

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

v.

Case No. 8:14-cv-2886-T-33TGW

ALBERT J. SCIPIONE,

Defendant.

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ORDER

This matter comes before the Court in consideration of Plaintiff Securities and Exchange Commission's Motion for Default Judgment of Permanent Injunction and Other Relief against Albert J. Scipione (Doc. # 12), filed on March 6, 2015. For the reasons that follow, the Court grants the Motion to the extent set forth herein.

I. Background

The Commission filed its Complaint on November 18, 2014, to restrain and enjoin Scipione from further violating the federal securities laws in connection with a fraudulent scheme to misappropriate investors' funds. (Doc. # 1). In particular, Scipione and his business partner operated Traders Café, LLC as an unregistered broker-dealer and defrauded investors by misappropriating assets, making

material misstatements and omissions, and operating a fraudulent scheme. (Id. at ¶ 1). The Complaint enumerates four claims for relief: (I) fraud in violation of Section 17(a)(1) of the Securities Act of 1933 ("Securities Act"), (II) fraud in violation of Sections 17(a)(2) and 17(a)(3) of the Securities Act, (III) fraud in violation of Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934 ("Exchange Act");, and (IV) unlawfully operating as a broker-dealer without registering with the Commission in violation of Section 15(a) of the Exchange Act. (See Id.).

On December 5, 2014, the Commission personally served Scipione. (Doc. # 8). On December 10, 2014, the Commission filed proof of personal service. (See Id.). Scipione's response to the Complaint was due on or before December 26, 2014, but Scipione did not file a responsive pleading or otherwise defend against this action. On January 7, 2015, the Commission applied for entry of clerk's default against Scipione and the clerk entered default against him. (Doc. ## 9-10).

On March 6, 2015, the Commission filed the present Motion, seeking an Order: (1) entering judgment against Scipione on Counts I through IV of the Commission's Complaint; (2) entering a permanent injunction enjoining Scipione from

future violations Securities Act and the Exchange Act; and (3) "reserving jurisdiction for 60 days after the Court enters judgment against Scipione to allow the Commission sufficient time to propose a specific disgorgement, prejudgment thereon, and civil money penalty amount in light of the criminal sanctions recently imposed against Scipione in a related criminal matter." (Doc. # 12 at 2). The Court has reviewed the Motion and is otherwise fully advised in the premises.

II. Legal Standard

Federal Rule of Civil Procedure 55(a) provides: "When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default." A district court may enter a default judgment against a properly served defendant who fails to defend or otherwise appear pursuant to Federal Rule of Civil Procedure 55(b)(2). DirectTV, Inc. v. Griffin, 290 F. Supp. 2d 1340, 1343 (M.D. Fla. 2003).

The mere entry of a default by the Clerk does not, in itself, warrant the Court entering a default judgment. See Tyco Fire & Sec. LLC v. Alcocer, 218 F. App'x 860, 863 (11th Cir. 2007) (citing Nishimatsu Constr. Co. v. Hous. Nat'l Bank, 515 F.2d 1200, 1206 (5th Cir. 1975)). Rather, a Court must

ensure that there is a sufficient basis in the pleadings for the judgment to be entered. Id. A default judgment has the effect of establishing as fact the plaintiff's well-pled allegations of fact and bars the defendant from contesting those facts on appeal. Id.

"Once liability is established, the court turns to the issue of relief." Enpat, Inc. v. Budnic, 773 F. Supp. 2d 1311, 1313 (M.D. Fla. 2011). "Pursuant to Federal Rule of Civil Procedure 54(c), '[a] default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings,' and a court may conduct hearings when it needs to determine the amount of damages, establish the truth of any allegation by evidence, or investigate any other matter." Id.

