

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Judge John L. Kane

Criminal Action No. **11-cv-00313-JLK**

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

NEAL R. GREENBERG,

Defendant.

FINAL JUDGMENT AS TO DEFENDANT NEAL R. GREENBERG

Kane, J.

The Securities and Exchange Commission (“Commission”) having filed a Complaint and Defendant Neal R. Greenberg (“Greenberg” or “Defendant”) having entered a general appearance; consented to the Court’s jurisdiction over Defendant and the subject matter of this action; consented to entry of this Final Judgment without admitting or denying the allegations of the Complaint (except as to jurisdiction); waived findings of fact and conclusions of law; and waived any right to appeal from this Final Judgment:

I.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant and Defendant's 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 Section 206(2) of the Investment Adviser's Act of 1940 , 15 U.S.C. § 80b-6(2), by using any means or instrumentality

of interstate commerce, or the mails, directly or indirectly, to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client.

II.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant and Defendant's 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 Section 206(4) of the Investment Adviser's Act of 1940, 15 U.S.C. § 80b-6(4), and Rule 206(4)-8 promulgated thereunder, 17 C.F.R. § 206(4)-8, by using any means or instrumentality of interstate commerce, or the mails, directly or indirectly, to engage in any act, practice or course of business which is fraudulent, deceptive, or manipulative, including, while acting as an investment adviser to a pooled investment vehicle to:

- (1) make any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in the light of the circumstances under which they were made, not misleading, to any investor or prospective investor in the pooled investment vehicle; or
- (2) otherwise engage in any act, practice, or course of business that is fraudulent, deceptive, or manipulative with respect to any investor or prospective investor in the pooled investment vehicle.

III.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant and Defendant's 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 aiding and abetting any violation of Section 206(4) of the Investment Adviser's Act of 1940, 15 U.S.C. § 80b-4, and Rules 206(4)-2 and 206(4)-7 promulgated thereunder, 17 C.F.R. §§ 206(4)-2 and 206(4)-7, by an investment adviser that uses any means or instrumentality of interstate commerce, or the mails to engage in any act, practice or course of business that is fraudulent, deceptive, or manipulative, including:

- (1) having custody of client funds unless: (a) it sends quarterly account statements to each of its clients for whom funds or securities are maintained identifying the amount of funds and of each security of which it has custody and setting forth all transactions during each period; (b) a public accountant verifies those funds and securities at least annually; and the independent public accountant notifies the Commission within one business day upon finding any material discrepancy; and
- (2) providing investment advice unless it adopts and implements written policies and procedures reasonably designed to prevent violation of the Investment Adviser Act and rules promulgated thereunder.

IV.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant is liable for disgorgement of \$3,941,185, representing profits gained as a result of the conduct alleged in the Complaint, together with prejudgment interest thereon in the amount of \$386,960, for a total of \$4,328,145. Based on Defendant's sworn representations in his Statement of Financial Condition dated December 10, 2010, and other documents and information submitted to the Commission, however, the Court is not ordering Defendant to pay a civil penalty and payment of all but \$330,000 of the disgorgement and pre-judgment interest thereon is waived. In addition, Defendant is ordered to disgorge his interests in various Agile hedge funds as set forth

herein. Defendant shall satisfy this payment obligation by paying \$330,000 within 14 days after entry of this Final Judgment to the Clerk of this Court, together with a cover letter identifying Greenberg as the defendant in this action; 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. Defendant shall simultaneously transmit photocopies of such payment and letter to the Commission's counsel in this action. By making this payment, Defendant relinquishes all legal and equitable right, title, and interest in such funds, and no part of the funds shall be returned to Defendant.

