IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH
NORTHERN DIVISION

SECURITIES AND EXCHANGE COMMISSION, Plaintiffs, vs. PANWORLD MINERALS INTERNATIONAL, INC., et al., Defendants.	ORDER GRANTING PLAINTIFF'S REQUEST FOR SUMMARY JUDGMENT AS TO DEFENDANT WENGER Case No. 2:97-CV-425 TS

On November 5, 2004, Plaintiff Securities and Exchange Commission ("SEC") filed its Motion for Summary Judgment as to Defendant Wenger. Defendant Wenger failed to respond to Plaintiff's Motion. The Court has reviewed Plaintiff's Motion and has determined as a matter of law and undisputed fact, summary judgment is warranted against Defendant Wenger as to all claims brought by Plaintiff.

I. BACKGROUND

In support of its Motion, Plaintiff sets forth an elaborate scheme in its Statement of Undisputed Facts. Plaintiff seeks Summary Judgment based on facts determined in Defendant

Wenger's prior criminal trial. These findings were made by Judge Cassell in an unpublished opinion, 2004 WL 724458 (D. Utah 2004), which resolved several issues pertaining to a criminal conviction of Defendant Wenger for the conduct also at issue in this civil proceeding. The Court notes that Defendant Wenger failed to respond to the following assertions found in Plaintiff's Motion:

Defendant Wenger hosted an investment radio show, *The Next SUPERstock*, and published a newsletter that also went by the name of *The Next SUPERstock*. *The Next SUPERstock* often made investment recommendations to potential purchasers of what are commonly referred to as "penny stocks."

Defendant Panworld Mineral International, Inc. ("Panworld") is a publicly traded company that is headquartered in Salt Lake City, Utah. Defendant Panworld engaged the services of *The Next SUPERstock* and Defendant Wenger to promote the sale of Panworld stock.

During the summer of 1994, Wenger publicized Panworld stock. Specifically, in *The Next SUPERstock* newsletter, he said "this development stage company is making significant progress on two distinct types of mining operations." He further stated, "Panworld . . . plans to follow a systematic, strategic plan designed to move the company out of development and into full and dynamic profitability." Wenger concluded the article with a recommendation,

> [w]e believe there are several sound reasons for investors to consider an acquisition of PWLM [Panworld] at this time: The company is well-diversified. . . . The fact that PWLM was one of the first companies to recognize Peru as a viable mining area. . . . While PWLM's move out of the development and into profitability may take several months, the financial rewards should be substantial–for the company and investors alike.

On June 18, 1994, Wenger again touted Panworld on a radio show when he appeared together with a consultant to Panworld. Wenger also participated in another radio show where he expressed being "impressed" with Panworld four different times during the show.

Wenger was lavishly compensated by Panworld for these favorable reports, a fact that was unknown to his audience. Additionally, prior to the newsletters and radio shows, Wenger contracted with Panworld to provide financial, public relations, consulting, and advisory services. In exchange for his services, Wenger was to receive 5,500,000 shares of Panworld stock. Panworld issued 2,100,000 shares of stock to Wenger from February 10, 1994, to April 15, 1994. On April 15, 1994, Wenger received 600,000 shares for which no registration statement was filed.

Shortly after telling his audience to buy Panworld stock, Wenger sold part of his shares and received $109,764.50. During this time, Wenger sold 7,752,300 shares of Panworld stock to investors at a total cost of $865,551.65. Some buyers were able to sell the shares for a total return of $10,160. However, these shareholders subsequently lost $855,391.65 when Panworld stock became worthless. The total value of the stock when it was received by Wegner was $335,000.

On May 26, 1999, Wenger was indicted on one count of securities fraud under 15 U.S.C. § 78j(b) and two counts of undisclosed compensation under 15 U.S.C. §§ 77q(b), 77x. Case No. 2:99-CR-260. On August 25, 2003, following a jury trial, Wenger was found guilty on all three counts of the Indictment.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is proper if the moving party can demonstrate that there is no genuine issue of material fact and it is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c). In considering whether genuine issues of material fact exist, the Court determines whether a reasonable jury could return a verdict for the nonmoving party in the face of all the evidence presented. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *Clifton v. Craig*, 924 F.2d 182, 183 (10th Cir. 1991). The Court is required to construe all facts and reasonable inferences in the light most favorable to the nonmoving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Wright v. Southwestern Bell Tel. Co.*, 925 F.2d 1288, 1292 (10th Cir. 1991).

If the nonmoving party fails to respond, the district court may not grant the motion without first examining the moving party's submission to determine if it has met its initial burden of demonstrating that no material issues of fact remain for trial and the moving party is entitled to judgment as a matter of law. If it has not, summary judgment is not appropriate, for "[n]o defense to an insufficient showing is required." *Reed v. Bennett*, 312 F.3d 1190, 1194-95 (10th Cir. 2002) (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 160-61 (1970)).