III. Counts I through III

A. Elements of the Commission's Anti-Fraud Claims

Counts I through III of the Complaint allege Scipione violated Section 17(a) of the Securities Act and Section 10b and Rule 10b-5 of the Exchange Act, which proscribe fraudulent conduct in the offer, purchase or sale of securities. These provisions prohibit essentially the same type of conduct. United States v. Naftalin, 441 U.S. 768, 773 n.4 (1979); SEC v. Unique Fin. Concepts, 119 F. Supp. 2d 1332, 1339 (S.D. Fla. 1998), aff'd, 196 F.3d 1195 (11th Cir. 1999). One of the

ways the Commission can establish a violation of these provisions is to show: (1) a misrepresentation or omission, (2) that is material, (3) made with scienter, (4) in the offer or sale or in connection with the purchase or sale of securities. Basic Inc. v. Levinson, 485 U.S. 224, 231-32 (1988). The Commission must also show the use of interstate commerce, the mails, or a national securities exchange. SEC v. Corporate Relations Grp., 2003 WL 25570113, *7 (M.D. Fla. March 28, 2003).

The same elements are required under Section 17(a)(1)-(3) in connection with the offer or sale of a security, although no showing of scienter is required under subsections (a)(2) or (a)(3). SEC v. First Jersey Sec., Inc., 101 F.3d 1450, 1467 (2d Cir. 1996) (citing Aaron v. SEC, 446 U.S. 680, 701-02 (1980)). Scienter is "a mental state embracing intent to deceive, manipulate, or defraud." Aaron, 446 U.S. at 686 n.5, 695-97; Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 n.12 (1976).

As pled in the Complaint and as described below, the Commission has established that Scipione violated Section 17(a) of the Securities Act and Section 10(b) and Rule 10b-5 of the Exchange Act.

B. Scipione Made Misrepresentations and Omissions

A defendant makes a false statement when he "acting alone or with others, creates a misrepresentation." In re Enron Corp. Sec. Litig., 235 F. Supp. 2d 549, 588 (S.D. Tex. 2002); SEC v. K.W. Brown and Co., 555 F. Supp. 2d 1275, 1304 (S.D. Fla. 2007). This can encompass participating in a course of business that operates as a fraud on the buyers or sellers of stock. SEC v. Zandford, 535 U.S. 813, 819-22 (2002).

Scipione made numerous misrepresentations and omissions, such as: (1) in a December 14, 2012, meeting, he told a potential customer that Traders Café had been operating for five years and had 80 to 90 customers with about \$250,000 in total deposits (these claims were false because Traders Café was formed in July 2012 and had just opened its two main operating accounts with zero balances on December 14, 2012) (Doc. # 1 at ¶ 16); (2) in May of 2013, Scipione recruited another customer by falsely stating Traders Café had 180 customers or traders (this claim was also false as Traders Café's bank account records show the firm never had more than approximately 26 customers or traders) (Id. at ¶ 17); (3) in August of 2013, Scipione told another customer that Traders Café had \$15 million in day trading accounts (this claim was also false as the firm never had more than \$367,000 in day

trading accounts) (Id. at ¶ 18); and (4) Scipione failed to inform investors that their funds were being misappropriated by Scipione and his business partner (See e.g., Id. at ¶ 34). Therefore, the Commission has demonstrated that Scipione made misrepresentations.

C. Materiality of Misrepresentations and Omissions

The objective standard for materiality, which governs this case, is whether a reasonable investor or prospective investor would have considered the information important in deciding whether to invest and if there is a substantial likelihood the misrepresented or omitted facts would have assumed actual significance in the deliberations of a reasonable investor. SEC v. Steadman, 967 F.2d 636, 643 (D.C. Cir. 1992); Basic, 485 U.S. 224, 231-32, 240 (1988); TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 448-49 (1976); SEC v. Carriba Air, Inc., 681 F.2d 1318, 1323 (11th Cir. 1982). If there is "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available" then it is material. Basic, 485 U.S. at 231-32; Carriba Air., 681 F.2d at 1323 (A statement is material if "a reasonable man would

attach importance to the fact misrepresented or omitted in determining his course of action.").

