

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

Case No. 14-CIV-61195-BLOOM/Valle

SECURITY AND EXCHANGE COMMISSION,

Plaintiff,

v.

BILLY V. RAY, JR
WADE CLARK and,
URBAN AG CORP.,

Defendants.

ORDER AND FINAL JUDGMENT SETTING CIVIL PENALTY

THIS CAUSE is before the Court on the Motion of Plaintiff Security and Exchange Commission (the “Commission”) for Final Judgment Setting Civil Penalty Amount as to Defendant Wade Clark, ECF No. [41] (the “Motion”). The Court has reviewed the Motion, all supporting and opposing filings, and the record in this case. For the reasons set forth below, the Motion is granted only in part.

I. FACTUAL AND PROCEDURAL HISTORY

The Commission filed its Complaint in this matter on May 22, 2014. ECF No. [1]. The Complaint alleges, among other things, that Clark violated Section 10(b) and Rules 10b-5(a) and (c) of the Securities Exchange Act of 1934 (“Exchange Act”), 15 U.S.C. § 78j(b), and 17 C.F.R. §§ 240.10b-5(a) and 240.10b-5(c). The Complaint seeks from Clark, in pertinent part: (i) injunctive relief; (ii) disgorgement and prejudgment interest; (iii) a civil money penalty; and (iv) a penny stock bar.

On June 10, 2014, the Commission filed Clark’s Consent to Judgment of Permanent Injunction and Other Relief. ECF No. [9]. As part of the Consent, Clark agreed to (i) a

permanent injunction against further violations of Section 10(b) and Rules 10b-5(a) and (c) of the Exchange Act; (ii) a penny stock bar; and (iii) further proceedings to determine imposition of monetary sanctions, including a civil money penalty. On June 13, 2014, the Court adopted the Consent and entered a Judgment of Permanent Injunction and Other Relief against Clark. ECF No. [12]. The Judgment provided, in relevant part, that “Clark shall pay a civil penalty pursuant to Section 21(d)(3) of the Exchange Act, 15 U.S.C. § 78u(d)(3)” and that for the purposes of “the Commission’s motion for disgorgement and/or civil penalty . . . the allegations of the Complaint shall be accepted as and deemed true by the Court.” *Id.* § III. Accordingly, the following allegations in the Complaint are deemed true for purposes of the instant Motion:

A. The Parties

During the relevant time period, Clark acted as a stock promoter for Defendant Urban AG Corp. (“AQUM”). Complaint, ¶ 10. AQUM is a Delaware corporation with its principal offices in North Andover, Massachusetts. *Id.* ¶ 11.

During the relevant time period, AQUM purported to be in the business of providing hazardous material abatement and environmental remediation services. *Id.* At all times material to this action, AQUM’s common stock was quoted on OTC Link operated by OTC Markets Group, Inc. under the symbol “AQUM.” *Id.* Its common stock is registered with the Commission pursuant to Section 12(g) of the Exchange Act, and is subject to Section 13(a) reporting obligations. *Id.*

AQUM’s stock is a “penny stock” as defined by the Exchange Act. *Id.* ¶ 12. At all times material to this action, the stock traded at less than a penny per share and did not meet any of the exceptions to penny stock classification pursuant to Section 3(a)(51) and Rule 3a51-1 of the Exchange Act. *Id.* For example: (a) the stock did not trade on a national securities exchange; (b) it was not an “NMS stock,” as defined in 17 C.F.R. § 242.600(b)(47); (c) AQUM did not have

net tangible assets (i.e., total assets less intangible assets and liabilities) in excess of \$5,000,000; and (d) AQUM did not have average revenue of approximately \$6,000,000 for the last three years. See Exchange Act, Rule 3a51-1(g). *Id.*

B. The Restricted Stock Transaction and Kickback

In April 2013, Defendant Billy V. Ray Jr. and the cooperating witness had a telephone conversation and an exchange of emails, which led to a May 16, 2013 meeting in Broward County, Florida, between Ray, Clark, the cooperating witness, and the undercover FBI agent, who posed as a corrupt fiduciary of a hedge fund, to discuss a fraudulent scheme involving AQUM's stock. *Id.* ¶ 16. During the meeting, the parties discussed the fiduciary duties of the hedge fund manager, the risks involved, and their desire not to draw attention to their actions. *Id.* ¶ 17.

