UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. TOBIN SMITH and NBT GROUP, INC. (FORMERLY CHANGEWAVE, INC. DBA NBT COMMUNICATIONS), Defendants.	Case No.: 1:16-cv-00587-TFH

MOTION BY PLAINTIFF SECURITIES AND EXCHANGE COMMISSION FOR ORDER TO SHOW CAUSE RE: CIVIL CONTEMPT AGAINST DEFENDANTS TOBIN SMITH AND NBT GROUP, INC.

Plaintiff Securities and Exchange Commission ("SEC") moves for an order to show cause why Defendants Tobin Smith ("Smith") and NBT Group, Inc. ("NBT") should not be held in civil contempt for violating the Final Judgment entered by the Court on April 21, 2016. (Dkt. No. 5). As set forth in the accompanying Memorandum of Points and Authorities below, subsequent to entry of the Final Judgment, the Defendants have fraudulently touted penny stocks in violation of both the permanent injunction prohibiting fraud and touting, and the penny stock bar included in the Final Judgment. Additionally, the Defendants have failed to pay the $182,793.69 in disgorgement and prejudgment interest ordered by the Final Judgment.

The SEC accordingly seeks an order for Defendants Smith and NBT to show cause why they should not be held in civil contempt and coercively sanctioned until they comply with the Final Judgment by stopping any ongoing violative conduct and paying the ordered disgorgement and interest. Should the Court find the Defendants violated the permanent injunction and/or the penny stock bar in contempt of the Final Judgment, the SEC seeks additional remedial relief in

the form of an accounting by the Defendants as to the monies received in violation of the Final Judgment, and disgorgement of all such monies.

DATED: April 12, 2017

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Securities and Exchange Commission ("SEC") moves for issuance of an order to show cause why Defendants Tobin Smith ("Smith") and NBT Group, Inc. ("NBT") should not be held in civil contempt for violating the permanent injunction, penny stock bar and disgorgement orders contained in this Court's Final Judgment, entered on April 21, 2016. (Dkt. No. 5).

This case involved a fraudulent touting scheme. As alleged in the Complaint, in 2012, the Defendants entered into agreements to provide "investor awareness" marketing services promoting IceWeb, Inc. ("IWEB"), a penny-stock company, and received undisclosed compensation for promoting IWEB. (*See* Complaint, Dkt. No. 1 ¶ 1.) In addition to failing to fully disclose their compensation, the Defendants made material misrepresentations and omissions regarding IWEB, including: (1) unsupported financial projections; (2) false representations that Smith was purchasing IWEB stock; (3) that IWEB was an acquisition target, and (4) that Facebook was a customer of IWEB. (*Id.*)

In late November 2016, the SEC was provided evidence that Smith and NBT were promoting another penny stock tech company, Rackwise, Inc. Subsequently, the SEC gathered evidence that, as in this case, the Defendants received undisclosed compensation for touting Rackwise securities, and made additional material misrepresentations similar to those they made about IWEB. These representations included: (1) false statements about Rackwise's financial health and prospects; (2) false representations that Smith had purchased Rackwise notes; and (3) false representations that the General Services Administration ("GSA") had approved Rackwise as the sole provider of DCIM software systems for 175 federal agencies.

Smith and NBT have also not paid any of the ordered $182,793.69 in disgorgement and prejudgment interest, as required by the Final Judgment. Strikingly, Defendants failed to pay after the Court explained to Smith in open court the provisions of the proposed Final Judgment prior to entering it that same day, and obtained Smith's verbal acknowledgement that he understood the he had to pay the amounts in the Final Judgment within two weeks. (Declaration of Yolanda Ochoa ("Ochoa Dec.") ¶ 14 & Ex. 12 (Transcript ("Tr.") 7:8-7:13 & 10:10-10:16.)

As set forth below, the SEC has satisfied its initial burden to demonstrate by clear and convincing evidence that: (1) there was a clear and unambiguous court order in place; (2) that order required certain conduct by the Defendants; and (3) the Defendants failed to comply with that order. *United States v. Latney's Funeral Home, Inc.*, 41 F.Supp.3d 24, 29-30 (D.D.C. 2014), *citing SEC v. Bilzerian*, 112 F.Supp.2d 12, 16 (D.D.C. 2000), among other authorities.

