facts." LR 56.1(B)(2)(a)(1), NDGa; see also LR 56.1(B)(2)(a)(2)(i) (requiring concise responses). In addition, in attempting to dispute facts set forth by the SEC, Warren often refers generally to his own declaration and the declarations of Messrs. Rooijakkers, Bishop, Sarnefors and van Woerkon. However, Warren does not cite specific pages or paragraphs of those declarations, as required by LR 56.1(B)(2)(a)(2)(i). (See, Defendant Peter Warren's Response to SEC's Statement of Undisputed Facts to Which There Exist Genuine Issues for Trial at 2, 4, 7, 11-13.) Accordingly, the Court disregards Defendant Peter Warren's Response to SEC's Statement of Undisputed Facts to Which There Exist Genuine Issues for Trial, and the Court will not consider the declarations of Messers. Rooijakkers, Bishop, Sarnefors and van Woerkon.

The Court also notes that several of the facts set forth in the SEC's Statement of Material Facts are facts taken directly from the SEC's Complaint, which are deemed to be true for purposes of the SEC's motion. (See Exs. 2 and 4 to SEC's Statement of Material

On January 31, 2005, Warren executed a stipulation and consented to the entry of an order of permanent injunction and other relief in this litigation, in the form ultimately entered by this Court against him on February 17, 2005. (See Exs. 1 and 2 to SEC's Statement of Material Facts.) Also on January 31, 2005, Warren, as President of Exo-Brain, executed a stipulation and consented to the entry of an order of permanent injunction and other relief in this litigation, in the form ultimately entered by this Court against Exo-Brain on February 11, 2005. (See Exs. 3 and 4 to SEC's Statement of Material Facts.) As mentioned supra, the two Orders entered by the Court provided, with Warren's and Exo-Brain's respective stipulations thereto, that Defendants "shall pay" disgorgement, pre-judgment interest and civil penalties in amounts to be resolved by motion of the Commission, and provided explicitly that for purposes of this motion, "the allegations of the Commission's complaint

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Facts.) Therefore, Defendants' attempt to deny these facts is improper and precluded by the Court's Orders entered respectively on February 11, 2005, and February 17, 2005. Further, insofar as Defendants have admitted the facts in the Complaint for purposes of this motion, the Court departs from its usual rule precluding parties from citing to a pleading to support a statement of fact.

Finally, the Court acknowledges that Defendant Warren filed a statement of additional facts, which he contends are material and present a genuine issue for trial. However, that filing substantially fails to comply with Local Rule 56.1(B)(1). Paragraphs 1-3, 5 and 7 are not supported by citations to evidence that include page or paragraph numbers. The Court therefore will not consider these facts. See LR 56.1(B)(1)(a). The fact set forth in paragraph 4 does cite a specific paragraph of Warren's Declaration, which was filed on November 30, 2005. However, as paragraph 4 of Defendant's Statement of Additional Facts pertains to Warren's financial condition and his declaration was filed over nine months prior to the filing of the Commission's Renewed Motion for Summary Judgment, the Court finds that the declaration is stale in this regard and not reliable evidence of Warren's financial condition. The declaration speaks to Warren's financial condition as of November 30, 2005, not his financial condition as of October 6, 2006, when he filed his response to the Commission's Renewed Motion for Summary Judgment. Therefore, irrespective of the truth or falsity of the facts set forth in paragraph 4, the statements have no evidentiary value with respect to the instant Renewed Motion for Summary Judgment, as there has been no recent sworn testimony from Warren affirming that his financial condition has not changed since November 30, 2005.

shall be deemed to be true." (See Exs. 2 and 4 to SEC's Statement of Material Facts.) The Orders further provided that Warren and Exo-Brain may not by way of defense contend that disgorgement, pre-judgment interest and civil penalties should not be imposed. (See id.)

