

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-80446-CIV-COHN/SELTZER

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

ECAREER HOLDINGS, INC., ECAREER, INC.,
JOSEPH J. AZZATA, DEAN A. ESPOSITO,
JOSEPH DEVITO, and FREDERICK J. BIRKS,

Defendants,

VIPER ASSET MANAGEMENT, LLC,
ESPO CONSULTING, LLC,
DJC CONSULTING, LLC,
J & D MARKETING, LLC,
GRYPHON ASSET MANAGEMENT, LLC, and
CARLA AZZATA,

Relief Defendants

**ORDER GRANTING PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S
MOTION FOR A FINAL JUDGMENT OF PERMANENT INJUNCTION AND OTHER
RELIEF AGAINST DEFENDANTS FREDERICK J. BIRKS AND RELIEF
DEFENDANTS GRYPHON ASSET MANAGEMENT, LLC**

This cause comes before the Court upon the Motion by Plaintiff Securities and Exchange Commission for a Final Judgment of Permanent Injunction and Other Relief against Defendant Frederick J. Birks ("Birks") and Relief Defendant Gryphon Asset Management, LLC ("Gryphon Asset Management") ("Motion for Final Judgment of Permanent Injunction"). The Court finds that good cause exists for the Court to grant the Commission's Motion for Final Judgment of Permanent Injunction. The Commission having filed a Complaint and Defendant Birks and Relief Defendant Gryphon Asset Management having entered a general appearance; consented to the Court's jurisdiction over them and the subject matter of this action; consented to entry of this Final Judgment of Permanent Injunction without admitting or denying the allegations of the

Complaint (except as to jurisdiction and except as otherwise provided herein); waived findings of fact and conclusions of law; and waived any right to appeal from this Final Judgment of Permanent Injunction; and Defendant Birks and Relief Defendant Gryphon Asset Management have agreed to the entry of this Final Judgment of Permanent Injunction and Other Relief (“Final Judgment of Permanent Injunction”). Accordingly, the motion is **GRANTED**, and the Court hereby orders as follows:

I.

PERMANENT INJUNCTION

A. Section 17(a) of the Securities Act

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant Birks is 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 in or offering of securities, (B) the registration status of such offering or of such securities, (C) the prospects for success of any product or

company, (D) the use of investor funds, or (E) the misappropriation of investor funds or investment proceeds.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Judgment of Permanent Injunction by personal service or otherwise: (a) any of Defendant Birks' officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Defendant Birks or with anyone described in (a).

B. Section 10(b) and Rule 10b-5 of the Exchange Act

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendant Birks is 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 (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 in or offering of securities, (B) the registration status of such offering

or of such securities, (C) the prospects for success of any product or company, (D) the use of investor funds, or (E) the misappropriation of investor funds or investment proceeds.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Judgment of Permanent Injunction by personal service or otherwise:

(a) any of Defendant Birks' officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Defendant Birks or with anyone described in (a).

C. Section 5(a) and 5(c) of the Securities Act

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant Birks is permanently restrained and enjoined from violating Section 5 of the Securities Act [15 U.S.C. § 77e] by, directly or indirectly, in the absence of any applicable exemption:

- (a) Unless a registration statement is in effect as to a security, making use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise;
- (b) Unless a registration statement is in effect as to a security, carrying or causing to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale; or
- (c) Making use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed with the Commission as to such security, or while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under Section 8 of the Securities Act [15 U.S.C. § 77h].

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Judgment of Permanent Injunction by personal service or otherwise: (a) any of Defendant Birks' officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Defendant Birks or with anyone described in (a).

D. Section 15(a) of the Exchange Act

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant Birks is hereby permanently restrained and enjoined from violating Section 15(a) of the Exchange Act, 15 U.S.C. § 78o(a), by using any means or instrumentality of interstate commerce, the mails, or any facility of any national securities by acting as broker or dealer by effect transactions in securities, or to induce or attempt to induce the purchase or sale of securities, without being associated with a broker or dealer that was registered with the Commission in accordance with Section 15(b) of the Exchange Act [15 U.S.C. § 78o(b)].