"A civil contempt action is characterized as remedial in nature, used to obtain compliance with a court order or to compensate for damages sustained as a result from noncompliance." *Latney's Funeral Home*, 41 F.Supp.3d at 29 [citations omitted]. The SEC now seeks relief to remedy the Defendants' noncompliance with the injunctive and penny stock bar provisions in the form of an accounting of all monies received as a result of the Defendants' agreement to tout the securities of Rackwise, a penny stock company, and disgorgement of all such monies, which total at least $10,000. The SEC seeks additional relief to coerce the Defendants' compliance with the disgorgement provision of the Final Judgment. Because the SEC has presented its *prima facie* case that the Defendants have violated the specific and definite disgorgement order, the burden should now be shifted to the Defendants to demonstrate why they are unable to comply. *Id.* at 30.

II. THE DEFENDANTS' VIOLATIONS OF THE FINAL JUDGMENT

The Court has inherent power to enforce compliance with its orders, and may exercise that authority through a civil contempt proceeding. *SEC v. Bankers Alliance Corp.*, 881 F. Supp. 673, 678 (D.D.C. 1995), *citing Shillitani v. United States*, 384 U.S. 364, 370 (1966), among other authorities. The Defendants consented to entry of a Final Judgment (Dkt. No. 5) which, among other things, orders that:

(1) Defendants are permanently enjoined from violating:

(a) directly or indirectly, the antifraud provisions of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), 15. U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5; and

(b) the antitouting provisions of Section 17(b) of the Securities Act of 1933 ("Securities Act") prohibiting, among other things, publishing, giving publicity to, or circulation of any notice, circular, advertisement, newspaper, article, letter, investment service, or communication which, though not purporting to offer a security for sale, describes such security for consideration received or to be received, directly or indirectly from an issuer, without fully disclosing the receipt by the Defendants, whether past or prospective, of such consideration and its amount.

(Final Judgment at 1-3 ¶¶ I-II.)

(2) Defendants are permanently barred from participating in an offering of penny stock, including engaging in activities with a broker, dealer, or issuer for purposes of issuing, trading, or inducing or attempting to induce the purchase or sale of any penny stock. (Final Judgment at 3 ¶ III.)

(3) Defendants are jointly and severally liable for disgorgement and prejudgment interest totaling $182,793.69, which was required to be paid to the SEC within fourteen days after entry of the Final Judgment. (Final Judgment at 3 ¶ IV.)

The Defendants have violated all three of these provisions.

A. The Defendants Have Violated the Permanent Injunction and the Penny Stock Bar

1. The Defendants Disseminated an Email and Facebook Messages Fraudulently Promoting Rackwise Securities

On December 1, 2016, SEC counsel spoke with an individual who provided an email from Defendant Smith which promoted a deal involving securities of Rackwise. (*See* Ochoa Dec.") ¶ 2 & Ex. 1 (email).) In its SEC filings, Rackwise represents that it is "a software development, sales and marketing company" and that it creates "applications based on the Microsoft operating system for network infrastructure administrators that provide for the modeling, planning, and documentation of data centers." (*Id.* ¶ 4.)

There is no question that Rackwise is a penny stock issuer. As described in paragraph III of the Final Judgment, "A penny stock is any equity security that has a price of less than five dollars, except as provided in Rule 3a51-1 under the Exchange Act [17 C.F.R. 240.3a51-1]." Rackwise's stock is quoted over-the-counter, and during September 2016, when Smith was promoting it, the stock price ranged from $1.17 to $3.20 per share with an average daily trading volume of 433 shares. (Ochoa Dec. ¶ 4.) The price range for the approximate past ten months (from May 31, 2016 through March 29, 2017) is $0.15 to $3.40 per share with an average daily trading volume of 148. (*Id.* & Ex. 3 (Yahoo! Finance Rackwise price and volume data).) As described below, when Smith promoted Rackwise, he specifically promoted "penny warrants," which he said were "ALREADY worth $2.6 million" and would be the "MASSIVE kicker" the

investor would get for making a "100k loan" to Rackwise. Warrants are included in the definition of "equity security" set forth in Exchange Act Section 3(a)(11), 15 U.S.C. § 78c(a)(11), and Rule 3a11-1 thereunder, 17 C.F.R. § 240.3a11-1.[1]

The individual – who requested to remain anonymous – told SEC counsel that he had received the email from a friend who told him he had received it from Smith. (*Id.*) To verify whether Smith had in fact circulated the email, SEC counsel clicked on an active link in the email, which led to a web page containing a photograph of Smith, and which states Smith's email address, which is at "nbtgroupinc.com." (*Id.* ¶ 3.) NBT Group, Inc. is the other Defendant in this action.

