

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

- against -

ORDER
02 CV 1524 (DRH)

PAUL SKULSKY, JEFFREY SKULSKY, EDWARD
R. CAPUANO, CINDY L. EISELE, JOSEPH
CASUCCIO, JEFFREY J. SCHNEIDER, AARON
CHAITOVSKY, ROBERT GLASS, ASHLEY
NEMIROFF, ROCCO SICLARI, GEORGE A.
CARHART, HOWARD ZELIN, CARL D. D'ELIA,
CRAIG A. BRANDWEIN, and DONALD CATAPANO,

Defendants.

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HURLEY, Senior District Judge:

Plaintiff Securities and Exchange Commission ("SEC") brought this action against defendants Paul Skulsky ("P. Skulsky"), Jeffrey Skulsky ("J. Skulsky"), Edward R. Capuano ("Capuano"), Cindy L. Eisele ("Eisele"), Joseph Casuccio ("Casuccio"), Jeffrey J. Schneider ("Schneider"), Aaron Chaitovsky ("Chaitovsky"), Robert Glass ("Glass"), Ashley Nemiroff ("Nemiroff"), Rocco Siclari ("Siclari"), George A. Carhart ("Carhart"), Howard Zelin ("Zelin"), Carl D. D'Elia ("D'Elia"), Craig A. Brandwein ("Brandwein"), and Donald Catapano ("Catapano") (collectively, "Defendants") in March 2002. The Complaint alleges that "[f]rom May 1997 through June 2000, AppOnline.com Inc. ("AppOnline"), a now-bankrupt mortgage company, engaged in two simultaneous schemes that defrauded AppOnline's public investors." (Compl. ¶ 1.) Namely, it is alleged that "AppOnline diverted more than \$60 million that was supposed to be used to fund mortgage loans in order to pay AppOnline's operating expenses and, thereafter, covered up the truth in its publicly-filed financial reports." (*Id.*) In addition, it is alleged that "AppOnline manipulated the public market for AppOnline common stock by paying

bribes in exchange for three brokerage firms recommending the purchase of AppOnline stock to their retail customers, thereby defrauding those retail customers and the investing public.” (*Id.*)

Presently before the Court is the SEC’s motion to withdraw its claims for disgorgement, prejudgment interest and civil penalties, and to enter final judgment only for injunctive relief, as against P. Skulsky, J. Skulsky, Capuano, Eisele, Casuccio, Nemiroff, Siclari, Zelin, D’Elia, Brandwein and Catapano. For the reasons stated below, the SEC’s motion is granted.

In 2002 and 2003, the SEC obtained full Final Judgments against Glass, Chaitovsky and Schneider. (*See* Docket Nos. 34, 36, 53.) None of the full Final Judgments provide for monetary relief. (Pl.’s Mem. at 3.) In addition, in 2002 and 2003, the SEC obtained Partial Final Judgments against Casuccio, Eisele, Capuano, J. Skulsky, P. Skulsky, Nemiroff, Carhart, Brandwein, Catapano, Zelin, Siclari and D’Elia. (*See* Docket Nos. 9, 10, 11, 12, 13, 30, 31, 32, 33, 35, 39, 42.) While the Partial Final Judgments granted the SEC injunctive relief, the SEC had deferred seeking any monetary relief because the United States Attorney’s Office had brought parallel criminal actions against P. Skulsky, J. Skulsky, Capuano, Eisele, Casuccio, Nemiroff, Siclari, D’Elia, Brandwein and Catapano based upon the same conduct at issue in the instant action. (*See* Pl.’s Mem. at 2; Decl. of John J. Graubard in Supp. of Mot., dated July 1, 2014 (“Graubard Decl.”), at ¶¶ 4, 5.) The criminal actions against P. Skulsky, J. Skulsky, Capuano, Eisele, Casuccio, Nemiroff, Siclari, D’Elia, Brandwein, Catapano, and Carhart have since been fully resolved, with these defendants being convicted of felonies based on guilty pleas, sentenced to home confinement, imprisonment and/or probation, and ordered to pay criminal monetary damages, including restitution and/or fines. (Graubard Decl. at ¶ 6.) Zelin was also convicted based on a guilty plea, sentenced to imprisonment, and ordered to pay monetary relief, including restitution. (*Id.*)

