

L72145.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

MARTIN J. MERRITT,

Defendant.

06 cv 7736 (GEL)
~~05 Civ.~~

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 10/2/06

PARTIAL FINAL CONSENT JUDGMENT AS TO MARTIN J. MERRITT

Plaintiff Securities and Exchange Commission (“Commission”) having filed a complaint (“Complaint”) charging defendant Martin J. Merritt (“Merritt” or “Defendant”) with violating Section 17(a) of the Securities Act of 1933 (“Securities Act”), Sections 10(b) and 13(b)(5) of the Securities Exchange Act of 1934 (“Exchange Act”) [15 U.S.C. §§ 77q(a), 78j(b), and 78m(b)(5)], and Rules 10b-5, 13b2-1, and 13b2-2 [17 C.F.R. §§ 240.10b-5, 240.13b2-1, and 240.13b2-2], and with aiding and abetting violations of Sections 13(a) and 13(b)(2) of the Exchange Act [15 U.S.C. §§ 78m(a) and 78m(b)(2)] and Rules 12b-20, 13a-1, 13a-13, and 13b2-1 [17 C.F.R. §§ 240.12b-20, 240.13a-1, 240.13a-13, and 240.13b2.1] promulgated thereunder, and Merritt, having executed the Consent of Martin J. Merritt (“Consent”), annexed hereto and incorporated herein, having acknowledged service of the summons and Complaint, having waived the entry of findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure, having admitted to the jurisdiction of this Court over him and over the subject matter of this action and, without admitting or denying the allegations contained in the

Complaint, except as to jurisdiction, which are admitted, and having consented to the entry of this Partial Final Consent Judgment As To Martin J. Merritt (“Partial Judgment”) without further notice:

I.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Merritt and his agents, servants, employees, attorneys, and all persons in active concert or participation with them who receive actual notice of this Partial 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.

II.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Merritt and his agents, servants, employees, attorneys, and all persons in active concert or participation with them who receive actual notice of this Partial 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 [17 C.F.R. §240.10b-5] promulgated thereunder, 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.

III.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Merritt and his agents, servants, employees, attorneys, and all persons in active concert or participation with them who receive actual notice of this Partial Judgment by personal service or otherwise are permanently restrained and enjoined from violating Section 13(b)(5) of the Exchange Act [15 U.S.C. § 78m(b)(5)] and Rule 13b2-1 [17 C.F.R. § 240.13b2-1] promulgated thereunder, by:

- (a) knowingly circumventing or knowingly failing to implement a system of internal accounting controls or knowingly falsifying any book, record or account described in Section 13(b)(2) of the Exchange Act [15 U.S.C. § 78m(b)(2)]; or
- (b) falsifying, or causing to be falsified, any book, record or account subject to Section 13(b)(2)(A) of the Exchange Act [15 U.S.C. § 78m(b)(2)(A)].

IV.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Merritt and his agents, servants, employees, attorneys, and all persons in active concert or participation with them who receive actual notice of this Partial Judgment by personal service or otherwise are permanently restrained and enjoined from violating Rule 13b2-2 [17 C.F.R. § 240.13b2-2], promulgated under the Exchange Act, by:

- (A) making or causing to be made a materially false or misleading statement to an accountant in connection with (1) any audit or examination of the financial statements of the issuer required to be made pursuant to Regulation 13A [17 C.F.R. §§ 240.13a and 240.13b]; or (2) the preparation or filing of any document or report required to be filed with the Commission pursuant to Regulation 13A [17 C.F.R. §§ 240.13a and 240.13b] or otherwise; or
- (B) omitting to state, or causing another person to omit to state, any material fact necessary in order to make such statements made not misleading to an accountant in connection with (1) any audit or examination of the financial statements of the issuer required to be made pursuant to Regulation 13A [17 C.F.R. §§ 240.13a and 240.13b]; or (2) the preparation or filing of any document or report required to be filed with the Commission pursuant to Regulation 13A [17 C.F.R. §§ 240.13a and 240.13b] or otherwise.

V.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Merritt and his agents, servants, employees, attorneys, and all persons in active concert or participation with them who receive actual notice of this Partial Judgment by personal service or otherwise are

permanently restrained and enjoined from aiding and abetting any violation of Section 13(a) of the Exchange Act [15 U.S.C. § 78m(a)] or Rules 12b-20, 13a-1 or 13a-13 [17 C.F.R. §§ 240.12b-20, 240.13a-1 and 240.13a-13] promulgated thereunder, by knowingly providing substantial assistance to an issuer that:

- (A) fails to file with the Commission any report required to be filed with the Commission pursuant to Section 13(a) of the Exchange Act [15 U.S.C. §78m(a)], and the rules and regulations promulgated thereunder; or
- (B) files with the Commission a report required to be filed with the Commission pursuant to Section 13(a) of the Exchange Act [15 U.S.C. §78m(a)] and the rules and regulations promulgated thereunder that (1) contains an untrue statement of material fact; (2) fails to include, in addition to the information required to be stated in such report, such further material information as may be necessary to make the required statements, in light of the circumstances under which they are made, not misleading; or (3) fails to disclose any information required to be disclosed therein.

