**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF TEXAS**
**HOUSTON DIVISION**

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| **SECURITIES AND EXCHANGE COMMISSION,** | § | |
| | § | |
| **Plaintiff,** | § | **CIVIL ACTION NO. H-04-2799** |
| **v.** | § | |
| | § | |
| **CARL R. ROSE, *et al.*,** | § | |
| | § | |
| **Defendants.** | § | |

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case, arising under various provisions of the Securities Exchange Act of 1934 (the "Exchange Act"), the Securities Act of 1933 (the "Securities Act"), and rules promulgated thereunder, was tried to the Court on April 2-4, 2007. Pursuant to Federal Rule of Civil Procedure 52, the Court's findings of fact and conclusions of law are set forth below.

## I. FINDINGS OF FACT

1. EVTC, Inc. was a public company whose stock was registered with the Securities and Exchange Commission under Section 12(g) of the Exchange Act. In 1999 and 2000, the company was principally engaged in the marketing and sale of refrigerants, refrigerant reclaiming services, and the recycling of fluorescent light ballasts and lamps.

2. David Keener is a certified public accountant. Keener joined EVTC as its chief financial officer in 1998 and became president of the company in December 1999 or early 2000.

3. George Cannan Sr. was the chairman of EVTC in 1999 and 2000, and in 1999 was its largest shareholder, owning over 20% of EVTC stock.

4. Harris "Butch" Ballow was formerly a resident of Galveston, Texas. He has fled the jurisdiction and his current whereabouts are unknown. In 1982, Ballow pled guilty to second degree felony theft based on an investment scheme involving a fraudulent motion picture deal, and was sentenced to ten years probation. On April 28, 1988, a judgment was entered against Ballow for third degree felony

theft stemming from a fraudulent sale and lease-back scheme, for which he was sentenced to two years in prison. On August 22, 1988, Ballow was sentenced to five years in federal prison after pleading guilty to fraudulent use of a credit card, wire fraud, and fraud in a telemarketing scheme.

5. Ballow controlled off-shore corporations which he used to shield assets from creditors. Among these corporations were three British Virgin Islands corporations known as Belsly Investments, Belfast Ventures, and Baldridge Ventures ("the BVI companies").[1] A Ballow associate named Frank Moss nominally controlled the BVI companies.

6. EpicEdge, Inc., formerly known as Design Automation Systems, Inc. and as Loch Exploration, Inc., was a public company that issued 2,304,700 shares in January 1999 to Ballow's BVI companies. The issuance was registered with the Securities and Exchange Commission on Form S-8, a form for registration of stock issued to employees and consultants of the issuer. Before the issuance of that stock, EpicEdge (known then as Loch Exploration) had 1,295,286 shares issued and outstanding. Frank Moss transferred the three BVI companies, whose only asserts were their Loch Exploration stock holdings, to Ballow sometime in 1999.

7. Earl Shawn Casias was a registered representative (*i.e.*, a licensed securities professional employed by a broker-dealer registered with the SEC) from 1989 to 2002. Casias worked at approximately ten different broker-dealers before starting employment at a company called Paradise Valley Securities. At Paradise Valley, Casias was the registered representative on accounts opened for three companies associated with Ballow, including Baldridge Ventures and Belfast Ventures.

8. Marvin Mikel "Mike" Barnwell is a resident of San Leon, Texas, with twenty-five years of experience in commercial banking. Barnwell met Ballow in 1999 and began to work for him pursuant to an oral employment agreement, essentially serving as Ballow's administrative assistant and right-hand man for financial affairs. Barnwell managed bank accounts and financial records for Ballow, wrote checks, executed wire transfers, handled stock certificates, signed letters, and acted on behalf of Ballow's off-shore corporations. Barnwell also cashed checks for Ballow so that Ballow could handle his affairs on a cash basis.

**A. Ballow's involvement with EVTC and Keener**

9. In 1999, EVTC's stock price had dropped to $1-$2, down from $12 in the mid-90s. An unsuccessful effort by the company to enter the recycling equipment business had failed and was discontinued in 1998, leading to negative financial results. In May 1999, the company's shares were removed from the Nasdaq National Market System and began trading on the Nasdaq Small Cap Market. In

[1] Variations of the spelling of these names appear in various documents. These variations are not material.

Keener's mind at that time, the true value of the stock lay somewhere in the $6 to $7 per share range.

10. At around the same time, an effort to work with a management consultant was not successful, and EVTC's relationship with its lender was deteriorating. In fact, EVTC was operating under a forbearance agreement with its lender. EVTC faced potential foreclosures and loss of business if it could not cure its default with its lender. Keener approached several investment institutions and funds for a capital infusion, but was unable to negotiate acceptable terms for an investment.

11. Keener learned from an acquaintance at a public company called Evans Systems, Inc., that Ballow was helping Evans Systems enhance the price and trading of its stock, and possibly could do the same for EVTC.

12. In late 1998 or early 1999, Keener attended a meeting at Ballow's house in Galveston, Texas. Keener attended with Cannan Sr.'s knowledge, and discussed the results of that meeting with Cannan Sr. Barnwell was present for part of the meeting.

13. During the meeting at Ballow's house, Ballow discussed how he and his group had helped promote Evans Systems stock and enhance its value and market. Ballow also asked questions about EVTC's stock, its shareholders, the stock activity, Cannan Sr., and Cannan Sr.'s willingness to sell some of his position. Ballow seemed interested in doing a deal with EVTC, including making a much-needed equity investment in the company.

14. Ballow stated that with his buying power and EVTC's relatively limited daily trading volume and true public float, he felt confident that he and his group could return EVTC's share price to a level that properly reflected its true market capitalization. Keener believed that Ballow could help EVTC.

15. Keener told Cannan Sr. what Ballow could do for EVTC. Cannan Sr. asked Keener what Ballow would charge for his services, and Keener predicted that Ballow would want a "pretty good chunk" of stock.

16. Keener was impressed by Ballow's record regarding Evans Systems, and personally invested in Evans Systems stock. Ballow represented to Keener that Evans would trade for more than $50 per share. Keener later personally invested in another company associated with Ballow: EpicEdge. Cannan Sr. told Keener that he was also purchasing EpicEdge stock to help Ballow.

17. In May 1999, the price of Evans Systems stock collapsed. Keener and Cannan Sr. were both concerned about Ballow's role in this collapse. Ballow blamed the price drop in the stock on the fact that Evans Systems had misstated its books, incompetent management, and its inability to raise the cash necessary to fund an

internet venture called Afreegift.com. Keener never asked anyone else why Evans Systems' stock crashed.

**B. First issuance of EVTC stock to companies controlled by Ballow**

18. In the spring and early summer of 1999, discussions continued between Ballow and Cannan Sr. and between Ballow and Keener as to the nature of Ballow's possible intervention in EVTC. On July 21, 1999, EVTC's board approved an issuance of company stock to an entity referred (and, indeed controlled) by Ballow. Ballow told Keener that Baldridge Ventures would be the purchaser. Keener sent Ballow a subscription agreement made out to Baldridge Ventures for the purchase.

19. Keener did not receive back the signed subscription agreement made out to Baldridge Ventures. Instead, Ballow told Keener that three entities, Baldridge Ventures, Belsly Investments, and Belfast Ventures, would make the investment. Keener sent new subscription agreements to Ballow. EVTC received back three subscription agreements, each of which subscribed to 264,267 shares at $.75 per share, or $198,200. The three subscription agreements included the typewritten names of Belsly Investments, Belfast Ventures, and Baldridge Ventures. However, Belfast Ventures and Baldridge Ventures were crossed out and replaced by the handwritten names of Belsly Investments and Texas Investment Corporation. All of the subscribers listed Ballow's personal residence in Galveston, Texas, as their business address.

20. The three subscription agreements bear the handwritten date "7/28/99," which would have been one week after the board originally authorized the stock issuance. However, Keener testified that a substantial period of time elapsed from the date that he sent out the original single-investor subscription and the date that he received back the three new subscriptions.

21. Despite the crossed-out names on the subscriptions, Keener, Cannan Sr., and EVTC's law firm sent instructions to EVTC's transfer agent to have the stock issued to Belsly Investment, Ltd., Belfast Ventures, Inc., and Baldridge Ventures, Inc. The shares were not issued in one bulk total; instead, various denominations (as small as 1,000 shares per certificate) were either given directly to Ballow or sent to him via overnight carrier, at Ballow's request. Keener found it odd that Ballow had requested specific certificate denominations, but did not investigate further. The date on the legal opinion authorizing issuance of the stock is October 20, 1999 and certificates issued to Balfast [sic] Ventures and Baldridge Ventures (and later transferred to individual investors) bear the date November 1, 1999.

22. After the subscription agreements were signed, Keener pressed Ballow for payment, which was slow in coming. It was clear that Ballow controlled the timing of the payments. Eventually, two checks from Belsly Investments and one check from Texas Investment Corp. were presented to EVTC in payment for the

stock. These payors correspond with the investor entity names that had been handwritten on the subscriptions, and the amounts on each check, $198,200, are consistent with the subscriptions. However, only one of the Belsly Investments checks cleared, and the Texas Investment Corp. check did not. Barnwell identified his signature on the Belsly check that cleared, but could not identify the handwriting on the two checks that did not clear. Instead, a check from Belfast Ventures dated "12-21-99" and signed by Barnwell at Ballow's request in the amount of $198,200 for "264,267 shs" cleared. Belsly Investments wired an additional $198,000 to "Full Cycle Refrigerant Reclaim Services Inc." on January 4, 2000. At the time, EVTC had a refrigerant reclamation subsidiary known as Full Circle, Inc.

23. EVTC had initially reported the proposed sale of stock in a Current Report on Form 8-K signed by Keener and dated August 9, 1999. The Form 8-K stated that the purchaser was a single "private investor," because at that time, Keener believed there would be only one investor. The Form 8-K stated that the sale involved 792,801 shares. Although this amount would constitute 13.7% of EVTC's outstanding stock, the Form 8-K did not identify the private investor, provide any information concerning the private investor's background, or disclose Ballow's role in the transaction.

24. EVTC later made inconsistent statements about the stock issuance in its annual Form 10-K report, filed on September 30, 1999. In the section titled "Liquidity and Capital Resources" the company stated that the stock had been issued to "several private investors," but note 13 to the audited financial statements refers to the purchaser as a single "private investor." To the extent that Keener perceived that there were investors other than Ballow, Keener viewed them as a group of foreign investors, from Panama or the British Virgin Islands. None of EVTC's annual and quarterly reports referencing the stock sale provided information concerning the identity or intentions of the purchaser or purchasers.

25. The issuance of EVTC stock to the three entities was not registered with the Securities and Exchange Commission, as EVTC described the stock in its September 1999 report as "restricted." EVTC's auditors instructed EVTC to disclose the 792,801 shares as subscription stock in the Statement of Stockholders' Equity as part of the audited financial statements, Item 8 of the annual report. Keener did not ask them whether the shares should be considered in determining what to include under the required disclosures of 5% shareholders in Item 12 of the annual report.

26. Keener dealt only with Ballow and Barnwell in carrying out the stock sale. At various points, Keener had heard Ballow refer to his "substantial interest" in Belsly or other related companies. Keener believed that Ballow had a strong affiliation with and underlying authority over these investor entities, even though Barnwell presented himself as the day-to-day director of the entities.

27. Keener and Cannan Sr. never performed any background research on Ballow or on the ownership and control of the BVI companies. Ballow never presented a resume or biographical information to Keener. At trial, Keener testified that he had asked his attorneys at the time if there was anything else he needed to do, and they had answered in the negative. Keener also stated that he may have performed a Yahoo search for information about Ballow, but admitted that he never mentioned any such search on the previous occasions that he had testified.

**C. Second issuance of EVTC stock**

28. At some point in 1999, Ballow introduced the internet company Afreegift.com to EVTC as a possible acquisition. EVTC had no previous experience with internet companies, which were unrelated to EVTC's core business. EVTC's acquisition of Afreegift.com was completed in early 2000.

