UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
(West Palm Beach Division)

CASE NO. 01-9108-CIV-RYSKAMP/VITUNAC

SECURITIES AND EXCHANGE COMMISSION, **Plaintiff,** **v.** **GLOBAL DATATEL, INC., RICHARD BAKER, MARIO HABIB and STUART BOCKLER,** **Defendants.**	**ORDER *GRANTING* SEC'S MOTION FOR SUMMARY JUDGMENT AND ENTERING FINAL JUDGMENT OF PERMANENT INJUNCTION AND OTHER RELIEF AS TO DEFENDANT STUART BOCKLER**

CLOSED CASE

THIS CAUSE comes before the Court upon plaintiff Securities and Exchange Commission's ("SEC" or "Commission") Motion for Summary Judgment against Defendant Stuart Bockler ("Bockler"), filed on December 12, 2002 (D.E. 33). The Court has considered the SEC's Motion, supporting memorandum of law and exhibits, Bockler's Answer and Exhibits in Support of His Defense Against Motion for Summary Judgment ("Answer") in opposition to summary judgment filed February 3, 2003 (D.E. 39), and the SEC's Reply thereto filed February 7, 2003 (D.E. 41), the Statement of Financial Condition filed by Bockler on March 17, 2003 (D.E. 44), the SEC's Penalty Recommendation in Support of Motion for Summary Judgment and Response to Defendant Stuart Bockler's Statement of Financial Condition, filed on March 17, 2003 (D.E. 44), and oral argument heard in open court on March 4, 2003. Accordingly, this matter is ripe for adjudication.

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I. BACKGROUND

The Commission filed this action on December 26, 2001, against Bockler, Global Datatel, Inc. ("Global"), Global's president and Chief Executive Officer Richard Baker, and Mario Habib, the president of Global's subsidiary eHola.com. The Commission's Complaint sought to enjoin Global, Baker and Habib from further disseminating false and misleading information about Global and eHola.com through press releases, during road shows and on the Internet. (Complt. ¶ 1)

As against Bockler, the SEC alleged that Bockler violated Sections 17(a) and 17(b) of the Securities Act of 1933 ("Securities Act"), and Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), and Rule 10b-5, thereunder, in connection with his stock promotion activities on behalf of Global. (Complt. ¶¶5, 25-30) Specifically, the Commission alleged that Bockler routinely touted stocks in return for compensation (usually in the form of freely tradeable shares of stock) from the relevant issuers, including Global, through "investment reports" he disseminated through financial news services, electronic mail and by posting the reports on the Internet. (*Id.*) The Commission alleged that Bockler violated Section 17(b), the anti-touting provision of the federal securities laws, by failing to disclose the nature and amount of compensation he received from Global. (Complt. ¶¶ 40-43) The Commission further alleged that Bockler violated the anti-fraud provisions of the securities laws by providing a materially misleading "disclosure," and by failing to inform his readers of the material fact that, at the same time he was touting Global and making "BUY" and "STRONG BUY" recommendations in his investment reports, he was in fact selling Global stock. (Complt. ¶¶ 30, 31-39)

On February 19, 2002, the Court entered a Judgment of Permanent Injunction and Other Relief against Global, upon the Consent of its bankruptcy trustee. (D.E. 20) The Court also entered Judgments of Permanent Injunction and Other Relief against defendants Baker and Habib, by their consents, on May 6, 2002, permanently enjoining them from future violations of the anti-fraud provisions of the securities laws and ordering Baker and Habib to pay civil penalties. (D.E. 24, 25)

On December 12, 2002, the SEC moved for summary judgment against Bockler, seeking the entry of a final judgment enjoining Bockler from further violations of the anti-touting and anti-fraud provisions charged, ordering Bockler to disgorge $174,616, the amount the Commission alleged Bockler received from the sale of Global stock, with prejudgment interest thereon, and a civil penalty pursuant to Section 20(d) of the Securities Act and Section 21(d)(3) of the Exchange Act.

The Court being fully advised in the premises, the Court makes the following findings of facts, conclusions and orders:

ORDERED AND ADJUDGED that the SEC's Motion for Summary Judgment is GRANTED and this Final Judgment of Permanent Injunction and Other Relief ("Final Judgment") is entered for the SEC and against Bockler for the following reasons:

II. FINDINGS OF FACTS

The Court finds that the Commission has made a proper and sufficient showing in support of its motion for summary judgment and that the following material facts are not disputed:

Bockler's Agreement to Promote Global

Since the mid-1990s, Bockler was principal of International Market Advisors, Inc. ("IMA"), a New Jersey company that provided financial public relations activities on behalf of publicly traded companies by preparing and disseminating "investment reports" and posting those reports on its website. (Bockler Test., at 14-18, SJ Exh.2; SJ Exh. 3)

