

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

vs.

RMR Asset Management Company,
Bruce A. Broekhuizen, Douglas J.
Derryberry, David R. Frost, Richard C.
Gounaud, Neil P. Kelly, John M.
Kirschenbaum, David S. Luttbeg,
Timothy J. McAloon, Jocelyn M.
Murphy, Michael Sean Murphy, Ralph
M. Riccardi, Dewey T. Tran, and
Philip A. Weiner,

Defendants.

Case No. 3:18-cv-01895-AJB-JMA

**ORDER GRANTING CONSENT
JUDGMENT**

(Doc. No. 7)

FINAL JUDGMENT AS TO DEFENDANT JOHN M. KIRSCHENBAUM

The Securities and Exchange Commission (“Commission”) having filed a Complaint and Defendant John M. Kirschenbaum (“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 and except as otherwise provided herein in paragraph VIII); waived findings of fact and conclusions of law; and waived any right to appeal from this Final Judgment:

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I.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendant 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.

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 Final Judgment by personal service or otherwise: (a) Defendant’s officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Defendant or with anyone described in (a).

II.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendant is permanently restrained and enjoined from violating, directly or indirectly, Section 15(a)(1) of the Exchange Act [15 U.S.C. § 78o(a)(1)], by making use of the mails or the means or instrumentalities of interstate commerce to effect transactions in, or to induce or attempt to induce the purchase or sale of, a security without being registered in accordance with Section 15(a)(1) of the Exchange Act while engaged in the business of effecting transactions in securities for the account of others.

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

7 III.

8 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendant is
9 permanently restrained and enjoined from violating, directly or indirectly, Rule G-17
10 of the Municipal Securities Rulemaking Board by not dealing fairly with all persons
11 and/or by engaging in any deceptive, dishonest, or unfair practice.

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

18 IV.

19 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendant is
20 enjoined for a period of five (5) years from the date of this Final Judgment from,
21 directly or indirectly, opening or maintaining any brokerage account(s) without
22 providing the relevant brokerage firm(s) a copy of the Complaint and a copy of this
23 Final Judgment.

24 V.

25 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant
26 is liable for disgorgement of \$169,275, representing profits gained as a result of the
27 conduct alleged in the Complaint, together with prejudgment interest thereon in the
28 amount of \$17,373 pursuant to Section 21(d)(3) of the Exchange Act [15 U.S.C. §

1 78u(d)(3)]. Defendant shall satisfy this obligation pursuant to the terms of the
2 payment schedule set forth in paragraph VII below.

3 Defendant may transmit payment electronically to the Commission, which will
4 provide detailed ACH transfer/Fedwire instructions upon request. Payment may also
5 be made directly from a bank account via Pay.gov through the SEC website at
6 <http://www.sec.gov/about/offices/ofm.htm>. Defendant may also pay by certified
7 check, bank cashier's check, or United States postal money order payable to the
8 Securities and Exchange Commission, which shall be delivered or mailed to
9 Enterprise Services Center
10 Accounts Receivable Branch
11 6500 South MacArthur Boulevard
12 Oklahoma City, OK 73169

13 and shall be accompanied by a letter identifying the case title, civil action number,
14 and name of this Court; John M. Kirschenbaum as a defendant in this action; and
15 specifying that payment is made pursuant to this Final Judgment.

16 Defendant shall simultaneously transmit photocopies of evidence of payment
17 and case identifying information to the Commission's counsel in this action. By
18 making this payment, Defendant relinquishes all legal and equitable right, title, and
19 interest in such funds and no part of the funds shall be returned to Defendant. The
20 Commission shall send the funds paid pursuant to this Final Judgment to the United
21 States Treasury.

22 The Commission may enforce the Court's judgment for disgorgement and
23 prejudgment interest by moving for civil contempt (and/or through other collection
24 procedures authorized by law) at any time after fourteen (14) days following entry of
25 this Final Judgment. Defendant shall pay post judgment interest on any delinquent
26 amounts pursuant to 28 U.S.C. § 1961.