The email includes the following representations from Smith:

- "I am placing a [6-month note deal] for a long time corporate client…My pension plan has taken down the first $100k...there are four $100k notes left to place IMMEDIATELY… I need to close a short term (6 month) preferred and secured package of up to $500,000 secured notes ($100k minimum—I bought the first $100k note fyi)."
- "RACK is only DCIM systems provider currently approved by the GSA for purchase for all 175 Federal Agencies required by law to have DCIM software in place."

[1] Rackwise's penny stock did not meet any of the exceptions from the definition of a "penny stock" set forth in Section 3(a)(51) of the Exchange Act, 15 U.S.C. § 78c(a)(51) and Rule 3a51-1 thereunder. Among other things, the securities were equity securities: (1) that were not an "NMS stock," as defined in 17 C.F.R. 242.600(b)(47); (2) that traded below five dollars per share during the relevant period; (3) whose issuer had net tangible assets and average revenue below the thresholds of Rule 3a51-1(g)(1); and (4) that did not meet any of the other exceptions from the definition of "penny stock" contained in Rule 3a51-1 under the Exchange Act.

- "As SOON as the initial GSA Order comes in, RACK is cash flow positive for its LIFE (aka before it sells out to the highest bidder in the enterprise IT space)."

(Ochoa Dec. Ex. 1; Declaration of Guy Archbold ("Archbold Dec.") Ex. 2.)

Rackwise's then-CEO, Guy Archbold ("Archbold"), confirms that none of these representations is true. (*See* Archbold Dec. ¶ 14.) Archbold had not seen the September 2016 email before talking to SEC counsel. (*Id.* ¶ 7 & Ex. 2.) He confirmed that Smith did not purchase any Rackwise notes as part of the company's private placement. (*Id.* ¶ 12.) As for Smith's claim about the GSA, Archbold asserts that he never told Smith that Rackwise was the only provider approved by the GSA, as Smith claims in the email. (*Id.* ¶ 14.) In fact, Archbold declares that Rackwise has not been approved by the GSA for purchase of its DCIM systems by all federal agencies, and that as far as he knows, the GSA has not approved any DCIM systems provider for purchase by all federal agencies. (*Id.*) He also never told Smith that GSA had in fact placed an order with Rackwise. (*Id.*)

With respect to Smith's claim that the company would be "cash flow positive," in Archbold's opinion, as the former CEO and president of Rackwise, there is no basis for this statement. (*Id.*) Indeed, Rackwise's financial condition was dire. Rackwise's filings are delinquent, as its last annual Form 10-K filing was for its fiscal year ending December 31, 2013, and was filed on April 15, 2014. Rackwise's independent auditor included "going concern" qualifications in each of the annual audit reports accompanying Rackwise's financial statements contained in its SEC filings beginning with its fiscal year 2011 Form 10-K and ending with the final Form 10-K Rackwise filed, for its fiscal year ended December 31, 2013. (Ochoa Dec. ¶ 5 & Exs. 4-6 (Audit Reports excerpted from 10-Ks).) Consistent with the auditor's assessment, in Rackwise's final SEC filing, the Form 10-Q filed on May 15, 2014 for the quarter ended March

31, 2014, Rackwise reported a net loss of approximately $2,838,892 for the quarter. (*Id.* ¶ 6 & Ex. 7 (Form 10-Q) at 5 & 10 Note 2.)

