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CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA, FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
(Tampa Division)

SECURITIES AND EXCHANGE COMMISSION, **Plaintiff,**	**CIVIL ACTION NO. 98-1806-CIV-T-17E**
v.	**FINAL JUDGMENT OF PERMANENT INJUNCTION AND OTHER RELIEF**
THE BARR FINANCIAL GROUP, INC. AND ALFRED E. BARR, **Defendants.**	

This cause comes before the Court upon plaintiff Securities and Exchange Commission's ("SEC") Motion for Summary Judgment ("Motion") against Defendants Barr Financial Group, Inc. ("BFG") and Alfred E. Barr ("Barr") (collectively, "Defendants"). The Court has considered the report and recommendation issued by the Magistrate Judge on March 3, 1999, Barr's objections to that report and Barr's Motion to Dismiss, and the SEC's responses to Barr's objections and Motion to Dismiss.

The Court hereby grants the Motion in its entirety. The Court rules as a matter of law that BFG, an investment adviser registered with the Commission, aided and abetted by its Chief Executive Officer, Barr, violated Section 204 of the Investment Advisers Act of 1940 ("Advisers Act") [15 U.S.C. § 80b-4] ("Section 204"), by willfully refusing to allow the SEC to examine BFG's books and records and to produce to the SEC copies of certain legally-required documents. The Court also rules as a matter of law that a permanent injunction against future violations of these provisions of the

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Advisers Act and that a civil money penalty is appropriate. The Court's ruling and Final Judgment of Permanent Injunction and Other Relief ("Final Judgment") follow.

I.
Procedural History

On September 3, 1998, the SEC filed a Complaint seeking, among other remedies, declaratory relief and preliminary and permanent injunctive relief against Defendants BFG and Barr. On that same day, this Court entered a Temporary Restraining Order prohibiting Defendants from violating Section 204 and Ordering the Defendants to produce certain documents relating to BFG's business within two business days. This Court subsequently entered an Order of Preliminary Injunction requiring the Defendants to produce the five categories of documents requested by the SEC.

II.
Undisputed Material Facts

The undisputed facts establish that BFG, a Delaware corporation, has been registered with the SEC as an investment adviser since 1996. Barr has, at all material times, been the Chief Executive Officer and sole employee of BFG. On July 28, 1998, SEC examiners attempted to conduct an examination of BFG's books and records at BFG's business address on North Reo Street in Tampa, Florida. Because the North Reo Street address was merely an executive suite without an office dedicated to BFG or its operations, the examiners were unable to conduct their examination at that location. On the following day, the SEC examiners met with Barr and advised him of their intention to examine BFG's records. At Barr's request, the SEC postponed the examination and agreed to conduct it at Barr's residence.

On August 10, the SEC appeared at Barr's residence on Troydale Road in Tampa, Florida, and Barr produced certain records in his possession to the examiners. On the following day, Barr objected to the release of his clients' personal information, and he removed from the provided records such client information. Upon further discussions, the SEC agreed to allow Barr to redact client identification information so that the examination could proceed. On the following day, the SEC sought to obtain client account numbers so that client information could be obtained from Dain Raucher, Inc., the broker-dealer which Barr identified as the one holding his clients' securities. Barr again refused to reveal information which might disclose the identity of his clients, and the examination was terminated. Further efforts at receiving the client identification information voluntarily were unsuccessful.

III.
Relevant Law

A. Standard for Summary Judgment

The court shall grant summary judgment for the moving party only when "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The court may look to "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits," in determining whether summary judgment is appropriate. Id. The movant bears the exacting burden of demonstrating that there is no dispute as to any material fact in the case. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986), Hairston v. Gainesville Sun Pub. Co., 9 F.3d 913, 918 (11th Cir. 1993).