On January 5, 1999, IMA entered into a written agreement with Defendant Global whereby IMA became Global's non-exclusive financial public relations consultant for one year. (SJ Exh.3) Defendant Global, a Nevada corporation located in Delray Beach, Florida, was a computer-systems integrator and Internet service provider operating in Central and South America, whose common stock was quoted on the Over-the-Counter ("OTC") Bulletin Board as "GDIS." (SJ Exh. 1; Bockler Test., at 35, SJ Exh. 2) Under the agreement, IMA agreed, among other things, to write at least two reports per quarter about Global and distribute these reports on a monthly basis to financial news services, specifically, Bloomberg News Terminals World Wide ("Bloomberg"), Nelsons Institutional Research Library ("Nelsons") and Multex Research Library ("Multex"). (Bockler Test., at 89-91, 93-94, SJ Exh. 2; SJ Exh. 3) Bockler also agreed to post the reports on his Internet site, and send at least 30,000 monthly e-mails to recipients directing them to his website to view the reports, operated by Bockler's other wholly-owned company, International Market Call, Inc. ("IMC"). (*Id.*)

In exchange for his consulting services, Global agreed to pay Bockler 25,000 shares of free-trading Global stock and warrants to purchase 150,000 shares at $5.50 per share. (SJ Exh. 3) The agreement also provided that Bockler would receive an additional 25,000 shares if Global's share price reached $15 for ten trading days during the one-year term of

the contract. (*Id.*) In accordance with the agreement, in January and February 1999, Global delivered 18,750 shares of free-trading stock to Bockler's attorney and escrow agent, John L. Milling, Esq., specifically, Bockler received 2,700 Global shares on January 28, 1999, 10,000 Global shares on February 1, 1999, and 6,050 Global shares on February 11, 1999. (SJ Exh. 4)

Bockler's Promotional Activities on Behalf of Global

From January through July 1999, Bockler drafted and disseminated eight investment reports touting Global, recommending to his readers that they buy Global stock and predicting that the price of Global stock would increase by as much as 300% to 400%. (SJ Exhs. 5-8, 10) From January through February 1999, Bockler drafted and disseminated the following four reports about Global:

1. On January 13, 1999, Bockler issued an IMA report making a "BUY" recommendation to readers, and predicting a six month price target of $12 to $16 per share. (SJ Exh. 5; Bockler Test., at 125, SJ Exh. 2)
2. On January 26, 1999, Bockler issued an IMA report making a "STRONG BUY" recommendation to readers, and predicting a six month price target of $15 to $18 per share, and a twelve month price target of $25 to $35 per share. (SJ Exh. 6; Bockler Test., at 130, SJ Exh. 2 at 130)
3. On February 5, 1999, Bockler issued an IMA report making a "STRONG BUY" recommendation to readers, and predicting a six month price target of $15 to $18 per share, and a twelve month price target of $25 to $35 per share. (SJ Exh. 7; Bockler Test., at 138, SJ Exh. 2)

4. On February 12, 1999, Bockler issued an IMA report making a "STRONG BUY" recommendation to readers, and predicting a "short term" price target of $18 to $25 per share, and a "long term" price target of $35 to $45 per share. [SJ Exh. 8; Bockler Test., at 139, SJ Exh. 2)

After the February reports, Bockler issued an additional four reports – dated March 3, 1999, May 7, 1999, June 1, 1999 and July 13, 1999 – making "BUY" or "STRONG BUY" recommendations and high stock price predictions. (SJ Exh. 10)

Bockler disseminated all eight IMA reports by sending them to Bloomberg, Nelsons, Multex, and posting them on IMA's Internet site. (Bockler Test., at 127-28, 130, 138-39, 154, 168, 172, 203, SJ Exh. 2) Bockler also sent at least 30,000 e-mails per month to subscribers informing them about Global and directing them to IMA's Internet site to read his reports on Global. (*Id.* at 95-96, 127-28, 130)

During the January through February time period, the stock price of Global stock rose from $7.19 per share on January 22, 1999 (shortly after Bockler issued his first report) to $10.25 per share by the end of February, 1999. (McGee Dec. ¶ 3, SJ Exh. 9) During the time Bockler issued the additional four reports (SJ Exh. 10), the price of Global stock continued to climb from $10.25 per share to a high of $16.84 per share on April 8, 1999. (Id. at ¶ 4) Moreover, Global's stock price sustained a daily average stock price in excess of $15 per share for a ten day period commencing May 7, 1999. (*Id.*)

The Standardized "Disclosure" in IMA's Investment Reports on Global

The eight IMA reports disseminated during the relevant time period all contained the following standardized disclosure on the last page, in fine print:

> [IMA and or IMC], or its affiliated companies and/or their Officers, Directors, Employees or Shareholders may at times

> have a position, including an arbitrage or option position, in the securities described herein and may sell or buy them. These companies may from time to time act as a consultant to a company being reported upon.