Smith also fails to disclose that he had negotiated an agreement with Archbold, whereby Rackwise would pay him at least $10,000 to raise funds in connection with a private placement offering by Rackwise, and to provide media consulting services. (Archbold Dec. ¶ 11.) Archbold, who was ousted from his position in early February, and no longer has access to Rackwise records, recalls Rackwise making at least one, and possibly two, payments of $10,000 to Smith or his designee (Smith's spouse or one of his companies) in the late spring or early summer of 2016, which would have been after the injunction was entered. (*Id.*)

In addition to the email, investor Sara L. Ellis ("Ellis") provided the SEC with a document which she obtained from Smith through Facebook on or about September 21, 2016, which purports to offer a "CONFIDENTIAL Secured Bridge Loan/Note Transaction for Accredited Private Investors." (Ellis Declaration ¶¶ 1-2 & Exs. 1-2.) Among other things, Smith represents:

- "You get the same deal I am getting—and it is an amazing deal"
- "Notes will be secured and repaid by an upcoming & mandated $100-$200 million+ purchase order from the Federal government (GSA) expected in a few weeks (as in 2-6 weeks) with up to $500 million additional software sales/annual maintenance fees as per DCIM software mandate for all 275 Federal agencies."
- "RACK is only DCIM systems provider currently approved by the GSA for purchase for all 175 Federal Agencies required by law to have DCIM software in place (we are awaiting final certification any day from 6 month GSA trial successfully concluded Sept. 12th"

- "The MASSIVE kicker is the lender (aka YOU) gets one million penny warrants for 100k loan (5 million with $500k loan) with 10X-100X upside over the next 6-12 months as I will quickly explain."
- "At it's [sic] current stock price of $2.30 . . . 1 million penny warrants are ALREADY worth $2.6 million"
- "FYI I have purchased the initial $100k note for my pension plan: $400 k left to fund"

As in the case of the email, Archbold's declaration establishes that these representations are false. Indeed, Ellis contacted Archbold, who is a friend of hers, regarding Smith's solicitations of her. (Ellis Dec. ¶ 5; Archbold Dec. ¶ 13.) Archbold told Ellis that Smith's representation that he himself had personally invested $100,000 in the Rackwise private placement was not true. (*Id.*) Ellis did not invest in Rackwise. (Ellis Dec. ¶ 5.)

2. The Defendants Violated the Penny Stock Bar

There is no question that the Defendants violated paragraph III of the Final Judgment, which ordered them:

> permanently barred from participating in an offering of penny stock, including engaging in activities with a[n] …issuer for purposes of issuing, trading, or inducing or attempting to induce the purchase or sale of any penny stock. A penny stock is any equity security that has a price of less than five dollars, except as provided in Rule 3a51-1 under the Exchange Act [17 C.F.R. 240.3a51-1].

As explained, Rackwise securities were penny stocks, and the evidence establishes that Smith was engaging in activities with the issuer, Rackwise, for the purpose of inducing or attempting to induce the purchase of Rackwise stock. The Defendants have thus violated the express terms of the Final Judgment. Moreover, they did so knowingly.

At the April 21, 2016, Status Hearing held by the Court prior to entering the Final Judgment that day, the Court recited the general terms of the Final Judgment, and engaged in the following colloquy with Smith:

> THE COURT: Now, Mr. Smith, you realize your obligations and that of the company [NBT] under this final judgment, I take it, to not only pay the amounts that I recited, but also not entering into the promotion of penny stocks again and the other activities that are barred by this judgment?
>
> MR. SMITH: Yes, I do.

(Ochoa Dec. Ex. 12 (Tr.) 7:8-7:13.) The Court had further discussion with Smith about his investor "awareness" and "relations" business, and while Smith claimed that "All the stuff that we ever sent was reviewed," he also did admit that "it wasn't reviewed carefully enough, I gather." (*Id.* 8:10-8:25.) Notwithstanding this admission and Smith's specific acknowledgement that he understood the terms of the proposed judgment, Smith has now engaged in violations that are virtually identical to those involving IWEB.

3. The Defendants Violated the Permanent Injunction Prohibiting Future Violations of the Antitouting Provisions of Securities Act Section 17(b)

The Defendants also violated paragraph II of the Final Judgment, which ordered them:

> permanently restrained and enjoined from violating Section 17(b) of the Securities Act … by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, to publish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, 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, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof.

Thus, to establish a violation of Section 17(b), the Commission must prove that a person "(1) publish[ed] or otherwise circulated (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, 1105 (C.D. Ill. 2001). Scienter is not an element of Section 17(b). *SEC v. Liberty Capital Group, Inc.*, 75 F. Supp. 2d 1160, 1163 (W.D. Wash. 1999).

