

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 05-21527-CIV-MOORE

SECURITIES AND EXCHANGE
COMMISSION,

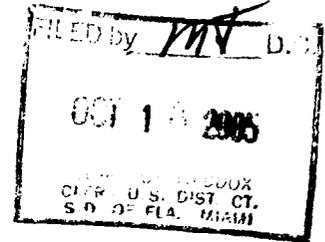
Plaintiff,

vs.

ORDER

FOCUS FINANCIAL ASSOCIATES, INC.,
FOCUS DEVELOPMENT CENTER, INC.,
MAX FRANCOIS,
AIBY PIERRE-LOUIS, and
JEAN FRITZ MONTINARD

Defendants.



THIS CAUSE came before the Court upon Plaintiff's Notice of Filing Consent of Max Francois to Final Judgment of Permanent Injunction and Other Relief (DE #18).

UPON CONSIDERATION of the Motion and the pertinent portions of the record, and being otherwise fully advised in the premises, the Court enters the following Final Judgment.

BACKGROUND

This case arises out of alleged violations of the antifraud provisions of the federal securities laws. Plaintiff, the Securities and Exchange Commission, brings this action against Focus Financial Associates, Inc., Focus Development Center, Inc., Max Francois ("Francois"), Aiby Pierre-Louis and Jean Fritz Montinard, (collectively "Defendants") for allegedly engaging in a Ponzi scheme that raised approximately \$6 million from more than 600 Haitian-Americans living in South Florida. Complaint ("Compl."), ¶1. The Focus Companies' scheme allegedly centered around the offer and sale of twelve-month notes, and the Defendants allegedly made misrepresentations and omissions in connection with the sale of these notes. *Id.* Francois has been the founder, president and day-to-day operational manager of Focus Development and a director of Focus Financial since January, 2002. *Id.* at ¶4.

Plaintiff Securities and Exchange Commission commenced this action by filing its Complaint against, among others, Defendant Max Francois ("Francois"). In its Complaint, the Commission sought, among other relief, a permanent injunction to prohibit violations of Section

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17(a) of the Securities Act of 1933 ("Securities Act"), Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), and Rule 10b-5 thereunder; an Order providing for disgorgement and prejudgment interest, and imposition of a civil money penalty against Francois pursuant to Section 20(d) of the Securities Act and Section 21(d) of the Exchange Act.

On September 27, 2005, Francois consented to a "Final Judgment of Permanent Injunction and Other Relief" (DE #18). The consent and the proposed injunction represent a settlement between the Commission and Francois, leaving the issues of disgorgement and civil penalty for the Court's later determination. In its proposed injunction, the parties agree, among other things, to permanently enjoin Francois from any further violations of Section 17(a) of the Securities Act and Section 10(b) (and Rule 10b-5 thereunder) of the Exchange Act.

DISCUSSION

In Plaintiff's Notice of Filing Consent of Max Francois to Final Judgment of Permanent Injunction and Other Relief, Plaintiff points out that the Eleventh Circuit "recently questioned the enforceability of a similarly worded permanent injunction in *SEC v. Smyth*." Indeed, the injunction in Smyth had nearly identical language to that quoted above. SEC v. Smyth, 420 F.3d 1225, 1229 (11th Cir. 2005). In Smyth, however, the defendant did not challenge the injunctive provisions contained in the consent decree. Id. at n.14. The Court of Appeals noted that "Although . . . the consent decree's injunctions are not before us for review, they are still before the district court, which retained jurisdiction to enforce them, and therefore are subject to the court's inherent power to modify or revoke them. Because the injunctions are still before the district court, we would be remiss if we did not inform the court that they are unenforceable." Id. The Court of Appeals concludes that "[e]ach of the injunctions is a quintessential 'obey-the-law' injunction." Id. (citing Florida Ass'n of Rehab. Facilities, Inc. v. Fla. Dep't of Health and Rehab. Servs., 225 F.3d 1208, 1222 (11th Cir. 2000) (finding injunction improper under Rule 65(d) because "it accomplished little more than enjoining Defendants from violating the law").