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Judgment of Permanent Injunction by personal service or otherwise: (a) any of Defendant Birks' officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Defendant Birks or with anyone described in (a).

II.

COMMAND TO COMPLY WITH PRIOR ORDERS

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to Section 20(c) of the Securities act and/or Section 21(e) of the Exchange Act, Defendant Birks: (a) is commanded to comply with the February 7, 2011, order for him to not associate with any broker or dealer. *In the Matter of Frederick J. Birks*, Exchange Act Release

No. 63862, Administrative Proceeding File No. 3-14240 (Feb. 7, 2011); and (b) is commanded to comply with the August 18, 2010, final district court judgment entered against him in *SEC v. Frederick J. Birks*, Case No. 8-80130-CIV (S.D. Fla., Feb. 7, 2008) enjoining him from future violations of Section 5 of the Securities Act and Sections 10(b) and 15 of the Exchange Act and Rule 10b-5 thereunder, and permanently barring him from participating in any penny stock offering.

III.

DISGORGEMENT, PREJUDGMENT INTEREST THEREON & CIVIL PENALTY

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant Birks and Relief Defendant Gryphon Asset Management shall, jointly and severally, pay disgorgement of \$288,247 and pay \$12,312 of prejudgment interest thereon. In addition, Defendant Birks shall pay a \$150,000 civil money penalty, pursuant to Section 20(d) of the Securities Act [15 U.S.C. § 77t(d)] and Section 21A of the Exchange Act. [15 U.S.C. § 78u-1].

IV.

SECURITIES SALES

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that within thirty days from the date of the Order, the Court appointed Receiver, David Levine, shall in a reasonable and prudent fashion sell all securities and close out all existing positions or margin loans in Gryphon Asset Management's brokerage account held at OptionsHouse (acct. # xxxxx1031), and distribute the proceeds of the OptionsHouse account as follows: (1) Defendant Birks or Relief Defendant Gryphon Asset Management shall receive \$10,000 from the proceeds of OptionsHouse (acct. # xxxxx1031); and (2) all remaining funds in the OptionsHouse (acct. # xxxxx1031) will be paid in partial satisfaction of the Final Judgment and held by the Receiver in a segregated account until further Order of this Court. Moreover, Defendant Birks and Relief

Defendant Gryphon Asset Management shall cooperate with the Court appointed Receiver and within ten days from the date of this Order, Birks shall execute any required paperwork, including a power-of-attorney, for the Receiver to sell all securities and close out all existing positions or margin loans in Gryphon Asset Management's brokerage account held in the OptionsHouse (acct. # xxxxx1031).

In addition, within ten days from the date of the Order, Defendant Birks shall provide the Receiver with original share certificates evidencing 55,000 shares of Continental Rail Corp. (ticker symbol CRCX) and 30,000 shares of Train Travel Holdings Inc. (ticker symbol TTX), and execute all necessary paperwork to allow the Receiver, in a reasonable and prudent fashion, including a power-of-attorney to sell these securities.

All payments made by Defendant Birks or Relief Defendant Gryphon Asset Management, including the funds held by the Receiver shall first go towards payment of any accrued post-judgment interest, if any; then towards the disgorgement, and prejudgment interest thereon, obligation of Defendant Birks and Relief Defendant Gryphon Asset Management; and then any remaining funds shall go towards the payment of the civil money penalty against Defendant Birks.

V.

PAYMENT PLAN

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED the total amount owed by Defendant Birks and Relief Defendant Gryphon Asset Management shall be reduced by payments the Receiver receives from the OptionsHouse (acct. # xxxxx1031) and the above referenced securities sales less the \$10,000 paid to Birks. Defendant Birks and Relief Defendant Gryphon Asset Management shall pay to the Receiver the remaining amount of

disgorgement, prejudgment interest, plus any accrued post-judgment interest, within 180 days from the date of this Order, and Defendant Birks shall pay to the Receiver the remaining amount of civil money penalty, plus any accrued post-judgment interest, within 180 days from the date of this Order. Defendant Birks and Relief Defendant Gryphon Asset Management shall request payment instructions from the Receiver or the SEC. The Receiver shall hold all funds he receives from Defendant Birks or Relief Defendant Gryphon Asset Management in a segregated account and shall periodically report to the Court the amount of funds he has received. When making payment, Defendant Birks and Relief Defendant Gryphon Asset Management shall also simultaneously transmit photocopies of evidence of payment and case identifying information to Christopher E. Martin, Esq, the Commission's counsel in this action.