29. Keener believed early on that Ballow had some sort of indirect interest in Afreegift.com. Ballow stated to Keener on at least one occasion that he had a significant "stake" in the project, although Keener did not learn the details as to how that stake was structured. It appeared to Keener that Ballow had some influence over the EVTC board members that were appointed as a result of the Afreegift.com transaction.

30. In order to acquire Afreegift.com, EVTC would need to raise $1,000,000. Ballow was slated to oversee the effort to raise the required amount via the sale of EVTC stock at $1 per share.

31. Approximately six to eight months after the first stock sale to the BVI companies, EVTC engaged in this second round of financing with Ballow to fund Afreegift.com. Keener expected the funding to come through Belsly Investments. In April 2000, Keener signed letters authorizing issuance of 750,000 shares at $1 per share to two different companies — Growth Stocks, Inc. and Growth Securities, Inc. (375,000 shares to each) — in exchange for the funding. This issuance of stock was also not registered with the SEC, as the stock was again restricted.

32. Before issuing the stock, EVTC received a $750,000 wire from Belsly Investments. Belsly Investments had received the funds from sales of EpicEdge stock in its account at A.G. Edwards.

33. In late March and early April 2000, individual investors Robert Cross and James Voight wrote checks to Growth Securities, totaling $760,000, to purchase restricted EVTC stock at $4 or more per share. Hector Garcia, another Ballow associate, had presented the investment opportunity to Cross and Voight, told them to write the checks to Growth Securities, and sent them EVTC certificates issued to Belfast Ventures and Belsly Investments.

34. With regard to the sale of Growth Stocks and Growth Securities, Keener again dealt only with Ballow and could not recall anyone else who was involved with either Growth Stocks, Inc. or Growth Securities, Inc..

35. Keener signed the subscription agreements from Growth Stocks and Growth Securities. Ballow's signature appears for Growth Securities. The Growth Stocks subscription appears to bear Hector Garcia's signature, but Garcia testified that he did not sign it, and that Ballow often wrote his signature. Both subscriptions display Garcia's address, but Garcia was not familiar with the transactions. Keener directed the transfer agent to send the stock to Ballow, and an e-mail from Keener's colleague Melissa Losonczy to Keener described the certificates as "Butch's new ones."

**D. Ballow's holdings in EVTC and EpicEdge stock**

36. Ballow began building a significant position in EVTC stock through market purchases in the fall of 1999, when his EVTC holdings reached over 300,000 shares. Ballow continued his market purchases throughout 2000, and by the middle of September 2000, he held over 1.8 million shares of EVTC stock in his accounts. These shares constituted approximately 47% of the publicly trading float of EVTC stock, in addition to and apart from the restricted stock that Ballow purchased directly from EVTC through the off-shore corporations.

37. Keener learned that Ballow was acquiring EVTC stock by means other than his purchases of restricted EVTC stock through the BVI companies. Shortly after the first BVI subscriptions in 1999, Ballow, at the request of Keener and Cannan Sr., purchased EVTC stock from an institutional investor that wanted to sell its position. Keener learned from broker Mark Menzel that Ballow corporations were buying EVTC stock, and Ballow indicated to Keener that his group was purchasing in the open market.

38. Cannan Sr. and Keener were aware that Ballow was not merely a passive investor or representative of investors. Ballow's function was to bring investors to EVTC. Ballow told Barnwell he was building a position in EVTC and was going to make market in the stock, which referred to finding people to purchase the stock and make the stock perform. Keener went with Barnwell and Ballow to Las Vegas on Ballow's private airplane, and Barnwell testified at his deposition that Keener knew that Ballow was a market maker.

39. Keener told Steve Fodrie, another acquaintance and sometime business associate of Ballow's, in the Spring of 2000 that he knew that Ballow had extensive holdings in EVTC and was influential in the company. At the time, Fodrie was negotiating a potential business combination between EVTC and a company called Polar Shield. The business combination never occurred.

40. Ballow financed his purchases of EVTC stock primarily with the EpicEdge stock that Ballow obtained through Frank Moss, following the merger between Loch Exploration, Inc. and Design Automation Systems, Inc. Ballow deposited that EpicEdge stock in brokerage accounts and either sold it or pledged it on margin to purchase EVTC stock. During the first nine months of 2000, EVTC and EpicEdge stock consistently constituted over 90% of the holdings in Ballow's accounts.

41. Plaintiff introduced substantial evidence that Ballow controlled some of the accounts identified in trial exhibits 57 (an analysis of Ballow's account holdings) and 58 (a float analysis of EVTC stock), and described below. Ballow therefore controlled the EpicEdge stock that was deposited into those accounts. In addition, some of the account documents listed Ballow's home address, 219 Catamaran, Galveston, Texas.

    a. Belsly Investments account at A.G. Edwards (see trial exhibit 62). This account received two deposits of EpicEdge stock traced to the initial 1999 issuance to Belsly Investments. Barnwell's signature appears on stock powers for the deposit of EpicEdge stock. The initial address for the account, Box 3152, Road Town, Tortola, BVI, was an address that Ballow used, and that was used on Baldridge Ventures, Belfast Ventures, and Belsly Investments letters to the EpicEdge transfer agent. Barnwell's address, PO Box 931, Bacliff, Texas, appears on account statements after January 2000. Barnwell had check-writing power on the account, wrote numerous checks for Ballow's benefit, and transferred funds from the account to the Belsly Investment bank account at Ballow's direction.

    b. Texas Investment Corp. account at First Union (see trial exhibit 63). This account received one deposit of EpicEdge stock traced to the initial issuance to Belsly Investments. The name B. Ballow appears on the account opening form and in the address on the account statements. Ballow's cell phone number was listed on the account opening form. Hector Garcia's passport is included with the account documents. Garcia recognized the address on the account as an address used by Ballow, and testified that Ballow controlled the account. Ballow's home address, 219 Catamaran, Galveston, Texas appears on the W-8 form.

    c. Baldridge Ventures account at First Union (see trial exhibit 64). Garcia's name and signature appear on numerous documents, his passport is included with the account opening forms, and he testified that Ballow controlled the account. Garcia's signature and address, 1619 Evergreen, Seabrook, Texas, appear on the W-8BEN form for the account. Garcia recognized the address on the account as an office in Panama set up by Ballow's associate Ruben Garza.

d. Baldridge Ventures account at Paradise Valley (trial exhibit 65). This account received two deposits of EpicEdge stock traced to the initial issuance to Baldridge Ventures. Garcia's handwriting and signature appears on numerous account documents, and his passport is included with the account opening forms. Garcia's signature appears on stock powers for deposit of EpicEdge stock. Barnwell's address, PO Box 931, Bacliff, Texas, appears on two letters, and his signature is on one letter received by Paradise Valley related to the account. Garcia testified that Ballow controlled the account.

e. Belfast Ventures account at Paradise Valley (see trial exhibit 66). This account received two deposits of EpicEdge stock traced to the initial issuances to Belfast Ventures and Belsly Investments. The address on the account opening form and statements, Box 3152, Road Town, Tortola, BVI, is the same as the address for the Belsly Investments account at A.G. Edwards, and was an address used by Ballow. In May 2000, the name and address on the statements was changed to Barnwell at PO Box 931, Bacliff, Texas. Barnwell received the account statements and gave them to Ballow. Barnwell's signature appears on stock powers for the deposit of EpicEdge stock, and Barnwell believed that Ballow had access to stock powers that Barnwell signed.

f. Redstone Financial Group account at Paradise Valley (see trial exhibit 67). Garcia's name, handwriting, and signature appear on the account opening documents. Garcia testified that Ballow set up the account.

g. Pines Intervest account at Pacific International (see trial exhibit 71). The address on the January 1999 account statement is Box 3152, Road Town, Tortola, BVI, an address used by Ballow that also appeared on Ballow-controlled accounts at A.G. Edwards and Paradise Valley. The address on account statements starting in March 2000 was 2951 Marina Bay Drive, 130-371, League City, Texas, which also appears as the address on the Texas Investment Corp. bank account, and which Barnwell controlled for Ballow. The persons named on the account, Samuel Ballow and Diane Johnson, were Ballow's brother and secretary. The account was transferred to Wolverton Securities in June 2000 (see below).

h. Redstone Financial Group account at Pacific International (see trial exhibit 72). This account received one deposit of EpicEdge stock traced to the initial issuance to Belfast Ventures; the deposit initially went to a Belfast Ventures account at Pacific International, and was transferred almost immediately to the Redstone Financial Group account. (The transfers occurred on February 2, March 5, and March 22, 1999.) The address on the Redstone and Belfast accounts is Box 3152, Road Town, Tortola, BVI. The person named on the account, Wade Williams, was a Ballow

associate. The account was transferred to Wolverton Securities in June 2000 (see below).

i. Pines Intervest account at Wolverton Securities (see trial exhibit 74). Ballow's address, 219 Catamaran, Galveston, Texas, is on the account opening forms and statements. Ballow's brother Samuel was named on the account.

j. Redstone Financial Group accounts #3222 and 3233 at Wolverton Securities (see trial exhibits 75 and 76). Ballow's address, 219 Catamaran, Galveston, Texas, is on the account opening forms and statements. The address Box 3152, Road Town, Tortola, BVI appears on the new client application forms. Garcia's name, signature, and address, 1619 Evergreen, Seabrook, Texas, appear on several documents. Ballow ordered a transfer of $2.9 million from the account, in the form of a check payable to Redstone Financial Group, Corp.

k. Southport Capital account at D.E. Frey Securities (trial exhibit 77). Garcia appears on the account opening form and his signature is on numerous documents. The address on the account, 12700 N. Featherwood, Houston, Texas, was an office used by Ballow. Garcia testified that Ballow gave him EpicEdge stock to deposit into the account, and that Garcia ordered trades with Ballow's input.

42. Ballow also financed his activities by selling EVTC restricted stock in an offering to public investors not using the Nasdaq OTC markets (*i.e.*, "off-market trades"). Ballow accomplished these sales through his associates Lawrence Clasby, Stacey Blake, and Hector Garcia. Keener had met Lawrence Clasby at EVTC and knew he had an association with Ballow. Plaintiff introduced evidence indicating that these public investors/purchasers paid in full for their stock. Contrary to Defendant Keener's suggestion at trial, there is no indication that these purchasers actually bought options, rather than shares.

43. Barnwell handled checks from individuals who purchased the stock, including checks deposited in the Belsly Investments bank account that reference EVTC. In return, Ballow and Garcia transferred certificates to these investors that Ballow had received from EVTC.

44. Ballow asked EVTC (through Keener and Cannan Sr.) to send him weekly securities position reports prepared by the Depository Trust Corp. (DTC). Keener requested and received such reports, and EVTC paid for them. Ballow explained to Keener that a DTC report provides information about which brokerage firms were holding EVTC stock in street name ,and about weekly changes in such holdings. Ballow wanted the reports in order to monitor trading in EVTC stock.

45. DTC considered securities position reports confidential during the period that Keener sent them to Ballow. The reports were available only to issuers and their authorized agents. DTC never received authorization to provide them to Ballow.

46. Garcia received the DTC reports and used them with Ballow to determine who was buying, selling, and holding EVTC stock. Ballow also received DTC reports from EpicEdge. When Salvatore DiPaolo, EpicEdge vice-president, learned that EpicEdge was obtaining DTC sheets and sending them to Ballow, he stopped that practice.

47. After trading between $12 and $14 per share through September 2000, the EVTC stock price collapsed simultaneously with the EpicEdge price. After the collapse, Ballow asked Keener to back date the stock certificates that EVTC had issued to the date the subscription agreement was signed, rather than the later date on which the certificates actually issued. Keener believed the purpose of the backdating would be to reduce the restriction period on the stock.