(SJ Exhs. 5-8, 10) None of the reports issued by Bockler disclosed that: (a) Bockler (or IMA) was in fact a paid consultant of Global; (b) that Global had paid IMA 18,750 free trading shares in Global; (c) that Bockler was due to receive an additional 25,000 free trading shares of Global if its stock price increased to over $15 per share for more than ten consecutive days; or that (d) Bockler was selling Global's shares at the same time he was making "buy" and "strong buy" recommendations in his reports. (*Id.*)

Bockler's Sale of Global Stock

During the January through February time period, while he was making "buy" and "strong buy" recommendations and predicting that Global's stock price would increase to as high as $45 per share (SJ Exhs. 5-8), Bockler was selling his Global stock on the open market. (SJ Exh. 4) Bockler sold all 18,750 shares of Global stock during January and February of 1999, at prices ranging from $8 to $11 per share, reaping proceeds totaling $174,616.16. (*Id.*; McGee Dec. ¶ 5, SJ Exh. 9)

Bockler Ceases Activities on Behalf of Global

Bockler ceased preparing and disseminated reports for Global under the agreement because Global failed to deliver any additional shares as required. (Bockler Test., at 121-22, 209, SJ Exh. 2) On July 2, 1999, Bockler's attorney prepared a demand letter requesting the additional 25,000 shares promised to Bockler under the agreement because the wide dissemination of IMA's glowing reports on Global had increased its share price to over $15 for ten consecutive days. (SJ Exh. 11)

Bockler's Disciplinary History

On February 28, 2001, the Commission issued an Order Instituting Public Administrative Proceedings Pursuant to Section 8A of the Securities Act of 1933, Making Findings and Imposing a Cease-and-Desist Order against Stuart Bockler ("C&D Order"), by his consent, in connection with his failure to disclose the nature and amount of compensation for publishing reports about an OTCBB listed stock, in violation of § 17(b) of the Securities Act. (SJ Exh. 12)

V. CONCLUSIONS OF LAW

Bockler offers no evidence sufficient to raise a genuine issue of material fact, or to otherwise show why summary judgment is inappropriate. Since there are no genuine issues of material fact to be tried, summary judgment in favor of the Commission and against Bockler is appropriate.

A. Summary Judgment Standard

> Under Federal Rule of Civil Procedure 56, summary judgment:
> (c) . . . shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.
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> * * * *
>
> (e) . . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party. (emphasis added)

Although the non-moving party must be accorded all favorable inferences, to prevent summary judgment, that party must come forward with evidence sufficient to support a

finding by the trier of fact in its favor. *Wohl v. City of Hollywood*, 915 F. Supp. 339, 341 (S.D. Fla. 1995). Moreover, "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original). Under the Supreme Court's ruling in *Anderson*, "the trial judge must [enter summary judgment] if, under the governing law, there can be but one reasonable conclusion." Id. at 250; *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) ("Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is 'no genuine issue for trial'.") (citation omitted).

Accordingly, summary judgment is appropriate here because there is no genuine issue of material fact to be tried.

B. Bockler's Violations of Section 17(b) of the Securities Act

Section 17(b) of the Securities Act provides, in pertinent part, that it is unlawful for any person

> to publish . . . or circulate any notice, circular, advertisement . . . or communication which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received, directly or indirectly, from an issuer . . . without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof.

15 U.S.C. § 77q(b).

This provision was "designed to meet the evils of the 'tipster sheet,' as well as articles in newspapers or periodicals that purport to give an unbiased opinion but which opinions in reality are bought or paid for." Committee on Interstate and Foreign Commerce, H.R. Rep. No. 85, 73d Cong., 1st Sess. 24 (1933). *See also SEC v. Wall Street Publishing*

Institute, Inc., 851 F.2d 365, 369 n. 6 (D.C. Cir. 1988) (quoting House Report), *cert. denied*, 489 U.S. 1066 (1989). No showing of scienter is required to prove a violation of Section 17(b). *SEC v. Liberty Capital Group, Inc.*, 75 F. Supp. 2d 1160, 1163 (W.D. Wash. 1999); *SEC v. Huttoe*, Civ. Action No. 96-2543 (GK) (D.D.C. September 14, 1998), 1998 U.S. Dist. LEXIS 23211, * 38.

The Court concludes as a matter of law that Bockler violated Section 17(b). It is undisputed that prior to issuing the investment reports about Global, Bockler had executed an agreement with Global for 25,000 shares of free-trading stock and an additional 150,000 warrants. Bockler in fact received 18,750 shares of Global stock before he issued his two February newsletters and subsequent newsletters. Bockler was also due to receive an additional 25,000 shares of free trading stock if the price of the stock rose to $15 per share for a ten-day trading period – a clear incentive for him to keep disseminating glowing reports about Global strongly encouraging readers to buy its stock. Yet Bockler failed to disclose any of these facts in his reports.