The evidence of record indicates that Warren and Exo-Brain have fraudulently raised up to $12.4 million from investors in violation of the securities laws. (Compl. ¶ 2.; see also Exs. 1-4 to SEC's Statement of Material Facts.) First, E-Brain LLC fraudulently offered and sold $4.38 million in securities in unregistered transactions in 2000 to U.S. investors. Beginning January 2001 and continuing through May 15, 2001, the company raised $1.999 million from foreign investors in unregistered transactions. E-Brain LLC was merged into Exo-Brain on May 31, 2001. (Compl. ¶ 3; see also Exs. 1-4 to SEC's Statement of Material Facts.) Exo-Brain subsequently violated the registration provisions when, in August 2001, it offered up to $6.4 million of securities in sales integrated with the 2000-2001 E-Brain LLC sales. At that point, all sales ceased. (Compl. ¶ 4; see also Exs. 1-4 to SEC's Statement of Material Facts.)

E-Brain LLC was, and Exo-Brain is controlled by Peter Warren, who resides in Cannes, France. (Compl. ¶ 5; see also Exs. 1-4 to SEC's Statement of Material Facts.) In offering documents, Warren and E-Brain LLC falsely claimed to have developed a working prototype that could make computers more user-friendly. Warren and E-Brain LLC claimed that this prototype would enable a person to operate a computer with a voice command and in numerous foreign languages. (Compl. ¶ 6; see also Exs. 1-4 to SEC's Statement of Material Facts.) Later, Warren also represented that the company had built a launch product or commercially available product. These representations were false. Additionally, Warren and E-Brain LLC misrepresented the company's financial situation. (Compl. ¶ 7; see also Exs. 1-4 to SEC's Statement of Material Facts.)

Warren authored the offering documents and directed the entire securities

offering effort. Many of the investors were unsophisticated or not accredited investors. Warren conceded that he took no steps to investigate the financial condition of the prospective investors and that, in practice, E-Brain LLC would accept funds from anyone. (Compl. ¶ 8; see also Exs. 1-4 to SEC's Statement of Material Facts.)

Warren, and Exo-Brain through Warren's efforts, acted with a high degree of scienter. Warren intentionally misrepresented the capabilities and developmental status of the technology, misrepresented the financial condition of the companies, and disregarded warnings of legal counsel recommending against further efforts to raise investor funds. (Compl. ¶ 10; see also Exs. 1-4 to SEC's Statement of Material Facts.)

Defendants knowingly or with severe recklessness made misrepresentations and omissions of material facts to investors. (Compl. ¶ 80; see also Exs. 1-4 to SEC's Statement of Material Facts.) The only financial information that Warren and E-Brain LLC provided to investors in 2000 was an audited financial statement prepared as of May 31, 2000, and the results of operations and its cash flows for the period beginning April 23, 2000 through May 31, 2000. (Compl. ¶ 81; see also Exs. 1-4 to SEC's Statement of Material Facts.) Although the May 31, 2000 statement appears to accurately reflect that the company had sustained a $44,000 loss during that period, the statement only reflected the results of operation for the first month of the company's existence and before the company had even opened an office in Chattanooga. (Compl. ¶ 82; see also Exs. 1-4 to SEC's Statement of Material Facts.) Warren and E-Brain LLC continued to disseminate the May 2000 financial statement throughout the rest of 2000. They failed to disclose that the company lost money at a considerately faster pace than depicted in the limited financial statements provided to investors. (Compl. ¶ 83; see also Exs. 1-4 to SEC's Statement of Material Facts.) As of December 31, 2000, E-Brain LLC reported a net loss of $6,083,425. (Compl. ¶ 84; see also Exs. 1-4 to SEC's Statement of Material Facts.) Revenues for

2000 totaling $25,225 were solely interest income. To fund its operation, E-Brain LLC had to seek investor funds six times in calendar 2000. The auditors also expressed substantial doubt concerning the company's ability to continue as a going concern. (Compl. ¶ 85; see also Exs. 1-4 to SEC's Statement of Material Facts.) Warren knew that the company was losing money at a much faster pace than the investors were led to believe. Warren and E-Brain LLC materially misrepresented the company's financial condition by continuing to use the May 31, 2000 financial statement throughout 2000. (Compl. ¶ 86; see also Exs. 1-4 to SEC's Statement of Material Facts.)