As part of the scheme, Ray and the undercover FBI agent, posing as the corrupt fiduciary, agreed that the purported hedge fund would purchase AQUM's restricted stock in exchange for an undisclosed 30% kickback by Ray and AQUM to the FBI agent. *Id.* ¶ 18. To conceal the kickback, Ray and AQUM agreed to pay the funds to a fictitious company owned by the corrupt fiduciary's purported brother-in-law, and to make the payment appear as if it represented payment for "contract services." *Id.* ¶ 19. Ray understood the company would not be performing any actual contract services. *Id.*

On May 17, 2013, Ray emailed the FBI agent a copy of the subscription agreement to execute. *Id.* ¶ 20. On May 28, 2013, the FBI agent signed the subscription agreement and returned it to Ray via UPS delivery. *Id.* ¶ 21. Pursuant to the subscription agreement, the hedge fund agreed to purchase up to \$1.5 million of restricted shares of AQUM stock. *Id.* ¶ 22. According to the agreement, the hedge fund would initially purchase 16,666,666 shares for \$100,000, payable in two installments of \$50,000 each. *Id.*

On June 3, 2013, the FBI agent sent AQUM's escrow agent a check for \$50,000 from the purported hedge fund representing the initial installment under the subscription agreement. *Id.* ¶ 23. The following day, Ray sent via FedEx a package addressed to the "company" affiliated with the FBI agent's brother-in-law, which contained a \$15,000 invoice from the company to AQUM for "contract services," as well as a \$15,000 check in payment of the invoice. *Id.* ¶ 24. Despite the invoice, AQUM in fact received no such services, and the payment represented the agreed-upon kickback. *Id.*

C. The Market Transaction

After the May 16, 2013 meeting, the cooperating witness and Ray agreed to engage in a further scheme whereby the cooperating witness would purchase AQUM stock in the open market. *Id.* ¶ 25. Ray intended for the purchases to artificially raise the trading price and volume of AQUM's stock. *Id.* ¶ 26. Ray told the cooperating witness he wanted to raise the share price to between three and five cents. *Id.* At the time, the stock was thinly traded at a share price of about one cent. *Id.*

Ray and the cooperating witness agreed that in exchange for the cooperating witness' fraudulent buying, Ray would make an inducement payment to him of one share for every three or four shares purchased. *Id.* ¶ 27. Specifically, based on the fraudulent buying Ray wanted done, Ray promised the cooperating witness an inducement payment of 500,000 restricted AQUM shares. *Id.*

In addition, as part of the manipulation, Ray said he planned to issue a press release with positive news about AQUM once the cooperating witness completed the buying. *Id.* ¶ 28. On May 30, 2013, Ray sent the cooperating witness an advance copy of the news from the upcoming press release. *Id.* ¶ 29. Ray included in the package a purported "Marketing Services Agreement," which provided for payment to the cooperating witness of the 500,000 shares in

exchange for the cooperating witness' launch of a "marketing campaign" for AQUM. *Id.* Ray knew the agreement was a sham designed to conceal the true purpose of the payment to the cooperating witness. *Id.*

On or about June 5, 2013, Ray emailed the cooperating witness another copy of the bogus "Marketing Services Agreement." *Id.* ¶ 30. The following day, during a telephone call between Ray and the cooperating witness, the latter confirmed the fraudulent nature of their activities, saying, "I do want to be clear that I am just front running this thing and doing some buying, some paid buying and creating some volume? I'm not really doing any kind of a marketing campaign, you know?" Ray replied, "Yeah." *Id.* ¶ 31.

During a June 10, 2013 telephone call, Ray told the cooperating witness the content of the news that would be coming out. *Id.* ¶ 32. The cooperating witness told Ray he would begin the buying that day. *Id.* Using a brokerage account under its control, the FBI, posing as the cooperating witness, made the following purchases of AQUM stock on the open market:

DATE	AMOUNT	NUMBER OF SHARES	PERCENTAGE OF DAILY TRADING VOLUME
June 10, 2013	\$620	40,000	20%
June 11, 2013	\$640	40,000	100%
June 14, 2013	\$520	40,000	21%

Id. ¶ 33. On June 17, 2013, AQUM issued a press release to the public, which was identical in content to the one Ray told the cooperating witness about. *Id.* ¶ 34. On June 26, 2013, AQUM's transfer agent sent the cooperating witness a stock certificate for 500,000 shares of AQUM common stock. *Id.* ¶ 35.

