IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

SECURITIES AND EXCHANGE COMMISSION, **Plaintiff**	§	
v.	§	**CIVIL ACTION NO. 1:10-CV-740-JRN**
MARLEEN AND JOHN JANTZEN, **Defendants.**	§	

FINAL JUDGMENT

Before the Court in the above-entitled and styled cause of action are Defendants' Brief Regarding Civil Penalty (Clerk's Dkt. No. 78) and Plaintiff's Brief in Support of its Motion for Civil Penalty (Clerk's Dkt. No. 80). The SEC asks that the Court impose the maximum civil penalties permissible under Section 21A of the Insider Trading and Securities Fraud Enforcement Act ("ITSA"), [Section 21A of the Exchange Act, 15 U.S.C. § 78u-1], on both Defendants. Both Defendants object to the imposition of any civil penalties. Having considered the Parties' respective Briefs, the Court concludes that Defendants shall pay civil money penalties in the amount of $26,920.50 each.

Under the Insider Trading and Securities Fraud Enforcement Act ("ITSA") [Section 21A of the Exchange Act, 15 U.S.C. § 78u-1], the Court may impose a civil penalty for insider trading not to exceed three times the "profit gained or loss avoided" from the defendant's insider trading.

In the present case, the Court found that Defendants realized one-day profits from their illegal insider trading of $26,920.50. Therefore, the Court may, within its sound discretion, order civil penalties against each Defendant in any amount between $0 and $80,761.50.

The legislative history of the Insider Trading Sanctions Act, the predecessor to the current statute, makes clear that Congress intended the penalty to serve as a deterrent mechanism because disgorgement alone "merely restores a defendant to his original position without extracting a real penalty for his illegal behavior." H.R. Rep. No. 98-355, 98th Cong. 2d Sess., 7-8 (1984), reprinted in U.S.C.C.A.N. 2274, 2280-81.

In determining the appropriate civil penalty, courts consider such factors as: (1) the defendant's culpability; (2) the amount of profits gained; (3) the deterrent effect of a penalty given the defendant's net worth; (4) the repetitive nature of the unlawful act; (5) whether the defendant has a prior record of securities violations; (6) other penalties that arise out of defendants' conduct; and (7) whether the defendant is employed in the securities industry. *SEC v. Svoboda,* 409 F. Supp.2d 331, 347 (S.D.N.Y. 2006); *SEC v. Sekhri*, 2002 WL 31100823, at *18 (S.D.N.Y. July 22, 2002).

The facts and circumstances surrounding the Jantzens' insider trading scheme and subsequent prosecution certainly demand some form of civil penalty. However, Defendants' actions in this case are not as egregious as in other insider trading cases where courts have imposed the maximum penalty.

Defendants' culpability in this case supports imposing maximum penalties for all the reasons that the Court imposed a permanent injunction and found that Defendants acted with a high degree of *scienter*. Particularly compelling evidence of culpability includes the premeditated creation of an alibi for their illegal trading (downloading the July article on the day of the money transfer and then

later claiming they did not know when it was downloaded), Marleen's unprecedented act of transferring her money to the account in John's name (although both had access to it) to conceal the trading and to avoid detection, and falsifying a document (John's diary) to attempt to concoct a defense to the insider trading. *See* Clerk's Dkt. No. 77 at pp. 13- 18.

The amount of profits Defendants realized from their illegal trading and their net worth are intertwined for purposes of determining an appropriate penalty. Although a $27,000 profit is somewhat insignificant when considering the profits reaped in many other insider trading cases, it was a substantial haul for Defendant. It is uncontested that the trading profits almost doubled the couple's liquid net worth, which weighs in favor of a larger penalty.

However, the Court also takes notice that Defendants have taken inconsistent positions throughout this action regarding their net worth. In his declaration filed during summary judgment briefing, John represented that he had access to $300,000 in investment assets to prove that the $27,000 profit was insignificant when compared to the couple's net worth [*See* Clerk's Dkt. No. 50-1 at pp. 1-2; *cf.*, Marleen's testimony that she used 50% of her available cash flow in the trades.] Further, Defendants' Response to Plaintiff's Motion for Summary Judgment states, "When viewed in the correct context the $5,000 invested in the Perot Systems options was less than 2% of the funds available to the Jantzens for investment." Clerk's Dkt. No. 50 at p. 5. However, these statements were offered with no support. Defendants now state that their net worth, not including exempt assets but including the disgorgement liability, is a negative $45,950. *See* Clerk's Dkt. No. 78 Ex. E. Although the Court is troubled by the inconsistency of Defendants' assertions regarding their net worth, it will not take the more far-fetched statements into consideration for purposes of crafting the civil penalties. Thus, the third factor—the Defendants' net worth—supports the imposition of a

minimal civil penalty, as any penalties in addition to the disgorgement will almost certainly have the desired deterrent effect on Defendants given their current financial predicament.

The SEC also concedes that the fourth and fifth factors weigh against a maximum penalty. The SEC has not alleged that Defendants have engaged in any other acts of insider trading, and neither Defendant has a prior record of securities violations.

As for the sixth factor, the SEC states that it intends to initiate an administrative proceeding against John before an Administrative Law Judge. The outcome of the hearing may include barring or suspending John from participating in the securities industry. Such an outcome would have a devastating effect on the couple's finances, as John has previously been employed as a securities broker and Marleen is no longer employed with Dell. However, the fact that John is a Commission-registered broker also weighs in favor of the imposition of a penalty against him under the seventh factor. As a licensed professional in the securities industry, John can be presumed to have known the securities laws, but he ignored them and acted with a high degree of *scienter* in carrying out the couple's insider trading scheme. Marleen was not a securities professional, but her breach of duties to her employer are what enabled John to have access to the inside information in the first place.