In a document dated December 10, 1999, which was given to offerees in February and March 2000 (the first offer to investors) and distributed to all subsequent offerees in a company disc format, Warren falsely claimed in a section of the document entitled "Products" that a prototype had been developed to the point that the "prototype sends e-mails and faxes and browses the Internet, finds things and shows it can do simple accounting, all of which is done in response to orders given to it in any old English the user cares to use...." The document also falsely stated that the "prototype is multi-user ... and speaks three languages – English, French and Norwegian...." The document also stated that "[our] working prototype is proof that my technology can be implemented." In fact, no prototype with the above abilities had been developed. (Compl. ¶87; see also Exs. 1-4 to SEC's Statement of Material Facts.)

In another offering document prepared in December 1999 and provided to investors, Warren falsely described the prototype's voice activation ability by asserting "Tell it: speak French and it will...." This document also stated that the E-brain LLC technology "creates a computer you can talk to, a computer you can give orders to as you would give them to a person. Not only can you give it the orders – either with a keyboard or with Voice Recognition technology – but it will react and carry out the orders as you would expect a computer trained human to carry them

out..." In another portion of that offering document, Warren claimed, "the prototype speaks English, French, German, Norwegian, and Japanese...." In fact, no prototype with the above abilities had been developed. (Compl. ¶ 88; see also Exs. 1-4 to SEC's Statement of Material Facts.)

Moreover, the June 4, 2000 offering document, which was the second offering to investors, clearly indicated that technology had reached an advanced stage of development by asserting that a "working prototype built with the Company's technology is available to be tried upon request...." In fact, no prototype with the above abilities had been developed. (Compl. ¶ 89; see also Exs. 1-4 to SEC's Statement of Material Facts.)

At the time the statements were made, the company had not developed a prototype with these capabilities and had not developed a prototype with such capability. (Compl. ¶ 90; see also Exs. 1-4 to SEC's Statement of Material Facts.)

A June 4, 2000 offering document falsely represented that "[i]n the First Offer to Investors, the Company raised adequate funds to build the Launch Products...." According to Warren, a "launch product" is a product that is ready for sale to the general public. (Compl. ¶ 91; see also Exs. 1-4 to SEC's Statement of Material Facts.) In reality, at the time the statement was made, adequate funding had not been raised to build a launch product. As discussed earlier, this offering document was mailed to all pre-June investors and to subsequent offerees that invested after June 4, 2000. (Compl. ¶ 92; see also Exs. 1-4 to SEC's Statement of Material Facts.) In fact, the company never developed a commercially available product and never derived any revenue from any product. (Compl. ¶ 93; see also Exs. 1-4 to SEC's Statement of Material Facts.)

Warren has admitted that Plaintiff's Exhibit 1 to the SEC's Requests for Admissions is a true and correct copy of Exo-Brain, Inc.'s Confidential Offering Memorandum under Regulation S of the Securities Act (for non-U.S. persons) dated June 1, 2001. (See SEC's Req. to Admit 1 and Warren's Response to SEC's Req. to