VI.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Merritt and his agents, servants, employees, attorneys, and all persons in active concert or participation with them who receive actual notice of this Partial Judgment by personal service or otherwise are permanently restrained and enjoined from aiding and abetting any violation of Section 13(b)(2) of the Exchange Act [15 U.S.C. § 78m(b)(2)], by knowingly providing substantial assistance to an issuer that:

- (A) fails to make and keep books, records and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of an issuer; or
- (B) fails to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that
 - (1) transactions are executed in accordance with management's general or specific authorization;
 - (2) transactions are recorded as necessary to permit preparation of financial statements in conformity with generally accepted accounting principles, or any other criteria applicable to such statements, and to maintain accountability for assets;
 - (3) access to assets is permitted only in accordance with management's general or specific authorization; and
 - (4) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

VII.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, pursuant to Section 21(d)(2) of the Exchange Act [15 U.S.C. § 78u(d)(2)], Merritt 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)].

VIII.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, upon motion of the Commission, the Court shall determine whether it is appropriate to order disgorgement of ill-gotten gains and/or a civil penalty pursuant to Section 21(d)(3) of the Exchange Act [15 U.S.C. § 78u(d)(3)] and, if so, the amount(s) of the disgorgement and/or civil penalty. The Commission shall make any such motion within five years of the entry of this Partial Judgment or by such later date as the parties may agree with the Court's approval. If disgorgement is ordered, Merritt shall pay prejudgment interest thereon, calculated from the date of the violation, 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) Merritt will be precluded from arguing that he did not violate the federal securities laws as alleged in the Complaint; (b) Merritt may not challenge the validity of the Consent or this Final 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 (d) 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.

IX.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Merritt shall pay the amounts, if any, ordered to be paid pursuant to paragraph VIII in the following manner and on the following terms and conditions:

A. Within the time directed by the Court, Merritt shall pay the total amount of the disgorgement, prejudgment interest and civil penalties, if any, ordered by the Court to the Clerk of the Court at the United States District Court for the Southern District of New York, 500 Pearl Street, New York, New York 10007, together with a cover letter identifying Merritt as a defendant in this action, setting forth the title and civil action number of this action and the name of this Court, and specifying that payment is made pursuant to this Partial Judgment. Defendant shall simultaneously transmit photocopies of such payment to the Commission's counsel in this action (Ken Joseph, Esq., U.S. Securities and Exchange Commission, Three World Financial Center, Room 4300, New York, NY 10281). By making this payment, Merritt relinquishes all legal and equitable right, title, and interest in such funds, and no part of the funds shall be returned to Merritt. Merritt shall pay post-judgment interest on any delinquent amounts pursuant to 28 USC § 1961;

B. The Clerk shall deposit the funds into an interest bearing account with the Court Registry Investment System ("CRIS"). These funds, together with any interest and income earned thereon (collectively, the "Fund"), shall be held by the CRIS until further order of the Court. In accordance with 28 U.S.C. § 1914 and the guidelines set by the Director of the Administrative Office of the United States Courts, the Clerk is directed, without further order of this Court, to deduct from the income earned on the money in the Fund a fee equal to ten percent

of the income earned on the Fund. Such fee shall not exceed that authorized by the Judicial Conference of the United States; and

C. The Commission may by motion propose a plan to distribute the Fund subject to the Court's approval. Such a plan may provide that Fund shall be distributed pursuant to the Fair Fund provisions of Section 308(a) of the Sarbanes-Oxley Act of 2002. Regardless of whether any such Fair Fund distribution is made, amounts ordered to be paid as civil penalties pursuant to this Judgment shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Merritt shall not, after offset or reduction of any award of compensatory damages in any Related Investor Action based on Merritt's payment of disgorgement in this action, argue that he is entitled to, nor shall he further benefit by, offset or reduction of such compensatory damages award by the amount of any part of Merritt's payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Merritt shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the United States Treasury or to a Fair Fund, as the Commission directs. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this Judgment. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against Merritt by or on behalf of one or more investors based on substantially the same facts as alleged in the Complaint in this action.

X.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the provisions of the annexed Consent be, and the same hereby are, incorporated in this Partial Judgment with the same force and effect as if fully set forth herein.

XI.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that this Court shall retain jurisdiction of this matter for all purposes, including, but not limited to, implementing and enforcing the terms and conditions of this Partial Judgment, and that the entry of this Partial Judgment shall not affect the discovery obligations of Merritt or any other party pursuant to this Court's Orders and the Federal Rules of Civil Procedure.

XII.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, there being no just reason for delay, the Clerk of this Court is hereby directed to enter this Partial Judgment forthwith pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

Dated: Sept. 27, 2006


UNITED STATES DISTRICT JUDGE

**THIS DOCUMENT WAS ENTERED
ON THE DOCKET ON _____**