In spite of the strongly worded dicta of the Eleventh Circuit in Smyth, this Court believes that the earlier decision of SEC v. Carriba Air, Inc., 681 F.2d 1318 (11th Cir. 1982) is

controlling.¹ In Carriba Air, a nearly identical injunction was upheld by the Court of Appeals where "the SEC had demonstrated a pattern of past and present questionable business practices" and "[b]latant and inexcusable violations of the securities laws occurred." 681 F.2d at 1322.

CONCLUSION

Francois, having entered a general appearance, consented to the Court's jurisdiction over him and the subject matter of this action, has consented to entry of this Final Judgment without admitting or denying the allegations of the Complaint (except as to jurisdiction); waived findings of fact and conclusions of law; and waived any right to appeal from this Final Judgment of Permanent Injunction (the "Judgment"). It is hereby

ORDERED AND ADJUDGED that Francois, his officers, agents, servants, employees, representatives, and all persons in active concert or participation with him, and each of them, directly or indirectly, 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:

1. to employ any device, scheme, or artifice to defraud;
2. 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
3. to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

It is further

¹Where prior panel decisions conflict, this Court is directed to follow the first one released, Cohen v. Office Depot, Inc., 204 F.3d 1069, 1072 (11th Cir.2000) ("where two prior panel decisions conflict we are bound to follow the oldest one"); United States v. Dailey, 24 F.3d 1323, 1327 (11th Cir.1994) (where there is an intra-circuit conflict, "the earliest panel opinion resolving the issue in question binds this circuit until the court resolves the issue en banc").

ORDERED AND ADJUDGED that Francois, his officers, agents, servants, employees, attorneys, 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:

1. to employ any device, scheme, or artifice to defraud;
2. 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
3. to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

It is further

ORDERED AND ADJUDGED that Francois shall pay disgorgement of ill-gotten gains, prejudgment interest thereon, and a civil penalty 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 determine the amounts of the disgorgement and civil penalty upon motion of the Commission. Prejudgment interests shall be calculated from February 1, 2002, based on the rate of interest used by the Internal Revenue Service for the underpayment of federal income tax as set forth in 26 U.S.C. §6621(a)(2). In connection with the Commission's motion for disgorgement and/or civil penalties, and at any hearing held on such a motion: (a) Francois will be precluded from arguing that he did not violate the federal securities laws as alleged in the Complaint; (b) Francois may not challenge the validity of the Consent or this Judgment; (c) solely for the purposes of such motion, the allegations of the Complaint shall be accepted as and deemed true by the Court; and (4) the Court may determine the issues raised in the motion on the basis of affidavits, declarations, excerpts of sworn deposition or investigative testimony, and documentary

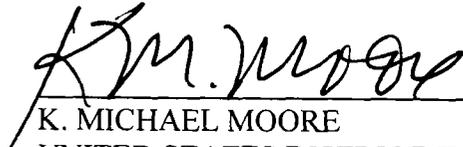
evidence, without regard to the standards for summary judgment contained in Rule 56(c) of the Federal Rules of Civil Procedure. In connection with the Commission's motion for disgorgement and/or civil penalties, the parties may take discovery, including discovery from appropriate non-parties. It is further

ORDERED AND ADJUDGED that the Consent is incorporated herein with the same force and effect as if fully set forth herein, and that Francois shall comply with all of the undertakings and agreements set forth therein. It is further

ORDERED AND ADJUDGED that this Court shall retain jurisdiction over this matter and Francois for a period of ninety (90) days 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. 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.

DONE AND ORDERED in Chambers at Miami, Florida, this 18th day of October, 2005.


K. MICHAEL MOORE
UNITED STATES DISTRICT JUDGE

copies provided:
All counsel of record