Once the moving party satisfies its burden, the burden shifts to the non-moving party to establish the existence of a genuine issue of material fact. See Celotex, 477 U.S. at 324; Howard v. BP Oil Co., 32 F.3d 520, 524 (11th Cir. 1994). The non-movant must designate specific facts

showing a genuine issue for trial beyond mere allegations or the party's perception. See Perkins v. School Bd. of Pinellas County, 902 F. Supp. 1503 (M.D. Fla. 1995). It must set forth, by affidavit or other appropriate means, specific facts showing that there is a genuine issue for trial. Fed.R.Civ.P. 56(e).

When deciding a motion for summary judgment, "[i]t is not part of the court's function ... to decide issues of material fact, but rather determine whether such issues exist to be tried. . ." and "[t]he court must avoid weighing conflicting evidence or making credibility determinations." Hairston, 9 F.3d at 919 (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)). The only determination for the court in a summary judgment proceeding is whether there exists genuine and material issues of fact to be tried. See Hairston, 9 F.3d at 921; see also Little v. United Technologies, Carrier Transicold Div. 103 F.3d 956, 959 (11th Cir. 1997). All the evidence and inferences from the underlying facts must be viewed in a light most favorable to the nonmoving party. Combs v. Plantation Patterns, 106 F.3d 1519, 1526 (11th Cir. 1997).

B. The Advisers Act

Every investment adviser who is registered or required to be registered under the Advisers Act is obliged to make and maintain true and accurate records as prescribed by the regulations. See Rule 204-2(a) of the Advisers Act [17 C.F.R. § 275.204-2(a)]. An investment adviser who "renders any investment supervisory or management service" to clients must create and maintain "true, accurate, and current" records that, among other things, identify the adviser's clients. Rule 204-2(c) of the Advisers Act, 17 C.F.R. § 275.204-2(c). Even though an investment adviser is permitted to develop a scheme to identify clients by "numerical or alphanumeric code or some similar designation," the clients must nonetheless be identifiable within the scheme utilized by the

adviser. Rule 204-2(d) of the Advisers Act [17 C.F.R. § 275.204-2(d)]. Additionally, Section 204 of the Advisers Act requires investment advisers to create and maintain certain records and to:

> furnish ... copies thereof ... as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors. All records ... of such investment advisers are subject at any time, or from time to time, to such reasonable periodic, special, or other examinations by representatives of the Commission as the Commission deems necessary or appropriate in the public interest or for the protection of investors.

[15 U.S.C. § 80b-4.] The SEC's examination authority is "central to the SEC's execution of its congressionally-mandated regulatory duties." SEC v. J.W. Korth & Co., 991 F. Supp. 1468, 1472 n.5 (S.D. Fla. 1998).

IV.
Findings

Relying on these provisions and Section 209 of the Advisers Act, [15 U.S.C. § 80b-9], which require investment advisers to produce to the SEC certain business records and allow injunctive relief and civil money penalties, respectively, as well as this court's prior ruling on the Temporary Restraining Order and the Preliminary Injunction, the SEC claims that it is entitled to judgment as to the matter of the Defendant's liability and permanent injunctive relief as a matter of law. Barr initially argues that he has already shown the requested records to SEC examiners and thus the SEC's further requests are unreasonable. Barr argues that even though he is an investment adviser, Rule 204-2 of the Advisers Act, [17 C.F.R. § 275.204-2], does not apply in this case, and therefore, Section 204 does not compel him to provide records to the SEC that reveal the identity of his clients. As grounds, Barr asserts that he does not retain or control any of his clients' funds or investment portfolios.