III. DISCUSSION

Plaintiff SEC has brought this Motion for Summary Judgment as to Defendant Wenger arguing that there are no disputed issues of material fact or law with respect to the allegations that Defendant has violated Section 5(a), 5(c), and 17(a) of the Securities Act of 1933 [15 U.S.C. §§ 77e(a), 77e(c), and 77q(a)], and Section 10(b) of the Securities Exchange Act of 1934 [15

U.S.C. §§ 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5], and Section 17(b) of the Securities Act [15 U.S.C. § 77q(b)].

Plaintiff is seeking the following relief: a permanent injunction for the above cited violations, disgorgement of profits and prejudgment and post-judgment interest, and the imposition of a civil penalty of up to $100,000 per violation of the securities laws.

A. COLLATERAL ESTOPPEL

"It is well established that a prior criminal conviction may work an estoppel in favor of the Government in a subsequent civil proceeding." *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558, 568 (1951). However, "[s]uch estoppel extends only to questions 'distinctly put in issue and directly determined' in the criminal prosecution." *Id.* at 569. "In the case of a criminal conviction based on a jury verdict of guilty, issues which were essential to the verdict must be regarded as having been determined by the judgment." *Id.*

Four elements must be met in order to apply the doctrine of collateral estoppel:

> "(1) the issue previously decided is identical with the one presented in the action in question; (2) the prior action has been finally adjudicated on the merits; (3) the party against whom the doctrine is invoked was a party, or in privity with a party, to the prior adjudication; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issues in the prior action."

Harrsion v. Eddy Potash, Inc., 248 F.3d 1014, 1022 (10th Cir. 2001).

Wenger was convicted by a jury of two counts of violating Section 17(b) of the Securities Act and one count of Section 10(b) of the Exchange Act and Rule 10b-5. The elements required under Section 17(a)(1)-(3) and under 10(b) are essentially the same. *See SEC v. Monarch Funding Corp.*, 192 F.3d 295, 308 (2d Cir. 1999).

The issues and elements of Section 17(b), Section 10(b), and Section 17(a)(1)-(3) are sufficiently similar to the elements addressed at Defendant's criminal trial. That trial was adjudicated on the merits and Defendant was convicted after a jury trial. Defendant is the party against whom collateral estoppel is being invoked and he was also the defendant in his criminal trial. Finally, Defendant had a full and fair opportunity to litigate these issues, and did so, in his prior criminal trial. As a result, Plaintiff is entitled to summary judgment on its claims that Defendant violated Sections 10(b), 17(a)(1)-(3), and 17(b).

B. SECURITIES LAWS

1. FRAUD

Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act prohibit fraudulent conduct in connection with the offer, purchase, and sale of securities. *See* 15 U.S.C. § 77(q)(a) and 15 U.S.C. § 78j(b). In order to establish a violation of these sections it must be shown that defendants: (a) used jurisdictional means; (b) engaged in fraudulent schemes, practices, or courses of business, or made materially false or misleading statements; (c) in connection with the offer or sale of securities; and (d) for violations of Section 17(a)(1) and 10(b), acted with scienter. *Steadman v. SEC*, 603 F.2d 1126, 1131–33 (5th Cir. 1979), *aff'd* 450 U.S. 91 (1981).

As established in his criminal trial, Wenger used the mails and a nationally broadcast radio show to tout Panworld stock. "Since the mails were used in connection with the sale of the securities and interstate commerce was involved, there is jurisdiction under the Securities

Exchange Act." *Glick v. Campagna*, 613 F.2d 31, 35–36 (3d Cir. 1979). The first element has been met.

Wenger failed to disclose his compensation for touting Panworld stock while he was encouraging investors to buy it. Wenger compared Panworld to other successful mining companies whose stock had sky-rocketed. Wenger also urged investors to call a brokerage firm to buy Panworld stock without disclosing that he was selling his stock through that same firm. In order "to fulfill the materiality requirement 'there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available.'" *Basic, Inc. v. Levinson*, 485 U.S. 224, 231–32 (1988) (quoting *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)). Wenger's misrepresentations and omissions are material because they altered the information available to the investors. Further, these misrepresentations and omissions were made in connection with the sale or offer of securities.

The Supreme Court has stated that "the term 'scienter' refers to a mental state embracing intent to deceive, manipulate, or defraud." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976). Plaintiff has presented evidence that Wenger violated Sections 10(b) and 17(a) while he was a promoter for Panworld and recommended Panworld stock to investors without a reasonable basis for doing so. Additionally, Wenger told investors to purchase Panworld stock without disclosing that he was being compensated and at the time that he himself was selling his own Panworld stock. The Court finds that this information is sufficient to satisfy the scienter element. Therefore, the Court finds that Wenger violated Section 17(a) and Section 10(b).

2. FAILURE TO DISCLOSE COMPENSATION

"In order to violate Section 17(b), a person must (1) publish or otherwise circulate (using a means of interstate commerce), (2) a notice or type of communication (which describes a security), (3) for consideration received (past, currently, or prospectively, directly or indirectly), (4) without full disclosure of the consideration received and the amount." *SEC v. Gorsek*, 222 F.Supp. 2d 1099, 1005 (C.D. Ill. 2001).