To the contrary, the only "disclosure" provided by Bockler – that IMA "may at times have a position" in the recommended securities, or "may sell or buy them," or that IMA and its affiliates "may from time to time act as a consultant" – was insufficient as a matter of law. *See, e.g., United States v. Amick*, 439 F.2d 351, 364-65 (7th Cir.), *cert. denied*, 404 U.S. 823 (1971); *see also In re Continental Capital & Equity Corp.*, Securities Act Release No. 7267; Exchange Act Release No. 36886 (Feb. 26, 1996) (finding inadequate a disclaimer that touter "may" have a position in touted stock or receive compensation when the touter had an agreement to receive compensation); *Huttoe*, *supra* at * 20-21, 37-38 (finding that virtually identical statements were legally insufficient disclosure).

Bockler's position that his disclosure was sufficient or, in the alternative, that the standards governing disclosure were unsettled or unclear, is unpersuasive and unsupported. Section 17(b) is clear: Bockler was required to "fully disclos[e] the receipt, whether past or prospective, of such consideration and the amount thereof." 15 U.S.C. § 77q(b). This Court finds as a matter of law that Bockler violated Section 17(b) of the Securities Act.

C. Bockler's Violations of the Anti-Fraud Provisions of the Securities Laws

Section 17(a) of the Securities Act, which prohibits fraudulent conduct "in the offer or sale of securities," and Section 10(b) of the Exchange Act, and Rule 10b-5 thereunder, which proscribes fraudulent conduct "in connection with the purchase or sale of securities," prohibit essentially the same kind of sales practices. *United States v. Naftalin*, 441 U.S. 768, 778 (1979). Among other things, the statutes and rule make it unlawful to make any untrue or misleading statement of material fact, or to omit to state any material fact necessary in the circumstances in order to make a statement not misleading, in the offer, purchase or sale of securities. Information is material if there is a substantial likelihood that the misrepresented or omitted facts would have assumed actual significance in the deliberations of a reasonable investor. *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988); *see also TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 448-49 (1976); *SEC v. Carriba Air, Inc.*, 681 F.2d 1318, 1323 (11th Cir. 1982). While scienter is required to establish violations of Section 17(a)(1) of the Securities Act and Section 10(b) of the Exchange Act, and Rule 10b-5 thereunder,[1] scienter is not required to establish a violation of Sections 17(a)(2) or 17(a)(3) of the

[1] Scienter exists where a person acts with intent to defraud or is severely reckless. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976); *Carriba Air*, 681 F.2d at 1324. The Eleventh Circuit has defined severe recklessness as involving "highly unreasonable omissions or misrepresentations . . . that present a danger of misleading buyers or sellers which is either known to the defendant or is so obvious that the defendant must have been aware of it." *McDonald v. Alan Bush Brokerage Co.*, 863 F.2d 809, 814 (11th Cir. 1989) (citation omitted).

Securities Act; a finding of negligence is sufficient. *Aaron v. SEC*, 446 U.S. 680, 696-97 701-02 (1980).

"Scalping" has long been recognized as fraudulent conduct under the federal securities laws. In *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180 (1963), the Supreme Court described the practice as follows:

> [A] practice of purchasing shares of a security for [the investment adviser's] own account shortly before recommending that security for long-term investment and then immediately selling the shares at a profit upon the rise in the market price following the recommendation.

Id. at 181. The Court concluded that this practice "operate[d] as a fraud or deceit upon any client or prospective client" of the investment adviser within the meaning of the Investment Advisers Act of 1940, and that an injunction was an appropriate remedy. *Id.* at 181-82.

Since the *Capital Gains* decision, the same reasoning has led courts to conclude that this practice also violates Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act, and Rule 10b-5 thereunder, because the failure of a stock promoter, newsletter publisher, investment adviser or other financial professional to disclose his own position in a security and his intention to sell that security, while at the same time recommending that his readers or clients purchase the security, is per se materially misleading. *See, e.g., SEC v. Huttoe*, Civ. Action No. 96-2543 (GK) (D.D.C. September 14, 1998), 1998 U.S. Dist. LEXIS 23211, *27-29 (summary judgment granted against publisher of newsletter who received and sold stock in companies he touted in newsletter; defendant's practice of selling stock he was recommending others to buy "has long been understood to operate as a fraud or deceit upon investors" in violation of Section 17(a) of the Securities Act and Section10(b) of the Exchange Act, and Rule 10b-5); *SEC v. Blavin*, 557 F. Supp.

1304, 1311 (E.D. Mich. 1983) (granting summary judgment against publisher of newsletter touting stocks because his failure to disclose his ownership interest and intent to sell those securities was a "material omission in violation of § 10(b)"), *aff'd*, 760 F.2d 706 (6th Cir. 1985).