The SEC has presented evidence showing that Barr, through BFG, retains and manages client funds. Indeed, Barr disclosed on an ADV form, filed with the SEC and dated March 27, 1998, that BFG provided "continuous and regular supervisory or management services" for twenty-five client securities portfolios having an aggregate market value of approximately $56,258,989 "on a discretionary basis." The same ADV form also discloses that BFG provided "continuous and regular supervisory or management services" for thirteen client securities portfolios having an aggregate market value of approximately $16,258,452 "on a non-discretionary basis." By his own admission at the hearing held on February 2, 1999, Barr provided investment advice to approximately fifteen clients. Therefore, this court finds that BFG is an investment adviser subject to Rule 204-2(c) of the Advisers Act, [17 C.F.R. § 275.204-2(c)], and is required to create and maintain records specifically identifying each of his clients. Since Barr must maintain these records, he is further compelled by statute to provide these records, or copies thereof, to the SEC upon request. See Section 204. Nowhere is it shown that such production need not include the identity of the clients.

Alternatively, it is possible that these representations are entirely false or are mere puffing. At the hearing, Barr asserted that he merely researches investments for others. If the representations on BFG's Forms ADV are false, there is all the more reason to allow for further inquiry by the SEC. Even if BFG, through Barr, offers only investment advice, as opposed to investment supervisory or management service, several of the provisions of Rule 204-2(a) of the Advisers Act [17 C.F.R. § 275.204-2(a)], would require Barr to make, maintain, and reveal records which identify his clients. E.g., Rule 204-2(a)(7) [17 C.F.R. § 275.204-2(a)(7)].

While Barr made several claims and assertions in opposition to the SEC's motion, he fails to proffer any evidence or law to support his allegations and does not directly address the basis of the SEC's motion. This Court finds no statutory or regulatory authority to support the Defendants' position. Even if the regulations at Rule 204-2(a)-(c) of the Advisers Act [17 C.F.R. §§ 275.204-2(a)-(c)] impose differing obligations for record keeping upon different type investment advisers, the Defendants are still covered. Barr's explanations and perceptions, unsupported by relevant evidence or law, are insufficient to rebut the facts established by the SEC or to otherwise create a question of fact. Thus, this Court finds, as a matter of law, that BFG, through Barr, has violated the requirements clearly prescribed in Section 204 of the Advisers Act.

V.
Relief

A. An Injunction is Appropriate

Section 209(d) of the Advisers Act [15 U.S.C. § 80b-9(d)] provides for injunctive relief upon a showing that "any person has engaged ... in any act or practice constituting a violation of any provision of this title or of any rule, regulation or order hereunder." Case law dealing with the analogous situation of a broker-dealer holds that a federal district court may issue a permanent injunction when the SEC shows that a "person is engaged or is about to engage in acts or practices constituting a violation of any provision of this chapter, the rules or regulations thereunder, or the rules of a national securities exchange or registered securities association." SEC v. J.W. Korth & Co., 991 F. Supp. 1468, 1472 (M.D. Fla. 1998) (quoting 15 U.S.C. § 78u(d)(1)). Since the SEC, in this case, is acting as a statutory guardian, "the standards of the public interest[] not the requirements of private litigation[] measure the propriety and need for injunctive relief . . . ." Id. (quoting Hecht Co. v. Bowles, 321 U.S. 321, 331 (1944) (quoted in

SEC v. Unifund SAL, 910 F.2d 1028,1035-36 (2d Cir. 1990))). Accordingly, a showing of irreparable injury is not necessary in the instant case. See id. at 1472-73 (citations omitted).

When determining whether to issue a permanent injunction a court is permitted to infer the potential for future illegal conduct based on the defendant's past conduct. See id. at 1473 (citing SEC v. Zale Co., 650 F.2d 718, 720 (5th Cir. Unit A July 1981)). However, the mere fact that a defendant has engaged in illegal conduct does not automatically justify granting permanent injunctive relief. See id. The defendant's past conduct must be measured "in light of present circumstances, [and] betoken a 'reasonable likelihood' of future transgressions." Id. A court must consider, in conjunction with the present circumstances, "the nature of the past violation, the defendant's present attitude, and objective constraints on (or opportunity for) future violations of the securities laws." Id. (quoting Zale Corp. 650 F.2d at 720).