27 VI.

28 IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that
based on Defendant's sworn representations in his Statement of Financial Condition

1 dated March 30, 2018 and other documents and information submitted to the
2 Commission, the Court is not ordering Defendant to pay a civil penalty. The
3 determination not to impose a civil penalty is contingent upon the accuracy and
4 completeness of Defendant's Statement of Financial Condition. If at any time
5 following the entry of this Final Judgment the Commission obtains information
6 indicating that Defendant's representations to the Commission concerning his assets,
7 income, liabilities, or net worth were fraudulent, misleading, inaccurate, or
8 incomplete in any material respect as of the time such representations were made, the
9 Commission may, at its sole discretion and without prior notice to Defendant, petition
10 the Court for an order requiring Defendant to pay the unpaid portion of the
11 disgorgement, pre-judgment and post-judgment interest thereon, and the maximum
12 civil penalty allowable under the law. In connection with any such petition, the only
13 issue shall be whether the financial information provided by Defendant was
14 fraudulent, misleading, inaccurate, or incomplete in any material respect as of the
15 time such representations were made. In its petition, the Commission may move this
16 Court to consider all available remedies, including, but not limited to, ordering
17 Defendant to pay funds or assets, directing the forfeiture of any assets, or sanctions
18 for contempt of this Final Judgment. The Commission may also request additional
19 discovery. Defendant may not, by way of defense to such petition: (1) challenge the
20 validity of the Consent or this Final Judgment; (2) contest the allegations in the
21 Complaint filed by the Commission; (3) assert that payment of disgorgement, pre-
22 judgment and post-judgment interest or a civil penalty should not be ordered; (4)
23 contest the amount of disgorgement and pre-judgment and post-judgment interest; (5)
24 contest the imposition of the maximum civil penalty allowable under the law; or (6)
25 assert any defense to liability or remedy, including, but not limited to, any statute of
26 limitations defense. Defendant shall also pay post-judgment interest on any
27 delinquent amounts pursuant to 28 U.S.C. § 1961.

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VII.

Defendant shall pay the total of disgorgement and prejudgment interest of \$186,648 in twelve (12) installments to the Commission according to the following schedule:

- (1) \$46,662 within fourteen (14) days of entry of this Final Judgment;
- (2) \$12,726 within four (4) months of entry of this Final Judgment;
- (3) \$12,726 within eight (8) months of entry of this Final Judgment;
- (4) \$12,726 within twelve (12) months of entry of this Final Judgment;
- (5) \$12,726 within fifteen (15) months of entry of this Final Judgment;
- (6) \$12,726 within eighteen (18) months of entry of this Final Judgment
- (7) \$12,726 within twenty one (21) months of entry of this Final Judgment
- (8) \$12,726 within twenty four (24) months of entry of this Final Judgment
- (9) \$12,726 within twenty seven (27) months of entry of this Final Judgment
- (10) \$12,726 within thirty (30) months of entry of this Final Judgment
- (11) \$12,726 within thirty three (33) months of entry of this Final Judgment; and
- (12) \$12,726 within thirty six (36) months of entry of this Final Judgment.

Payments shall be deemed made on the date they are received by the Commission and shall be applied first to post judgment interest, which accrues pursuant to 28 U.S.C. § 1961 on any unpaid amounts due after fourteen (14) days of the entry of Final Judgment. Prior to making the final payment set forth herein, Defendant shall contact the staff of the Commission for the amount due for the final payment.

If Defendant fails to make any payment by the date agreed and/or in the amount agreed according to the schedule set forth above, all outstanding payments under this Final Judgment, including post-judgment interest, minus any payments made, shall become due and payable immediately at the discretion of the staff of the Commission without further application to the Court.

VIII.

IT IS 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, and further, any debt for disgorgement, prejudgment interest, civil penalty or other amounts due by Defendant 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 Defendant 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).

IX.


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.

X.

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 forthwith and without further notice.

IT IS SO ORDERED.

Dated: August 17, 2018



Hon. Anthony J. Battaglia
United States District Judge