The Clerk shall deposit the funds into an interest bearing account with the Court Registry Investment System ("CRIS") or any other type of interest bearing account that is utilized by the Court. These funds, together with any interest and income earned thereon (collectively, the "Fund"), shall be held in the interest bearing account until further order of the Court. In accordance with 28 U.S.C. § 1914 and the guidelines set by the Director of the Administrative Office of the United States Courts, the Clerk is directed, without further order of this Court, to deduct from the income earned on the money in the Fund a fee equal to ten percent of the income earned on the Fund. Such fee shall not exceed that authorized by the Judicial Conference of the United States. Defendant shall also pay post-judgment interest on any delinquent amounts pursuant to 28 USC § 1961.

The determination not to impose a civil penalty and to waive payment of all but \$330,000 of the disgorgement and pre-judgment interest is contingent upon the accuracy and completeness of Defendant's Statement of Financial Condition. If at any time following the entry of this Final Judgment the Commission obtains information indicating that Defendant's representations to the Commission concerning his assets, income, liabilities, or net worth were fraudulent, misleading,

inaccurate, or incomplete in any material respect as of the time such representations were made, the Commission may, at its sole discretion and without prior notice to Defendant, petition the Court for an order requiring Defendant to pay the unpaid portion of the disgorgement, pre-judgment and post-judgment interest thereon, and the maximum civil penalty allowable under the law. In connection with any such petition, the only issue shall be whether the financial information provided by Defendant was fraudulent, misleading, inaccurate, or incomplete in any material respect as of the time such representations were made. In its petition, the Commission may move this Court to consider all available remedies, including, but not limited to, ordering Defendant to pay funds or assets, directing the forfeiture of any assets, or sanctions for contempt of this Final Judgment. The Commission may also request additional discovery. Defendant may not, by way of defense to such petition: (1) challenge the validity of the Consent or this Final Judgment; (2) contest the allegations in the Complaint filed by the Commission; (3) assert that payment of disgorgement, pre-judgment and post-judgment interest or a civil penalty should not be ordered; (4) contest the amount of disgorgement and pre-judgment and post-judgment interest; (5) contest the imposition of the maximum civil penalty allowable under the law; or (6) assert any defense to liability or remedy, including, but not limited to, any statute of limitations defense.

V.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant shall upon Court approval relinquish, at the direction of current management of Agile Group, LLC and for the sole benefit of investors in the Agile Safety Fund, Agile Safety Fund International, and Agile Safety Variable Fund, other than Neal R. Greenberg: (1) his non-retirement interest in the Agile Safety Fund (registered in the name of Neal R. Greenberg) and

his interest in the Agile Performance Fund (registered in the name of Neal R. Greenberg), and (2) his rights to recovery, arising from his interests in any Agile hedge fund, in any litigation brought by any Agile hedge fund or investors in any Agile hedge funds. Defendant will provide to the Court for Court approval, within 60 days of this order, a plan for equitable distribution of the relinquished interests described above.

VI.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that the Commission may by motion propose a plan to distribute the Fund subject to the Court's approval. Such a plan may provide that the Fund shall be distributed pursuant to the Fair Fund provisions of Section 308(a) of the Sarbanes-Oxley Act of 2002. Regardless of whether any such Fair Fund distribution is made, amounts ordered to be paid as civil penalties pursuant to this Judgment shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Defendant shall not, after offset or reduction of any award of compensatory damages in any Related Investor Action based on Defendant's payment of disgorgement in this action, argue that he is entitled to, nor shall he further benefit by, offset or reduction of such compensatory damages award by the amount of any part of Defendant's payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Defendant shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the United States Treasury or to a Fair Fund, as the Commission directs. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this Judgment. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought

against Defendant by or on behalf of one or more investors based on substantially the same facts as alleged in the Complaint in this action.

VII.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that the Consent of Defendant Neal R. Greenberg is incorporated herein with the same force and effect as if fully set forth herein, and that Greenberg shall comply with all of the agreements set forth therein.

VIII.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that this Court shall retain jurisdiction of this matter for the purposes of enforcing the terms of this Final Judgment.

Dated: February 10, 2011

BY THE COURT:

/s/John L. Kane
SENIOR U.S. DISTRICT JUDGE