Here, the Defendants have already failed to comply with several Orders of this Court. First, the Defendants failed to comply fully with a Temporary Restraining Order entered on September 3, 1998, which required the Defendants to produce five categories of documents to the SEC's offices in Miami, Florida. Second, this Court entered an Order of Preliminary Injunction requiring the defendants to **produce** the documents identified by correspondence prepared by the SEC and mailed to the Defendants on August 26, 1998. Third, an Order to Show Cause was entered on September 17, 1998, demanding that the Defendants show why they should not be held in contempt of court for their open defiance of the Court's prior Orders. In response, the Defendants produced some of the required documents at the show cause hearing held on September 24, 1998.

The hearing conducted by this Court on February 2, 1999, demonstrated that Barr's attitude toward delivering the subject information to the SEC has changed little. At the hearing, Barr again insisted that as an investment adviser he was not required to produce the client identity records demanded by the SEC. However, as this Court has established, Barr is required under Rule 204-2 of the Advisers Act [17 C.F.R. § 275.204-2] to create and maintain the records sought by the SEC. As such, Barr is statutorily required to allow the SEC to inspect such records or provide copies thereof. See Section 204. This he has consistently failed to do.

Absent a permanent injunction, this Court finds that Barr will continue to ignore his regulatory or statutory obligations. When viewed as a whole, the nature of the Defendants' prior open and willful defiance of court orders, statutes, and securities regulations, coupled with his arguments advanced at the hearing held on February 2, 1999, indicate that he will continue his current course of action. Therefore, it is ORDERED that a permanent injunction issue in this case to prevent future violations of Section 204 of the Advisers Act [15 U.S.C. § 80b-4] and regulations thereunder governing the conduct of investment advisers under Rule 204-2 of the Advisers Act [17 C.F.R. § 275.204-2].

B. A Penalty is Appropriate

Next, the SEC requests that this court impose civil money penalties on the Defendants for their violations of the Advisers Act. Based on the circumstances of this case, a court is permitted to impose, "for each violation," a "first tier" civil money penalty that "shall not exceed ... $5,000 for a natural person or $50,000 for any other person." Section 209(e)(2)(A) of the Advisers Act [15 U.S.C. § 80b-9(e)(2)(A)]. However, if the circumstances of a case indicate that the defendant has engaged in "fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory

requirement," a court may, "for each violation," impose "second tier" civil money penalties that "shall not exceed ... $50,000 for a natural person or $250,000 for any other person." Section 209(e)(2)(B) of the Advisers Act [15 U.S.C. § 80b-9(e)(2)(B)].

Here, indicia of "fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement" are not clearly established from the circumstances and evidence presented. On the record presented, the Defendants merely argue for a strained interpretation of fact and law. Thus, the elements of "fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement" necessary for the imposition of a second tier penalty do not apply in this case as presented. Accordingly, a second tier penalty is unwarranted.

Even though Barr argued in good faith before the court, he cannot escape the fact that he has shown a blatant disregard for the statutory authority of the SEC and the powers of the judiciary by (1) refusing to comply with statutory requirements to disclose information to the SEC, and (2) failing to comply with court orders on the occasions previously described. Accordingly, this court ORDERS that a first tier civil money penalty is warranted in the amount of $5,000 against Barr. Given the "void" status of BFG and its lack of tangible substance, a civil penalty against it would appear to be a vain and useless act. For this reason, this Court foregoes imposing any fine as against BFG. Barr is ORDERED to pay the civil penalty into the Treasury of the United States within sixty (60) days of the date of this Order.

In conclusion, and for the foregoing reasons, it is hereby ORDERED that the SEC's Motion for Summary Judgment is granted and that the Final Judgment as set out herein be entered.

FINAL JUDGMENT

Accordingly, the Court hereby enters Final Judgment for the SEC as follows:

I.

