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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SECURITIES AND EXCHANGE
COMMISSION,

No. C 03-03252 WHA

Plaintiff,

v.

OLIVER HILSEN RATH and DAVID S.
KLARMAN,

Defendants.

**ORDER PARTIALLY GRANTING
PLAINTIFF'S MOTION FOR
PERMANENT INJUNCTION,
OFFICER AND DIRECTOR BAR,
AND CIVIL PENALTIES AGAINST
DEFENDANT HILSEN RATH**

INTRODUCTION

Pro se defendant Oliver Hilsenrath pled guilty to and was convicted of securities fraud and tax evasion. In this related civil action, plaintiff Securities and Exchange Commission filed suit against Hilsenrath and co-defendant David S. Klarman for engaging in securities fraud. The SEC now seeks a permanent injunction from future violations, an officer and director bar, and civil penalties against defendant Hilsenrath.

STATEMENT

From August 1996 to March 2000, defendant Oliver Hilsenrath was the president, chief executive officer, and director of U.S. Wireless Corporation, a publicly traded company headquartered in California that developed and sold location-based information and services. Hilsenrath also had a beneficial ownership interest in Telecom Associates, an off-shore corporation, which he failed to disclose to the board of directors of U.S. Wireless.

1 From August 1997 through January 2000, Hilsenrath directed U.S. Wireless to wire-transfer
2 \$12,000 per month to Telecom on 29 separate occasions for a total of \$348,000. None of the
3 U.S. Wireless Form 10-KSB annual reports for fiscal years 1998, 1999 and 2000 described the
4 transfers to Telecom or Hilsenrath's relationship with Telecom. Hilsenrath signed these reports.

5 The SEC settled its claims against co-defendant Klarman in June 2005. In a separate
6 criminal prosecution on February 6, 2007, Hilsenrath pled guilty to securities fraud in violation of
7 15 U.S.C. 78ff and tax evasion in violation of 26 U.S.C. 7201. He stated in his plea agreement
8 (*United States v. Oliver Hilsenrath*, Case No. CR 03-0213 WHA, Dkt. No. 366 at ¶ 1):

9 I agree that the elements of the offense of securities fraud are as
10 follows: (1) I made or caused to be made untrue, false or
11 misleading statements of material fact in reports or documents
12 required to be filed under the Securities and Exchange Act of 1934
13 and the rules and regulations thereunder; and (2) I made or caused
14 to be made these untrue, false or misleading statements knowingly
15 and willfully. I agree that the elements of the offense of tax
16 evasion are as follows: (1) I owed more federal income tax for the
17 calendar year 1998 than was declared on my income tax return;
18 (2) I knew that more federal income tax was owed than was
19 declared due on my income tax return; (3) I made an affirmative
20 attempt to evade or defeat an income tax; and (4) in attempting to
21 evade or defeat such additional tax, I acted willfully.

22 In his plea agreement, defendant also agreed that, *inter alia*, the following facts were
23 true (*id.* at ¶ 2):

24 Under SEC regulations, I knew that, as CEO of U.S. Wireless, I
25 could not make materially false and misleading statements and
26 omissions to the company and its accountants in connection with
27 the preparation of U.S. Wireless Corporation's Form 10-KSB
28 annual reports that were filed with the SEC. In fiscal year ending
March 31, 1998, in order to avoid paying taxes, I sent \$12,000 per
month of my salary to an account at Matheson Bank (Jersey)
Limited, which was located in Jersey (the Channel Islands) and
which was in the name of Telecom Associates. I was the
beneficial owner of Telecom Associates. I agree that, prior to the
filing of the U.S. Wireless Corporation Form 10-KSB for fiscal
year 1998, I did not disclose to U.S. Wireless Corporation's
auditors that I had an ownership interest in Telecom Associates.
By failing to disclose this fact, I caused U.S. Wireless Corporation
to file a materially untrue, false, and misleading Form 10-KSB for
the fiscal year ending March 31, 1998. I sent a total of \$144,000 to
Telecom Associates in calendar year 1998. I did not report these
taxable earnings on my federal income tax return, and thus I
under-reported my income and thereby evaded taxes on the money
that I sent to the Telecom Associates account. I agree that I owed
more federal income tax for 1998 than was declared on my return,
and I knew it at the time I signed and filed my return.

1 This Court granted summary judgment in this related civil matter for all but one claim
2 brought by plaintiff, and the sole remaining claim was later voluntarily dismissed. Plaintiff now
3 seeks the relief noted above.

4 ANALYSIS

5 1. PERMANENT INJUNCTION.

