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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U. S. DISTRICT COURT
JUL - 3 2003
S. D. OF N.Y.

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SECURITIES AND EXCHANGE COMMISSION,

02 Civ. 0306 (WHP)

Plaintiff,

MEMORANDUM AND ORDER

-against-

MAX C. TANNER, DENNIS EVANS,
MARK A. TAYLOR, SR., KEVIN KIRKPATRICK,
KENNETH KURTZ, KEVIN J. RUGGIERO,
MICHAEL BOSTON, ALEX SHEYFER, AND
ALEXANDER ZALMENENKO,

Defendants.
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WILLIAM H. PAULEY III, District Judge:

On March 18, 2003, plaintiff Securities and Exchange Commission (the "Commission") moved for summary judgment against defendant Kevin Kirkpatrick ("Kirkpatrick") alleging violations of Section 17(a) of the Securities Act of 1933 ("Securities Act"), 15 U.S.C. § 77q(a), Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5. Pursuant to a January 7, 2003 agreement with the Commission, Kirkpatrick did not file an opposition to this motion. On January 23, 2003, this Court entered a "Final Judgment of Permanent Injunction" against Kirkpatrick, in which he consented to a permanent injunction against future securities law violations and agreed to "not contest his liability as to the violations of the [Federal antifraud provisions], as alleged in the Commission's complaint in this case" in connection with any motion to determine the appropriate amount of monetary relief. (Order, dated January 23, 2003.) Familiarity with this Court's January 23, 2003 order is presumed.

This summary judgment motion solely concerns the monetary relief that the Commission seeks, namely the disgorgement of Kirkpatrick's illegal stock manipulation profits and a civil monetary penalty. Because Kirkpatrick failed to oppose the Commission's motion there are no disputed issues of material fact. For the reasons set forth herein, the Commission's motion for summary judgment is granted.

The facts relating to Kirkpatrick's liability are not in dispute. (See Order, dated January 23, 2003.) To summarize, from March through at least December 1998, Kirkpatrick and his co-defendants¹ engaged in a scheme to manipulate the price of Maid Aide, Inc. ("MDAN") stock. (Pl.'s Appendix of Exhibits, dated March 13, 2003, Ex. 2 at 18-49, 53-71.) This tripartite scheme involved the defendants, including Kirkpatrick: (1) gaining control of the market supply of MDAN stock (Ex. 2 at 36; Ex. 3 at 99, 101-02; Ex. 13 at 65-68, 74); (2) creating an artificial public demand for the stock through a boiler room operation (Ex. 2 at 14-15, 29-35; Ex. 4 at 12; Ex. 13 at 76-81, 87-88, 94-98); and (3) creating an appearance of actual market activity and controlling trading of MDAN stock through Kirkpatrick acting as a middleman between the defendants' boiler room operation and their brokerage accounts. (Ex. 2 at 35, 40-43; Ex. 3 at 37-45; Ex. 13 at 94-99).

Courts have "broad equitable power to fashion appropriate remedies, including ordering that culpable defendants disgorge their profits." SEC v. First Jersey Sec., Inc., 101 F.3d 1450, 1474 (2d Cir. 1996). "The primary purpose of disgorgement as a remedy for violation of the securities laws is to deprive violators of their ill-gotten gains, thereby effectuating the

¹ All other defendants to this action have either settled with the Commission or are subject to a default judgment.

deterrence objectives of those laws." First Jersey, 101 F.3d at 1474. "The proper measure of disgorgement is the amount of the wrongdoer's unjust enrichment," and the court has broad discretion in calculating the amount to be disgorged. SEC v. McCaskey, 98 Civ. 6153 (SWK), 2001 WL 1029053, at *7 (S.D.N.Y. Sept. 6, 2001); accord First Jersey, 101 F.3d at 1474-75.

"Thus, the measure of disgorgement need not be tied to the losses suffered by defrauded investors, and a district court may order disgorgement regardless of whether the disgorged funds will be paid to such investors as restitution." SEC v. Robinson, 00 Civ. 7452 (RMB)(AJP), 2002 WL 1552049, at *7 (S.D.N.Y. July 16, 2002) (citations omitted).

The undisputed facts show that Kirkpatrick unlawfully obtained \$92,000 in profits through his Olsen Payne & Company trading account from March 1998 through at least December 1998 as a result of the fraudulent scheme involving MDAN. (Ex. 4 at 11-14 (Joint Pretrial Order, Stipulated Facts).) Accordingly, the Court orders Kirkpatrick to disgorge \$92,000 in unlawful profits. The Commission also requests, and is entitled to prejudgment interest on that disgorgement amount. See First Jersey, 101 F.3d at 1476; Robinson, 2002 WL 1552049, at *9 (citing cases). In calculating the amount of prejudgment interest on the \$92,000 disgorgement, the Commission requests that the Court apply the IRS underpayment rate. (Pl.'s Mem. at 16.) The Second Circuit has approved the use of the IRS underpayment rate as it "reflects what it would have cost to borrow the money from the government and therefore reasonably approximates one of the benefits the defendant derived from its fraud." First Jersey, 101 F.3d at 1476; accord SEC v. Rosenfeld, 97 Civ. 1467 (WHP)(RLE), 2001 WL 118612, at *4 (S.D.N.Y. Jan. 9, 2001) (applying IRS rate to prejudgment interest calculation). Applying the IRS formula, the prejudgment interest owed on \$92,000, calculated from January 1, 1999 through

