

UNITED STATES OF AMERICA  
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 01-7874-CIV-HURLEY/LYNCH

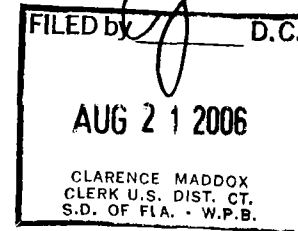
SECURITIES AND EXCHANGE COMMISSION,  
Plaintiff,

v.

PAUL R. JOHNSON,  
JOHN COOK,  
EMANUELE CARDACI, and  
SCOTT SCHOENBAUER,  
Defendants,

and

J& J MANAGEMENT CONSULTING,  
A/K/A 1287769 ONTARIO INC., and  
CATERINA JOHNSON,  
Relief Defendants.



**ORDER GRANTING PARTIAL SUMMARY JUDGMENT IN  
FAVOR OF PLAINTIFF AND AGAINST DEFENDANT PAUL R. JOHNSON,  
FINAL PARTIAL SUMMARY JUDGMENT &  
ORDER OF PERMANENT INJUNCTION AND OTHER RELIEF**

THIS CAUSE is before the Court on Plaintiff Securities and Exchange Commission's Motion for Summary Judgment against Defendant Paul Johnson [DE# 230, 231, 232] and renewed motion for summary judgment filed March 21, 2006 [DE# 270].

By its motion, the Commission seeks a determination of Johnson's liability for securities fraud and entry of corresponding injunctive relief based on the collateral estoppel effect of a prior criminal judgment which Johnson suffered on certain overlapping securities fraud charges. By its underlying Amended Complaint, it also seeks monetary relief in the form of civil penalties and disgorgement of sums greater than the investor losses attributable to the fourteen substantive charges on which he was found criminally liable. Acknowledging this variance, the Commission

requests that all issues pertaining to the appropriate scope of monetary relief be reserved for later evidentiary hearing upon motion of the Commission.

The Court agrees that collateral estoppel bars re-litigation of defendant's liability for the fourteen substantive securities fraud charges on which he was previously found criminally liable, but rejects the notion that Johnson's criminal conviction translates into an exposure for all investor losses associated with the same fraudulent scheme upon a predicate of simple proof of loss. Rather, Johnson's financial responsibility for any investor losses beyond those determined by his conviction on the fourteen substantive securities fraud counts in the criminal case must be predicated on evidence which first establishes his culpability for the conduct precipitating the losses. Since this is not attempted or accomplished by way of the Commission's motion for summary judgment in this case, Johnson's liability for the total losses claimed in this action is necessarily reserved for determination by the trier of fact at the time of trial.

The Court has accordingly determined to grant a partial summary judgment on liability with corresponding injunctive relief, for reasons more fully discussed below.

### **I. Procedural History**

The SEC filed its original complaint in this action on December 12, 2001, and the Court approved the SEC's filing of an amended complaint on December 30, 2002, now the operative complaint ("the Complaint") in this case [DE# 1, 160, 162]. The Complaint alleges Johnson violated Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78j(b) and 17 C.F.R. § 240.10b-5; and Sections 5(a), 5(c), and 17(a)(1)-(3) of the Securities Act of 1933 ("Securities Act"), 15 U.S.C. §§ 77e(a), 77e(c), and 77q(a)(1)-(3), through his fraudulent conduct in offering and selling the unregistered securities of Link Express

Delivery Solutions, Inc. (“Link”), a now-defunct package delivery company incorporated in Delaware and doing business in Florida, which he controlled and for which he was the majority shareholder. The Complaint alleges that in committing these violations, Johnson used the means and instrumentalities of interstate commerce, the means and instruments of transportation and communication in interstate commerce, and the mails.

On July 8, 2003, in *U.S. v. Paul Johnson*, Case No. 02-60012-CR-Middlebrooks, a parallel criminal case against Johnson and others, the United States Attorney for the Southern District of Florida filed a Superseding Indictment against Johnson and others, which charged, among other things, that Johnson committed violations of Section 10(b) and Rule 10b-5 of the Exchange Act based on the same course of conduct giving rise to the SEC’s complaint in this case.

In the criminal case, Johnson received the complete panoply of due process protections, including a full opportunity to litigate the charges against him through a month-long jury trial. At the conclusion of trial in the criminal case, the jury convicted Johnson, and, in its April 21, 2004 Amended Judgment (“the Criminal Judgment”), the District Court adjudicated Johnson guilty of conspiring to and committing securities fraud based on the same violations of Section 10(b) and Rule 10b-5 of the Exchange Act as which are alleged by the SEC in this case. Johnson was also adjudicated guilty of perjury and money laundering.