The undisputed material facts establish Bockler's liability as a matter of law. In a classic case of "scalping," Bockler strongly recommended Global to his readers and on the Internet, setting price projections of as high as $45 per share, while failing to disclose the critical material fact that he was, at the very same time, selling the stock. Bockler's failure to disclose that he had a position in Global, and that he was in fact selling his Global shares at the same time he was making his "buy" and "strong buy" recommendations, is materially misleading and fraudulent per se. This is true even if Bockler in fact believed the glowing information he was disseminating in his newsletters. *Blavin*, 557 F. Supp. at 1310-11; *see also Zweig v. Hearst Corp*, 594 F.2d 1261, 1265 (9th Cir. 1979) (although court "assume[d] that [defendant] did not know that the misleading parts of his column were false . . . [and] he honestly believed the optimistic opinions of his codefendants" he was nevertheless liable under § 10(b) and Rule 10b-5 because his ownership and sale of the stock he was recommending to his readers was material information that should have been disclosed).[2]

Bockler's failure to disclose that he was being paid to tout Global was also fraudulent. *Huttoe, supra* at 19-21 (citing cases). As the court in *Huttoe* explained:

> [T]the compensation [the touters] received from an issuer was not for 'consulting' but for writing and publishing material promoting that issuer's securities. [The touters] did not merely happen to 'own' shares in the companies they promoted, they were given shares in exchange for promoting

[2] Accordingly, Bockler's claimed reliance on Global's principals for the information he published in his reports, or his purported due diligence in connection with writing the reports, are irrelevant to the antifraud charges based upon his undisputed scalping activities.

> the company in the Newsletter. It is inherently misleading to present articles as objective reporting when they are in fact promotions paid for by the company featured.

Id. at * 21. Here, too, it was inherently fraudulent for Bockler to pass himself off as an independent analyst and stock-picker when, in fact, he was being paid to promote Global.

Finally, this Court finds that Bockler's standardized disclaimer was insufficient and, in fact misleading, as a matter of law. *Huttoe, supra* at *21-22; *Blavin*, 557 F. Supp. at 1312-13. The vague disclaimer improperly suggests that IMA or its Internet "affiliate" IMC – both companies wholly controlled by Bockler with no employees – has an unspecified number of officers, directors, and employees, some or all of which "may" from time to time hold a position in a recommended stock. In fact, the only officer, director or employee of IMA or IMC was Bockler, who in fact *did* own a position in Global. And while the disclaimer suggests that "from time to time" IMA or IMC "may act as a consultant," in fact the only relationship IMA had with Global was that it was paid to tout its stock.

This Court finds that based upon the undisputed material facts, as a matter of law Bockler violated Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

D. Remedial Sanctions Are Necessary and Appropriate

1. Permanent Injunction

The SEC has requested a permanent injunction pursuant to Section 20(a) of the Securities Act and Section 21(d) of the Exchange Act. The SEC appears in this matter "not as an ordinary litigant, but as a statutory guardian charged with safeguarding the public interest in enforcing the securities laws." *SEC v. Management Dynamics, Inc.*, 515 F.2d

801, 808 (2d Cir. 1975). It therefore faces a lower burden than a private litigant when seeking an injunction, and need not meet the requirements for an injunction imposed by traditional equity jurisprudence. *Hecht Co. v. Bowles*, 321 U.S. 321, 331 (1944). The SEC is not required to show irreparable injury or a balance of equities in its favor. *See, e.g., SEC v. Unifund SAL*, 910 F.2d 1028, 1036 (2d Cir. 1990); *SEC v. Torr*, 87 F.2d 446, 450 (2d Cir. 1937); *SEC v. Musella*, 578 F. Supp. 425, 434 (S.D.N.Y. 1984), *aff'd*, 898 F.2d 138 (2d Cir. 1990). Indeed, SEC enforcement actions "bring[] with [them] an implied finding that violations of the statute will harm the public and ought to be restrained." *SEC v. J.W. Korth & Co.*, 991 F. Supp. 1468, 1472 (S.D. Fla. 1998).

In determining whether a permanent injunction is appropriate, the courts consider the following factors:

(1) the egregiousness of the defendant's actions;

(2) the isolated or recurrent nature of the violations;

(3) the degree of scienter involved;

(4) the sincerity of the defendant's assurances against future violations;

(5) the defendant's recognition of the wrongful nature of his conduct; and

(6) the likelihood that the defendant's occupation will present opportunities for future violations.

See, e.g., SEC v. Carriba Air, Inc., 681 F.2d 1318, 1322 (11th Cir. 1982) (affirming grant of permanent injunction) (citing *SEC v. Blatt*, 583 F.2d 1325 (5th Cir. 1978)); *SEC. v. Youmans*, 729 F.2d 413 (6th Cir.) (reversing denial of injunction), *cert. denied*, 469 U.S. 1034 (1984); *SEC. v. Warner*, 674 F. Supp. 841, 844 (S.D. Fla. 1987).