VIOLATION OF SECTION 204 OF THE ADVISERS ACT

IT IS HEREBY ORDERED that Defendants BFG and Barr, their directors, officers, agents, servants, employees, attorneys, and those persons in active concert or participation with them, and each of them, are hereby permanently enjoined from, directly or indirectly, violating or aiding or abetting violations of Section 204 of the Investment Advisers Act of 1940 [15 U.S.C. § 80b-4] and the rules and regulations promulgated thereunder, by failing to furnish to the SEC copies of BFG's records that are required by SEC rule to be kept, and by failing to make all of BFG's records subject at any time, or from time to time, to such reasonable periodic, special, or other examinations by representatives of the SEC as the SEC deems necessary or appropriate in the public interest or for the protection of investors.

II.

CIVIL MONEY PENALTIES

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that, pursuant to Section 209(e) of the Advisers Act [15 U.S.C. 80b-9(e)], Defendant Barr shall pay a civil money penalty in the amount of $5,000. Such payment shall be: (i) made by United States postal money order, certified check, bank cashier's check or bank money order; (ii) payable to the "United States Treasury;" (iii) transmitted to the Comptroller, U.S. Securities and Exchange Commission, 450 Fifth Street, N.W., Mail Stop 0-3, Washington, D.C. 20549; and (iv) submitted under cover of a letter which identifies the Defendants in this action, a copy of which cover letter and money order or check

shall be sent to Mitchell E. Herr, Esq., Regional Trial Counsel, Securities and Exchange Commission, Southeast Regional Office, 1401 Brickell Avenue, Suite 200, Miami, Florida 33131.

III.

RETENTION OF JURISDICTION

IT IS HEREBY FURTHER ORDERED that this Court will retain jurisdiction over this matter and Defendants BFG and Barr 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.

DONE AND ORDERED at 9:00 o'clock A m. this 5th day of May, 1999, at Tampa, Florida.

ELIZABETH A. KOVACHEVICH
UNITED STATES DISTRICT JUDGE

cc: Mitchell E. Herr, Esq.
Regional Trial Counsel
SECURITIES AND EXCHANGE COMMISSION
1401 Brickell Avenue, Suite 200
Miami, Florida 33131

The Barr Financial Group, Inc.
550 North Reo Street
Suite 300
Tampa, FL 33609-1013

Alfred E. Barr
4712 Troydale Road
Tampa, FL 33615

United States Court of Appeals

Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

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MIDDLE DISTRICT OF FLORIDA
TAMPA, FLORIDA

Thomas K. Kahn
Clerk

In Replying Give Number
Of Case And Names of Parties

July 02, 1999

MEMORANDUM TO COUNSEL OR PARTIES

RE: 99-12027-C Securities & Exchange Comm. v. The Barr Financial
DC DKT NO.: 98-01806 CIV-T-17E

The referenced case was docketed in this court on June 30, 1999. Please use the appellate docket number noted above when making inquiries. Counsel participating in this appeal should complete and return the enclosed appearance form within fourteen (14) days [11th Cir. R. 46-1]. Persons appearing pro se need not file an appearance form.

11th Cir. R. 33-1(a)(1) requires appellant to file "with the clerk of the court of appeals, with service on all other parties, an original and two copies of a completed Civil Appeal Statement within 10 days after filing the notice of appeal in the district court." Another Civil Appeal Statement form is enclosed for appellant's use.

Pursuant to Eleventh Circuit Rule 42-1(b) appellant is hereby notified that upon expiration of fourteen (14) days from this date, **this appeal will be dismissed without further notice** by the clerk unless the default(s) noted below have been corrected:

Complete the transcript order form and order the transcript, as required by Fed.R.App.P.10(b)(1); a transcript order form is available from the district court clerk. Appellant is required to file and serve a copy of the form in accordance with the instruction included on the form.

Sincerely,

THOMAS K. KAHN, Clerk

Reply To: Pam Holloway (404) 335-6182

Encl.