The substantive securities fraud counts on which Johnson was convicted (Counts 2 through 15) in the criminal case rested on violations of Section 10(b) and Rule 10b-5 of the Exchange Act committed in connection with Johnson’s solicitation of funds from specific investors who responded to five private stock offerings in LEDS stock between 1997 and 2000. As charged in Counts 2 through 15 of the criminal indictment, the investor losses corresponding

to these LEDS stock transactions amounted to \$1,505,850.00. Johnson was sentenced to 180 months imprisonment on the criminal securities fraud charges and ordered to pay restitution in the amount of \$4,402,479.79, plus an assessment in the amount of \$ 2,800.00.

Johnson appealed his criminal judgment to the United States Court of Appeals for the Eleventh Circuit, which affirmed all of his convictions for conspiring to and committing securities fraud (Counts 1 - 15) and perjury (Counts 16-17), while reversing some of his convictions for money laundering (Counts 22-28) and affirming others (Counts 18-21). *United States v. Johnson*, 440 F.3d 1286 (11th Cir. 2006), *rehearing and rehearing en banc denied* \_\_\_\_ F.3d \_\_\_\_ (11th Cir. July 12, 2006).

## **II. The SEC Complaint**

According to the Commission's current Complaint, Johnson and other defendants, themselves and through Argus Securities, Inc. ("Argus"), a broker-dealer Johnson controlled, offered and sold Link securities from October 1997 through March 2000 through five overlapping fraudulent private placement offerings and sales of Johnson's personal stock. These overlapping Link offerings comprised millions of units of securities and included:

- an offering of Series A Convertible Preferred Stock, selling at \$1.50 per unit.
- an offering of Series B Convertible Preferred Stock, selling at \$3.50 per unit.
- an offering of Series C Link stock selling at \$10 per share.
- an offering of Series A Convertible Debentures selling at \$10,000 per debenture.
- an offering of units consisting of a share of common stock and three common stock purchase warrants, selling at \$9.50 per unit.

It is alleged that Johnson and the other defendants allegedly generated roughly \$15.5 million in sales from these offerings, while Johnson generated another \$3.4 million dollars in sales of his personal Link stock in 1999 and 2000. It is undisputed that there were no registrations filed with the SEC for any of the Link securities offered or sold by Johnson or the other defendants.

### **III. Summary Judgment Motion**

The SEC filed its initial motion for summary judgment on September 8, 2005, accompanied by its supporting Memorandum of Law [DE# 231] and Statement of Undisputed Material Facts [DE# 232]. After the Court granted Johnson two extensions of time to respond to the SEC's motion [DE# 235 and 241], the motion was fully briefed on both sides [DE# 247, 248, 252, 255, 256, 257]. The Court then deferred ruling on the motion to allow Johnson to file an answer to the SEC's Amended Complaint, without prejudice to the SEC later renewing its motion. [DE# 262]. The SEC subsequently renewed its motion [DE# 274] and both sides have since submitted supplemental materials in support of and in opposition to the motion [DE# 278, 283, 284, 286, 287].

The essential premise of the Commission's motion is that the doctrine of collateral estoppel prevents Johnson from disputing facts which established his criminal liability, after a jury trial in a separate criminal proceeding, for violating Section 10(b) and Rule 10b-5 of the Exchange Act.

### **IV. Discussion**

A criminal conviction, whether by jury verdict or guilty plea, constitutes an estoppel in favor of the United States in a subsequent civil proceeding as to those matters determined by the judgment in the criminal case. *United States v Podell*, 572 F.2d 31, 35 (2d Cir. 1978), *citing McCarthy v United States*, 394 U.S. 459, 89 S. Ct. 1166, 22 L. Ed. 2d 418 (1969). Thus, a criminal conviction for securities fraud may be given collateral estoppel effect in a subsequent civil SEC action. *See Parklane Hosiery Co. v Shore*, 439 U.S. 322, 326 n. 5, 332-33, 337, 99 S. Ct. 645, 649 n. 5, 58 L. Ed.2d 552 (1979)(endorsing use of offensive collateral estoppel by

private securities litigants against defendants who were found to have violated the anti fraud provisions of the federal securities law in earlier suit brought by the SEC); *Securities & Exchange Commission v Bilzerian (In re Bilzerian)*, 153 F.3d 1278 (11th Cir. 1998); *Securities & Exchange Commission v Gruenberg*, 989 F.2d 977 (8th Cir. 1993); *Securities & Exchange Commission v Svoboda*, 409 F. Supp.2d 331 (S.D.N.Y. 2006); *In re Media Vision Technology Securities Litigation*, 2003 WL 2227875 (N.D. Cal. 2003)(unpub.); *In re Towers Financial Corporation Noteholders Litigation*, 75 F. Supp. 2d 178 (S.D.N.Y. 1999), and cases cited *infra*; *In re Ivan Boesky Securities Litigation*, 848 F. Supp. 1119 (S. D. N. Y. 1994); *Securities & Exchange Commission v Dimensional Entertainment Corp.*, 493 F. Supp. 1270 (S. D. N.Y. 1980).