These elements are clearly met here. The undisputed evidence is that Wenger touted Panworld stock on a national radio show. He received compensation from Panworld for his efforts. Wenger failed to disclose that he received shares of stock from Panworld for these activities or that he was selling his stock while advising others to buy it. Therefore, the Court finds that Wenger violated Section 17(b).

3. SALE OF UNREGISTERED STOCKS

Section 5(c) of the Securities Act makes it unlawful to offer to sell a security for which a registration statement has not been filed. 15 U.S.C. § 77e(a)(2). Section 5(a) of the Securities Act makes it unlawful for persons to use any means or instruments of transportation or communication in interstate commerce or of the mails to sell a security for which a registration statement is not in effect. 15 U.S.C. § 77e(a)(3). The elements of a Section 5 claim "are '(1) lack of a registration statement as to the subject securities; (2) the offer or sale of the securities; and (3) the use of interstate transportation or communication and the mails in connection with the offer or sale.'" *Europe and Overseas Commodity Traders, S.A. v. Banque Paribas London*, 147

F.3d 118, 124 n.4 (2d Cir. 1998) (quoting *In re Command Credit Corp.*, 1995 WL 279776, *2 (S.E.C. Apr. 19, 1995)).

Here, no registration statement was filed for the 600,000 shares Wenger received on April 15, 1994. Wenger sold part of his shares after the fraudulent communications were made to investors. Therefore, Plaintiff SEC has made out a *prima facie* case that Wenger sold unregistered securities. Once a *prima facie* case has be made, the burden shifts to Wenger to prove that he was entitled to the claimed exemption, that there was no public offering of the securities, and that registration was not otherwise required. *SEC v. Ralston Purina*, 346 U.S. 119 (1953). Wenger has failed to respond. Therefore, the Court finds that Wenger has violated Section 5.

C. RELIEF

Plaintiff SEC seeks a permanent injunction, disgorgement of profits, and civil penalties. Since Plaintiff has proven all its claims, the Court finds that it is entitled to all the relief it seeks.

1. PERMANENT INJUNCTION

When a violation of the federal securities law has been found, those statutes provide that a court "shall issue a permanent injunction, upon a proper showing." *See* Sections 20(b) of the Securities Act and Section 21(d)(1) of the Exchange Act. A court should issue a permanent injunction in order to deter future violations. *See SEC v. Management Dynamics*, 515 F.2d 801, 808 (2d Cir. 1975).

Courts have considered several factors to determine whether an injunction is appropriate. These include: the reasonable likelihood of recurrence, the character of the defendant's violation,

the degree of scienter involved, whether the defendant has acknowledged the wrongfulness of his conduct and given sufficient reassurance that it will not be repeated, whether the violation is an isolated or repeated occurrence, and the degree to which the defendant's occupation or the nature of his business activities may present situations involving future opportunities to violate the law. *See SEC v. Savoy Industries, Inc.*, 587 F.2d 1149, 1168 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 913 (1979).

The Court finds that Wenger's acts were such that a permanent injunction is appropriate. Throughout 1994 and 1995, Wenger continually touted Panworld's stock. He did so without revealing that he was being compensated by Panworld for his actions. He also continued to advise investors to buy Panworld stock while he was trying to sell his own Panworld stock. The Court finds that with this pattern of fraudulent conduct, it is appropriate to issue a permanent injunction enjoining Wenger from committing similar acts.

2. DISGORGEMENT

The Court has the power to disgorge profits obtained through violations of the securities laws. *See SEC v. Clark*, 815 F.2d 439, 453 (9th Cir. 1990). Here, Wenger sold or intended to sell stock valued at $335,000. The Court orders Wenger disgorge this amount along with prejudgment and post-judgment interest for a total of $723,427.73.

3. CIVIL PENALTIES

Pursuant to Section 20 of the Securities Act and Section 21(d)(3) of the Exchange Act, the Court has jurisdiction to impose a civil penalty on Wenger of up to $100,000 per violation of

the securities law. Plaintiff SEC requests the imposition a civil penalty against Wenger for each violation of the securities laws. The Court will grant this request.

IV. CONCLUSION

It is therefore

ORDERED that Plaintiff's Motion for Summary Judgment as to Defendant Wenger is GRANTED. It is further

ORDERED that Defendant is permanently enjoined from committing similar acts in the future. It is further

ORDERED that Defendant disgorge profits made as a result of violating the securities laws, along with prejudgment and post-judgment interest, in the amount of $723,427.73. It is further

ORDERED that Defendant pay $300,000 in civil penalties for violating Sections 5(a), 5(c), 17(a), and 17(b) of the Securities Act and Section 10(b) of the Exchange Act.

DATED this 13th day of September, 2005.

BY THE COURT:

TED STEWART
United States District Court Judge