Admit 1, attached as Exs. 5 and 6 to SEC's Statement of Material Facts.) Warren has admitted that Plaintiff's Exhibit 2 to the SEC's Requests for Admissions contains true and correct copies of Exo-Brain, Inc.'s "Certificate of Incorporation" and "Agreement and Plan of Merger" between E-Brain Solutions LLC and Exo-Brain, Inc. (See SEC's Req. to Admit 2 and Warren's Response to SEC's Req. to Admit 2.) Warren has further admitted that Plaintiff's Exhibit 3 to the SEC's Requests for Admissions is a true and correct copy of E-Brain Solutions LLC's "Offer to Investors" dated February 22, 2000. (See SEC's Req. to Admit 3 and Warren's Response to SEC's Req. to Admit 3.) Warren has admitted that Plaintiff's Exhibit 4 to the SEC's Requests for Admissions is a true and correct copy of E-Brain Solutions LLC's Investor Disclosure documents, also known as the Blue Book. (See SEC's Req. to Admit 4 and Warren's Response to SEC's Req. to Admit 4.) Similarly, Warren has admitted that Plaintiff's Exhibit 5 to the SEC's Request for Admissions is a true and correct copy of E-Brain Solutions LLC's "Fourth Offer of Member Interests to Investors" dated August 1, 2000, along with a true and correct copy of a sample subscription agreement for that offering. (See SEC's Req. to Admit 5 and Warren's Response to SEC's Req. to Admit 5.) Finally, Warren has admitted that Plaintiff's Exhibit 6 to the SEC's Requests for Admissions is a true and correct copy of Exo-Brain, Inc.'s Confidential Placement Memorandum offering for sale up to 4,000,000 shares of common stock of Exo-Brain, Inc. , dated August 27, 2001. (See SEC's Req. to Admit 6 and Warren's Response to SEC's Req. to Admit 6.)

Exo-Brain, Inc.'s Placement Memorandum dated August 27, 2001, provides the highest and best basis for disgorgement against both Warren and Exo-Brain. The Placement Memorandum provides, in pertinent part, the following:

> In 2000 and 2001, E-Brain financed its operations through the sale of its securities to more than 200 investors. The offers and sales of these securities were not registered under federal or state securities laws. Federal and state securities laws require registration of securities unless an appropriate exemption from the registration requirements of those laws is available. To the extent that an exemption was not available for these offerings, we may not have complied with the registration

> requirements of these laws. If so, the purchasers could seek rescission of their investments, and recover the money they paid for the securities. We intend to make a reasonable rescission offer in 2001 or the first quarter of 2002 to all or some of the investors who participated in the offerings of securities of E-Brain. Should we make the offer to all of these purchasers, and should all of these purchasers accept the rescission offer, we would need to pay those purchasers up to approximately $6.4 million, excluding interest, which could have a material adverse effect on our financial condition and our ability to continue to operate our business ...

(See SEC's Req. to Admit 6 and Warren's Response to SEC's Req. to Admit 6; see also Plaintiff's Ex. 6 to SEC's Requests for Admission to Warren at 13.) Warren, and Exo-Brain through him, have thus admitted in Exo-Brain's most recent private placement memorandum that Exo-Brain received $6,400,000 from the unregistered sales of its securities to investors in 2000 and 2001. (See id.)

Also relevant to the instant Renewed Motion for Summary Judgment is the sworn testimony of Gerald Payne, an accountant who graduated from the University of Chattanooga in 1958 with a degree in business, received his CPA certificate in Tennessee in 1961, and received an MBA from the University of Chattanooga in 1968. (Sworn Statement of Gerald Payne at 5.) Beginning in the year 2000, Payne worked referral business through another accountant, Bob Himmelsbach, and during that year became acquainted with E-Brain Solutions and Peter Warren. (Id. at 8:14-10:2.) Payne prepared two unaudited financial statements for E-Brain LLC and provided them to Warren. (Id. at 13:13-14:12; 20:17-19.) Warren later told Payne that he wanted audited financial statements. (Id. at 14:4-16; 35:19-21; 44:18-45:17.)

