

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 10-20475-CV-TURNOFF

SECURITIES AND EXCHANGE COMMISSION,

CONSENT CASE

Plaintiff,

vs.

ERIC GORDON, et al.,

Defendant.

ORDER

THIS CAUSE is before the Court upon the Plaintiff Securities and Exchange Commission's ("SEC") Motion to Set Disgorgement, Prejudgment Interest and Penalty Amounts Against Defendant Eric Gordon. [DE146]. A hearing on this Motion [DE146] took place before the undersigned United States Magistrate Judge on February 21, 2013. [DE156]. Upon review of the Motion [DE146], the Response [DE153], the Reply [DE154], hearing argument from counsel, and being otherwise duly advised in the premises, the undersigned makes the following findings.

Defendant Eric Gordon ("Gordon") executed a Consent Judgment on July 27, 2011. [DE119-1]. Same was entered by the Court on August 1, 2011. [DE122]. Gordon consented to, among other things, (1) the entry of a permanent injunction for violations of Section 10(b) and Rule 10b-5 of the Exchange Act; (2) disgorgement with prejudgment interest; and (3) a civil penalty. [DE119-1] [DE122]. The specific amounts were to be determined by the Court upon motion of the Commission. [DE119-1, ¶ 2]. The SEC now seeks disgorgement in the amount of \$589,031, prejudgment interest in the amount of \$119,967.07, and a civil penalty in the amount of \$1,767,093.¹

¹This figure represents triple the amount of the disgorgement.

Disgorgement and Prejudgment Interest

As to the disgorgement amount, the SEC claims that Gordon profited \$570,234, and that two of his friends profited \$13,397 and \$5,400, respectively. [DE146]. This amount, totaling \$589,031, relates to fraud allegedly committed during a three month period in 2007. [DE119-1]. The Consent Judgment also calls for prejudgment interest calculated from August 8, 2007. Id. The calculation is based upon the rate used by the Internal Revenue Service as to underpayment of federal income tax, as per 26 U.S.C. § 6621(a)(2). Using a start of August 8, 2007, ending on the day the Consent Judgment was signed, the prejudgment interest requested is \$119,979.07. Id. at 6-7, Ex. A. Gordon opposes those amounts.

In his Response, he asks the Court to consider that he was at a disadvantage when he agreed to the judgment, because he was proceeding without counsel. [DE153]. Gordon specifically claims that he was asked to make pre-settlement concessions that were inherently unfair and stripped him of all of his defenses. Id. In this connection, he claims that the SEC required him to consent to the judgment without an agreement as to the exact amounts to be paid. Id.

The Court has reviewed the Consent at issue and finds that same is typical of the agreements entered into in these types of cases. The undersigned questioned Gordon during the hearing and finds that he is competent, articulate, and was able to comprehend the document that he executed and the terms that he agreed to. Further, the Consent spells out that it is being entered into freely and voluntarily. [DE119-1, ¶6]. Accordingly, the Court is satisfied that Gordon knowingly and voluntarily entered into the Consent Judgment. In so doing, he waived the right to findings of fact and conclusions of law. He likewise waived the right to a trial by jury and the right to appeal the entry of judgment. Id.

Consistent with the above and foregoing, it is hereby **ORDERED AND ADJUDGED** that Gordon shall pay disgorgement in the amount of **\$589,031** and prejudgment interest in the amount of **\$119,967.07**.

Penalties

As noted *supra*, the Consent Judgment calls for the imposition of a civil penalty. **[DE122]**. The decision to impose a penalty, and the amount of any such penalty, however, is a matter within the discretion of the Court. SEC v. Reynolds, 2010 WL 3943729, at *6 (N.D. Ga. Oct. 5, 2010). Specifically, pursuant to Section 21A of the Exchange Act, the Court *may* impose a civil penalty for insider trading not to exceed “three times the profit gained or loss avoided as a result of such unlawful purchase, sale or communication.” 15 U.S.C. § 78u-1(a)(2)(emphasis added). Any civil penalty is to be determined by the Court “in light of the facts and circumstances” surrounding the violations. 15 U.S.C. § 77t(d)(2)(A); SEC v. Aura Financial Services, Inc., 2010 WL 3419200, at *3 (S.D.Fla. July 14, 2010). In making such a determination courts will consider: (1) the egregiousness of defendant’s conduct; (2) the degree of the defendant’s scienter; (3) whether the defendant’s conduct related to substantial losses or the risk of substantial losses to other persons; (4) whether the defendant’s conduct was isolated or recurrent; (5) whether the defendant has admitted wrongdoing; and (6) whether the penalty should be reduced due to the defendant’s demonstrated current and future financial condition. Id. (citing SEC v. One Wall Street, Inc., 2008 WL 63256, at*4 (E.D.N.Y. Jan. 3, 2008)).