As a final matter, the SEC asks that the Court take into consideration Defendants' conduct throughout this litigation. Although the Court agrees that some of Defendants' claims and pleadings, such as the motion for summary judgment and motion to strike, were indeed frivolous, it cannot agree with the SEC that this should weigh in favor of more severe civil penalties. Defendants should not be prejudiced by actions of counsel, and the Court is not aware of any other court taking vexatious litigation tactics into consideration when assessing a civil penalty.

The other factors are decidedly mixed. In imposing civil penalties, the Court must effectuate

the Congressional intent demonstrated by ITSA to effect punishment on those who violate securities laws. Giving all factors addressed above their due weight, the Court concludes that an appropriate civil penalty is equal to one time the profit gained, to be assessed against each Defendant. The Court therefore imposes on John and Marleen Jantzen civil penalties of $26,920.50 each. Although these penalties are considerably less than those requested by the SEC, they represent a severe reprimand given each Defendant's financial condition and will adequately deter future criminal conduct.

IT IS THEREFORE ORDERED that Defendants and Defendants' agents, servants, employees, attorneys, and all persons in active concert or participation with them who receive actual notice of this Final Judgment by personal service or otherwise are permanently restrained and enjoined from violating, directly or indirectly, Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") [15 U.S.C. § 78j(b)] and Rule 10b-5 promulgated thereunder [17 C.F.R. § 240.10b-5], by using any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, in connection with the purchase or sale of any security:

(a) to employ any device, scheme, or artifice to defraud;

(b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or

(c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

IT IS FURTHER ORDERED that Defendants and Defendants' agents, servants,

employees, attorneys, and all persons in active concert or participation with them who receive actual notice of this Final Judgment by personal service or otherwise are permanently restrained and enjoined from violating, directly or indirectly, as to Defendant John Jantzen and Defendant Marleen Jantzen, Section 14(e) of the Exchange Act [15 U.S.C. § 78n(e)] and Rule 14e-3(a) [17 C.F.R. § 240.14e-3(a)] promulgated thereunder, and in addition, as to Defendant Marleen Jantzen, Exchange Act Rule 14e-3(d) [17 C.F.R. § 240.14e- 3(d)] in connection with any tender offer or request or invitation for tenders, from engaging in any fraudulent, deceptive, or manipulative act or practice, by:

(a) purchasing or selling or causing to be purchased or sold the securities sought or to be sought in such tender offer, securities convertible into or exchangeable for any such securities or any option or right to obtain or dispose of any of the foregoing securities while in possession of material information relating to such tender offer that Defendant knows or has reason to know is nonpublic and knows or has reason to know has been acquired directly or indirectly from the offering person; the issuer of the securities sought or to be sought by such tender offer; or any officer, director, partner, employee or other person acting on behalf of the offering person of such issuer, unless within a reasonable time prior to any such purchase or sale such information and its source are publicly disclosed by press release or otherwise; or

(b) communicating material, nonpublic information relating to a tender offer, which Defendant knows or has reason to know is nonpublic and knows or has reason to know has been acquired directly or indirectly from the offering person; the issuer of the securities sought or to be sought by such tender offer; or any officer, director, partner, employee, advisor, or other person acting on behalf of the offering person of such issuer, to any person under circumstances in which it is reasonably foreseeable that such communication is likely to result in the purchase or sale of securities in the manner described in subparagraph (a) above, except that this paragraph shall not apply to a communication made in good faith

(i) to the officers, directors, partners or employees of the offering person, to its advisors or to other persons, involved in the planning, financing, preparation or execution of such tender offer;

(ii) to the issuer whose securities are sought or to be sought by

such tender offer, to its officers, directors, partners, employees or advisors or to other persons involved in the planning, financing, preparation or execution of the activities of the issuer with respect to such tender offer; or

(iii) to any person pursuant to a requirement of any statute or rule or regulation promulgated thereunder.

IT IS FURTHER ORDERED that Defendants are jointly and severally liable for disgorgement of $26,920.50, representing profits gained as a result of the conduct alleged in the Complaint, together with prejudgment interest thereon in the amount of $2,453.70, for a total of 29,374.20 jointly and severally.

IT IS FURTHER ORDERED that Defendant John Jantzen is liable for a civil penalty in the amount of $26,920.50 pursuant to Section 21A of the Exchange Act [15 U.S.C. § 78u-1], and that Defendant Marleen Jantzen is liable for a civil penalty in the amount of $26,920.50 pursuant to Section 21A of the Exchange Act [15 U.S.C. § 78u-1]. Defendants shall satisfy their obligations by paying a total of $83,215.20 within ten (10) business days after entry of this Final Judgment, by certified check, bank cashier's check, or United States postal money order payable to the Securities and Exchange Commission. The payment shall be delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, 100 F Street NE, Mail Stop 6042, Washington, DC 20549, and shall be accompanied by a letter specifying by name the Defendant or Defendants who are submitting such payment; setting forth the title and civil action number of this action and the name of this Court; and specifying that payment is made pursuant to this Final Judgment. Defendants shall pay post-judgment interest on any delinquent amounts pursuant to 28 USC § 1961. The Commission shall remit the funds paid pursuant to this paragraph to the United States Treasury.

IT IS FINALLY ORDERED that this Court shall retain jurisdiction of this matter for the

purposes of enforcing the terms of this Final Judgment.

SIGNED this 28th **day of March, 2012.**

JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE