

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 03-80612-CIV-MARRA/JOHNSON

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

MICHAEL LAUER et al.,

Defendants,

and

LANCER OFFSHORE, INC., et al.,

Relief Defendants.

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ORDER SETTING PENALTY AMOUNT

THIS CAUSE is before the Court upon Plaintiff Securities and Exchange Commission's ("SEC") Notice of Filing Recommended Penalty Amount Against Defendant Michael Lauer [DE 2276]. The Court has carefully reviewed the SEC's recommendation and Michael Lauer's ("Lauer") response, and is otherwise fully advised in the premises.

On December 12, 2008, the Court held an evidentiary hearing on the amount of disgorgement. When the Court entered its Order setting disgorgement and prejudgment interest, it ordered Lauer to pay more than \$62 million. *See* DE 2260. The Court found that Lauer's gain from the fraud was \$43.6 million. Subsequently, the SEC was directed to recommend a specific penalty amount that Lauer should pay.

The SEC recommends a \$1 million civil penalty be imposed based on the findings made in the Order and Opinion for Summary Judgment and pursuant to Section 20(d) of the Securities Act of 1933, Section 21(d)(3) of the Securities Exchange Act of 1934, and Section 209(e) of the Investment Advisers Act of 1940.

These statutes are virtually identical and establish three tiers of penalties. Under the first tier, the court may impose a penalty of up to (i) \$5,000 on Lauer for each violation or (ii) the gross amount of pecuniary gain to Lauer as a result of the violation. Under the second tier, the court may impose a penalty of up to (i) \$50,000 on Lauer for each violation or (ii) the gross amount of pecuniary gain to Lauer 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 (i) \$100,000¹ on Lauer for each violation or (ii) the gross amount of pecuniary gain to Lauer as a result of the violation. The third tier applies where 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.

¹ The statutory adjustment for inflation increased this tier penalty to \$110,000 for each violation (for conduct occurring after December 1996 through February 2, 2001), and \$120,000 for each violation (for conduct after February 2, 2001). See 17 C.F.R. at Tbl. II to Subpt. E. These adjusted rates apply to this case since Lauer’s fraudulent conduct started by no later than November 1999 and lasted through at least July 2003. DE 2133 at 34 & 41-42.

Accordingly, based on these statutes, the Court could impose a civil penalty of up to \$43.6 million (the amount of Lauer's pecuniary gain) or impose a third tier penalty for each of Lauer's numerous violations.

The purpose of a civil penalty is to punish the individual violator like Lauer as well as to deter future violations.

A monetary penalty is designed to serve as a deterrent against securities law violations. As set forth in H.R. Report No. 616-the Report of the Committee on Energy and Commerce of the U.S. House of Representatives on the Remedy Act,

[T]he money penalties proposed in this legislation are needed to provide financial disincentives to securities law violations other than insider trading Disgorgement merely requires the return of wrongfully obtained profits; it does not result in any actual economic penalty or act as a financial disincentive to engage in securities fraud. A violator who avoids detection is able to keep the profits resulting from illicit activities. Currently, even a violator who is caught is required merely to give back his gains with interest, leaving him no worse off financially than if he had not violated the law. The Committee therefore concluded that authority to seek or impose substantial money penalties, in addition to the disgorgement of profits, is necessary for the deterrence of securities law violations that otherwise may provide great financial returns to the violator.

SEC v. Lybrand, 281 F. Supp. 2d 726, 729-30 (S.D.N.Y. 2003) (internal citations omitted).

The court may consider a number of factors in determining the appropriate amount for a civil penalty, including (1) the egregiousness of the Lauer's conduct; (2)

the degree of the Lauer's scienter; (3) whether the conduct created substantial losses to other persons; (4) whether the conduct was isolated or recurrent; and (5) whether the penalty should be reduced in light of the defendant's demonstrated current and future financial condition. *S.E.C. v. Kane*, No. 97 Civ. 2931, 2003 WL 1741293,* 4 (S.D.N.Y. April 1, 2003). Applying these factors to this case inexorably leads to the conclusion that the Court should impose a third tier civil penalty against Lauer. Lauer's violations involved fraud, deceit, manipulation, and deliberate disregard of regulatory requirements. Lauer's conduct resulted in hundreds of millions of dollars in investor losses. Lauer's conduct was egregious, he acted with scienter, and the misconduct lasted for several years. The seriousness of the fraud and the principal role played by Lauer make appropriate a fine approximating the maximum.

In determining the amount of penalty,² however, the Court is cognizant that it has already ordered Lauer to pay more than \$62 million in disgorgement and prejudgment interest, and the fact that Lauer is now being criminally prosecuted for these same violations. Lauer claims his current financial condition is destitute. In

² While determination of liability is a jury function, determining the amount of a civil penalty is a judge function. See *Tull v. United States*, 481 U.S. 412, 426-27 (1987) ("Congress' assignment of the determination of the amount of civil penalties to trial judges . . . does not infringe on the constitutional right to a jury trial. . . [A] determination of a civil penalty is not an essential function of a jury trial . . ."). Since liability has been determined in this case as a matter of law, the Court may now determine the amount of civil monetary penalty to impose. *SEC v Warren*, 534 F.3d 1368 (11th Cir. 2008).

light of the unlikelihood of any recovery, and taking into account all of the facts and circumstances of the case, the Court will impose a civil penalty against Lauer in the amount of \$500,000.00.

DONE AND ORDERED in Chambers at West Palm Beach, Palm Beach County, Florida, this 17th day of August, 2009.



KENNETH A. MARRA
United States District Judge

copies to:
All counsel of record
Michael Lauer