D. Insider Trading

At the May 16, 2013 meeting in Broward County, Clark and the FBI agent agreed to participate in an insider trading scheme involving the stock of another company ("Company B").

Id. ¶ 36. During the meeting, Clark agreed to sell inside information regarding Company B in exchange for a twenty percent kickback from the FBI agent. *Id.* As it turned out, however, Clark did not have access to non-public information regarding Company B. Complaint, ¶ 37. Instead, the information Clark eventually provided to the FBI agent regarding Company B was either publicly available, or fabricated and inaccurate. *Id.*

On June 17, 2013, the FBI agent wire transferred \$10,000 to an entity Clark controlled, which transfer represented an advance payment on the kickback. *Id.* ¶ 38. On July 9, 2013, prior to Clark's providing any of the promised information regarding Company B, Clark and the FBI agent discussed an additional insider trading scheme involving AQUM. *Id.* ¶ 39. Prior to Clark's discussion with the FBI agent, Ray already had provided Clark with an advance copy of an AQUM press release announcing a joint venture, and instructed Clark to forward it to the FBI agent. *Id.* Ray hoped the FBI agent would make advance purchases of AQUM stock as part of the planned stock manipulation scheme. *Id.*

During their conversation on July 9, 2013, Clark advised the FBI agent that AQUM would be releasing positive news regarding a joint venture and suggested the FBI agent "should probably start buying." *Id.* ¶ 40. Consistent with Ray's instructions, Clark agreed to provide the FBI agent with an advance copy of AQUM's press release, which Clark said would "hopefully" increase the price of the company's stock by as much as three cents per share. *Id.*

To conceal communication of the non-public information, that same day, Clark created an email account using a fictitious username and saved a copy of the press release in a "draft folder." *Id.* ¶ 41. The following day, on July 10, 2013, Clark called the FBI agent and provided him the username and password for the email account. *Id.* ¶ 42. With Clark on the telephone, the FBI agent logged into the account and reviewed the draft press release, which discussed an upcoming joint venture between AQUM's subsidiary and another company called CX Inc.,

pursuant to which the subsidiary would provide certain telecommunications-related construction services. *Id.* After the FBI agent praised Clark for his creativity in the way he communicated the information, Clark remarked, “it pays to be in telecom” and further reassured the FBI agent no one would be able to trace the press release to them. *Id.* ¶ 43.

On July 9, 2013, the FBI purchased 40,000 shares of AQUM stock and an additional 40,000 shares on July 10, for a total of \$472. *Id.* ¶ 44. On July 18, 2013, prior to the opening of the market, AQUM publicly issued the press release Clark had provided to the FBI agent. *Id.* ¶ 45. The announcement caused AQUM’s stock price to rise to .013 cents a share, which was 30% over the prior day’s close. *Id.*

II. DISCUSSION

The Commission seeks a second-tier civil money penalty against Clark in the amount of \$10,000 pursuant to Section 21(d)(3) of the Exchange Act, 15 U.S.C. § 78u(d)(3). A civil monetary penalty for securities violations are guided by statute and resulting tier. Securities Act of 1933, § 20(d), 15 U.S.C. § 77t(d); Securities Exchange Act of 1934, § 21(d)(3), 15 U.S.C. § 78u(d)(3). The statute establishes a three-tier system of penalties.¹ However, the actual penalty amount is within the full discretion of the district court. *See S.E.C. v. Big Apple Consulting USA, Inc.*, 2013 WL 1352166, at *2 (M.D. Fla. Mar. 29, 2013); *S.E.C. v. Kern*, 425 F.3d 143, 153 (2d Cir. 2005); 15 U.S.C. § 77t(d).