48. Keener also learned after the stock crash that several individuals had acquired restricted EVTC stock from Ballow.

49. No evidence that Keener or any officer at EVTC conducted an investigation after the crash of EVTC was provided at trial.

**E. Keener's preparation of EVTC's SEC filings**

50. Keener oversaw the preparation of EVTC's annual reports and other filings with the Securities and Exchange Commission. By his signature, Keener represented that they were accurate in all material respects.

51. The current report on Form 8-K filed by EVTC on August 9, 1999 and signed by Keener disclosed that the company had sold stock to "a private investor," but did not identify Ballow as the beneficial owner of the investor. The Form 8-K also failed to describe Ballow's control and influence over EVTC or his intentions and role as a promoter of EVTC stock.

52. On January 6, 2000, EVTC filed its annual report on Form 10-K and an amended annual report for the year ending September 30, 1999. In these annual reports, EVTC and Keener did not disclose that Ballow beneficially owned nearly 13.7% of EVTC stock through the BVI companies. The annual reports also did not describe Ballow's influence at EVTC, his position as part of the control group, or his role as a promoter of EVTC stock.

53. Ballow's beneficial ownership of EVTC stock, his position as part of the control group, and his role as a stock promoter were also not disclosed in EVTC's Form 10-K for the year ended September 30, 2000, filed on December 29, 2000. At the time of the filing, Ballow had increased his beneficial ownership of EVTC stock

beyond the initial 13.7% through restricted purchases by Growth Stocks and Growth Securities and by market purchases.

**F. Defendant Casias's involvement in Ballow's activities**

54. Defendant Earl Shawn Casias was the registered representative on accounts at Paradise Valley in the names of Belfast Ventures, Baldridge Ventures, and Redstone Financial Group. These accounts were brought to Casias by Ballow. Casias had previously been the registered representative at another broker-dealer for an account with Texas Investments, also a Ballow corporation. Casias knew that Ballow was in the business of financing and consulting for small public companies, and that the Belfast Ventures, Baldridge Ventures, and Redstone Financial Group accounts were trading in stocks of companies with which Ballow was involved. Casias also traded directly with these accounts through an inventory account that he controlled at Paradise Valley. Casias stated at trial that all trades at Paradise Valley had to be executed by a registered representative.

55. Casias met with Ballow in person twice: once with Garcia and Barnwell in Las Vegas, and another time with Garcia in Houston. In 2000, Casias approached Ballow to help finance a business that Casias wanted to start.

56. In 1999, Casias executed orders by sending them to the main Paradise Valley office in Phoenix. Around March 2000, Casias's business had grown to the point that Scott Green, a Paradise Valley trader, moved to Casias's office in San Diego to assist him in his work. Green executed trades on Casias's orders. Casias and Green were the only persons employed at the San Diego office.

57. Barnwell did not order trades in the Belfast Ventures account, but gave the account statements to Ballow. Ballow made the orders for trades in the Baldridge Ventures account. Casias spoke with Ballow at least once a week in 2000. Ballow would ask Casias for information, such as quotes, on stocks, including EpicEdge and EVTC. Ballow's accounts provided 10% or more of Casias's income at Paradise Valley.

**G. EVTC stock holdings in Ballow's Paradise Valley accounts**

58. The Paradise Valley Belfast Ventures account accumulated over 100,000 shares of EVTC in 1999, paying approximately $2 to $4 per share. The account had acquired 167,500 shares of EVTC by the end of March 2000. In April 2000, Ballow purchased over 260,000 shares of EVTC stock in the Belfast account at approximately $11 to $12 per share. Purchases were made on almost every trading day in April. These purchases were made with money borrowed from Paradise Valley and/or its clearing broker. The margin debt in this account increased from less than $500,000 at the end of March to more than $1.9 million by the end of April.

59. By the end of April 2000, the Belfast Ventures account by itself held more than 5% of the total issued and outstanding EVTC stock.

60. The Belfast Ventures account stopped buying EVTC stock in May, but Ballow shifted his purchasing to the Baldridge Ventures account. The Baldridge Ventures account purchased EVTC on almost every trading day in May 2000 and accumulated more than 150,000 shares by the end of the month. At the end of May, the Belfast and Baldridge accounts together held 622,998 shares of EVTC, or 8.4% of the 7,378,752 EVTC shares issued and outstanding at that time.

61. Margin debts on the Belfast and Baldridge accounts totaled approximately $5.4 million at the end of May 2000. The debt, for which Casias was personally liable, was supported almost entirely by EVTC and EpicEdge stock. The EVTC and EpicEdge holdings in the two accounts were worth approximately $17.4 million at the end of May 2000.

62. Casias knew that the Belfast and Baldridge accounts were trading stocks that were Ballow "projects." Moreover, he knew that purchases of EVTC stock were occurring at historically high prices. Casias also knew that Paradise Valley received subpoenas about these two accounts, and acknowledged that his job as a registered representative required some diligence beyond merely executing orders for clients. Nevertheless, Casias testified that he did not ask Ballow about his relationship with EVTC or intentions as to the accounts.

63. While Casias was executing purchases of EVTC stock for the Ballow-related accounts, Paradise Valley made an unusually large number of EVTC trades during the last half-hour of trading days, and Paradise Valley was the high bidder in an unusually large number of locked and crossed markets for EVTC stock (*i.e.*, markets where the high bid equaled or exceeded the low offer). On twelve occasions, Paradise Valley executed purchases of EVTC at prices higher than the offer during crossed markets. At trial, Casias did not challenge Plaintiff's exhibits or contentions regarding this pattern of trades, and provided no contradictory evidence.

64. In approximately May 2000, Paradise Valley became concerned about the level of margin debt in the Belfast Ventures and Baldridge Ventures accounts. Casias's assistant was instructed to obtain information from the account holders, which he did by obtaining extremely brief statements in letters signed by Garcia and Barnwell. Barnwell wrote his letter at Ballow's request. The Barnwell letter purported to give information about Belsly Investments, even though Belsly Investments did not have an account at Paradise Valley.

65. The margin debt in the Belfast Ventures account did not decrease during the summer of 2000. The margin debt in the Baldridge Ventures account was reduced to $2.2 million in June 2000, but that was accomplished by selling the

only stocks in the account other than EVTC and EpicEdge. Meanwhile, Ballow continued to buy EVTC in the Baldridge Ventures account.

66. At trial, Casias claimed that he relied on the advice of compliance personnel at Paradise Valley and its clearing broker. There is no evidence, however, that Casias provided information to the compliance employees about Ballow, his control or influence over the accounts that were trading Ballow stocks, the nature of Ballow's business as a financier, or other facts concerning Ballow and the corporate account holders (other than the brief letters about their financial condition discussed above). Casias kept even Scott Green ignorant about Ballow.

**H. EpicEdge stock holdings in Ballow's Paradise Valley accounts**

67. Between July 1999 and April 2000, Ballow deposited 690,700 shares of EpicEdge stock into the Belfast Ventures and Baldridge Ventures accounts. This stock originated from the initial January 1999 issuance described above. Belfast Ventures and Baldridge Ventures sold approximately 330,000 shares of that stock between July 1999 and September 2000. Casias assumed that Belfast Ventures and Baldridge Ventures were trading stocks that Ballow had financed. Nevertheless, Casias did not inquire as to how the Belfast and Baldridge accounts had obtained the stock that was deposited. The initial 1999 issuance of the EpicEdge stock had been registered with the SEC on Form S-8, and thus the stock certificates bore no restrictive legends. No registration statement covered the resales by the Belfast and Baldridge accounts, however.

68. The EpicEdge stock that Ballow sold through Paradise Valley was part of a larger distribution of EpicEdge stock that began almost immediately after the stock was issued in January 1999, and that helped finance Ballow's purchases of EVTC stock. In January and March 1999, Belfast Ventures deposited 531,760 shares of newly issued EpicEdge stock into a Belfast Ventures account at Pacific International, and transferred the stock to the account of Redstone Financial Group at Pacific International. That stock was sold to the public between January and March 1999. The distribution of EpicEdge stock continued at Paradise Valley.

69. While the Belfast Ventures and Baldridge Ventures accounts at Paradise Valley were selling EpicEdge stock, they also engaged in occasional purchases of the stock. Belfast Ventures bought 42,295 shares of EpicEdge between July 1999 and April 2000, and Baldridge Ventures bought 5,800 shares in April 2000. While EpicEdge stock was being distributed, Ballow was making special efforts to sell EpicEdge stock in off-market trades, for which he hired Garcia and others. The distribution was large in magnitude because, as stated in the Form S-8 registration statement, the outstanding stock of EpicEdge (then Loch Explorations) at the time of the issuance was only 1,295,286 shares. The 2,304,700 shares initially issued in January 1999 to Belsly Investments, Belfast Ventures, and Baldridge Ventures thus nearly tripled the outstanding stock, and most of that stock was deposited

into brokerage accounts and sold. Casias was a participant in the distribution of EpicEdge, because he executed the sales for the accounts.

70. After EpicEdge and EVTC stock prices simultaneously collapsed in September 2000, Ballow told Casias that he had a purchaser in Panama that would take care of the unsecured debts in his Paradise Valley accounts. However, this deal never went through. Casias settled with Paradise Valley and its clearing broker for a portion of the debts.

**I. Keener's alleged benefit**

71. During the manipulation of EVTC stock in 2000, Keener realized $229,607 from sales of his own EVTC shares. Keener testified that his net profit from EVTC stock sales over three years was $162,000.

72. Keener (and EVTC) also benefited from Ballow's manipulation of EVTC stock in that EVTC was able to use its stock to make acquisitions, as described in its 2000 annual report.

73. At trial, Keener stated that he was currently employed in real estate development (primarily residential). Keener also testified that he, along with four other partners, bought a privately held company in England that manufactures audio mixing consoles.

**J. Casias's alleged benefit**

74. Casias received commissions for trades in the three Ballow accounts at Paradise Valley. Casias's commissions from July 21, 1999 through September 22, 2000 in the Belfast Ventures, Baldridge Ventures, and Redstone Financial Group accounts for trades in EpicEdge and EVTC totaled $334,097.

75. At trial, Casias testified that he was currently engaged in business development consulting and shareholder communications.

**K. Barnwell's alleged benefit**

76. Under Barnwell's initial oral employment agreement with Ballow, he was to receive compensation of $90,000 a year for his services to Ballow. However, Barnwell was never actually paid that much. During 1998, 1999, and 2000, Barnwell received a total amount of compensation relating to his services for Ballow's companies (including Polar Shield, Posh International, and EVTC) of $31,700.00. In addition, Barnwell received $42,188.53 in compensation and expense reimbursement, for a total of $73,888.53 from Ballow-owned or controlled entities.

77. At the time of trial, Barnwell was self-employed as a new home and remodeling contractor through his company, Bayside Developers, Inc. Barnwell's 2005 Form-1099 indicates that he received $11,000 in compensation from Bayside that year. In 2006, Barnwell made $25,000 through Bayside. Barnwell also received $18,190 in Social Security benefits in 2006. Barnwell has also received small dividends from stock holdings: $534.06 from Exxon Mobil stock in 2005, and $611.55 in 2006. Barnwell estimated his projected earnings in 2007 to be approximately $35,000.

## II. CONCLUSIONS OF LAW – LIABILITY (Keener and Casias)

1. The applicable standard of proof in SEC enforcement actions is a preponderance of the evidence. *E.g.*, *SEC v. Ginsburg*, 362 F.3d 1292, 1298 (11th Cir. 2004) ("The SEC must prove violations of § 10(b) and § 14(e), and their supplementary Rules, by a preponderance of the evidence, and may use direct or circumstantial evidence to do so."); *SEC v. First Fin. Group of Tex.*, 645 F.2d 429, 434-35 (5th Cir. 1981) (finding that the preponderance of the evidence standard should be applied in SEC civil enforcement actions for preliminary injunctive relief, and citing the D.C. Circuit's application of the preponderance of the evidence standard in SEC civil enforcement actions for permanent injunctive relief, *SEC v. Savoy Indus., Inc.*, 587 F.2d 1149, 1168 (D.C. Cir. 1978)); *see also SEC v. Moran*, 922 F. Supp. 867, 888 (S.D.N.Y. 1996) ("The majority of lower courts which have addressed this issue have determined that in civil enforcement actions the proper standard of proof is preponderance of the evidence").