6 The Securities Exchange Act of 1934 provides court authority to grant the Commission's
7 request for a permanent injunction from committing future violations of the Securities Exchange
8 Act. 15 U.S.C. 78u(d)–(e). To obtain a permanent injunction, the SEC

9 ha[s] the burden of showing there [is] a reasonable likelihood of
10 future violations of the securities laws. . . In “predicting the
11 likelihood of future violations,” [the Court] must assess “the
12 totality of the circumstances surrounding the defendant and his
13 violations,” and we consider such factors as (1) the degree of
14 scienter involved; (2) the isolated or recurrent nature of the
15 infraction; (3) the defendant's recognition of the wrongful nature
16 of his conduct; (4) the likelihood, because of defendant's
17 professional occupation, that future violations might occur; (5) and
18 the sincerity of his assurances against future violations.

19 *SEC v. Fehn*, 97 F.3d 1276, 1295–6 (9th Cir. 1996).

20 There is no doubt that a high degree of scienter is present here. Hilsenrath admitted in
21 his plea agreement that his actions in transferring the money off-shore and signing the inaccurate
22 Form 10-KSB for those years were done knowingly and willfully. Hilsenrath's current attempts
23 to argue that his actions were merely clumsy or inappropriate are contrary to his plea agreement
24 and are given no weight. The first factor weighs heavily in favor of granting an injunction.

25 There is some contention as to the recurrent nature of the infraction. Plaintiff does not
26 argue that the act of sending the money off-shore to avoid income taxes is a violation of the
27 Securities Exchange Act. Instead, plaintiff claims that the ongoing concealment of these actions
28 led to the company filing an inaccurate Form 10-KSB, which is the actual violation.

Hilsenrath, however, only admitted to causing the company to file a materially false Form
10-KSB for 1998. Plaintiff did not pursue claims against Hilsenrath for false Form 10-KSB
reports for 1999 and 2000. Nevertheless, Hilsenrath engaged in a continuous pattern of deceit,
demonstrated by his 29 illegal wire-transfers, that ultimately resulted in the inaccurate 1998

1 report. The recurrent nature of Hilsenrath's underlying actions in the violation means that the
2 second prong weighs slightly in favor of granting an injunction.

3 The recognition of the wrongful nature of the act and the sincerity of assurances against
4 future violations are closely related factors. While Hilsenrath has admitted to committing the
5 violation, there is no doubt that Hilsenrath acts the part of a victim. He asserts that his actions
6 were done in ignorance and not with malice. That said, nothing is more basic as the duty of an
7 officer of a publicly traded company to make truthful, accurate reports. Hilsenrath's claims of
8 ignorance ring hollow for such an apparent duty. The defense that more experienced and
9 knowledgeable individuals than Hilsenrath were committing similar acts only further highlights
10 a denial of responsibility for his central role in the violation, and provide a glaring counter-point
11 to his assurances against future violations. The third and fifth factors weigh heavily in favor of
12 granting an injunction.

13 With regard to the likelihood of future violations, Hilsenrath's statements that he will not
14 seek a position with reporting and accounting responsibilities are of dubious quality. It may be
15 true that Hilsenrath's skill-set appear better suited for technology-oriented positions, and surely
16 this conviction will make it more difficult for defendant to obtain a position in which he could
17 commit these violations again. Hilsenrath only states, however, that he will not "seek" a position
18 having these responsibilities. He has not stated that he would be unwilling to accept another
19 position, if offered, with said duties. If Hilsenrath were to eventually fill another position with
20 similar responsibilities to the one he previously held, there is a reasonable likelihood that future
21 violations will occur. Accordingly, the fourth prong weighs slightly in favor of granting an
22 injunction.

23 On the whole, the evidence supports an injunction against violating securities laws.
24 Hilsenrath's actions showed a sufficient degree of scienter, probability of recurrence, and despite
25 the plea agreement, Hilsenrath has made no reliable acknowledgment of wrongdoing or
26 assurances against future violations. Accordingly, this order permanently enjoins Hilsenrath
27 from committing future violations of the Securities Exchange Act.
28

1 **2. OFFICER AND DIRECTOR BAR.**

2 The Securities Exchange Act also authorizes an order prohibiting, conditionally or
3 unconditionally, and permanently or for such period of time as it shall determine, any person
4 who employs manipulative devices such as those that violate Section 10(b) of the Exchange
5 Act or Rule 10b-5. In determining whether to order the bar, a court may consider:

6 (1) the “egregiousness” of the underlying securities law violation;
7 (2) the defendant’s “repeat offender” status; (3) the defendant’s
8 “role” or position when he engaged in the fraud; (4) the
 defendant’s degree of scienter; (5) the defendant’s economic stake
 in the violation; and (6) the likelihood that misconduct will recur.

9 *SEC v. First Pacific Bancorp*, 142 F.3d 1186, 1193 (9th Cir. 1998) (quoting 15 U.S.C.
10 78(u)(d)(2)).