Defendant Birks and Relief Defendant Gryphon Asset Management relinquishes all legal and equitable right, title, and interest in any payment they make to the Receiver or the SEC and no part of the funds shall be returned to either of them.

The Commission may enforce the Court's judgment for disgorgement and prejudgment interest by moving for civil contempt (and/or through other collection procedures authorized by law) at any time after 30 days after the unpaid amount becomes due. Beginning thirty days after entry of this Order, Defendant Birks and Relief Defendant Gryphon Asset Management shall pay post-judgment interest on any delinquent amounts pursuant to 28 U.S.C. § 1961.

Defendant Birks shall not seek or accept, directly or indirectly, reimbursement or indemnification from any source, including but not limited to payment made pursuant to any insurance policy, with regard to any civil penalty amount he pays pursuant to this Final Judgment, regardless of whether such penalty amounts or any party thereof are added to a distribution fund or otherwise used for the benefit of investors. Defendant Birks further shall not

claim, assert, or apply for tax deduction or tax credit with regard to any federal, state, or local tax for any penalty amounts he pays pursuant to this Final Judgment, regardless of whether such penalty amounts or any part thereof are added to a distribution fund or otherwise used for the benefit of investors.

VI.

RECORDS PRESERVATION

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant Birks and Relief Defendant Gryphon Asset Management, any of their directors, officers, agents, servants, employees, attorneys, depositories, banks, and those persons in active concert or participation with any one or more of them, and each of them, be and they hereby are restrained and enjoined from, directly or indirectly, destroying, mutilating, concealing, altering, disposing of, or otherwise rendering illegible in any manner, any of the books, records, documents, correspondence, brochures, manuals, papers, ledgers, accounts, statements, obligations, files and other property of or pertaining to any of the Defendants or Relief Defendants, wherever located and in whatever form, electronic or otherwise.

VII.

BANKRUPTCY NONDISCHARGEABILITY

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that solely for purposes of exceptions to discharge set forth in Section 523 of the Bankruptcy Code, 11 U.S.C. §523, the allegations in the complaint are true and admitted by Defendant Birks, and further, any debt for disgorgement, prejudgment interest, civil penalty or other amounts due by either of them under this Final Judgment of Permanent Injunction or any other judgment, order, consent order, decree or settlement agreement entered in connection with this proceeding, is a debt for the violation by Defendant Birks 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).

VIII.

INCORPORATION OF THE CONSENT

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Consent of Defendant Birks and Relief Defendants Gryphon Asset Management to a Final Judgment of Permanent Injunction and Other Relief is incorporated herein with the same force and effect as if fully set forth herein, and that each of them shall comply with all of the undertakings and agreements set forth therein.

IX.

RETENTION OF JURISDICTION

IT IS HEREBY FURTHER ORDERED that this Court shall retain jurisdiction over this matter and Defendant Birks and Relief Defendant Gryphon Asset Management in order to implement and carry out the terms of all Orders and Decrees that may be entered and/or to entertain any suitable application or motion for additional relief within the jurisdiction of this Court, and will order other relief that this Court deems appropriate under the circumstances.

X.

RULE 54(b) CERTIFICATION

There being no just reason for delay, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the Clerk is ordered to enter this Final Judgment of Permanent Injunction forthwith and without further notice.

DONE AND ORDERED this 29th day of FEBRUARY 2016, at Fort Lauderdale, Florida.


UNITED STATES DISTRICT JUDGE
JAMES I. COHN

Copy to all counsel and parties of record