As noted *supra*, the SEC seeks a penalty in the amount of \$1,767,093, representing triple the amount of the disgorgement. **[DE146]**. At the hearing, the SEC argued that the amount is warranted, because, among other things, the conduct in question amounted to approximately five (5) incidents of insider trading. Id. The profits gained, as previously indicated, total over half a million dollars. The

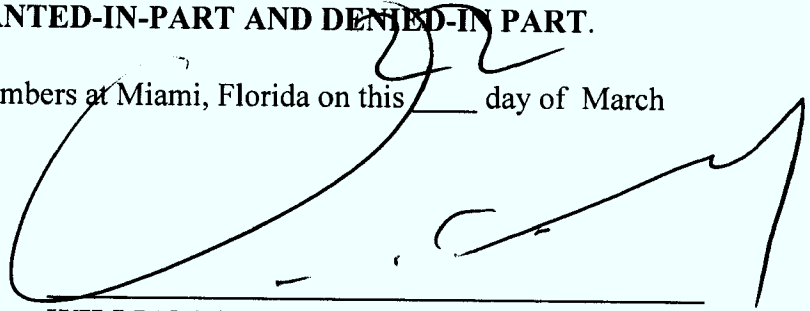
SEC also notes that in the Consent Judgment, Gordon neither admits, nor denies liability and that Gordon has never admitted to any wrongdoing.

Gordon, on the other hand, claims that his consent to judgment alone shows that he conceded the allegations. [DE153]. He asks the Court to consider his net worth which is, for the most part, limited to his annual salary of \$170,000 as an American Airlines pilot. Id. In this regard, Gordon claims that due to the airline industry's precarious financial situation, he will not be able to secure additional flights and extra compensation. Gordon also suggests that he will be subjected to imminent increases in employee contributions for benefits such as healthcare premiums, etc. In light of this, he claims that his "net worth is near zero and his income is just enough to meet the financial demands of his family." Id. In his view, "a sizable financial judgment will place a lifelong black cloud over [his] family thereby causing difficulties much greater than any affects [sic] sustained by the market or company in question." Id. In sum, Gordon asks that the Court forgo the imposition of a civil penalty.

Upon careful consideration of the entire record, including the facts and circumstances of this case, the undersigned declines to impose a civil penalty. In so doing, the Court is mindful of the seriousness of the allegations and commends the SEC for its fine work in this case and similar cases. Here, however, on this record, the undersigned finds that a civil penalty is not appropriate. Gordon has never run away from this litigation. He has defended this action both with, and without the benefit of counsel. In this Court's view, he has made a good faith effort to resolve this matter and has accepted responsibility for his actions. In Court, he expressed a desire to comply with the judgment and pay any assessed penalties. He fears that if the amount is excessive, he may not be able to pay it off during his lifetime. At this time, the bulk of his income is limited to his salary. Amounts assessed in excess of disgorgement and prejudgment interest will, most likely, be good only on paper and uncollectible.

Consistent with the above and foregoing, it is hereby **ORDERED AND ADJUDGED** that Plaintiff's Motion to Set Aside Disgorgement, Prejudgment Interest and Penalty Amounts Against Defendant Eric Gordon [DE146] is **GRANTED-IN-PART AND DENIED-IN PART**.

DONE AND ORDERED in Chambers at Miami, Florida on this _____ day of March 2013.

A large, stylized handwritten signature in black ink, appearing to read 'W.C. Turnoff', is written over the signature line and extends upwards into the text area.

WILLIAM C. TURNOFF
UNITED STATES MAGISTRATE JUDGE

cc: Counsel of Record