2. At trial, Plaintiff demonstrated by a preponderance of the evidence that Defendants Keener and Casias were liable for each violation of the securities laws claimed against them.

### A. Securities Anti-fraud Violations: Claims for Relief 1, 2 and 3 (Keener and Casias)

3. The first three claims for relief in the SEC's First Amended Complaint assert that Defendants Earl Shawn Casias and David A. Keener:

    a. with scienter, in connection with the purchase or sale of securities, employed a scheme to defraud, made an untrue statement of material fact or a material omission, or engaged in business practices operating as a fraud upon a purchaser or seller and knowingly used means of interstate transportation or communication in furtherance of the fraudulent conduct, in violation of Section 10(b) of the Exchange Act and Rule 10b-5 (15 U.S.C. § 78j(b) and 17 C.F.R. § 240.10b-5);

    b. with scienter, in the offer or sale of securities, employed a scheme to defraud, in violation of Section 17(a)(1) of the Securities Act (15 U.S.C. § 77q(a)(1)); and

c. in the offer or sale of securities, negligently obtained money by means of untrue statements of material facts or material omissions, or engaged in business practices operating as a fraud upon a purchaser or seller, in violation of Sections 17(a)(2) and (3) of the Securities Act (15 U.S.C. §§ 77q(a)(2) and (3)).

4. Casias violated these anti-fraud provisions by participating with Harris "Butch" Ballow in the manipulation of EVTC stock.

5. Keener violated these anti-fraud provisions by participating with Ballow in the manipulation of EVTC stock, and by failing to disclose material information in EVTC's public filings about Ballow and his involvement with EVTC stock.

6. The "in connection with" requirement has been met because the manipulation in which Casias and Keener participated involved sales and purchases of EVTC stock, and because EVTC's public filings were reasonably calculated to influence trading in EVTC stock. *See, e.g.*, *Alley v. Miramon*, 614 F.2d 1372, 1378 (5th Cir. 1980) (citing *Sargent v. Genesco, Inc.*, 492 F.2d 750, 763 (5th Cir. 1974)).

7. The fraud occurred "in the offer or sale" of securities because EVTC, Keener, and Ballow sold EVTC stock while the manipulation was ongoing and because Ballow and Casias sold EpicEdge stock to finance the EVTC purchases.

**1. Manipulation**

8. The fraudulent conduct in which Keener and Casias participated included impermissible manipulation of individual stocks and of the market.

9. Section 9(a)(2) of the Exchange Act (15 U.S.C. § 78i(a)(2)) makes it illegal "[t]o effect, alone or with one or more persons a series of transactions in any security registered on a national securities exchange . . . creating actual or apparent active trading in such security, or raising or depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others." Section 9(a) applies to exchange-traded securities. For over-the-counter securities, the same prohibitions have been incorporated into and are actionable under the general antifraud provisions (Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, and Rule 10b-5). *See, e.g.*, *Sunrise Fin. v. Painewebber, Inc.*, 4 F. Supp. 2d 1035, 1043 (D. Ut. 1998); *Walck v. Am. Stock Exch., Inc.*, 565 F. Supp. 1051, 1063 (E.D. Pa. 1981); *SEC v. Resch-Cassin & Co.*, 362 F. Supp. 964, 975 (S.D.N.Y. 1973).

10. Market manipulation includes "the creation of deceptive value or market activity for a security, accomplished by an intentional interference with the free forces of supply and demand." *Swartwood, Hesse, Inc.*, 50 S.E.C. 1301, 1307 (1992) (citing *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 (1976) and *Schreiber v.*

*Burlington N., Inc.*, 472 U.S. 1 (1985)). Trade-based manipulative schemes, such as purchases in order to induce higher prices, are illegal even if they involve "real customers, real transactions, and real money," as long as the trader has the necessary manipulative purpose. *E.g., Markowski v. SEC*, 274 F.3d 525, 528-29 (D.C. Cir. 2001); *Seagoing Uniform Corp. v. Texaco, Inc.*, 705 F. Supp. 918, 934-35 (S.D.N.Y. 1989).

11. Repeated purchases designed to prop up a market price by drying up the public float of a security constitute illegal manipulation. *E.g., Resch-Cassin & Co.*, 362 F. Supp. at 976-77; *L.C. Wegard & Co.*, 53 S.E.C. 607 (1998); *Patten Secs. Corp.*, 51 S.E.C. 568, 573 (1993); *Halsey, Stuart & Co.*, 30 S.E.C. 106, 112 (1949). Repeated large purchases are particularly deceptive when accompanied by secret sales that help finance the purchases. *Crane Co. v. Westinghouse Airbrake*, 419 F.2d 787, 794-95 (2d Cir. 1969).

12. The plaintiff is not required to prove that a defendant's manipulative conduct actually influenced prices, nor is it necessary to show that the manipulation was enhanced by false press releases or other false information pertaining to the issuer's business value. It is sufficient to show that the conduct creates a false impression of supply and demand for the stock. *GFL Advantage Fund, Ltd. v. Colkitt*, 272 F.3d 189, 205-07 (3d Cir. 2001).

13. Proof of manipulation is usually established by circumstantial evidence. *Seagoing Uniform Corp.*, 705 F. Supp. at 934. "Proof of a manipulation almost always depends on inferences drawn from a mass of factual detail. Findings must be gleaned from patterns of behavior, from apparent irregularities, and from trading data. When all of these are considered together, they can emerge as ingredients in a manipulative scheme designed to tamper with free market forces." *Pagel, Inc.*, 48 S.E.C. 223, 226 (1985).

14. The fact that a manipulation cannot be sustained and that perpetrators of the manipulation suffer losses does not provide a defense to the conduct. A failed manipulative scheme is nevertheless actionable. *Markowski*, 274 F.3d at 529; *R.B. Webster Investments, Inc.*, 51 S.E.C. 1269, 1274 (1994).

15. Ballow, through numerous brokerage accounts that he controlled, manipulated EVTC stock by means of a lengthy series of purchases of EVTC stock between approximately July 1999 and September 2000. The purchases were designed to increase the price and volume of EVTC stock, and caused the stock to be substantially overvalued in 2000. Ballow's manipulation was financed by sales of stock of EpicEdge (formerly known as Design Automation Systems, Inc., and Loch Exploration, Inc.), by margin loans using such stock as collateral, and by off-market sales of EVTC stock. Ballow withdrew cash from brokerage firms to further the manipulation, and shielded himself from having practical financial liability for the debts caused by these withdrawals by using off-shore entities as debtors on the margin loans.

16. Keener may be exposed to liability stemming from Ballow's manipulative scheme even if he did not perform the actual manipulative acts. In *U.S. v. Hall*, 48 F. Supp. 2d 386, 387 (S.D.N.Y. 1999), the court noted that a company may hire legitimate stock promoters to educate the public, but may not unlawfully manipulate the market by hiring illegitimate promoters who seek to drive the stock price up through illegal activity. *See also U.S. v. Charnay*, 537 F.2d 341, 344 (9th Cir. 1976) (involving individuals who caused others to perform manipulative trades); *In re Secs. Litig. BMC Software, Inc.*, 183 F. Supp. 2d 860, 905 (S.D. Tex. 2001) (following Second Circuit holdings that primary liability may be imposed on persons who had knowledge of fraud and assisted in its perpetration); *SEC v. Enter. Solutions, Inc.*, 142 F. Supp. 2d 561 (S.D.N.Y. 2001) (holding issuer's consultant liable for fraud by the issuer, where court found that consultant was principal architect of scheme).

17. Keener assisted in Ballow's manipulations and violated anti-fraud provisions of the securities laws by providing ongoing assistance in Ballow's fraudulent activities; and by bringing Ballow to EVTC for the purpose of developing investor interest in the company's stock and to raise EVTC's stock price to a higher level, without conducting due diligence about Ballow or his companies.

18. Keener personally benefited from the manipulation, directly by selling EVTC stock at artificially enhanced prices and indirectly because EVTC sold stock at artificially enhanced prices (both to investors for cash and to other companies in connection with acquisitions by EVTC). Keener's primary motive appeared to be, however, helping the company itself. Motivation to manipulate, combined with manipulative trades, establishes manipulative purpose, and shifts the burden of going forward with evidence to the defendant. *Seagoing Uniform Corp.*, 705 F. Supp. at 935. Moreover, even if Keener held a *bona fide* belief that EVTC's stock was undervalued, that belief did not not justify manipulative trading to raise the stock's price. *Halsey, Stuart & Co.*, 30 SEC at 112.

19. Registered representatives are liable for participating in manipulations carried out by their customers, if they know or recklessly disregard red flags of such manipulations. In *SEC v. Resch-Cassin & Co.*, 362 F. Supp. 964 (S.D.N.Y. 1973), the court held that "[b]y engaging in transactions with the public, . . . a broker-dealer impliedly represents that the price of a transaction is reasonably related to a price prevailing in a market that is free, open and competitive." *Id.* at 978. A registered representative is liable for executing manipulative trades even if he does not share the manipulative purpose of his client: "[A]s long as [the registered representative], with scienter, effected the manipulative buy and sell orders, [his] personal motivation for manipulating the market is irrelevant in determining whether he violated Section 10(b). . . . Like lawyers, accountants, and banks who engage in fraudulent and deceptive practices at their clients' direction, [the registered representative] is a primary violator despite the fact that someone else directed the market manipulation scheme." *SEC v. U.S. Envtl., Inc.*, 155 F.3d

107, 112 (2d Cir. 1998). *See also Graham v. SEC*, 222 F.3d 994, 1005-06 (D.C. Cir. 2000) (citing cases holding that a registered representative has "an independent duty to use due diligence" and "a duty to investigate" when faced with "unusual factors" and "red flags"). *Graham* also holds that a registered representative may not rely on the supervisory structure of his or her firm to execute these duties, but must personally ensure that they are performed. *Id.*

20. Brokers' liability for manipulations derives from their position as gatekeepers for persons who wish to enter the public markets: "Since brokers and dealers occupy so strategic a position in the capital markets and since few manipulations can succeed without the assistance of these professionals, the requirement that they exercise reasonable care when confronted by indicia of manipulative activity is implicit in the statutory scheme." *Edward J. Mawod & Co.*, 46 S.E.C. 865, 875 (1977).

21. Manipulative schemes may involve certain technical conduct, such as repeatedly trading stocks near the end of the trading day (known as "marking the close"). *See, e.g.*, *Newby v. Enron Corp. (In re Enron Corp. Secs., Derivative, & ERISA Litig.)*, 235 F. Supp. 2d 549, 579 (S.D. Tex. 2002) (noting that "marking the close" and trading designed to raise or lower the price of a security are examples of conduct that violates the antifraud provisions). Marking the close is particularly likely to require the involvement of a registered representative.

22. "Price leadership" is another indicator of manipulation that often requires involvement by a registered representative. *See Resch-Cassin*, 362 F. Supp. at 976. Bidding for stock at levels higher than the market price tends to substantiate manipulative intent. *Wright v. SEC*, 112 F.2d 89, 92 (2d Cir. 1940).

23. Some of Casias's trading patterns, when he was the registered representative on Paradise Valley accounts controlled by Ballow, demonstrate his involvement as a broker in Ballow's maniuplations. An unusually large number of EVTC trades occurred in the last half hour of the trading day, which is evidence that Casias marked the close. Casias also caused Paradise Valley to maintain bids at a time when offer quotations for EVTC equaled or fell below the bids, and executed purchases during crossed markets at prices higher than the offer, which is evidence of price leadership in an effort to maintain the price of EVTC stock.

