UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. CHARLES ANTHONY FARRELL, JAMES W. FARRELL, JAMES L. ERICKSTEEN, GARY L. MOORE, JILL HALL, and GUIDO BENSBERG, Defendants	Civil Action No. 97CV1684B(JAH) **FINAL JUDGMENT AS TO DEFENDANT GUIDO BENSBERG**

The Court, after having made its Settled Findings of Fact and Conclusions of Law based on the testimony of witnesses, the evidence offered by the respective parties, and the oral and written arguments and briefs of counsel during a six-day bench trial that commenced on March 7, and concluded on March 15, 2001, now enters its Final Judgment in favor of plaintiff Securities and Exhange Commission (the "SEC") and against defendant Guido Bensberg.

I.

A. Introduction

The SEC instituted this action on September 17, 1997 pursuant to the enforcement authority set forth in Sections 20(b) of the Securities Act of 1933 ("Securities Act") [15 U.S.C. § 77t(b)], and 21(d) of the Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. § 78u(d)] for injunctive

relief and disgorgement of unlawful gains. The SEC also brought this action to seek civil monetary penalties pursuant to Section 20(d) of the Securities Act [15 U.S.C. § 77t(d)] and 21(d)(3) of the Exchange Act [15 U.S.C. § 78u(d)(3)]. This Court has jurisdiction over this action pursuant to Section 22(a) of the Securities Act [15 U.S.C. § 77v(a)] and Sections 21(e) and 27 of the Exchange Act 15 U.S.C. §§ 78u(e) and 78aa].

The SEC alleged in its Complaint that during the period from the summer of 1994 through the summer of 1996, defendant Bensberg participated in a fraudulent scheme to "lease" temporary physical possession of stock certificates representing millions of restricted shares of eight U.S. public companies, and one Canadian entity whose stock traded in the U.S. Thereafter, on two separate occasions, the Complaint alleged, that Bensberg misrepresented that he owned the stock and pledged it as collateral to unwitting financial institutions, obtaining more than $10 million in loans that he refused to repay.

The SEC charged that Bensberg's conduct violated Section 17(a) of the Securities Act [15 U.S.C. § 77q(a)], Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5], which prohibit persons from engaging in fraud in the acquisition or disposition of securities. The evidence presented at trial demonstrated conclusively that Bensberg violated each of the above antifraud provisions.

Prior to the trial, in January 2000, Bensberg filed a motion to dismiss the SEC's action against him, arguing, among other things, that this Court lacked subject matter jurisdiction to hear the SEC's case against him. On April 26, 2000 this Court denied Bensberg's motion and decided that jurisdiction was proper. This Court stated that the evidence suggested that Bensberg had engaged in "an integrated plan to defraud [two financial institutions] that involved significant conduct arising in or related to actions occurring in the United States which caused effects in the United States."

In March 2001, the Court held a six-day trial to hear the merits of the SEC's case against defendant Bensberg. After a six-day contested bench trial, the Court concluded the following:

B. Findings of Fact

1. The Defendant

At all relevant times, Guido Bensberg owned and controlled the affairs of Red Oak Ltd., an Isle of Man company, and Philmont A.V.V., an Aruba company. At all relevant times, Sandy Anderson acted on Bensberg's behalf and assisted Bensberg in carrying out his business endeavors.

2. The Bank Leu Transaction

On August 15, October 4, and November 22, 1994 Bensberg, acting on behalf of Red Oak Ltd., and defendant James Ericksteen, acting on behalf of his alter ego company, Helix Capital Corp., entered into "Securities Lease Agreements," pursuant to which Bensberg acquired temporary physical possession of stock certificates representing millions of shares of seven U.S. public companies and one Canadian entity, whose shares traded in the U.S. The "Securities Lease Agreements" specified that "[n]o part of the assets [could] be sold, transferred, re-registered, conveyed or otherwise disposed of by Lessee [Bensberg] . . . ."

In total disregard of the transfer restrictions set forth in the Securities Lease Agreements, in early November, 1994 Bensberg hand delivered certain of the stock certificates to Bank Leu employee Claus Korner in the Munich offices of Bensberg's German attorney, Max Strauss. In mid November 1994 Sandy Anderson, acting on Bensberg's behalf, delivered certain of the other stock certificates to Bank Leu's corresponding bank in Canada, the Bank of Montreal.