Smith's touting of Rackwise satisfies all the elements of a Section 17(b) violation. In 2016, Smith entered into an agreement to promote Rackwise and to provide media consulting services in exchange for at least $10,000 in compensation, and received at least that amount. Smith, through NBT, then circulated an email and Facebook message, which did not disclose his compensation. Smith placed the Rackwise touts on NBT's website – a vehicle for broad dissemination – and his compensation from Rackwise was for the purpose of recruiting investors. These nondisclosures regarding Smith's compensation violated Section 17(b), which "calls for the disclosure of the receipt of compensation *and* the amount." *Gorsek*, 222 F. Supp. 2d at 1106 (emphasis in original).

4. The Defendants Violated the Permanent Injunction Prohibiting Future Violations of the Antifraud Provisions of Exchange Act Section 10(b) and Rule 10b-5

The Defendants violated paragraph I of the Final Judgment, which ordered them:

> permanently restrained and enjoined from violating, directly or indirectly, Section 10(b) of the Securities Exchange Act …and Rule 10b-5 promulgated thereunder…, by using any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, in connection with the purchase or sale of any security:
>
> (a) to employ any device, scheme, or artifice to defraud;
> (b) to make any untrue statement of a material fact or to omit 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) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

As explained above, Smith made several untrue statements of material fact and omissions of material fact. These included: (1) that he personally purchased Rackwise securities when he had not; (2) that Rackwise was the only DCIM systems provider currently approved by the GSA for purchase for all 175 Federal Agencies when it had not been approved by GSA for this purpose; (3) that as soon as the initial GSA Order comes in, Rackwise would be cash-flow positive for its life, "aka before it sells out to the highest bidder in the enterprise IT space," when in fact Rackwise was in dire financial condition; and (4) Smith's omission to disclose his compensation for promoting Rackwise. These representations, including Smith's omission to disclose his compensation, are material because there is a substantial likelihood that a reasonable investor would have viewed disclosure of the omitted facts as having significantly altered the "total mix" of information made available. *Basic, Inc. v. Levinson,* 485 U.S. 224, 231-32 (1988). Additionally, Smith's touting of Rackwise securities through an email and Facebook messages, as he did before with regard to IWEB, constitutes a device, scheme or artifice to defraud, and a course of doing business which operates as a fraud.

Each of the above misrepresentations was also made with scienter, which is an element of a violation of Section 10(b) and Rule 10b-5. *Aaron v. SEC*, 446 U.S. 680, 695 (1980). Scienter may be established by showing either knowing conduct or "extreme recklessness." *Dolphin & Bradbury v. SEC*, 512 F.3d 634, 639 (D.C. Cir. 2008). Extreme recklessness "is an extreme departure from the standards of ordinary care . . . It is, in fact, a lesser form of intent, implying the danger was so obvious that the actor was aware of it and consciously disregarded it." *Id.* at 639 (internal quotations and citations omitted).

Smith clearly knew that he had not purchased Rackwise securities and that he had not disclosed his compensation arrangement with Rackwise. The representations about GSA and

Rackwise's cash flow were made, at a minimum, recklessly, because Archbold never told Smith these untrue facts, and if Smith had done his due diligence regarding Rackwise, he would know that its public filings have been delinquent for three years, and that since 2011, its filings include a "going concern" qualification by Rackwise's auditors. Moreover, these falsehoods follow the same pattern of Smith's misleading touting of IWEB – he made virtually identical misrepresentations and omissions about his ownership of IWEB stock and compensation to promote the company, and similar misrepresentations about that company's financial condition and likely status as an acquisition candidate. Smith was, of course, on notice that his misrepresentations and omissions regarding Rackwise were material, because the Complaint in this action includes allegations that virtually identical misconduct constituted material misrepresentations and omissions made in violation of the antifraud provisions.

B. The Defendants Have Failed to Pay Disgorgement

The Final Judgment orders that the Defendants are jointly and severally liable for disgorgement of $165,900, together with prejudgment interest of $16,893.69, totaling $182,793.69. (Final Judgment ¶ IV.) This amount was required to be paid within fourteen days of the April 21, 2016 entry of the Final Judgment, or no later than May 5, 2016. (*Id.*) None of this disgorgement or interest has been paid. (Ochoa Dec. ¶ 7.) The Defendants have failed to pay any of the ordered amounts notwithstanding the following dialogue between the Court and Smith at the April 21, 2016 hearing:

> THE COURT: Mr. Smith, you do have to come up with a lot of money in the next two weeks.
> MR. SMITH: I am aware of that, Your Honor.