The Court finds that - in deciding whether or not to invest - an investor or prospective investor would consider it important to know that Scipione was misappropriating investor funds for his own personal use. Reasonable investors would have also considered it important to know Scipione was dishonest regarding: (1) the use of investor funds (See e.g., Doc. # 1 at ¶¶ 22-24); (2) Traders Café's risk protocols and procedures (Id. at ¶ 19); and (3) the financial condition and success of Traders Café (Id. at ¶¶ 16-19). Accordingly, the Court finds that Scipione's fraudulent statements and omissions were material.

D. Scienter

Scienter is required to establish violations of Section 17(a)(1) of the Securities Act and Section 10(b) and Rule 10b-5 of the Exchange Act. Scienter is "a mental state embracing intent to deceive, manipulate, or defraud." Ernst & Ernst, 425 U.S. at 193 n.12. Courts have further defined scienter as either knowing misconduct or severe recklessness - extreme departure from the standards of ordinary care. Id. at 193. The Eleventh Circuit has defined severe recklessness as involving "highly unreasonable omissions or

misrepresentations . . . which is either known to the defendant or is so obvious that the defendant must have been aware of it." McDonald v. Alan Bush Brokerage Co., 863 F.2d 809, 814 (11th Cir. 1989) (citation omitted).

The allegations set forth in the Complaint - which the Court takes as true at this stage - establish Scipione acted with scienter. Scipione knew, or was severely reckless in not knowing, that, among other things, he was: (1) misappropriating investor funds (Doc. # 1 at ¶¶ 22-24); (2) misrepresenting Traders Café's operating history, the amount of capital and number of traders that Traders Café had (Id. at ¶¶ 16-19); and (3) lying to an investor about the profitability of Traders Café (Id. at ¶¶ 32-33). Hence, Scipione acted with scienter. Therefore, the Commission has satisfied this element.

E. The "In Connection With" Test

An action satisfies the "in connection with" requirement if the fraud somehow touches upon the securities transactions. SEC v. Rana Research, 8 F.3d 1358 at 1362 (9th Cir. 1993); see also Zandford, 535 U.S. at 819 ("in connection" language is broadly interpreted); Jacoboni v. KPMG LLP, 314 F. Supp. 2d 1172, 1179 (11th Cir. 2004) ("in connection" requirement is extremely broad). Here, Scipione's

fraud was "in connection with" the securities transactions as he made misrepresentations to investors when he was soliciting investments from them and by not using their funds for their intended use. (See Doc. # 1 at ¶¶ 15-34, 36, 39, 42). Accordingly, the Commission has satisfied the "in connection with" requirement.

F. Use of Interstate Commerce

Scipione repeatedly used the instrumentalities of interstate commerce. For example, Scipione solicited 26 customers from across the nation who established accounts at Traders Café by signing a "Partnership Agreement" or a "Branch Partnership Agreement." (Doc. # 1 at ¶ 13). Furthermore, on numerous occasions, Scipione misappropriated funds from bank accounts. (Id. at ¶¶ 22-24). Moreover, Scipione represented to another investor that Traders Café had opened an office located out-of-state, used a website describing Traders Café as a global trading firm, and the firm's master account was held overseas. (See Id. at ¶¶ 9-10, 13, 15-34; see also Id. at ¶¶ 8, 36, 39, 42). The Commission has, therefore, satisfied the "use of interstate commerce" requirement.

In sum, the Commission has established each of the requisite elements, thereby demonstrating that Scipione violated Section 17(a) of the Securities Act and Section 10(b)

and Rule 10b-5 of the Exchange Act. Accordingly, the Commission's Motion is granted as to Counts I through III.

IV. Section 15(a) of the Exchange Act

Section 15(a)(1) of the Exchange Act makes it unlawful for any broker or dealer to make use of the mails or any means of interstate commerce to effect any transactions in, or induce or attempt to induce the purchase or sale of, any security unless such broker or dealer is: (1) registered with the Commission; (2) in the case of a natural person, is an associated person of a registered broker-dealer; or (3) satisfies the conditions of an exemption or safe harbor, none of which are applicable in this case. There is no scienter requirement to establish a violation of Section 15(a). See SEC v. United Monetary Servs., Inc., [19 Transfer Binder] Fed. Sec. L. Rep. (CCH) 95,284 at 96,302 (S.D. Fla. May 18, 1990).