24. Casias benefited from the manipulation by receiving commissions for the trades that he executed.

**2. Scienter for the manipulation**

23. Violations of Section 17(a)(1) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder require a showing of scienter. *Aaron v. SEC*, 446 U.S. 680, 701-02 (1980). Actions pursuant to Sections 17(a)(2) and (3) of the Securities Act do not require scienter. *Id.* Scienter is defined as a "mental

state embracing intent to deceive, manipulate or defraud." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976). Scienter may be established by a showing of "reckless indifference," *Rubinstein v. Collins*, 20 F.3d 160, 169 (5th Cir. 1994), which is not inexcusable negligence, but rather an extreme departure from the standards of ordinary care that presents "a danger of misleading buyers or sellers which is either known to the defendant or is so obvious that the defendant must have been aware of it." *Id.*

24. Scienter in manipulation cases "need not be established by direct evidence. Rather, the scienter requirement is satisfied when it has been shown that defendants pursued a course of conduct that constituted market manipulation as a matter of law." *SEC v. Lorin*, 877 F. Supp. 192, 198 (S.D.N.Y. 1995), *vacated in part on other grounds by* 76 F.3d 458 (2d Cir. 1996) (citing *Herman & MacLean v. Huddleston*, 459 U.S. 375, 391 n.30 (1983)).

25. "Circumstantial evidence can support a strong inference of scienter." *Abrams v. Baker Hughes Inc.*, 292 F.3d 424, 430 (5th Cir. 2002); *see also Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 n.30 (1983) ("the proof of scienter required in fraud cases is often a matter of inference form circumstantial evidence. If anything, the difficulty of proving the defendant's state of mind supports a lower standard of proof. In any event, we have noted elsewhere that circumstantial evidence can be more than sufficient."); *Nathenson v. Zonagen Inc.*, 267 F.3d 400, 410 (5th Cir. 2001) ("There does not appear to be any question that under the PSLRA circumstantial evidence can support a strong inference of scienter."). Further, the Court must view the evidence presented not in isolation, "but taken together as a whole to see if they raise the necessary strong inference of scienter." *Abrams*, 292 F.3d at 431.

26. At trial, the Court found that Defendant Keener sufficiently established his lack of direct knowledge of Ballow's fraudulent schemes. However, given the testimony by other witnesses (and by Keener himself) about the extent and irregularity of Ballow's activities, the Court did not find it credible that Keener – a certified public accountant and the chief financial officer of the company – altogether lacked scienter. In the Court's view, Keener met the "reckless disregard" standard in his EVTC-related dealings with Ballow. Despite the fact that Ballow assumed a major role as an investor in EVTC and a promoter of EVTC stock, Keener failed to perform any substantive investigation into Ballow or his entities, despite (or perhaps because of) EVTC's precarious financial condition and the large amount of stock being distributed to those entities. Even after the collapse of EVTC stock, Keener declined to investigate Ballow, despite the fact that Ballow (and individuals who had purchased restricted EVTC stock from Ballow) asked Keener to back date the stock certificates to reduce the restriction period.

27. Keener also displayed reckless disregard of numerous red flags pointing to Ballow's manipulation of EVTC:

- Ballow demonstrated great interest in EVTC and was willing to purchase and promote its stock, despite the fact that numerous other investment institutions and funds refused to offer EVTC acceptable terms of investment.

- Ballow switched the number of investors in the initial EVTC stock offering to three, after Keener had already sent a subscription agreement for one investor. When the three revised subscription agreements were returned to EVTC, they bore names other than those Ballow had provided. All three of the entities, however, listed Ballow's personal residence as their business address.

- Ballow requested that the stock certificates be issued in various denominations and be delivered directly to him, which Keener found "odd." Payment from Ballow for the subscriptions was slow, requiring Keener to make repeated calls. Two of the three checks that Ballow eventually sent by way of payment did not clear, and were replaced by other forms of payment.

- Keener heard Ballow say that he had a substantial interest in Belsly Investments. Keener was also aware that Ballow had some sort of stake in Afreegift.com.

- Keener considered Ballow to be a major EVTC shareholder and knew or heard that Ballow was acquiring EVTC stock in the market.

- Evans Systems, which Ballow had touted as an example of his ability to enhance a company's stock, crashed in part due to lack of ability to raise money.

- Keener associated Barnwell and Garcia with Ballow, and their names and signatures appeared on checks and other paperwork related to the "investment" entities.

- Ballow requested weekly DTC reports and Keener caused EVTC to pay for them, obtain them, and give them to Ballow.

28. The Court did not find credible Keener's testimony that he may have performed an internet search about Ballow, and that he felt he could rely on the advice of his attorneys that nothing more needed to be done.

29. Defendant Casias also displayed at least reckless disregard of Ballow's actions, and therefore possessed the requisite scienter. Casias knew that Ballow was in the business of financing and promoting public companies, and knew that the Belfast Ventures, Baldridge Ventures, and Redstone Financial Group accounts were trading almost exclusive in stocks of companies with which Ballow was involved. Casias knew or recklessly disregarded the facts that 1) the Belfast account had acquired more than 5% of EVTC's outstanding stock without any public disclosure having made; and 2) the Belfast and Baldridge accounts appeared to be

related, and together had acquired more than 5% of EVTC's outstanding stock without any public disclosure having been made. Moreover, Casias had a strong incentive to question Ballow about the activities in the accounts because the Ballow-related accounts were highly margined, Casias was personally liable for their debts, and the Ballow-related accounts continued to buy EVTC even through it was already trading at historic highs. Nevertheless, Casias did not admit to questioning Ballow or anyone else connected to the accounts concerning their reasons and intentions for accumulating EVTC stock. Moreover, Casias did not provide information about Ballow, Ballow's business background, or Ballow's involvement with the accounts to his management or compliance department, even after they began to question the margin debts in the accounts. In sum, Casias knew or recklessly disregarded that Ballow was controlling or attempting to control the market for EVTC stock, and was using Casias as a participant in those efforts.

**3. False and misleading statements (Keener)**

30. Keener, as an officer of a public company, is liable for failing to disclose facts relating to the manipulation of EVTC stock that he knew or recklessly disregarded. *E.g.*, *In re Initial Pub. Offering Secs. Litig.*, 241 F. Supp. 2d 281, 382 (S.D.N.Y. 2003) ("The duty to disclose falls on all parties aware of the manipulation, or who take advantage of it. . . . It is enough that all Defendants -- Underwriters, Issuers, and Individuals alike -- are alleged to have known of or recklessly disregarded the manipulation, and to have used that knowledge to their advantage."). Failure to reveal that a price move is not due to the free operation of market forces constitutes a material misrepresentation and omission under Section 10(b) and Rule 10b-5. *Charnay*, 537 F.2d at 351; *see also United States v. Regan*, 937 F.2d 823, 829 (2d Cir. 1991).

31. Duties to disclose facts in public filings are partly set forth by regulations, particularly Regulation S-K (17 C.F.R. § 229). A duty to disclose can also arise when statements in public filings are incomplete. "A duty to speak the full truth arises when the defendant undertakes to say anything," *Rubinstein*, 20 F.3d at 170 (quoting *First Va. Bankshares v. Benson*, 559 F.2d 1307, 1317 (5th Cir. 1977)). Misleading failures to disclose are omissions that fall within the anti-fraud provisions. "A misstatement or omission is material if there is a substantial likelihood that a reasonable investor would consider it important in making an investment decision." *Basic, Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988).

32. Keener signed and was responsible for public filings by EVTC on Forms 10-K and 8-K during the relevant period of time. EVTC's annual reports did not disclose Ballow's plans, activities, and efforts to manipulate the stock price. Moreover, EVTC disclosed the identities and backgrounds of its officers, directors, and major shareholders, but did not disclose the control and influence Ballow had on EVTC stock and management of the company. In addition, because Ballow was affiliated with EVTC, purchases in the market by accounts

that he controlled were akin to issuer repurchases. Repurchases by issuers and their affiliates must be disclosed where material. "Investors and particularly the issuer's shareholders should be able to rely on a market that is set by independent market forces and not influenced in any manipulative manner by the issuer or persons closely related to the issuer." *Purchases of Certain Equity Secs. by the Issuer and Others; Adoption of Safe Harbor*, Exch. Act Rel. No. 34-19244 (Nov. 17, 1982), at 1.

33. The current report on Form 8-K filed by EVTC on August 9, 1999 disclosed that the company had sold stock to "a private investor." At that time, Keener believed that the private investor was Baldridge Ventures, and had reason to know that Baldridge Ventures was controlled by Ballow. Keener also had reason to know that the purchase would cause Baldridge Ventures to own more than 10% of EVTC's outstanding stock. Nevertheless, the Form 8-K did not identify Baldridge Ventures or Ballow as the investor, or fully describe Ballow's control and influence over EVTC.

34. Keener's failures to disclose were material. Ballow's purchases were sufficient to have an impact on the market for EVTC stock. Reasonable investors would consider it important that an individual who was, in effect, part of the EVTC control group was purchasing and/or manipulating the stock in an effort to increase public interest. Reasonable investors would also consider it important that Ballow was exercising control and influence over EVTC and its board. Disclosure of Ballow's identity could have led reasonable investors to perform their own investigation into Ballow's background, an investigation that EVTC and Keener failed to perform.

**B. Violations of Rule 101 of Regulation M (Anti-manipulation): Claim for Relief 4 (Casias)**

35. The SEC's fourth claim for relief alleges that Defendant Casias violated Rule 101 of Regulation M (17 C.F.R. § 242.101). Regulation M is designed to prohibit certain persons who are interested in the success of a securities distribution from improperly generating public interest in the distribution by purchasing the securities being distributed or inducing others to do so (a practice known as "purchasing during a distribution"). Rule 100 of Regulation M (17 C.F.R. § 242.100) defines a distribution under Regulation M to include any offering of securities that can be distinguished from ordinary trading transactions by both its magnitude and the presence of special selling efforts and methods. Rule 101 forbids any "distribution participant" or "affiliated purchaser" of the distribution participant from bidding for, purchasing, or attempting to induce others to bid for or purchase a covered security during a distribution of that security. Rule 100 defines a distribution participant as any person "who has agreed to participate or is participating in a distribution." Regulation M does not include in its terms a scienter requirement.

36. The January 1999 distribution of EpicEdge stock to the BVI companies was a Regulation M distribution. The Belfast Ventures and Baldridge Ventures accounts were selling security holders in the distribution of EpicEdge stock. The distribution was large in magnitude and nearly tripled EpicEdge's outstanding stock. Casias was a participant in the distribution in that he executed the sales for the accounts. Casias violated Rule 101 by executing purchases of EpicEdge in the Belfast and Baldridge accounts while they were also involved in the distribution of that stock.

**C. Failure to Register Securities Under Sections 5(a) and (c): Claim for Relief 8 (Keener and Casias)**

37. The SEC's eighth claim for relief alleges that Keener and Casias sold securities when no registration statement was filed or in effect as to those securities. Pursuant to Sections 5(a) and (c) of the Securities Act, "Unless a registration statement is in effect as to a security, if shall be unlawful for any person, directly or indirectly (1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or (2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale. . . . [and] it shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security." 15 U.S.C. § 77e(a) and (c). Scienter is not required under Sections 5(a) and (c) because "[t]he Securities Act of 1933 imposes strict liability on offerors and sellers of unregistered securities." *Swenson v. Engelstad*, 626 F.2d 421, 424 (5th Cir. 1980) (citing *Hill York Corp. v. Am. Int'l Franchises, Inc.*, 448 F.2d 680, 686 (5th Cir. 1971)).