(Ochoa Dec. Ex. 12 (Tr.) 10:14-1016.)

Research of property records shows that Smith sold his home in North Bethesda. Maryland in March 2016 for $1,450,000, and that it had a mortgage of just under $500,000, yielding a profit on the sale of just under a million dollars. (Ochoa Dec. ¶¶ 8-9 & Exs. 8 & 9.)[2] Additional research shows that Smith and his wife are planning a trip in September 2017 he terms his "**60th Birthday Dream Adventure to Italy's Amalfi Coast and Cinque Terra Sept 2017**." (*Id.* ¶¶ 11-13 & Ex. 11.) It would appear from this evidence that Smith could easily comply with the requirement of the Final Judgment that he pay the $182,793.69 in disgorgement and prejudgment interest.[3]

III. ISSUANCE OF AN ORDER TO SHOW CAUSE IS APPROPRIATE

The SEC has satisfied its initial burden to demonstrate by clear and convincing evidence that: (1) there was a clear and unambiguous court order in place; (2) that order required certain conduct by the Defendants; and (3) the Defendants failed to comply with that order. *Latney's Funeral Home, Inc.*, 41 F.Supp.3d at 29-30, *citing Bilzerian*, 112 F.Supp.2d at 16, among other authorities; *SEC v. Showalter*, 227 F.Supp.2d 110, 120 (D.D.C. 2002). Because the SEC has established, by clear and convincing evidence, that the Defendants have violated the Final Judgment, it is appropriate to find the Defendants in civil contempt, and to order them to show cause why they should not be subject to contempt sanctions. *See Walters v. People's Republic of China*, 72 F. Supp.3d 8, 12 (D.D.C. 2014).

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[2] Interestingly, Smith did not disclose these facts to the Court. When the Court asked him "We got the right address for you?" Smith responded "Yeah, the 6116 Rosemont" a reference to Smith's North Bethesda residence, which apparently had in fact already been sold. (*See* Ochoa Dec. Ex. 12 (Tr.) at 11:18-11:19).

[3] Smith has also failed to pay the $75,000 civil penalty he was ordered to pay. (Final Judgment ¶ V.) The SEC does not seek contempt for this failure because, in contrast to disgorgement, unpaid civil penalties must be pursued through the Federal Debt Collection Act. *Cf. SEC v. AMX, International, Inc.*, 7 F.3d 71, 75-76 (5th Cir. 1993) (disgorgement is not a "debt" within the meaning of the Debt Collection Act; consented to disgorgement order properly enforceable through the court's contempt powers).

Civil contempt is "wholly remedial" and is intended to coerce compliance with an order of the court. *See McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949); *Bankers Alliance Corp.*, 881 F. Supp.at 678. A sanction is considered "civil" or "remedial" if it either coerces compliance with a court order or compensates the complainant for losses sustained. *International Union, UMWA v. Bagwell*, 512 U.S. 821, 829 (1994).

With regard to the Defendants' violations of the penny stock bar and the injunction, the SEC seeks an accounting by the Defendants of all monies they directly or indirectly received to promote Rackwise stock, and disgorgement of those monies to Rackwise. The SEC seeks the accounting because Archbold is uncertain as to the full amount Rackwise paid Smith or his agent, even though he knows that Rackwise paid Smith at least $10,000. The accounting should include all supporting documentation, such as any written agreement and any record of payment. Additionally, the Defendants should be ordered to disgorge to Rackwise the monies received in violation of the Final Judgment, including the $10,000 and any additional compensation. Such an order is compensatory, and civil in nature. *See NOW v. Operation Rescue*, 37 F.3d 646, 660 (D.C. Cir. 1994) (affirming that fines equaling the damages to clinics by the defendants payable to the clinics "are clearly compensatory and civil"); *see also Latney's Funeral Home*, 41 F.Supp.3d at 36 (arsenal of civil contempt sanctions includes compensatory and coercive fines, as well as imprisonment).