#### **A. Securities Fraud**

In this case, upon review of the submissions of the SEC and the opinion of the Eleventh Circuit Court of Appeals in Johnson's criminal case, *United States v Johnson*, 440 F.3d 1286 (11th Cir. 2006), the court concludes that the factual determinations necessarily made by the jury in convicting Johnson for criminal securities fraud in violation of § 10(b) and Rule 10b-5 at Counts 2 - 15 of Superseding Indictment also establishes Johnson's liability for a similar, discrete category of violations of the securities laws which are encompassed in the charges set forth in the Commission's complaint in this civil action. *Securities & Exchange Commission v McCaskey*, 2001 WL 1029053 (S. D. N. Y. 2001).

However, Johnson's substantive criminal convictions do not establish his liability in this action for all losses attributable to the conspiracy to commit securities fraud, even though the claims in this civil suit arise from the same alleged fraudulent scheme and course of conduct. The court recognizes that Johnson was also criminally convicted of conspiracy to commit

securities fraud, and that the conspiracy charge encompassed a series of alleged overt acts and means which coincide with the allegations of securities fraud made in the SEC's complaint here. However, Johnson's conviction on the conspiracy charge rested on a general verdict, and it is therefore impossible to determine which of the particular means charged in the superseding indictment were used to effect the conspiracy. Therefore, the collateral estoppel effect which may be drawn from his conviction on conspiracy charge is necessarily circumscribed to the essence of the conspiracy, and the Commission cannot, through invocation of collateral estoppel principles, transpose the overt acts or manner or means of conspiracy charged in the criminal case here to enhance the scope of civil liabilities and losses attributable to Johnson. *See generally United States v Podell*, 572 F.2d 31 (2d Cir. 1978); *United States v Guzzone*, 273 F.2d 121 (2d Cir. 1959).

The court accordingly finds the facts established by Johnson's conviction on Counts 2 through 15 of the Superseding Indictment sufficient to satisfy all the prerequisites for civil liability under § 10(b) and Rule 10b-5 as to those transactions upon which his criminal liability under Counts 2 through 15 of the Superseding Indictment was predicated. It now adjudges Johnson civilly liable for those offenses and shall order disgorgement of all profits gained from those transactions.<sup>1</sup>

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<sup>1</sup> It is recognized that the amount of disgorgement ordered need only be a reasonable approximation of profits causally connected to the violation, and that any risk of uncertainty in the calculation should fall on the wrongdoer whose illegal conduct created the uncertainty. *SEC v Patel*, 61 F.3d 137, 139-40 (2d Cir. 1995). Within this range, the court finds the amount of disgorgement for which Johnson may be held liable by force of collateral estoppel must necessarily correspond to the violations for which he was adjudicated criminally liable under Counts 2 through 15 of the Superseding Indictment.

### **B. Registration Violations**

The unrefuted record evidence also establishes that there were no registrations filed with the SEC for any of the Link securities which Johnson and the other defendants offered or sold.<sup>2</sup> Given this evidence, and given that Johnson was criminally convicted of fourteen substantive counts of securities fraud based on the offering and sale of the Link securities, the court finds no genuine issue of material fact on Johnson's liability for the securities registration violations alleged under Section 5(a)- 5(c) of the Securities Act in Counts 1 and 2 of the Commission's complaint.

The court recognizes that Johnson has asserted certain affirmative defenses potentially applicable to these charges -- His answer references unspecified exemptions from the registration requirements and good faith reliance on counsel in defense of the registration claims. However, the court finds that the Commission has satisfied its Rule 56 burden of demonstrating the absence of evidence on the issues framed by the indeterminate exemptions lodged by Johnson in affirmative defense to the registration claims.<sup>3</sup> *See generally FDIC v Giammettei*, 34 F.3d 51 (2d Cir. 1994)(where plaintiff uses summary judgment motion to test legal sufficiency of affirmative defense on which defendant bears burden of proof at trial, plaintiff satisfies Rule 56 burden by showing there is absence of evidence to support essential element non- moving party's case); *Fitzpatrick v City of Atlanta*, 2 F.3d 1112 (11th Cir. 1993). The court further finds that Johnson has failed to come forward with any competent evidence tending to lay a minimal evidentiary predicate or foundation for those exemptions, or otherwise tending to show the

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See Declaration of Chih-Pin Lu and supporting attachments, attached as Ex. A to SEC Memorandum of Law in Support of Ex -Parte Motion for Temporary Restraining Order and other Emergency Relief (DE # 5).