38. To establish a *prima facie* case for a violation of Section 5, Plaintiff must show that (1) no registration statement was in effect as to the securities, (2) the defendant sold or offered to sell these securities, and (3) interstate transportation or communication and the mails were used in connection with the sale or offer of sale. *SEC v. Cont'l Tobacco Co*., 463 F.2d 137, 155 (5th Cir. 1972).

39. After the *prima facie* case has been made out, the burden shifts to the defendant to prove that he was entitled to an exemption under Section 5. *Cont'l Tobacco*, 463 F.2d at 156 (citing, *inter alia*, *SEC v. Ralston Purina*, 346 U.S. 119, 126 (1953), *Strahan v. Pedroni*, 387 F.2d 730, 732 (5th Cir. 1967)). However, "these enumerated 'exempted transactions' must be narrowly viewed since the Securities Act of 1933 is remedial legislation entitled to a broad construction." *Cont'l Tobacco*, 463 F.2d at 155 (citing *Hill York Corp. v. Am. Int'l Franchises, Inc*., 448 F.2d 680, 690 (5th Cir. 1971)).

**1. Violations of Sections 5(a) and 5(c) by Keener**

40. Keener and Cannan, Sr., at Ballow's direction, caused EVTC to issue restricted stock to Ballow-controlled entities. Ballow and his associates resold some of that stock in off-market transactions to individual investors in several different states. As a result of the resales, Ballow and the entities that he controlled acted in interstate commerce as underwriters, as defined in Section 2(a)(11) of the Securities Act. *See* 15 U.S.C. § 77b(a)(11) ("The term 'underwriter' means any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking"). Ballow was the beneficial owner of the stock that was resold; nevertheless, under the definition of the term, a person need not be an owner of stock to be an underwriter. Neither the initial issuance nor the resale of the stock were registered with the SEC.

41. As defined in the Securities Act, "The term 'sale' or 'sell' shall include every contract of sale or disposition of a security or interest in a security, for value." 15 U.S.C. § 77b(a)(3). Ballow and his associates offered and sold EVTC stock to individual investors at a discount and received the full discounted price in payment for the stock.

42. Defendant Keener bears the burden of proving that the sales of EVTC stock to Ballow-controlled entities were exempt from registration. *Cont'l Tobacco*, 463 F.2d at 156.

43. Rule 506 of Regulation D (17 C.F.R. § 230.506) exempts an issuer who offers and sells restricted securities without general solicitation to a limited number of investors, as long as those investors are sophisticated enough to understand the merits and risks of the offering, and certain information is furnished to the investors. Regulation D allows the investors to use a "purchaser representative," as long as he or she "is not an affiliate, director, officer, or other employee of the issuer, or beneficial owner of 10 percent or more of any class of the equity securities or 10 percent or more of the equity interest in the issuer . . .". 17 C.F.R. § 230.501(h).

44. Plaintiff has adequately demonstrated that Ballow was the beneficial owner of the EVTC stock purchased by the BVI entities. Therefore, the Regulation D exemption does not apply.

45. Section 4(2) of the Securities Act exempts from registration "transactions by an issuer not involving any public offering." 15 U.S.C. § 77d(2). The Fifth Circuit has adopted a four-factor analysis to distinguish private and public offerings, under which the Court must examine "1) the number of offerees and their

relationship to the issuer; 2) the number of units offered; 3) the size of the offering; and 4) the manner of the offering." *E.g.*, *Mary S. Krech Trust v. Lakes Apartments*, 642 F.2d 98, 101 (5th Cir. 1981). The Fifth Circuit has noted that these types of transactions are "limited in order to prevent and exempt a private offering from becoming a mere conduit for a public offering without a registration statement," *id.*, and the Supreme Court has stated that "[t]he design of the statute is to protect investors by promoting full disclosure of information thought necessary to informed investment decision." *SEC v. Ralston Purina Co.*, 346 U.S. 119, 124 (1953).

46. Because Ballow was an underwriter of the stock, the Section 4(2) exemption does not apply. Ballow used sham entities to purchase the stock, and did so with a view towards distributing the stock to other persons. Ample evidence was introduced at trial demonstrating that the restricted stock issued to the BVI entities was indeed resold to numerous individual investors.

47. The issuer and its officers who sell securities on behalf of the issuer must take reasonable steps to determine whether a stock purchaser is purchasing for investment. Placing restrictive legends on certificates and obtaining written statements from the purchaser regarding investment intent is helpful but not sufficient in meeting that obligation. Purchases by persons engaged in the business of buying and selling securities require careful scrutiny for the purpose of determining whether such person may be acting as an underwriter for the issuer. *Custer Channel Wing Corp.*, 247 F. Supp. at 489-90. Keener knew that Ballow engaged in the business of buying and selling securities, and the fact that Ballow demanded issuance of EVTC stock in numerous small denominations was a red flag that Ballow intended to offer and sell the stock to members of the public.

48. Keener violated Sections 5(a) and (c) of the Securities Act by causing EVTC to offer and sell its stock to Ballow, an underwriter, in transactions that were not registered with the Commission and for which no exemption applied.

**2. Violations of Sections 5(a) and 5(c) by Casias**

49. Ballow and entities under his control acted as underwriters in the distribution of EpicEdge stock that Ballow acquired through Frank Moss in 1999. EpicEdge (then known as Loch Exploration) issued 2,304,700 shares to the BVI companies in January 1999. This issuance was registered with the SEC on Form S-8, but that registration covered only the initial issuance, not any resales. *See* L. Loss & J. Seligman, *Fundamentals of Securities Regulation* 439 (5th ed. 2004) ("[T]hough in form an issuer registers its *securities*, in substance it registers *offerings* – or, more precisely perhaps, securities *with respect* to specified offerings.") (emphasis in the original). 531,760 of the Belfast Ventures shares were delivered to a Belfast Ventures account at Pacific International Securities, from which they were transferred to another Pacific International account in the name of Redstone

Financial Group. Almost all of the shares were sold between January and March 1999. Resales that occur shortly after the original acquisition strongly imply that the purchaser acquired the securities with a view to resale. *SEC v. Cavanagh*, 1 F. Supp. 2d 337, 370 (S.D.N.Y. 1998); *see also Vohs v. Dickson*, 495 F.2d 607, 620-21 (5th Cir. 1974).

50. Resales of the EpicEdge stock continued in July 1999, when Belfast Ventures opened an account at Paradise Valley and deposited the remaining Belfast Ventures EpicEdge shares. Belfast Ventures both bought and sold EpicEdge over the ensuing months, but sales exceeded purchases. The stock was more than exhausted by April 2000, at which time Belfast Ventures deposited another 77,760 shares of EpicEdge. These shares trace back to the initial January 1999 issuance of stock to Belsly Investments. Belfast Ventures did not make any more sales of EpicEdge after April, but Baldridge Ventures opened an account at Paradise Valley in March 2000, deposited 480,000 shares of EpicEdge that trace back to the January 1999 issuance, and sold approximately 55,000 shares of the stock through mid-September 2000. These transactions all occurred in interstate commerce, and demonstrate a continuing distribution of EpicEdge stock over a period that covered 20 months.

51. Casias was the registered representative who executed the EpicEdge sales at Paradise Valley in the Belfast and Baldridge accounts. Liability under Sections 5(a) and 5(c) extends beyond those who sell stock in unregistered transactions, and includes all necessary participants in the sale of the stock. *Cavanagh*, 1 F. Supp. 2d at 372. Registered representatives in particular have a duty to comply with Section 5 when selling stock for a customer. *Distrib. by Broker-Dealers of Unregistered Secs.,* Sec. Act Rel. No. 4445 (Feb. 2, 1962); *see also Wonsover v. SEC*, 205 F.3d 408, 415 (D.C. Cir. 2000); *Kane v. SEC*, 842 F. 2d 194, 198-99 (8th Cir. 1988). These authorities state that a registered representative should obtain information from the customer concerning the source of the stock, and that the inquiry should be most extensive for sales of large blocks of little-known or lightly traded issuers.

52. Casias, who had worked for several other broker-dealers and was experienced in determining when stock sales needed to be registered, knew that the Ballow had a business relationship with EpicEdge. Nevertheless, Casias made no effort to determine how the Ballow-affiliated holders of the accounts he managed acquired the stock, or whether they had a legitimate exemption from registration. Casias thus violated Sections 5(a) and (c) of the Securities Act.

**D. Aiding and Abetting Filing Violations: Claim for Relief 10 (Keener)**

53. The SEC's tenth claim for relief alleges that Defendant Keener aided and abetted EVTC in making material false and misleading statements in annual reports on Form 10-K and current reports on Form 8-K filed with the SEC. Pursuant to Section 13(a) of the Exchange Act, 15 U.S.C. § 78m(a), every issuer of a security

registered under Section 12 of the Exchange Act (15 U.S.C. § 78l) must file annual and quarterly reports with the SEC, as required by SEC rules. Rule 13a-1 (17 C.F.R. § 240.13a-1) requires the filing of annual reports. Rule 13a-11 (17 C.F.R. § 240.13a-11) requires registrants to file a current report on Form 8-K unless the same information has been previously reported. Rule 12b-20 (17 C.F.R. § 240.12b-20) requires the addition of "such further material information, if any, as may be necessary to make the required statements, in the light of the circumstances under which they are made, not misleading." The official Forms make reference to Regulation S-K for instructions on the information required to be disclosed in the reports.

54. Item 403(a) of Regulation S-K (17 C.F.R. § 229.403(a)) required EVTC to disclose in its annual reports the identity of all persons who owned more than 5% of its outstanding stock, as of the most practicable date. EVTC, acting through Keener, filed an annual report on Form 10-K in January 2000 for the fiscal year ended September 30, 1999. This annual report did not disclose the identity of the purchasers (the BVI companies) of the 792,801 shares of EVTC (13.7% of total outstanding shares) that Ballow negotiated with Keener. The annual report used December 22, 1999 as the date for reporting the number and market value of its outstanding shares. The shares were issued to the Ballow entities before December 22, 1999.

55. Under SEC Rule 13-d3 (17 C.F.R. § 240.13-d3), beneficial ownership applies to securities that a person has a right to acquire and right to control disposition within 60 days. The BVI purchasers had a right to acquire the EVTC stock and to control its disposition on September 30, 1999, and thus qualified as beneficial owners as of that date. These entities were never, however, identified as beneficial owners of the EVTC stock.

56. EVTC, acting through Keener, similarly failed to disclose Ballow's beneficial ownership of more than 5% of EVTC's stock in an annual report filed on Form 10-KSB, for the year ended September 30, 2000. EVTC also failed to identify Ballow and disclose his control of more than 10% of EVTC stock in a current report on Form 8-K.

57. Item 403 of Regulation S-K defines "person" to include any "group," as defined in Section 13(d)(3) of the Exchange Act (15 U.S.C. § 78m(d)(3)). That definition reads as follows: "When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a 'person' for the purposes of this subsection." Even if the purchasers of 792,801 shares in 1999 were technically separate entities, they were a group under that definition, because Ballow controlled the entities and maintained their EVTC stock in his possession. At the time of the purchases, Keener viewed the off-shore entities as a group.

58. Under Section 20(a) of the Securities Exchange Act, 15 U.S.C. § 78t(a), the SEC may charge controlling individuals with aiding and abetting their company's violations. In order to establish Keener's liability for aiding and abetting, Plaintiff must show "(1) that the primary party committed a securities violation; (2) that the aider and abettor had 'general awareness' of its role in the violation; and (3) that the aider and abettor knowingly rendered 'substantial assistance' in furtherance of it." *Abbott v. Equity Group, Inc.*, 2 F.3d 613, 621 (5th Cir. 1993).

59. At trial, Plaintiff sufficiently demonstrated that Keener, as chief financial officer and later president of EVTC, knowingly rendered "substantial assistance" in furthering EVTC's filing of false and misleading annual and current reports. These reports failed to disclose Ballow's beneficial ownership of EVTC stock in an amount greater than 5% of the total outstanding shares, failed to identify Ballow as a member of the EVTC control group, and failed to disclose Ballow's control and influence over EVTC.