Payne had initially been hired by Defendants only to generate monthly financial statements, not to provide an audit. In fact, there was no one in the accountant's office capable of providing an audit. (Id. at 16:22-17:2.) Eventually, Payne, after meeting with Warren, produced an audited report work sheet, which essentially substituted E-Brain for an earlier client. In preparation of that work sheet, Warren provided Payne with a purported schedule of his expenses. (Id. at

22:10-24:8.) However, Warren did not provide Payne with any backup documentation supporting the claimed expenses, and Payne did not verify Warren's claimed expenses for the financial statement. (Id. at 24:6-25.) Warren was Payne's sole source for all documentation and figures supporting expenses recorded on the financial statements. (Id. at 25:24-26:12.) Payne signed off on the audited financial statement. (Id. at 28:1-23.) However, Payne acknowledged that certain other items, for example $240,000 worth of claimed research and development costs, were never verified or vouched for in any way. (Id. at 28:24-31:4.)

II. STANDARD OF REVIEW

The Commission, as the party seeking summary judgment, has the initial burden to show that there is no genuine issue as to any material fact and that it is entitled to a judgment as a matter of law. See Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Defendants, as the opposing parties, must demonstrate that a triable issue of fact exists, and Defendants may not rest upon mere allegations or denials. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A mere scintilla of evidence supporting the case is insufficient. Id. "When a court considers whether or not to enter summary judgment, it views all of the evidence, and all inferences drawn therefrom, in the light most favorable to the non-moving party." SEC v. Calvo, 378 F.3d 1211, 1215 (11th Cir. 2004) (citation omitted).

III. CONCLUSIONS OF LAW

The Commission is entitled to summary judgment in its favor on the issues of disgorgement and pre-judgment interest. As the Commission has properly invoked the court's equity jurisdiction by seeking and, in this case, obtaining injunctive relief, the Court has the power to order all equitable relief necessary under the circumstances. SEC v. Materia, 745 F.2d 197, 200 (2d Cir. 1984). In SEC enforcement actions, disgorgement prevents violators from being unjustly enriched, SEC v. Commonwealth Chemical Securities, Inc., 574 F.2d 90, 102 (2d Cir. 1978), and

enhances the deterrent effect of such actions by making violations unprofitable. SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1104 (2d Cir. 1972). Courts clearly have the power to order disgorgement in Commission enforcement actions. SEC v. Texas Gulf Sulphur Co., 446 F.2d 1301, 1307 (2d Cir. 1971). Courts further have the authority to order defendants to pay pre-judgment interest on ill-gotten gains. SEC v. First Jersey Securities, Inc., 101 F.3d 1450, 1476 (2d Cir. 1997).

In the instant case, Warren and Exo-Brain have admitted, for purposes of this Renewed Motion, that they fraudulently made misrepresentations to induce investments in unregistered securities, that the possessed the requisite scienter, and that they did not have the working prototype that they falsely touted was available to induce the investments. Disgorgement is clearly warranted in this circumstances. The Court finds it appropriate to order Defendants to disgorge the amount they raised from the securities they fraudulently sold. In this regard, Warren admitted in his response to the Commission's First Requests for Admissions that the August 27, 2001 Private Placement Memorandum is a true and correct copy of essentially the last offering material of Exo-Brain, and that Private Placement Memorandum provides that $6,400,000.00 of securities had then been sold by Defendants. As such, disgorgement of $6.4 million against Warren and Exo-Brain is the appropriate amount of disgorgement to be ordered against each of the Defendants, as this is the amount raised by Defendants from securities sales to investors and admitted to by Defendants in Exo-Brain's Private Placement Memorandum dated August 27, 2001. See S.E.C. v. Calvo, 378 F.3d 1211, (11th Cir. 2004) ("The SEC is entitled to disgorgement upon producing a reasonable approximation of a defendant's ill-gotten gains."); accord SEC v. First Jersey Securities, Inc., 101 F.3d at 1475 (holding that the amount of disgorgement ordered "need only be a reasonable approximation of profits causally connected to the violation").

The Court likewise finds that an award of pre-judgment interest is warranted. The Commission seeks pre-judgment interest from both Warren and Exo-Brain from

September 1, 2001 through August 31, 2006. According to the Declaration of Woodward, the pre-judgment interest for that period of time totals $1,981,734.50. (Declaration of William C. Woodard in Support of the SEC's Renewed Motion for Summary Judgment and to Set Disgorgement, Prejudgment Interest and a Civil Penalty Against Warren and Exo-Brain, Inc. ¶ 9.)