Under the first tier, the Court may impose a penalty of up to the greater of: (i) \$7,500 for a natural person or \$80,000 on an entity for each violation; or (ii) the gross amount of pecuniary gain to the defendant as a result of the violation. Under the Second Tier, the Court may impose a penalty of up to the greater of: (i) \$80,000 for a natural person or \$400,000 on an entity for each

¹ Under the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996, the tier amounts were adjusted to account for inflation, based on violation dates occurring on or after March 5, 2013. *See* 17 C.F.R. § 201.1005, Tbl. V to Subpt. E.

violation; or (ii) the gross amount of pecuniary gain to the defendant as a result of the violation. The second tier applies where the violation involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement. Finally, under the third tier the Court may impose a penalty of up to the greater of: (i) \$160,000 on a natural person or \$775,000 on an entity for each violation; or (ii) the gross amount of pecuniary gain to the defendant as a result of the violation. *S.E.C. v. KS Advisors, Inc.*, 2006 WL 288227 at *3 (M.D. Fla. Feb. 6, 2006). The third tier applies to cases in which the requirements of a second tier penalty are present *and* the violation directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons. *Meadows v. S.E.C.*, 119 F.3d 1219, 1228 (5th Cir. 1997).

Civil penalties are designed to punish the violator and deter future violations of the securities laws. *S.E.C. v. Moran*, 944 F. Supp. 286, 296 (S.D.N.Y. 1996). In determining whether to impose civil penalties and the amount of the fine, courts look to a number of factors, including: (i) the egregiousness of the conduct; (ii) the degree of the defendants' scienter; (iii) whether the defendants' conduct created substantial losses or the risk of substantial losses to other persons; (iv) whether the defendants' conduct was isolated or recurrent; and (v) whether the penalty should be reduced due to the defendants' current and future financial condition. *See S.E.C. v. U.S. Pension Trust Corp.*, 2010 WL 3894082, at *25 (S.D. Fla. Sept. 30, 2010); *S.E.C. v. Tourre*, 4 F.Supp.3d 579, 593 (S.D.N.Y. 2014); *S.E.C. v. Opulentica, LLC*, 479 F. Supp. 2d 319, 331 (S.D.N.Y. 2007). While these factors are helpful in characterizing a particular defendant's actions, the civil penalty framework is of a "discretionary nature" and each case "has its own particular facts and circumstances which determine the appropriate penalty to be imposed." *Moran*, 944 F. Supp. at 296-97.

Consideration of those factors in light of the facts here guides the Court to impose a civil penalty at an amount less than requested by the Commission in its Motion. Clark's actions do

reflect scienter. The purpose of the scheme was to purchase AQUM stock using material, non-public information about the company's joint venture, which Clark said would "hopefully" increase the price of the company's stock by as much as three cents per share. Complaint ¶ 40. To conceal information about the joint venture, Clark created a fictitious email account and remarked that it "pays to be in telecom" when the undercover FBI agent praised Clark for his creativity in concealing the information. *Id.*, ¶ 43. The FBI purchased the stock in advance of the press release. When the release was made public, AQUM's stock price rose thirty percent. *Id.*, ¶ 45.

While Clark's conduct was particularly egregious as borne out by the Commission's allegations, Clark was the less culpable of the two defendants in this case. Clark promised insider information, but had none to give. He exchanged non-insider information with a government agent in exchange for \$10,000, but returned that \$10,000. Pursuant to Clark's action, on July 9th and 10th, 2013, the FBI purchased 80,000 shares of AQUM stock for \$472.00. On July 18, AQUM issued the press release and its stock price rose approximately thirty percent. The net market effect of Clark's tip was only \$141.60 in realized gains in AQUM stock.

Further, Clark's actions were isolated. The Commission only alleges that Clark participated in one insider scheme. Moreover, Clark's conduct created no risk of loss to anyone. His conduct served to directly benefit Ray, AQUM, and the purported investor. Clark caused no person an actual loss or any risk of loss.

Finally, while nothing in the securities laws expressly prohibits a court from imposing penalties in excess of a violator's ability to pay, inability to pay is a factor to be considered in imposing a civil penalty. *S.E.C. v. Warren*, 534 F.3d 1368, 1370 (11th Cir. 2008); *S.E.C. v. Monterosso*, 756 F.3d 1326, 1338 (11th Cir. 2014). A review of the material submitted in

consideration of Clarks' financial condition reveals a modest monthly positive cash flow of \$1,265, but total liabilities of over \$1 million, including a tax lien of over \$544,000. *See* ECF No. [44-2].