Consideration of these factors leads inexorably to the conclusion that a permanent injunction is fully warranted in this case. Bockler's conduct was egregious and recurrent. He issued and widely disseminated eight reports over the course of six months that were presented as an independent analysis and recommendation of Global, and predicting stock prices as high as $45 per share. Bockler failed to disclose, however, that while he was making his "buy" recommendations, he was dumping his Global stock at a substantial profit to himself. The Court finds that these actions were clearly done intentionally and with scienter; indeed, the fact that Bockler repeatedly sold the stock while at the same time touting it establishes the willful nature of the conduct. *Huttoe, supra* at *28; *see also Blavin*, 557 F. Supp. at 1313 (the very fact of defendant's scalping activity – acquiring the stock, recommending it to readers, then selling his stock – creates an overwhelming presumption that such activity was intentional). Indeed, Bockler continued to write reports touting Global, and ceased his touting activities only *after* Global failed to pay him his additional shares and warrants under their agreement. Far from recognizing the wrongfulness of his conduct, Bockler has consistently maintained that he did nothing wrong. Bockler's other 17(b) violations in connection with his reports and Internet site (SJ Exh. 12), when considered with the instant matter, establish conclusively that he should be permanently enjoined. *See Huttoe, supra* at * 30-31 (imposing permanent injunction on virtually identical facts); *see also SEC v. R.J. Allen*, 386 F. Supp. 866, 874 (S.D. Fla. 1974)("illegal

past conduct gives rise to the inference that there is a reasonable likelihood of future violations") (citing cases).

2. Disgorgement & Prejudgment Interest Thereon

The SEC also requests that Bockler be ordered to disgorge his ill-gotten gains. Disgorgement is designed both to deprive a wrongdoer of his unjust enrichment and to deter others from violating the securities laws. *SEC v. Blatt*, 583 F.2d 1325, 1335 (5th Cir. 1978); *see also SEC v. First City Fin. Corp., Ltd.*, 890 F.2d 1215, 1230-31 (D.C. Cir. 1989); *SEC v. Blavin*, 760 F.2d 706, 713 (6th Cir. 1985); *SEC v. Tome*, 833 F.2d 1086, 1096 (2d Cir. 1987), *cert. denied*, 486 U.S. 1014 (1988); *SEC v. Manor Nursing Ctrs., Inc.* 458 F.2d 1082, 1104 (2d Cir. 1972) ("The effective enforcement of the federal securities laws requires that the SEC be able to make violations unprofitable.").

Moreover, the law does not require precision in determining the proper amount of disgorgement. Disgorgement "need only be a reasonable approximation of profits causally connected to the violations." *First City*, 890 F.2d at 1231. As the court carefully explained in *SEC v. Hughes Capital Corp.*, 917 F. Supp. 1081 (D.N.J. 1996), *aff'd*, 124 F.33d 449 (3rd Cir. 1997): "[o]nce the [SEC] has established that the disgorgement figure is a reasonable approximation of unlawful profits, the burden of proof shifts to the defendants, who must 'demonstrate that the disgorgement figure is not a reasonable approximation.'" *Id.* at 1085 (*quoting First City*). A showing of the "actual profits on the tainted transactions" presumptively satisfies the SEC's burden of approximating the disgorgement amount. *First City*, 890 F.2d at 1232. However, the SEC "is not required to trace every dollar of proceeds misappropriated by the defendants . . . nor is [it] required to identify monies which have been commingled by them." *SEC v. Great Lakes Equities Co.*, 775 F. Supp. 211, 214 n. 21

(E.D. Mich. 1991), *aff'd*, 12 F.3d 214 (6th Cir. 1993). Finally, in determining the appropriate disgorgement amount, all doubts "are to be resolved against the defrauding party." *SEC v. First City Fin. Corp., Ltd.*, 688 F. Supp. 705, 727 (D.D.C.1988), *aff'd*, 890 F.2d 1215 (D.C. Cir. 1989) (*quoting SEC v. MacDonald*, 699 F.2d 47, 55 (1st Cir. 1983)).

Under these well-settled principles, the Court concludes that Bockler should be ordered to disgorge the proceeds he received from the sale of his Global stock. The SEC submitted the trading records of Bockler's escrow account maintained with his attorney (SJ Exh. 4), which establish that Bockler received $174,616.16 from the sale of the 18,750 shares of Global stock. (*See also* McGee Dec. ¶ 5, SJ Exh. 9) Although the burden shifted to Bockler to show why this amount is not appropriate or otherwise a "reasonable approximation" of disgorgement, Bockler has not submitted any evidence to dispute this amount. The Court therefore finds that disgorgement in the amount of $174,616.16 is appropriate.