The Commission also seeks summary judgment on the issue of a civil penalty against Defendants Warren and Exo-Brain. Section 20(d) of the Securities Act of 1933 ("Securities Act") and Section 21(d)(3) of the Securities Exchange Act of 1934 ("Exchange Act") provide that the Commission may seek to have a court impose civil penalties for any violations of those acts. Civil monetary penalties pursuant to the Securities Act and the Exchange Act are required to be adjusted for inflation. Warren's and Exo-Brain's conduct herein occurred in 2000 and 2001, essentially bridging the time that the adjustment became effective in early 2001. 17 C.F.R. § 201.1001, Adjustment of Civil Monetary Penalties – 1996. LEXSEE 66 FR 8761 at 8762. The amounts of civil monetary penalties applicable herein are therefore the amounts for the relevant time of the violation, including the amounts for conduct that occurred after February 1, 2001.

First tier penalties for any violation (arising from conduct that, as here, occurred after February 1, 2001) may be imposed up to the larger of (a) $6,500 for any natural person and $60,000 for any other person, or (b) the gross amount of pecuniary gain for the defendant. Where fraud has occurred, the maximum penalty amounts rise to the greater of (a) $60,000 for any natural person and $300,000 for any other person, or (b) the gross amount of pecuniary gain for the defendant. When a defendant's violative conduct involved fraud and resulted in substantial losses to others, or significant risk of losses, a district court may impose a civil penalty in an amount not to exceed the greater of (a) $120,000 for a natural person and $600,000 for any other person, or (b) the gross amount of pecuniary gain for the defendant.

This Court has concluded that it should impose a civil penalty against

Defendants. Warren was the central point of the scheme, when acting through the use of fraud and deceit, he obtained investor funds from the offer and sale of securities by the use of misleading financial information, false representations that a voice-activated working prototype that functioned in multiple languages existed, and false representations that Exo-Brain's predecessor had adequate funds to build a launch product. Warren clearly and indisputably acted with scienter. As the company's president and director, his state of mind is also imputed to the company. See Armstrong, Jones & Co. v. SEC, 421 F.2d 359, 362 (6th Cir. 1970); SEC v. Interlink Data Network of Los Angeles, Inc., No. Civ. A93-3073, 1993 WL 603274, at *9 (C.D. Cal. Nov. 15, 1993), rev. on other grounds, 77 F.3d 1201 (9th Cir. 1996). Warren's and Exo-Brain's activities clearly involved fraud and deceit. Given the repeated incidents of fraudulent solicitations by Warren and Exo-Brain, and given the fact that their activity resulted in substantial losses to investors, a substantial civil penalty is appropriate, even after considering mitigating factors.

Defendant Warren's primary argument in opposition to an award of disgorgement, pre-judgment interest and a civil penalty is that the Commission should have determined that he is "incapable of payment" and therefore exercised its discretion and waived disgorgement, pre-judgment interest and a civil penalty. However, this Court is in no position to exercise control over the Commission's discretionary decisions, and Warren has cited no binding law to suggest that the Court does have such control or authority.

Warren also presumably urges the Court to determine that he is incapable of paying disgorgement, pre-judgment interest and a civil penalty. However, Warren's opposition to the Commission's Renewed Motion for Summary Judgment does not properly set forth facts, supported by citations to specific evidence (including page number or paragraph), establishing that he is incapable of paying disgorgement, pre-judgment interest and a civil penalty. See Nwaogu v. Wellstar Health Sys., Civil Action No. 1:06-CV-0703-JOF, 2007 WL 2479277, at *5 (N.D. Ga. Aug. 28, 2007)