In an effort to obtain a loan from Bank Leu, on November 14, 1994, Bensberg visited the offices of Bank Leu in Switzerland and executed a deed of pledge in favor of Bank Leu, effectively transferring the stock certificates to Bank Leu. Bensberg omitted to tell persons employed by Bank Leu about the significant restrictions and encumbrances on the securities, including a restriction effectively prohibiting the transfer of the securities by Bensberg.

Based on the belief that the stock certificates pledged by Bensberg had real value and were negotiable, Bank Leu granted Bensberg a line of credit in the amount of $5 million. After obtaining the line of credit, Bensberg borrowed funds from Bank Leu totaling $4,271,976. Bensberg abandoned his obligation to repay the loan.

3. The Lehman Brothers Transaction

On January 24, 1996, Anderson, acting on behalf of Bensberg, caused Philmont A.V.V. to enter into two agreements with Affinity Teleproductions, Inc., a Florida-based public company whose stock traded on the NASDAQ small cap market. Pursuant to the terms of the agreements, Bensberg acquired physical possession of stock certificates representing two million Affinity shares. The terms of the first agreement pursuant to which Bensberg acquired half of the two million shares, prohibited Bensberg from transferring the shares for the period of one year. The terms of the second agreement, pursuant to which Bensberg acquired the other half of the two million Affinity shares, not only prohibited Bensberg from transferring the shares for one year, but also bore an additional condition, conferring an absolute right in favor of Affinity to reacquire the shares after a year.

In total disregard of the transfer restrictions in the Agreements, on February 20, 1996 Bensberg entered into a Prime Brokerage Agreement with Lehman Brothers International in London, England and delivered the two million Affinity shares into Lehman Brothers' custody as collateral to secure a loan.

In an effort to obtain the loan from Lehman Brothers, Bensberg told representatives of Lehman Brothers that he owned the Affinity stock and that he was planning on selling 500,000 shares within 6 months. Bensberg assured representatives of Lehman Brothers that there was no reason why the Affinity shares could not be registered in Lehman's name. Bensberg omitted to tell persons employed at Lehman Brothers about the significant restrictions and encumbrances on the securities.

Based on the belief that the stock certificates pledged by Bensberg had real value and were negotiable, Lehman Brothers granted Bensberg a line of credit in the amount of $6.5 million. At Bensberg's direction, Lehman Brothers transferred the entire $6.5 million to Bensberg's personal Miami bank account in late February 1996. In response to demands from Lehman Brothers, Bensberg repaid $125,000, but abandoned his obligation to repay the remaining $6,375,000.

4. Other Attempted Fraudulent Transactions

In addition to the consummated frauds against Bank Leu in 1994, and Lehman Brothers in 1996, Bensberg attempted a similar fraud against Lehman Brothers in mid 1996 when he tried to use stock certificates of another U.S. public company, which he did not own, as collateral for an $8 million loan. That attempt by Bensberg was unsuccessful.

Thereafter, in mid 1997, Bensberg tried depositing legend free restricted stock certificates of yet another company with a Vancouver brokerage firm to create the false appearance of creditworthiness to avoid foreclosure on a loan securing his pleasure yacht. That attempt by Bensberg was unsuccessful.

C. Legal Analysis

For purposes of Exchange Act Section 10(b) and Rule 10b-5, the term "purchase" is broadly defined to include "any contract to buy, purchase, or otherwise acquire" a security. For purposes of these provisions and of Section 17(a) of the Securities Act, the term "sale" is likewise broadly defined to include "every contract of sale or disposition of a security or interest in a security, for value." Specifically, the Supreme Court has held that a sale occurs under Section 17(a) of the Securities Act when stock is pledged as collateral for a loan. Rubin v. United States, 449 U.S. 424, 428-31 (1981). The Supreme Court, while not expressly so holding, has stated that the pledge-as-a-sale theory also applies under Section 10(b) of the Exchange Act. Marine Bank v. Weaver, 455 U.S. 551, 554 n.2 (1982). Accordingly, consistent with the evidence at trial, Bensberg's pledges of the shares as security for the loans from both Bank Leu and Lehman Brothers constitute sales under the antifraud provisions of the federal securities laws.