The Court also finds that an award of prejudgment interest is also proper and consistent with the purpose of disgorgement. *See SEC v. Hughes Capital Corp.*, 917 F. Supp. 1080, 1090-91 (D.N.J. 1996), *aff'd*, 124 F.3d 449 (3d Cir. 1997); *Huttoe, supra* at * 45 (ordering disgorgement plus prejudgment interest thereon). An award of prejudgment interest, like an award of disgorgement, will deprive the defendant of his ill-gotten gain and will prevent unjust enrichment. *See SEC v. Stephenson*, 732 F. Supp. 438, 439 (S.D.N.Y. 1990). Bockler's personal wrongdoing justifies an award of interest in accord with the doctrines of fundamental fairness. *See SEC v. Tome*, 638 F. Supp. 638, 639 (S.D.N.Y. 1986), *aff'd*, 833 F.2d 1086 (2d Cir. 1987), *cert. denied*, 486 U.S. 1014 (1988). In the context of Section 10(b) and Rule 10b-5 actions, proof of a defendant's scienter is sufficient

to justify an award of prejudgment interest. *See SEC v. Musella*, 748 F. Supp. 1028 (S.D.N.Y. 1989), *aff'd*, 898 F.2d 138 (2d Cir.), *cert. denied*, 498 U.S. 816 (1990). Accordingly, the Court will order Bockler to pay prejudgment interest at the statutory rate as established by the Internal Revenue Service, IRC § 6621(a)(2), in the amount of $7,985.16.

3. Civil Penalty

Pursuant to Section 20(d) of the Securities Act and Section 21(d)(3)(B) of the Exchange Act, the SEC seeks the imposition of civil money penalties against Bockler. Both the Securities Act and the Exchange Act provide for the imposition of penalties in three "tier" levels, using identical statutory language. First-tier penalties "shall be determined by the court in light of the facts and circumstances" and "shall not exceed the greater of (I) $5,000 for a natural person or $50,000 for any other person, or (II) the gross amount of pecuniary gain to such defendant as a result of the violation." *E.g.*, Exchange Act § 21(d)(3)(B)(i). Second-tier penalties range from $5,001 to $50,000 for a natural person and from $50,001 to $250,000 for any other person, or the gross amount of pecuniary gain to such defendant, and are appropriate "if the violation . . . involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement." Exchange Act § 21(d)(3)(B)(ii). Finally, third-tier penalties range from $50,001 to $100,000 for a natural person and from $250,001 to $500,000 for any other person, or the gross amount of pecuniary gain, and are appropriate if the violation "involved fraud, deceit, [etc.] and . . . resulted in substantial losses or created a significant the risk of substantial losses to other persons." Exchange Act § 21(d)(3)(B)(iii). Since Bockler's conduct occurred after 1996,

any penalty assessed is increased by 10% under the statutory adjustment for inflation. 17 C.F.R. Pt. 201, Subpt. E., Tbl. II.

Bockler's conduct clearly falls within tier three; he repeatedly engaged in fraud and deceit. Bockler's conduct also resulted in substantial losses or created the significant risk of substantial losses to investors. During the time period Bockler issued his reports on Global, the stock price rose from a low of $7.19 per share to a high of $16.84 per share. Investors who purchased Global's shares during that time period – including the 18,750 shares sold by Bockler – were plainly harmed by Bockler's actions.

Bockler argues that he is financially unable to pay a civil penalty. While financial hardship is not grounds for denying disgorgement, it is a factor this Court may consider in determining the amount of civil penalty to impose. *SEC v. Rosenfeld*, 2001 WL 11812 at *2 (S.D.N.Y. Jan. 9, 2001). Unsupported claims of poverty, however, are insufficient. *Id.* at 10 (rejecting unsupported claim of financial hardship and imposing third tier penalty in the amount of $100,000).

At the March 4, 2003 hearing on the SEC's Motion, this Court invited Bockler to submit documentation in support of his claim of financial hardship. On March 17, 2003, Bockler filed a three-page Statement of Financial Condition of Stuart Bockler dated March 13, 2003 ("Statement"). Although Bockler "certifies" on the last page that the prior two pages are "true and complete," this is no substitute for a sworn statement submitted under penalty of perjury under 28 U.S.C. § 1746. *Nissho-Iwai Am. Corp. v. Kline*, 845 F.2d 1300, 1305 (5th Cir. 1988); *In re Muscatell*, 106 B.R. 307, 309 (Bankr. M.D. Fla. 1989). The Statement, furthermore, contains inconsistencies and provides insufficient information to evaluate Bockler's true financial condition. Moreover, although Bockler has had several

months to collect documentation in support of his claim of poverty, he has failed to submit any such documentation to this Court. This Court holds that Bockler has failed to substantiate his claim of financial hardship.

Accordingly, the Court will order Bockler to pay a tier three penalty in the amount of $110,000.