Considering the type of conduct by Clark here – egregious but not recurrent – and the lack of any losses to others resulting from that conduct, the \$10,000 penalty requested by the Commission is disproportionate to Clark's actions and inconsistent with penalties imposed in like cases. The Commission seeks a penalty of nearly one-hundred times the gains realized by Clark. *Cf., e.g., SEC v. Coblin*, Case No. 12-cv-80599 (S.D. Fla. Jan. 22, 2014) (assessing \$12,500 penalty, the exact amount gained from the securities violations); *SEC v. Repko*, Case No. 12-cv-61079 (S.D. Fla. Jan. 28, 2012) (assessing \$28,000 penalty, consummate with the illicit gains from the alleged security violations). Additionally, Clark's financial condition counsels against a penalty at the amount requested. While a second-tier penalty is consistent with the recommendation of 15 U.S.C. § 77t(d)(2), the Court imposes a penalty amount of \$5,000.00.

III. CONCLUSION

For the foregoing reasons, it is hereby **ORDERED AND ADJUDGED** that:

1. **Disposition of Motion.** The Motion, ECF No. [41], is **GRANTED in part**, and **Final Judgment** is entered against Defendant Wade Clark, as set forth herein.
2. **Civil Penalty.** Clark shall **PAY** a second-tier civil penalty in the amount of **\$5,000.00** pursuant to Section 21(d)(3) of the Exchange Act, 15 U.S.C. § 78u(d)(3). Clark shall make this payment to the Commission **within ninety (90) days** after entry of this Final Judgment.
 - a. Clark may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request.

- b. Payment also may be made directly from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>. Clark also may pay by certified check, bank cashier's check, or United States postal money order payable to the Securities and Exchange Commission, which shall be delivered or mailed to

Enterprise Services Center
Accounts Receivable Branch
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

and shall be accompanied by a letter (i) identifying the case title, civil action number, and name of this Court; (ii) identifying Clark as a defendant in this action; and (iii) specifying that payment is made pursuant to this Final Judgment. Clark shall simultaneously transmit photocopies of evidence of payment and case identifying information to the Commission's counsel in this action:

Andrew O. Schiff, Esq.
Securities & Exchange Commission
801 Brickell Avenue, Suite 1800
Miami, FL 33131
schiffa@sec.gov

By making this payment, Clark relinquishes all legal and equitable right, title, and interest in such funds and no part of the funds shall be returned to him. The Commission shall send the funds paid pursuant to this Final Judgment to the United States Treasury. Clark shall pay post judgment interest on any delinquent amounts pursuant to 28 U.S.C. § 1961.

3. ***Bankruptcy Nondischargeability.*** For purposes of exceptions to discharge set forth in 11 U.S.C. §523, the allegations in the Complaint are true and admitted by

Clark, and further, any debt for disgorgement, prejudgment interest, civil penalty or other amounts due by Clark under this Final Judgment or any other judgment, order, consent order, decree or settlement agreement entered in connection with this proceeding, is a debt for the violation by Clark of the federal securities laws or any regulation or order issued under such laws, as set forth in Section 523(a)(19) of the Bankruptcy Code, 11 U.S.C. §523(a)(19).

4. ***Dismissal of Claim for Disgorgement and Prejudgment Interest.*** Upon entry of this Final Judgment, the Commission's claims for disgorgement and prejudgment interest against Clark are **DISMISSED**.
5. ***Rule 54 Certification.*** There being no just reason for delay, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the Clerk is directed to **ENTER** this Final Judgment forthwith and without further notice.
6. ***Closure of Case.*** The Clerk is directed to **CLOSE** this case. Any pending motions are **DENIED as moot**. Any impending deadlines are **TERMINATED**.
7. ***Retention of Jurisdiction.*** The Court will retain jurisdiction of this matter and of Clark for the purposes of enforcing the terms of this Final Judgment and the terms of the Judgment of Permanent Injunction and Other Relief entered against Clark on June 13, 2014, ECF No. [12].

DONE AND ORDERED in Fort Lauderdale, Florida this 28th day of January, 2015.



BETH BLOOM
UNITED STATES DISTRICT JUDGE

Copies to:
Counsel of Record