February 28, 2003 is \$33,173.81. (Ex. 17.) Therefore, Kirkpatrick's disgorgement plus prejudgment interest totals \$125,173.81. (Ex. 17.) Accordingly, this Court directs Kirkpatrick to disgorge to the Commission, within thirty (30) days of the date of this Order, \$92,000 that he obtained as a result of his fraudulent scheme, plus \$33,173.81 in prejudgment interest, totaling \$125,173.81.

The Commission also seeks the imposition of an appropriate civil monetary penalty against Kirkpatrick, pursuant to Section 20(d) of the Securities Act and Section 21(d)(3) of the Exchange Act (collectively, the "Penalty Provisions"). 15 U.S.C. §§ 77t(d)(2), 78u(d)(3)(B). Congress enacted civil penalties to punish and deter securities law violations, and such penalties may be imposed in addition to disgorgement and injunctive relief. See, e.g., SEC v. Kane, 97 Civ. 2931 (CBM), 2003 WL 1741293, at *2-3 (S.D.N.Y. Apr. 1, 2003); SEC v. Ballesteros Franco, 253 F. Supp. 2d 720, 731 (S.D.N.Y. 2003); Rosenfeld, 2001 WL 118612, at *4; see also H.R. Rep. No. 101-616, 101st Cong., 2d Sess., reprinted in 1990 U.S.C.C.A.N. 1379, 1384-86. The Penalty Provisions provide that the amount of the penalty "shall be determined by the court in light of the facts and circumstances," and allow penalties to be imposed in three tiers. 15 U.S.C §§ 77t(d)(2)(A), 78u(d)(3)(B)(i). First tier penalties of up to \$5,000 per violation for a natural person or the gross amount of pecuniary gain to a defendant as a result of the violation are appropriate for any violation of the Securities and Exchange Act provisions. 15 U.S.C. §§ 77t(d)(2)(A), 78u(d)(3)(B)(i); see Rosenfeld, 2001 WL 118612, at *4. Second tier penalties of up to \$50,000 per violation for a natural person or the gross amount of pecuniary gain to a defendant as a result of the violation apply to, inter alia, violations involving "fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement." 15 U.S.C. §§

77t(d)(2)(B); 78u(d)(3)(B)(ii); see Rosenfeld, 2001 WL 118612, at *4. Third tier penalties apply to violations involving "fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement," and where "such violation directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons." 15 U.S.C. §§ 77t(d)(2)(C); 78u(d)(3)(B)(iii); see Rosenfeld, 2001 WL 11862, at *4. "The third tier allows for a penalty for each violation of the Act up to \$100,000 for a natural person or the gross amount of pecuniary gain to a defendant as a result of the violation. . . ." Kane, 2003 WL 1741293, at *2; accord 15 U.S.C. §§ 77t(d)(2)(C); 78u(d)(3)(B)(iii). This Court finds that Kirkpatrick's violations involved fraud, deceit and manipulation of the public for personal gain, and that such violations resulted in substantial losses or created a significant risk of losses to the public, specifically to investors who purchased MDAN stock at inflated prices. Consequently, this Court directs Kirkpatrick to pay a third tier civil monetary penalty of \$75,000, pursuant to Section 20(d) of the Securities Act and Section 21(d)(3) of the Exchange Act, §§ 77t(d), 78u(d)(3), within thirty (30) days of the date of this Order.

All payments shall be made by U.S. postal money order, certified check, bank cashier's check, or bank money order payable to the order of the "United States Securities and Exchange Commission." This payment shall be transmitted to the Comptroller, Securities and Exchange Commission, Operations Center, 6432 General Green Way Stop 0-3, Alexandria, VA 22312, under cover of a letter that identifies the defendant, the name and civil action number of this litigation, and in the Court in which it was brought. The cover letter also shall contain the investigation name, In The Matter of Maid Aide, Inc., and the case number assigned by the Commission staff (NY-6492), and shall identify the payments as disgorgement, prejudgment

interest, and civil penalty, respectively. A copy of the cover letter and of any money orders or checks, front and back, shall be simultaneously submitted to Jack Kaufman, Esq., Securities and Exchange Commission, 233 Broadway, New York, NY 10279.

CONCLUSION

The Commission's motion for summary judgment is granted. Defendant is directed to pay the Commission \$92,000 in disgorgement, plus \$33,173.81 in prejudgment interest, totaling \$125,173.81. Defendant is additionally directed to pay the Commission a civil penalty of \$75,000. The Clerk of the Court is directed to close this case.

Dated: July 2, 2003
New York, New York

SO ORDERED:


WILLIAM H. PAULEY III
U.S.D.J.

Copies mailed to:

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