FINAL JUDGMENT

I.

FRAUD IN VIOLATION OF SECTION 17(a) OF THE SECURITIES ACT

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant, his officers, agents, servants, employees, representatives, and all persons in active concert or participation with him, and each of them, directly or indirectly, who receive actual notice of this Final Judgment, by personal service or otherwise, be and they hereby are, permanently restrained and enjoined from, directly or indirectly, singly or in concert, as aiders and abettors or otherwise, in the offer or sale of any security, by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails:

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

(b) obtaining money or property by means of any untrue statement of material fact or omission to state any material fact necessary in order to make the statement made, in light of the circumstances under which it was made, not misleading; or

(c) engaging in any transaction, practice or course of business which operates or would operate as a fraud or deceit upon purchasers or prospective purchasers of any such security,

in violation of Sections 17(a)(1), 17(a)(2) and 17(a)(3) of the Securities Act, 15 U.S.C. §§ 77q(a)(1), 77q(a)(2) and 77q(a)(3).

II.

FRAUD IN VIOLATION OF SECTION 10(b) OF THE EXCHANGE ACT AND RULE 10b-5 THEREUNDER

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant, his officers, agents, servants, employees, representatives, and all persons in active concert or participation with him, and each of them, directly or indirectly, who receive actual notice of this Final Judgment, by personal service or otherwise, be and they hereby are, permanently restrained and enjoined from, knowingly, willfully, or recklessly, directly or indirectly, singly or in concert, as aiders and abettors or otherwise, in connection with the purchase or sale of any security, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange:

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

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

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

in violation of Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5, 17 C.F.R. § 240.10b-5, thereunder.

III.

FAILURE TO DISCLOSE IN VIOLATION OF SECTION 17(b) OF THE SECURITIES ACT

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant, his officers, agents, servants, employees, representatives, and all persons in active concert or participation with him, and each of them, directly or indirectly, who receive actual notice of this Final Judgment, by personal service or otherwise, be and they hereby are, permanently restrained and enjoined from, directly or indirectly, singly or in concert, as aiders and abettors or otherwise, by the use of the means or instruments of transportation or communication in interstate commerce or by the use of the mails, publishing, giving publicity to, or circulating communications that, though not purporting to offer securities for sale, describe certain securities, without fully disclosing the past or future receipt of consideration from an issuer for such activities, and the amount thereof, in violation of Section 17(b) of the Securities Act, 15 U.S.C. § 77q(b).

IV.

DISGORGEMENT & CIVIL PENALTY

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant shall pay disgorgement in the amount of $174,616.16, representing the proceeds he received as a result of the conduct alleged in the Complaint, together with pre-judgment interest in the amount of $ 7,985.16.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant shall pay a civil penalty in the amount of $110,000 pursuant to Section 20(d) of the

Securities Act, 15 U.S.C. § 77t(d) and Section 21(d)(3) of the Exchange Act, 15 U.S.C. § 78u(d)(3).

V.

PAYMENT INSTRUCTIONS

Defendant shall pay the disgorgement and civil penalty ordered herein within thirty (30) days after the entry of this Final Judgment by sending a U.S. postal money order, certified check, bank cashier's check or bank money order payable to the U.S. Securities and Exchange Commission, and transmitted to the Comptroller, U.S. Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549, under cover of a letter that identifies Defendant, the caption and case number of this action and the name of this Court. Copies of such check and accompanying cover letter shall be simultaneously transmitted to Teresa J. Verges, Regional Trial Counsel, U.S. Securities and Exchange Commission, Southeast Regional Office, 801 Brickell Avenue, Suite 1800, Miami, Florida 33131.

VI.

RETENTION OF JURISDICTION

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that this Court shall retain jurisdiction over this matter and Defendant in order to implement and carry out the terms of all Orders and Decrees that may be entered and/or to entertain any suitable application or motion for additional relief within the jurisdiction of this Court, and will order other relief that this Court deems appropriate under the circumstances.

VII.

CONCLUSION

The Court, being fully advised and having considered all pertinent portions of the record, hereby

ORDERS AND ADJUDGES that plaintiff SEC's Motion for Summary Judgment against Defendant Bockler, filed on December 12, 2002 (D.E. 33) is GRANTED, with Defendant Bockler to pay a $110,000 civil penalty pursuant to Section 20(d) of the Securities Act, 15 U.S.C. § 77t(d) and Section 21(d)(3) of the Exchange Act, 15 U.S.C. 78u(d)(3). The Clerk of Court shall CLOSE this case and DENY any pending motions as MOOT.

DONE AND ORDERED at Chambers in West Palm Beach, Florida, this 16 day of April, 2003.

THE HONORABLE KENNETH L. RYSKAMP
UNITED STATES DISTRICT COURT JUDGE

Copies to:

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