Section 3(a)(4)(A) of the Exchange Act defines "broker" as "any person engaged in the business of effecting transactions in securities for the accounts of others." Courts have interpreted this definition to connote "a certain regularity of participation in securities transactions at key points in the chain of distribution." Mass. Fin. Servs., Inc.

v. Sec. Investor Prot. Corp., 411 F. Supp. 411, 415 (D. Mass.), aff'd, 545 F.2d 754 (1st Cir. 1976).

Among the activities that indicate a person may be a broker are: (1) solicitation of investors to purchase securities; (2) involvement in negotiations between the issuer and the investor; (3) advising on the merits of an investment; and (4) receipt of transaction-related compensation. See SEC v. Gagnon, 2012 WL 994892 (E.D. Mich. Mar. 22, 2012); SEC v. Hansen, [1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) 91,426 (S.D.N.Y. 1984). These factors are not determinative or exclusive in assessing whether a person is a broker. SEC v. Benger, 697 F. Supp. 2d 932, 943-45 (N.D. Ill. 2010).

In the present matter, Scipione was not registered with a broker dealer since 2002. (Doc. # 1 at ¶¶ 4, 14). Nevertheless, from at least December of 2012, through at least October of 2013, Scipione solicited investors to purchase securities, was involved in negotiations between Traders Café and an investor who invested in Traders Café, and received transaction-related compensation by misappropriating investors' funds. (Doc. # 1 at ¶¶ 15-34). Accordingly, the Commission has established that Scipione violated Section

15(a) of the Exchange Act and, therefore, the Commission's Motion is granted as to Count IV.

V. Permanent Injunction

Scipione's violations of the securities laws, as demonstrated above, establish the basis for a permanent injunction barring him from future violations of Section 17(a) of the Securities Act and Sections 10(b) and Rule 15(a) and Rule 10b-5 of the Exchange Act. The Commission appears in this matter "not as an ordinary litigant, but as a statutory guardian charged with safeguarding the public interest in enforcing the securities laws." SEC v. Mgmt. Dynamics, Inc., 515 F.2d 801, 808 (2d Cir. 1975).

The Commission is entitled to a permanent injunction when it establishes (1) the defendant has violated the securities laws, and (2) a reasonable likelihood the defendant will repeat the violations. Calvo, 378 F.3d at 1216; SEC v. Unique Fin. Concepts, 196 F.3d 1195 at 1199 n.2 (11th Cir. 1999). In determining whether a defendant is likely to continue to violate the securities laws, courts consider the following factors: (1) the egregiousness of the actions; (2) the isolated or recurrent nature of the violations; (3) the degree of scienter involved; (4) the defendant's recognition of the wrongful nature of their conduct; (5) the sincerity of

their assurances against future violations; and (6) the likelihood the defendant's occupation will present opportunities for future violations. Calvo, 378 F.3d at 1216.

Having considered these factors and the detailed factual allegations in the Complaint, the Court finds that Scipione is likely to continue to violate the securities laws. Accordingly, the Court grants the Commission's request for permanent injunction, as outlined below.

A. Permanent Injunction as to Section 10(b) and Rule 10b-5 of the Exchange Act

Scipione and his agents, servants, employees, attorneys, and all persons in active concert or participation with them who receive actual notice of this 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

by, directly or indirectly, (i) creating a false appearance or otherwise deceiving any person, or (ii) disseminating false or misleading documents, materials, or information or making, either orally or in writing, any false or misleading statement in any communication with any investor or prospective investor, about:

(A) any investment strategy or investment in securities,

(B) the prospects for success of any product or company,

(C) the use of customer or investor funds,

(D) compensation to any person,

(E) Defendant's qualifications to advise customers or investors; or

(F) the misappropriation of customer or investor funds or investment proceeds.