It is well established that civil contempt sanctions may be imposed to coerce compliance with disgorgement orders in SEC actions. *See, e.g., Showalter*, 227 F.Supp.2d at 120; *SEC v. Bilzerian*, 131 F.Supp.2d 10, 14 (D.D.C. 2001); *Bilzerian*, 112 F.Supp.2d at 16; *Bankers Alliance Corp.*, 881 F. Supp. at 681 (failure to repatriate funds). With regard to Defendants' failure to pay disgorgement Smith and NBT should be ordered to comply within a short period of ten days or

so, and if they fail to comply or show cause why they cannot comply, they should be ordered to pay a daily fine of $1,000; alternatively, Smith should be ordered incarcerated until he complies.

It is the Defendants' burden to show, categorically and in detail, why they are unable to comply. *United States v. Rylander*, 460 U.S. 752, 755 (1983); *Bilzerian*, 112 F.Supp.2d at 16. Their showing must also be credible. *Bilzerian*, 131 F.Supp.2d at 15. Inability to comply is only a complete defense if the defendant cannot pay *any* of the disgorgement judgment; otherwise, he must pay what he can. *Bilzerian*, 112 F.Supp.2d at 17 & 27. Here, based on available financial information described above, it appears that Smith is able to pay all of the disgorgement and interest. Any attempted showing by him of inability to pay must accordingly address "categorically and in detail" the available financial information that shows that he can, in fact, pay the full amount of the disgorgement judgment.

IV. CONCLUSION

For all of the reasons stated, the SEC requests that the Court issue an order to show cause why the Defendants should not be held in civil contempt of the penny stock bar, permanent injunction, and disgorgement orders contained in the Final Judgment.

DATED: April 12, 2017

/s/Yolanda Ochoa

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PROOF OF SERVICE

I am over the age of 18 years and not a party to this action. My business address is:

[X] U.S. SECURITIES AND EXCHANGE COMMISSION, 444 S. Flower Street, Suite 900, Los Angeles, California 90071
Telephone No. (323) 965-3998; Facsimile No. (323) 965-3908.

On April 12, 2017 I caused to be served the document entitled **MOTION BY PLAINTIFF SECURITIES AND EXCHANGE COMMISSION FOR ORDER TO SHOW CAUSE RE: CIVIL CONTEMPT AGAINST DEFENDANTS TOBIN SMITH AND NBT GROUP, INC.; MEMORANDUM OF POINTS AND AUTHORITIES** on all the parties to this action addressed as stated on the attached service list:

[X] **OFFICE MAIL:** By placing in sealed envelope(s), which I placed for collection and mailing today following ordinary business practices. I am readily familiar with this agency's practice for collection and processing of correspondence for mailing; such correspondence would be deposited with the U.S. Postal Service on the same day in the ordinary course of business.

[X] **PERSONAL DEPOSIT IN MAIL:** By placing in sealed envelope(s), which I personally deposited with the U.S. Postal Service. Each such envelope was deposited with the U.S. Postal Service at Los Angeles, California, with first class postage thereon fully prepaid.

[ ] **EXPRESS U.S. MAIL:** Each such envelope was deposited in a facility regularly maintained at the U.S. Postal Service for receipt of Express Mail at Los Angeles, California, with Express Mail postage paid.

[ ] **HAND DELIVERY:** I caused to be hand delivered each such envelope to the office of the addressee as stated on the attached service list.

[ ] **UNITED PARCEL SERVICE:** By placing in sealed envelope(s) designated by United Parcel Service ("UPS") with delivery fees paid or provided for, which I deposited in a facility regularly maintained by UPS or delivered to a UPS courier, at Los Angeles, California.

[X] **ELECTRONIC MAIL:** By transmitting the document by electronic mail to the electronic mail address as stated on the attached service list.

[X] **E-FILING:** By causing the document to be electronically filed via the Court's CM/ECF system, which effects electronic service on counsel who are registered with the CM/ECF system.

[ ] **FAX:** By transmitting the document by facsimile transmission. The transmission was reported as complete and without error.

I declare under penalty of perjury that the foregoing is true and correct.

Date: April 12, 2017 */s/Sarah Mitchell*
Sarah Mitchell

SEC v. TOBIN SMITH, et al.
United States District Court –District of Columbia
Case No. 1:16-CV-00587
LA-04262

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