("Although the Court must construe the record in [the non-movant's] favor, it does not have a duty to sift through the record in search of evidence to support a party's opposition to summary judgment .... Rule 56 allocates a duty to the opponent of the motion, who is required to point out the evidence, albeit evidence that is already in the record, that creates an issue of fact.") Warren attempts to rely on a declaration he filed in November of 2005 in response to the Commission's initial summary judgment motion, but Warren has not filed with his current opposition any sworn statement establishing that his financial condition has not changed since November of 2005. A past inability to pay is not a present inability to pay, and Warren has not submitted with his opposition any evidence concerning his present inability to pay.[4] Therefore, insofar as Warren has not properly substantiated his claimed inability to pay, no genuine issue of material fact precludes summary judgment in this regard.

Warren further argues that disgorgement is limited to his own personal profit, as opposed to the amounts by which he defrauded investors. As a matter of law, however, as long as the measure of disgorgement is reasonable, courts have held that the wrongdoer should bear the risk of any uncertainty. Calvo, 378 F.3d at 1217; accord SEC v. Patel, 61 F.3d 137, 140 (2d Cir. 1995); S.E.C. v. Warde, 151 F.3d 42, 50 (2d Cir. 1998); SEC v. First City Fin. Corp., 890 F.2d 1215, 1232 (D.C. Cir. 1989). Additionally, insofar as the Commission has produced a reasonable approximation of Defendants' ill-gotten gains, Warren has the burden to demonstrate that the SEC's estimate is not a reasonable approximation. Calvo, 378 F.3d at 1217. Warren does not explicitly argue that the Commission's calculation is not a reasonable approximation, but he does suggest that the Court should determine the proper

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[4] Attached to Warren's Second Motion to Strike is another version of his financial statement dated March 31, 2006, and signed as of April 3, 2006. This financial statement still precedes Warren's opposition to the Renewed Motion for Summary Judgment by six months. Additionally, because the financial statement was not submitted with his opposition to the Renewed Motion for Summary Judgment, the financial statement is not proper for the Court's consideration.

amount of disgorgement by considering his salary and then deducting certain unreimbursed expenses that he purports to have paid out of his pocket. Notably, however, in responding to the Commission's Renewed Motion for Summary Judgment, Warren does not cite to any specific evidence (including page number or paragraph) of his salary or the purported out-of-pocket unreimbursed expenses.[5] This Court is consequently well within its discretion "to rule that amount of disgorgement will be the more readily measurable proceeds received from the unlawful transactions." Calvo, 378 F.3d at 1218. The more readily measurable proceeds are the $6,400,000 that Defendants readily admit Exo-Brain received from the unregistered sales of its securities to investors in 2000 and 2001.

IV. SUMMARY

For the reasons set forth above, the Court **GRANTS** the SEC's Renewed Motion for Summary Judgment and to Order Disgorgement, Prejudgment Interest and Civil Penalties Against Defendants Warren and Exo-Brain [Doc. No. 41]. The Court **DENIES** Defendant Peter Warren's Motion to Strike [Doc. No. 45] and Defendant Peter Warren's Motion to Strike SEC's Unsupported Argumentation [Doc. No. 51].

The Court **ORDERS** that Defendants Warren and Exo-Brain shall each pay disgorgement in the amount of $6,400,000, representing the investor funds that they raised from investors from the illegal and fraudulent sales of E-Brain and Exo-Brain securities. Pre-judgment interest owed by Warren and owed by Exo-Brain, from

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[5] In Defendant Peter Warren's Response to SEC's Statement of Undisputed Facts to Which There Exist Genuine Issues for Trial, which does not comply with this Court's Local Rules, see footnote 2, Warren does point to certain sworn testimony by Steven Lowe that Warren paid Mr. Lowe half of his salary from January through April 2000 out of his pocket. However, Mr. Lowe's testimony does not establish that Warren was never reimbursed. In addition, attached to Warren's Second Motion to Strike are several pages which Warren contends represents receipts for out-of-pocket expenses he incurred. As Warren did not present these receipts in opposition to the Renewed Motion for Summary Judgment, they are not proper for the Court's consideration.