**E. Defendant Barnwell**

60. Before trial of this case, Defendant Barnwell consented to entry of an injunction without admitting or denying the allegations of Plaintiff's complaint, leaving only the issue of remedies to be determined at trial. The Court's order of June 9, 2005 stated that "Defendant [Barnwell] will be precluded from arguing that he did not violate the federal securities laws as alleged in the Complaint; (b) Defendant may not challenge the validity of the Consent or this Injunction; [and] (c) solely for the purposes of [a motion by the Commission to set disgorgement and penalty], the allegations of the Complaint shall be accepted as and deemed true by the Court."[2]

61. The SEC's First Amended Complaint alleges that Barnwell violated the anti-fraud provisions (claims for relief 1-3) by participating in the manipulation of EVTC stock; Rule 102 of Regulation M (claim for relief 5) by purchasing EVTC and EpicEdge stock at a time when he was a selling shareholder in distributions of both securities; the provisions requiring filing of ownership reports (claims for relief 6 and 7) by participating in a group that acquired EVTC and EpicEdge stock but did not make the filings required by Section 13(d)(1) of the Exchange Act and Rules 13d-1 and 13d-2 thereunder for 5% shareholders, and Section 16(a) of the Exchange Act and Rule 16a-3 thereunder for 10% shareholders; and the securities registration provisions (claim for relief 8) by offering and selling EVTC and EpicEdge stock when no registration statement was filed or in effect as to such securities.

62. Barnwell possessed the requisite scienter. He knowingly or recklessly acted as Ballow's "right hand man" in maintaining books and records, lending his name on numerous occasions for Ballow-controlled accounts, writing and cashing checks on Ballow's behalf, and generally assisting Ballow in distancing himself from his own fraudulent schemes.

[2] *See* Docket No. 89.

## III. CONCLUSIONS OF LAW – REMEDIES (Keener, Casias, and Barnwell)

63. Plaintiff seeks the following relief against the following defendants: 1) permanent injunctions against Keener and Casias; 2) disgorgement by Keener, Casias, and Barnwell; 3) civil penalties under the Exchange Act against Keener, Casias, and Barnwell; and 4) an officer and director bar against Keener.

### A. Injunctive Relief (Keener and Casias)

64. Section 21(d)(1) of the Exchange Act, 15 U.S.C. § 78u(d)(1), and Section 20(b) of the Securities Act, 15 U.S.C. §77t(b), authorize the SEC to seek a permanent injunction "upon a proper showing that the defendant is engaged or is about to engage in violations of the securities laws." *SEC v. Zale Corp.*, 650 F.2d 718, 720 (5th Cir. 1981) (quotations omitted). The "critical question" in determining whether an injunction should issue is "whether defendant's past conduct indicates that there is a reasonable likelihood of further violations in the future." SEC v. Blatt, 583 F.2d 1325, 1334 (5th Cir. 1978). The Fifth Circuit has set forth a number of factors that are relevant to this determination: (1) the egregiousness of the defendant's actions; (2) the isolated or recurrent nature of the violation; (3) the degree of scienter involved; (4) the sincerity of the defendant's assurances against future violations; (5) the defendant's recognition of the wrongful nature of his conduct; and (6) the likelihood that the defendant's occupation will present opportunities for future violations. Id. at 1334 n.29.

65. None of the parties has submitted extensive argument regarding the above-listed factors. In post-trial briefing, the SEC states only that "[c]onsideration of these factors demonstrates that defendants Keener and Casias should be enjoined. Both defendants' assistance and participation in the fraud was ongoing, not just one isolated incident. Both defendants refuse to accept any responsibility for their actions and gave no assurance against future violations." Keener argues that "[h]e simply was deceived by Ballow, as others had been. He has not violated securities laws in the past, nor is he likely to do so in the future. As stated previously, he did not have sufficient scienter in the actions presented. Additionally, he is not currently an officer of a public company, so it is therefore unlikely that he will even have the opportunity for any future violations."

66. Although the evidence presented at trial was not overwhelming, the Court finds that Plaintiff nevertheless demonstrated by a *preponderance* of the evidence that a permanent injunction should be entered against Defendant Keener.

- **Egregiousness:** The Court wishes to reiterate its impression that Keener was primarily motivated not by personal benefit, but by a desire to strengthen EVTC. However, the following facts demonstrate the gravity of Keener's conduct, starting from the time Ballow first became involved with EVTC through the aftermath of the stock collapse. First, and most seriously, Keener

utterly failed to investigate Ballow or his off-shore companies, despite numerous indications that Ballow was using sham entities to manipulate EVTC stock. Given the precarious financial condition of the company and its striking dependence on investment and promotion by Ballow, Keener's almost total avoidance of due diligence was an egregious oversight. Second, Keener participated in the preparation of numerous SEC filings that contained material errors and misrepresentations – namely, the failure to disclose accurate information about Ballow, his beneficial ownership of a large percentage of EVTC stock, his involvement in and influence over EVTC, and the identities of the off-shore purchasers of EVTC stock. In part because of Keener's failings, Ballow was able to build large positions in EVTC with the SEC and other investors none the wiser, and to profit from the illegal resale of restricted EVTC stock to individual investors. Ballow's manipulations led directly to the collapse of EVTC and EpicEdge stock in September 2000.

- **Isolated or recurrent nature of the violation:** Evidence adduced at trial demonstrated that Keener's misconduct was recurrent, from at least spring 1999 through fall 2000. Keener failed to heed early warning signs regarding Ballow's conduct; for example, Keener did not inquire with anyone other than Ballow as to why Evans Systems stock crashed in May 1999. From the initial negotiation of the EVTC stock purchase by the BVI companies to irregularities with the stock certificates, to problems with payment, to the ultimate collapse of EVTC, Keener appears to have turned a blind eye to most, if not all, indications of Ballow's manipulation. Further, none of the EVTC filings with the SEC from August 1999 through the EVTC collapse properly disclosed information about Ballow, his beneficial ownership, or the off-shore investors.

- **Degree of scienter:** The Court has found that Keener demonstrated reckless disregard of Ballow's fraudulent schemes. While not as serious as direct knowledge, Keener's head-in-the-sand approach was particularly harmful given that only he and Cannan, Sr. appeared to make serious decisions about EVTC.

- **Sincerity of Keener's assurances against future violations:** At trial, Keener gave no assurances against future violations of the securities rules and regulations.

- **Keener's recognition of the wrongful nature of his conduct:** While Keener displayed some regret that, at the time, he had not recognized certain signs of Ballow's misconduct, Keener seemed truly to believe that he had not done anything improper. The Court cannot find that, at trial, Keener recognized the wrongful nature of his conduct.

- **Likelihood that Keener's occupation will present opportunities for future violations:** Keener testified that he is currently engaged primarily in

residential real estate development. Keener is also part-owner of a privately held company in England. There seems to be a low probability that his current occupations will present opportunities for future violations of the securities laws. The other five factors addressed above, however, all tilt towards entry of a permanent injunction against Keener. Therefore, this factor is outweighed.

67. The Court similarly finds that, by a preponderance of the evidence, a permanent injunction should be entered against Defendant Casias. In fact, the factors weigh more strongly in favor of injunctive relief against Casias than against Keener.

- **Egregiousness:** As a registered representative on three accounts held by Ballow-affiliated companies, Casias performed essentially as the instrument of many of Ballow's manipulations. An experienced broker-dealer, Casias had worked with Ballow before, and Ballow brought the Baldridge, Belfast, and Redstone accounts to Casias at Paradise Valley. Casias executed trades in these accounts with great frequency through much of 1999 and 2000. Casias's trades exhibited unusual characteristics: frequently "marking the close," for example, and trading in "locked" and "crossed" markets. Casias also assisted the Ballow entities in purchasing during a distribution (of EpicEdge stock), and allowed those entities to run up significant amounts of margin debt in their accounts. Casias never provided compliance employees at Paradise Valley with complete information about Ballow and his activities. Paradise Valley eventually received subpoenas about the Belfast and Baldridge accounts, and when EVTC and EpicEdge collapsed, Paradise Valley had to settle the unsecured debts remaining in the accounts with Casias and its trading broker.

- **Isolated or recurrent nature of the violation:** Casias's participation in and furtherance of Ballow's stock manipulations was anything but isolated. Rather, Casias executed trades in the Ballow-controlled accounts with great frequency through much of 1999 and 2000.

- **Degree of scienter:** The Court has ruled that Casias displayed at least reckless disregard of Ballow's fraudulent schemes. As a broker on three Ballow accounts, Casias could observe large blocks of stocks moving in and out; knew that the stocks were primarily from companies with which Ballow was involved; and knowingly engaged in practices such as marking the close, trading in crossed and locked markets, and purchasing during a distribution.

- **Sincerity of Casias's assurances against future violations:** At trial, Casias provided no assurances against future violations of the securities laws.

- **Casias's recognition of the wrongful nature of his conduct:** At trial, Casias displayed absolutely no recognition that his conduct in relation to the Ballow-controlled accounts was improper. Casias stated that the market was generally

vigorous at the time, and that he saw no reason to question the trades he was executing or the historically high price of EVTC stock. Casias also theorized that Plaintiff had purposely waited to investigate until after EVTC and EpicEdge collapsed, in order to cast a broad net for individuals with potential liability. Casias further opined that Plaintiff was essentially taking advantage of brokerage firms.

- **Likelihood that Casias's occupation will present opportunities for future violations:** Casias testified that he now works mostly in business consulting. Further, Casias stated that his brokerage license had expired. He therefore appears unlikely to violate the securities laws in his current occupation. Again, however, this factor is outweighed by the other five, all of which favor entry of a permanent injunction against Casias.

## A. Disgorgement (Keener, Casias, Barnwell)

68. A court may exercise its equitable powers to order a defendant to "disgorge the profits that he obtained by fraud." *Blatt*, 583 F.2d at 1335. Disgorgement serves the purpose of "forc[ing] the defendant to give up . . . the amount by which he was unjustly enriched," so as to "deprive the wrongdoer of his ill-gotten gain." *Id.* Before a court can order disgorgement, the SEC must provide a reasonable approximation of profits or losses avoided and show that the defendant's violations proximately caused these profits or avoided losses. *See, e.g.*, *SEC v. Happ*, 392 F.3d 12, 31 (1st Cir. 2004) ("The amount of disgorgement 'need only be a reasonable approximation of profits causally connected to the violation.'") (citing *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1231 (D.C. Cir. 1989)). The amount of disgorgement should thus be "the amount with interest by which the defendant profited from his wrongdoing." *Blatt*, 583 F.2d at 1335. As the SEC points out, courts have found that a defendant should not be permitted to avoid disgorgement by claiming a lack of funds. *See SEC v. Thorn*, No. 2:01-CV-2902002, WL 31412439 at *3 (S.D. Ohio Sept. 30, 2002) ("Financial hardship does not preclude the imposition of an order of disgorgement.").

69. Under federal law, the award of pre-judgment interest in a securities fraud action is a question of fairness resting within the district court's discretion. *Wolf v. Frank*, 477 F.2d 467, 479 (5th Cir. 1973) (citing *Blau v. Lehamn*, 368 U.S. 403, 414 (1962).

### 1. Keener

70. Plaintiff asks the Court to order disgorgement by Keener in the amount of $162,000, the amount that Keener had personally profited from selling EVTC stock over the course of three years. Keener argues that he "only sold EVTC stock for his personal financial needs. His sales of EVTC stock were consistent with his trading of similar stocks. The Plaintiff presented no evidence that Defendant Keener obtained his profits through fraud."

71. Keener admitted at trial that he had netted a total of $162,000 from his sales of EVTC shares. The evidence further established that most of Keener's holdings in EVTC stock resulted from his exercise of options at a price between 65 cents and $1. Keener then stated that he sold the stock at prices ranging, on the high end, from $6 to $12, but that after the collapse, he sold shares at $1 or less.