As a result of the resolution of the aforementioned criminal proceedings, the SEC has decided to forego seeking any monetary relief against P. Skulsky, J. Skulsky, Capuano, Eisele, Casuccio, Nemiroff, Siclari, D'Elia, Brandwein, Catapano, and Zelin in this instant action because it asserts that “the punishment imposed and the restitution ordered in [the] parallel criminal proceedings” renders any additional disgorgement or civil penalty against these particular defendants inappropriate or unnecessary. (Pl.’s Mem. at 3; *see also* Graubard Decl. at ¶ 7.) In this regard, the SEC asserts that disgorgement would be an inappropriate equitable remedy since its purpose is to deprive a wrongdoer of the fruits of his illegal conduct, and that purpose has already been achieved by the restitution orders that were entered in many of the criminal proceedings. (Pl.’s Mem. at 3-4.)¹ *See S.E.C. v. Contorinis*, 743 F.3d 296, 301 (2d Cir. 2014) (“Disgorgement serves to remedy securities law violations by depriving violators of the fruits of their illegal conduct.”). Moreover, the SEC asserts that the criminal restitution orders also effectively punish these defendants such that additional civil penalties are unnecessary. (Pl.’s Mem. at 3-4.) In sum, the SEC argues that the criminal convictions and criminal restitution orders sufficiently punish the defendants for whom Partial Final Judgments have been entered, and, thus, the SEC will not seek monetary relief in this action; however, the SEC requests that the injunctive relief granted in the Partial Final Judgments continue to remain in effect so as to prevent these defendants from violating federal securities laws in the future. (*Id.* at 4.)² Notably, Defendants have not opposed the SEC’s instant motion.

¹ It appears from the SEC’s Memorandum of Law that criminal restitution orders were not entered against Brandwein or Catapano. (*See* Pl.’s Mem. at 4.)

² The SEC also declines to seek monetary relief against Carhart as he is now deceased. According to the SEC, no estate was opened for Carhart as he had no known assets. The SEC placed a Suggestion of Death on the record for Carhart and does not plan to substitute a representative for him in this action. (Pl.’s Mem. at 3.)

Although the SEC has not stated whether its request to permit withdrawal of its claims falls under Federal Rule of Civil Procedure (“Rule”) 15, i.e., as a request to amend its pleading, or, instead, under Rule 41(a), i.e., as a request seeking voluntarily dismissal of its claims, the Second Circuit has indicated that a claim may be withdrawn under either provision. *See Wakefield v. N. Telecom, Inc.*, 769 F.2d 109, 114 n.4 (2d Cir. 1985) (“[I]t is clear that a district court may permit withdrawal of a claim under Rule 15, subject to the same standard of review as a withdrawal under Rule 41(a).” (citation omitted)); *see also Broadway & Ninety-Sixth St. Realty Corp. v. Loew’s, Inc.*, 23 F.R.D. 9, 11 (S.D.N.Y. 1958) (observing that the considerations governing dismissal of less than an entire case under Rule 15 and Rule 41(a) are “substantially identical”).

In this case, none of the defendants for whom the instant motion applies filed an Answer to the Complaint.³ Thus, if Rule 41 applies in this case, the provision of that Rule applying to the filing of “a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment” permits the SEC to withdraw its claims without a court order. Fed.R.Civ.P. 41(a)(1)(A)(i). If Rule 15 applies in this case, on the other hand, that Rule provides that the Court should grant the SEC leave to amend its pleading if “justice so requires.” Fed.R.Civ.P. 15(a)(2).

Based upon the information before the Court, the Court concludes that, whether pursuant to Rule 41(a)(1) or Rule 15, the SEC is entitled to withdraw its claims seeking monetary relief against P. Skulsky, J. Skulsky, Capuano, Eisele, Casuccio, Nemiroff, Siclari, D’Elia, Brandwein, Catapano, Carhart and Zelin.

³ Only Schneider, as to whom a Full Final Judgment was entered, filed an Answer. (*See* Docket No. 26.)

CONCLUSION

For the foregoing reasons, the SEC's motion to withdraw its claims for disgorgement, prejudgment interest and civil penalties against P. Skulsky, J. Skulsky, Capuano, Eisele, Casuccio, Nemiroff, Siclari, Zelin, D'Elia, Brandwein, Catapano and Carhart is granted. The Clerk of Court is directed to enter final judgments as to P. Skulsky, J. Skulsky, Capuano, Eisele, Casuccio, Nemiroff, Siclari, Zelin, D'Elia, Brandwein and Catapano consisting of the same respective provisions contained in the Partial Final Judgments previously entered against each of these defendants. Upon entry of judgment, the Clerk of Court is directed to close this case.

SO ORDERED.

Dated: Central Islip, New York
December 8, 2014

/s/

Denis R. Hurley
United States Senior District Judge