B. Permanent Injunction as to Section 17(a) of the Securities Act

Scipione and his agents, servants, employees, attorneys, and all persons in active concert or participation with them who receive actual notice of this Judgment by personal service or otherwise are permanently restrained and enjoined from violating Section 17(a) of the Securities Act of 1933 (the "Securities Act") [15 U.S.C. § 77q(a)] in the offer or sale of any security by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly:

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

(b) to obtain money or property by means of any untrue statement of a material fact or any omission of a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or

(c) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser

by, directly or indirectly, (i) creating a false appearance or otherwise deceiving any person, or (ii) disseminating false or misleading documents, materials, or information or

making, either orally or in writing, any false or misleading statement in any communication with any investor or prospective investor, about:

- (A) any investment strategy or investment in securities,
- (B) the prospects for success of any product or company,
- (C) the use of customer or investor funds,
- (D) compensation to any person,
- (E) Defendant's qualifications to advise customers or investors; or
- (F) the misappropriation of customer or investor funds or investment proceeds.

C. Permanent Injunction as to Section 15(a) of the Exchange Act

Scipione and his agents, servants, employees, attorneys, and all persons in active concert or participation with them who receive actual notice of this Judgment by personal service or otherwise are permanently restrained and enjoined from violating Section 15(a) of the Exchange Act, 15 U.S.C. § 78o(a), by, directly or indirectly, through use of the means or instruments of transportation or communication in interstate commerce or the mails, acting as a broker and/or effecting transactions in, inducing or attempting to induce the purchase or sale of, securities (other than an exempted

security or commercial paper, bankers' acceptances or commercial bills) without being registered with the Commission in accordance with Section 15(b) of the Exchange Act, 15 U.S.C. § 78o(b).

VI. Disgorgement, Prejudgment Interest Thereon, and a Civil Money Penalty

The Commission requests that the Court reserve jurisdiction for 60 days to allow the Commission sufficient time to propose a specific disgorgement, prejudgment interest thereon, and civil money penalty amount in light of the criminal sanctions recently imposed against Scipione in a related criminal matter. (Doc. # 12 at 2). Specifically, on November 18, 2014, Scipione pled guilty to one count of conspiracy to commit wire fraud. (Id. at 2 n.1). On February 20, 2015, Scipione was sentenced to 30 months imprisonment followed by 36 months of supervised release and ordered to pay \$463,463.81 in restitution. (See Case No. 8:14-cr-469-T-26MAP, Doc. ## 5, 12, 20). The Commission submits that, "[i]n response to [the] criminal sentence imposed against Scipione, the staff is in the process of conferring with the five-member Commission located in Washington[,] D.C. to determine what monetary sanctions are appropriate, if any, in light of

the criminal sanctions already imposed against Scipione.”
(Doc. # 12 at 2 n.1).

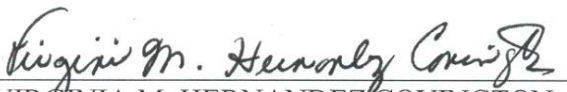
Based on the forgoing, the Court grants the Commission’s request. Therefore, the Court will reserve jurisdiction to determine the amounts of the disgorgement, prejudgment interest thereon, and civil penalty upon motion of the Commission, which the Commission shall make within **sixty days** from entry of this Judgment.

Accordingly, it is

ORDERED, ADJUDGED, and DECREED:

- (1) Plaintiff Securities and Exchange Commission’s Motion for Default Judgment of Permanent Injunction and Other Relief Against Albert J. Scipone (Doc. # 12) is **GRANTED**.
- (2) The Court will reserve jurisdiction to determine the amounts of the disgorgement, prejudgment interest thereon, and civil penalty upon motion of the Commission, which the Commission shall make within **sixty days** from entry of this Judgment.
- (3) This Court shall retain jurisdiction of this matter for the purposes of enforcing the terms of this Judgment.

DONE and **ORDERED** in Chambers in Tampa, Florida, this 18th day of March, 2015.


VIRGINIA M. HERNANDEZ COVINGTON
UNITED STATES DISTRICT JUDGE

Copies: All Counsel and Parties of Record