72. There appears to be no question that Keener's profits from selling EVTC shares were enhanced to at least some extent by Ballow's manipulation of the stock, and Keener's participation therein. Plaintiff offered no evidence, however, that would aid the Court in determining the percentage of Keener's profits that could be attributed to the manipulation, as opposed to normal market factors.

73. The Court is therefore unwilling both to assume that the entirety of Keener's profits constituted "ill-gotten gains" *and* to award pre-judgment interest. The Court **GRANTS** Plaintiff's request for disgorgement by Keener of $162,000, but **DENIES** the request for pre-judgment interest.

**2. Casias**

74. With regard to Casias, Plaintiff requests disgorgement of $334,097, the total amount that Casias received in commissions for EVTC trades in the three Ballow accounts. At trial, Casias admitted to earning approximately $300,000 from Ballow or Ballow-referred accounts. Casias stated that while that figure constituted "a good portion" of his income, it was not the majority of his business.

75. In the Court's view, Casias's improper conduct as an instrument of Ballow's manipulations thoroughly pervaded his work on the three Ballow-controlled accounts at Paradise Valley. It appears that most, if not all, of the commissions that Casias has (approximately) admitted earning could be considered ill-gotten gains. Therefore, Court is not inclined to reduce the amount requested, and **GRANTS** Plaintiff's request for disgorgement of $334,097.

76. The Court believes that this amount of disgorgement is sufficiently punitive, when viewed in combination with the other remedies assessed herein against Casias. The Court again exercises its discretion to **DENY** Plaintiff's request for pre-judgment interest.

**3. Barnwell**

77. Defendant Barnwell introduced evidence at trial that he received only $73,888 in compensation while he worked for Ballow, $42,188.53 of which was compensation and expense reimbursement. Plaintiff, on the other hand, directed the Court's attention to additional sums that moved in and out of bank accounts that Barnwell handled for Ballow, and argued that Barnwell should disgorge $226,445.

78. Plaintiff did not persuade the Court by a preponderance of the evidence that the larger figure constituted compensation paid by Ballow to Barnwell. It was evident during Barnwell's testimony that one of his primary responsibilities was to funnel Ballow's money through bank accounts that Barnwell nominally controlled, so that Ballow could conduct his own affairs in cash. The evidence introduced by Plaintiff did not adequately demonstrate that Barnwell was keeping the majority of the bank deposits he made while working for Ballow for his own use.

79. Plaintiff also did not persuade the Court by a preponderance that the whole of the lower $73,888 figure comprised compensation by Ballow to Barnwell. Plaintiff's Trial Exhibit 55, a summary of Barnwell's out-of-pocket unreimbursed expenses relating to Ballow companies such as Polar Shield and EVTC, supported Barnwell's contention that not all of the $73,888 constituted compensation.

80. Barnwell does admit, though, that he received $31,700.00 in compensation. Barnwell derived this income entirely from assisting in Ballow's schemes and distancing Ballow from his own manipulations. The entire amount of Barnwell's compensation should be considered ill-gotten gains. Therefore, the Court **ORDERS** disgorgement of $31,700.00 as to Barnwell.

81. The Court's June 9, 2005 order entering an injunction against Barnwell stated that Barnwell would pay prejudgment interest on any disgorgement of ill-gotten gains, to be calculated from October 10, 2000 based on the rate of interest used by the Internal Revenue Service for the underpayment of federal income tax as set forth in 26 U.S.C. § 6621(a)(2). With regard to Barnwell, the Court agrees that payment of prejudgment interest is appropriate, given the relatively small amount of disgorgement that has been ordered. The Court **GRANTS** Plaintiff's request for the award of prejudgment interest against Barnwell, to be calculated as described above.

**A. Civil Penalties (Keener, Casias, Barnwell)**

82. Section 21(d)(3) of the Exchange Act, 15 U.S.C. § 78u(d)(3), authorizes the imposition of civil money penalties for violations of securities rules and regulations. The purpose of the civil penalty is to both punish and deter future violations. *E.g.*, *SEC v. Moran*, 944 F. Supp. 286, 296 (S.D.N.Y. 1996).

83. A three-tier range of penalty amounts may be imposed. Under 17 C.F.R. § 201.1001, Table I, the maximum penalty amounts are $5,500 under the first tier, $55,000 under the second tier, and $110,000 under the third tier. Second tier penalties may be imposed where the defendant's violation "involved fraud, deceit, manipulation or deliberate or reckless disregard of a regulatory requirement." 15 U.S.C. §§ 78u(d)(3)(B)(ii). Third tier penalties may be imposed where the defendant's violation additionally "directly or indirectly resulted in substantial

losses or created a significant risk of substantial losses to other persons." 15 U.S.C. §§ 78u(d)(3)(B)(iii)(bb), 77t(d)(2)(C)(II).

84. Courts may examine a number of factors in determining whether civil penalties should be imposed, including many of those discussed above in relation to injunctive relief. *See, e.g.*, *SEC v. Lybrand*, 281 F. Supp. 2d 726, 730 (S.D.N.Y. 2003) (setting forth the following general factors relied upon by courts in imposing penalties): (1) the egregiousness of the violations at issue; (2) the defendant's degree of scienter; (3) the repeated nature of the violations; (4) the defendant's failure to admit wrongdoing; (5) whether the violations created substantial losses or the risk thereof; (6) the defendant's lack of cooperation or honesty with authorities; and (7) whether the penalty should be reduced because of the defendant's demonstrated current and future financial condition).

85. Plaintiff requests third-tier penalties against all three defendants. Keener states simply that the SEC has presented insufficient evidence that he meets the criteria for imposition of a civil penalty. Barnwell asserts that his "current and anticipated financial condition, his age and occupation, coupled with the absence of factors (1) thru [sic] (4) would make the imposition of a civil penalty, or in the alternative, no more than a tier one penalty, inappropriate and unduly harsh."

86. With regard to Defendants Keener and Casias, the Court has already found that their actions relating to the manipulation of EVTC (and, in Casias's case, EpicEdge) stock were serious; they both possessed at least severe recklessness; their violations were not isolated; and they both failed to admit their wrongdoing at trial.

87. On the other hand, Plaintiff has not demonstrated the extent of the losses, if any, created by Keener's and Casias's conduct. While both Keener and Casias maintained their belief that they had not violated securities laws, there is no evidence that they were uncooperative or dishonest – at least in their own minds – with authorities during the investigation of this case. Finally, no evidence was introduced establishing the current incomes or financial conditions of either Keener or Casias.

88. The Court has already ordered Keener and Casias to disgorge, respectively, $162,000 and $334,097. In addition, the Court is mindful of the high cost, both financial and personal, that the last several years of litigation have likely taken on both defendants. Finally, while the Court found that Plaintiff established, by a preponderance of the evidence, Keener's and Casias's violations of securities laws and the appropriateness of injunctive relief and disgorgement, the evidence was not overwhelming, and the Court's decision was a close one. For these reasons, the Court **DENIES** Plaintiff's request to impose civil penalties on Defendants Keener and Casias.

89. Defendant Barnwell consented before trial to the entry of injunctive relief against him and agreed not to contest Plaintiff's assertions that he had violated securities laws. The Court therefore accepts the allegations of the First Amended Complaint stating that Barnwell violated securities laws with the requisite scienter. However, Barnwell entered into an agreement with Plaintiff rather than pursue his claims at trial, and appears honestly to have cooperated with authorities. Further, Plaintiff has not demonstrated the extent of the losses caused by Barnwell's conduct in this matter. Finally, the Court notes that at trial, evidence was introduced to show that Barnwell's current occupation as a self-employed new home and remodeling contractor has yielded only a modest income in the last three years. No evidence suggested that Barnwell possessed other significant financial resources.

90. The Court has ordered Barnwell to disgorge $31,700 and prejudgment interest thereupon, in addition to the injunctive relief that was imposed before trial. In light of the remedies that have already been assessed against Barnwell, the Court does not believe that further punishment or deterrence is necessary. Plaintiff's request for a civil penalty against Barnwell is **DENIED.**

**A. Officer and Director Bar (Keener)**

91. The federal securities laws also authorize a court to bar a defendant from acting as an officer or director of a publicly-traded company if he or she is found to have violated Section 10(b) of the Exchange Act or Section 17(a)(1) of the Securities Act. 15 U.S.C. §§ 78u(d)(2), 77t(e). At the time of Defendant's violations in 1999 and 2000, these laws authorized the imposition of such an officer/director bar "if the person's conduct demonstrates substantial unfitness to serve as an officer or director." *Id.* Courts generally consider six factors in determining whether to impose an officer/director bar: (1) the egregiousness of the underlying securities law violation; (2) whether the defendant is a repeat-offender; (3) the defendant's 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 the defendant's misconduct will recur. *SEC v. Patel*, 61 F.3d 137, 141 (2d Cir. 1995); *SEC v. First Pac. Bancorp*, 142 F.3d 1186, 1193 (9th Cir. 1998). While these factors are considered useful, a court need not apply all of these factors in a given case, nor is a court limited to these six. *Patel*, 61 F.3d at 141 ("A district court should be afforded substantial discretion in deciding whether to impose a bar to employment in a public company.").

92. Plaintiff requests imposition of the officer and director bar against Keener, stating that "he was an officer of EVTC and sought out Ballow to bring up the price and volume of EVTC while ignoring or recklessly disregarding numerous red flags regarding the manipulation and because of his refusal to accept responsibility for his integral part in the manipulation." Keener argues that application of the bar is inappropriate.

93. The Court has already found that Keener's conduct was recurrent and displayed a certain level of egregiousness, and that he recklessly disregarded numerous signs of Ballow's manipulations and fraudulent schemes. As chief financial officer and later president of EVTC, Keener appeared to be one of only two primary decision makers for the company (along with Cannan, Sr.), and the devastating collapse of EVTC stock in September 2000 must be laid largely at Keener's feet. Although the Court believes that Keener acted mostly to help the company, he did derive some personal benefit, having profited to the tune of $162,000 from the sale of EVTC stock at prices that were at least partially inflated by Ballow's manipulation. Finally, the Court does acknowledge that Keener's current involvement in the real estate business and his part-ownership of a privately held company do not strongly suggest that his misconduct will recur.

94. This last factor, however, is outweighed by the first five. Further, the Court continues to be troubled by Keener's almost total abdication of due diligence during the relevant events, and his continued failure to acknowledge – rather than simply regret – his wrongdoing in enabling Ballow to carry out his schemes. For these reasons, the Court finds that Plaintiff's request for imposition of the officer and director bar against Keener should be **GRANTED**.

## IV. CONCLUSION

For the reasons stated above, **JUDGMENT IS ENTERED** for Plaintiff and against Defendants David Keener, Earl Shawn Casias, and Marvin M. Barnwell. Permanent injunctions are hereby **ENTERED** against Keener and Casias, pursuant to Section 21(d)(1) of the Exchange Act, 15 U.S.C. § 78u(d)(1), and Section 20(b) of the Securities Act, 15 U.S.C. §77t(b). Keener is **ORDERED** to disgorge $162,000; Casias is **ORDERED** to disgorge $334,097; and Barnwell is **ORDERED** to disgorge $31,700 and prejudgment interest thereon. Plaintiff's request for civil penalties against each of the defendants is **DENIED.** The Court hereby **BARS** Keener from acting as an officer or director of any publicly traded company, under 15 U.S.C. §§ 78u(d)(2), 77t(e).

**IT IS SO ORDERED.**

**SIGNED** this 5th day of September, 2007.

KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE

**TO INSURE PROPER NOTICE, EACH PARTY WHO RECEIVES THIS ORDER SHALL FORWARD A COPY OF IT TO EVERY OTHER PARTY AND AFFECTED NON-PARTY EVEN THOUGH THEY MAY HAVE BEEN SENT ONE BY THE COURT.**