<sup>3</sup> See Plaintiff's Supplementary Reply in Support of Summary Judgment filed July 14, 2006. pp. 6-15.



existence of a disputed issue of material fact on whether the securities offered qualified for any cognizable exemption from registration. Accordingly, the court concludes that summary judgment is appropriately entered against Johnson on these claims. *Doran v Petroleum Management Corp.*, 545 F.2d 893 (5th Cir. 1977); *Domino Media, Inc. v Kranis*, 8 F. Supp. 2d 374 (S.D.N.Y. 1998), *aff'd* 173 F.3d 843 (2d Cir. 1999); *Frankel v ICD Holdings S.A.*, 930 F. Supp. 54, 65 (S.D.N.Y. 1996).

#### **V. ORDER**

For reasons discussed above, it is **ORDERED AND ADJUDGED**:

1. The SEC's Motion for Summary Judgment against defendant Paul R. Johnson [DE# 230, 270 ] is partially **GRANTED** and **PARTIAL FINAL SUMMARY JUDGMENT** is entered as follows:

a. Under application of collateral estoppel principles, defendant Johnson is liable for the securities fraud charged in this case under §10(b) and Rule 10-b of the Exchange Act and Section 17(a) of the Securities Act as to that discrete category of conduct forming the basis of his conviction on the fourteen substantive securities fraud counts charged in the corresponding criminal case at Counts 2-15 of Superseding Indictment;

b. Under application of collateral estoppel principles, defendant Johnson is liable for the securities registration violations charged in this case under Section 5 of the Securities Act with respect to the Link offerings implicated in that discrete category of conduct forming the basis of his conviction on the fourteen substantive securities fraud counts charged in the corresponding criminal case at Counts 2-15 of Superseding Indictment.

2. A judgment of **PERMANENT INJUNCTION** and Other Relief (“Judgment”) is entered for the SEC and against Defendant Johnson as follows:

a. **IT IS ORDERED AND ADJUDGED** that Johnson and Johnson’s agents, servants, employees, attorneys, representatives, 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 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.

b. **IT IS FURTHER ORDERED AND ADJUDGED** that Johnson and Johnson’s agents, servants, employees, attorneys, representatives, 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 [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.

**c. IT IS FURTHER ORDERED AND ADJUDGED** that Johnson and Johnson's agents, servants, employees, attorneys, representatives, 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 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].

**3. IT IS FURTHER ORDERED AND ADJUDGED** that, pursuant to Section 21(d)(2) of the Exchange Act [15 U.S.C. § 78u(d)(2)], Johnson is prohibited from acting as an officer or director of any issuer that has a class of securities registered pursuant to Section 12 of the Exchange Act [15 U.S.C. § 78l] or that is required to file reports pursuant to Section 15(d) of the Exchange Act [15 U.S.C. § 78o(d)].


**4. IT IS FURTHER ORDERED AND ADJUDGED** that Johnson shall pay disgorgement of ill-gotten gains related to the conduct underlying his conviction on Counts 2 through 15 of superseding criminal indictment, together with prejudgment interest thereon, and corresponding civil penalties pursuant to Section 20(d) of the Securities Act [15 U.S.C. § 77t(d)] and Section 21(d)(3) of the Exchange Act [15 U.S.C. § 78u(d)(3)]. The Court shall reserve ruling on the amounts of the disgorgement and civil penalty pending further motion of the Commission.

**5. IT IS FURTHER ORDERED AND ADJUDGED** that this Court shall retain jurisdiction of this matter for the purposes of enforcing the terms of this Judgment.

**6. IT IS FURTHER ORDERED AND ADJUDGED** that 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 Judgment forthwith and without further notice.

7. **IT IS FURTHER ORDERED AND ADJUDGED** that at the time of the upcoming telephonic status conference, the SEC inform this Court of its intent with respect to the prosecution of any other claims that may remain unresolved in this action, as well as its readiness to proceed to adjudication of such claims or to discontinue them in the light of the relief provided by the Final Judgment directed here.

**DONE AND ORDERED** this 19<sup>th</sup> day of August, 2006 in chambers at West Palm Beach, Florida.

  
**DANIEL T. K. HURLEY**  
**UNITED STATES DISTRICT JUDGE**

Copies served upon:

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