September 1, 2001 through August 31, 2006, totals $1,981,734.50. Both Warren and Exo-Brain shall satisfy this obligation by paying $8,381,734.50 within thirty (30) days from the date of the entry of this Final Judgment by cashier's check, certified check, or postal money order made payable to the Clerk, Northern District of Georgia; hand-delivered or delivered by overnight delivery service to the Clerk, United States District Court, Northern District of Georgia, 75 Spring Street, S.W., Atlanta, Georgia 30303; and submitted under a cover letter which identifies the appropriate paying party as a defendant in these proceedings, a copy of which cover letter and money order or check shall be sent to Edward G. Sullivan, Senior Trial Counsel, Securities and Exchange Commission, 3475 Lenox Road, N.E., Suite 1000, Atlanta, Georgia 30326-1232, within thirty-five (35) days from the entry of this Final Judgment. By making their payments, Defendants Warren and Exo-Brain relinquish all legal and equitable right, title and interest in such funds, and no part of the funds shall be returned to the paying defendant. The Court shall deposit the funds into an interest bearing account with the Court Online Banking System ("COLB"). These funds, together with any interest and income earned thereon (collectively referred to as the "Fund") shall be held by the COLB until further order of the Court. In accordance with the guidelines set by the Director of the Administrative Office of the United States Courts, the Clerk is directed, without further order of this Court, to deduct from the income earned on the money in the Fund a fee equal to ten percent of the income earned on the Fund. Such fee shall not exceed that authorized by the Judicial Conference of the United States.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant Warren pay a civil penalty pursuant to Section 20(d) of the Securities Act and Section 21(d)(3) of the Exchange Act. Warren is ordered to pay the civil penalty in the amount of $75,000 to the United States Treasury within thirty (30) days from the date of the entry of this Final Judgment by cashier's check, certified check, or postal money order made payable to the U.S. Treasury; hand-delivered or delivered by

overnight delivery service to the Comptroller, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0 - 3, Alexandria, Virginia 22312; and submitted under a cover letter that identifies Peter Warren as a defendant in these proceedings, a copy of which cover letter and money order or check shall be sent to Edward G. Sullivan, Senior Trial Counsel, Securities and Exchange Commission, 3475 Lenox Road, N.E., Suite 1000, Atlanta, Georgia 30326-1232, within thirty-five (35) days from the entry of this Final Judgment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant Exo-Brain pay a civil penalty pursuant to Section 20(d) of the Securities Act and Section 21(d)(3) of the Exchange Act. Exo-Brain is ordered to pay the civil penalty in the amount of $75,000 to the United States Treasury within thirty (30) days from the date of the entry of this Final Judgment by cashier's check, certified check, or postal money order made payable to the U.S. Treasury; hand-delivered or delivered by overnight delivery service to the Comptroller, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0 - 3, Alexandria, Virginia 22312; and submitted under a cover letter that identifies Exo-Brain, Inc. as a defendant in these proceedings, a copy of which cover letter and money order or check shall be sent to Edward G. Sullivan, Senior Trial Counsel, Securities and Exchange Commission, 3475 Lenox Road, N.E., Suite 1000, Atlanta, Georgia 30326-1232, within thirty-five (35) days from the entry of this Final Judgment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this Court shall retain jurisdiction over this matter for all purposes, including implementing and enforcing the terms of this Final Judgment and may order other and further relief that this Court deems appropriate under the circumstances.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there is no just reason for delay, and the Clerk is directed to enter a Final Judgment against defendants Warren and Exo-Brain pursuant to the terms of this Order, and pursuant to the terms of the Orders of Permanent Injunction previously entered in this Court

against the Defendants on February 11 and 17, 2005.

SO ORDERED this 26th day of September, 2007.

s/ CLARENCE COOPER

CLARENCE COOPER
UNITED STATES DISTRICT JUDGE