11 Four of the above six factors have been previously discussed. The degree of scienter
12 weighs heavily in favor of a bar. Hilsenrath’s role was a central one and his actions were done
13 while he was CEO of the company, also weighing heavily in favor of a bar. The “repeat
14 offender” status has been analyzed and Hilsenrath’s recurrent concealment weighs slightly in
15 favor of a bar. The likelihood that future misconduct will occur has been deemed as weighing
16 slightly against Hilsenrath, therefore in favor of a bar.

17 With regard to the “egregiousness” of the underlying securities law violation, this order
18 finds that the first prong does not weigh in favor of or against a bar. While plaintiff argues that
19 these actions were over a three-year period, Hilsenrath has only admitted to one particular
20 misleading report for 1998, and plaintiff did not pursue its claims for any other year. The actions
21 only indirectly affected investors, as it was not the inaccurate books that destroyed investors’
22 equity but rather the SEC’s trading suspension to allow investigation into the company’s books
23 and the company’s subsequent bankruptcy. The indirect nature of Hilsenrath’s acts, however,
24 should not diminish the egregiousness of the violation. Hilsenrath used his position of the
25 highest authority in the company to mislead the public as to the company’s true financial state
26 in 1998. Given these competing considerations, this order finds the first prong mostly neutral in
27 the analysis.
28

1 Regarding defendant's economic stake in the violation, Hilsenrath repeatedly argues that
2 there was no self-enrichment when he transferred the money off-shore to avoid income taxes.
3 This order finds this to be an absurd proposition. When one actively avoids paying income taxes
4 by channeling funds off-shore, the sole reason is to avoid the personal costs of paying those
5 personal income taxes. Yet Hilsenrath asserts that all unpaid taxes stayed with the company.
6 Unless the company calculated his taxes and deducted them before transferring the money, it is
7 difficult to believe that defendant did not have any financial gain in shipping his admittedly
8 legitimate salary overseas. The fifth prong weighs in favor of a bar.

9 On balance, the evidence supports the finding that Hilsenrath is unfit to serve as an
10 officer or board member on any publicly traded company. That Hilsenrath is unfit does not
11 necessarily require a lifetime bar as the remedy here. The proper question is whether "a
12 conditional bar (*e.g.*, a bar limited to a particular industry) and/or a bar limited in time (*e.g.*, a bar
13 of five years) might be sufficient." *SEC v. Patel*, 61 F.3d 137, 142 (2d Cir. 1995). A shorter ban
14 is the more appropriate remedy. This order issues an unconditional officer and director bar
15 against Hilsenrath of five years, to commence from the date of entry of this order.

16 **3. CIVIL MONETARY PENALTIES.**

17 Finally, plaintiff requests civil penalties against defendant for violations of the securities
18 laws under 15 U.S.C. 78u(d)(3). The statute lays out three tiers of punishment, the third of
19 which allows a district court to impose penalties up to the higher of the individual's gain or
20 \$110,000 for each violation. A person is subject to third-tier penalties when their violation
21 involves "fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory
22 requirement; and . . . directly or indirectly resulted in substantial losses or created a significant
23 risk of substantial losses to other persons."

24 Hilsenrath clearly meets the criteria for a third-tier penalty. His actions were admittedly
25 fraudulent and deceitful when he submitted the knowingly inaccurate Form 10-KSB.
26 In addition, this order has already found that defendant was at least indirectly responsible for
27 substantial losses to investors when the value of the company's stock plummeted while the SEC
28 investigated Hilsenrath's inaccurate reports. Hilsenrath, in sum, abused his position of authority

1 to mislead the public. This abuse ultimately caused the public financial harm and thus penalties
2 are appropriate.


3 That said, the full penalty under the statute is not warranted. Hilsenrath, as stated,
4 was only indirectly responsible for the losses. The only undisputed act in this case is the
5 inaccurate 1998 10-KSB form. Plaintiff cites *SEC v. Henke*, 275 F. Supp. 2d 1075, 1086
6 (N.D. Cal. 2003), to support a \$110,000 penalty for each of the five claims on which Hilsenrath
7 lost summary judgment. In *Henke*, however, the court ordered \$100,000 penalties for each of
8 five different claims that had numerous underlying acts as the basis for the defendant's violation
9 of the Securities Exchange Act. Here, there are five claims as well, but with only one underlying
10 act that justifies monetary punishment. This Court assesses a lesser, cumulative penalty of
11 \$110,000 against Hilsenrath.

12 CONCLUSION

13 For the reasons state above, a permanent injunction is hereby **GRANTED** against
14 defendant Hilsenrath against committing any future violations of the Securities Exchange Act.
15 Defendant Hilsenrath is hereby **PROHIBITED** from serving in any official or board capacity on a
16 publically traded company for a period of five years. Finally, defendant Hilsenrath is hereby
17 **ORDERED** to pay \$110,000 in civil penalties.

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19 **IT IS SO ORDERED.**

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21 Dated: June 26, 2009.

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23 _____
24 WILLIAM ALSUP
25 UNITED STATES DISTRICT JUDGE
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