1. Bensberg's Misrepresentations and Omissions Were Material

In an action pursuant to Rule 10b-5, the SEC is required to establish that the misrepresentations or omissions of fact that form the basis of the allegation of fraud are material. McCormick v. Fund American Cos., 26 F.3d 869, 875 (9th Cir. 1994). Materiality depends on the significance the reasonable investor would place on the withheld or misrepresented information. Basic Inc. v. Levinson, 485 U.S. 224, 240 (1988). "An omitted fact is material if

there is a substantial likelihood that a reasonable shareholder would consider it important . . . ." TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976); see Basic, 485 U.S. at 231.

The factual record established by the SEC clearly exceeds the materiality test. The unrebutted evidence provided at trial by the SEC established that Bank Leu and Lehman Brothers would not have extended loans to Bensberg had they known that the securities pledged by Bensberg were encumbered with conditions and restrictions that effectively rendered them unsalable. Bensberg, by contrast, offered no evidence suggesting otherwise.

2. Bensberg Acted with Scienter

Section 17(a)(1), Section 10(b) and Rule 10b-5 require proof that the alleged violator acted with scienter, which has been defined as a state of mind embracing an intent to deceive, manipulate or defraud. See Aaron v. SEC, 446 U.S. 680 (1980). While the Supreme Court has not decided the issue, every Court of Appeals to decide the question has concluded that recklessness satisfies the scienter requirement, at least in actions brought by a law enforcement agency. See 8 Louis Loss & Joel Seligman, Securities Regulation 3665-67 n.521 (3d ed. 1991) (11 of 12 federal courts of appeals have held that recklessness satisfies the scienter requirement, citing cases). The Commission need not prove scienter to establish a violation of Sections 17(a)(2) and 17(a)(3) of the Securities Act. See Aaron, 446 U.S. at 696-97. Nevertheless, the SEC has proven that Bensberg acted with scienter by knowingly and intentionally defrauding the victims, and Bensberg has presented no evidence to the contrary.

3. The Concept of Reliance

Once materiality and scienter are proven in 10b-5 cases involving face-to-face transactions, there is a presumption that the defrauded person or entity relied on the material misstatements and/or omissions in making his or her investment decision. In such cases, a defendant can avoid liability only where he or she rebuts this presumption by a preponderance of the evidence. Dupont v. Brady, 828 F.2d 75 (2d Cir. 1987); Barnes v. Resource Royalties, Inc., 795 F.2d 1359 (8th Cir. 1987). The seminal case on the issue of reliance in face-to-face securities transactions is Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128 (1972), reh. denied,

407 U.S. 916 (1972). In Affiliated Ute, a case involving a material omission, the Court ruled that:

> positive proof of reliance is not a prerequisite to recovery. *All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of this decision.* See Mills v. Electric Autho-Lite Co., 396 U.S. 375, 34 (1970); Securities & Exchange Commission v. Texas Gulf Sulphur Co., 401 F.2d 833, 849 (2d Cir. 1968), cert. denied, sub nom. Coates v. Securities & Exchange Commission, 394 U.S. 976(1969); L. Loss, Securities Regulation, 3876-3880 (Supp. 1969); A. Bromberg, Securities Law, Fraud – SEC Rule 10b-5, pts. 2.6 and 8.6 (1967). This obligation to disclose and this withholding of a material fact establish the requisite element of causation in fact. Chasins v. Smigh, Barney and Co., 438 F.2d, at 1172. (emphasis added)

406 U.S. at 152-154.

In the instant case, the SEC has provided uncontroverted evidence that Claus Korner and Peter Keller on behalf of Bank Leu, and Alan Pace and Jeffrey Dorman on behalf of Lehman Brothers, relied on Bensberg's material misstatements and omissions in deciding to move the Bensberg credit requests forward, and ultimately extending the loans to Bensberg, which totaled more than $10 million. All four of the above testified that had they known that Bensberg did not own the stock in question, but was merely leasing it, no loans would have been extended.

D. Conclusions of Law

Bensberg willfully violated Section 10(b) of the Securities Exchange Act of 1934 [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5] in that he directly or indirectly, in connection with the purchase or sale of securities, by use of the means or instrumentalities of interstate commerce or the mails, employed devices, schemes and artifices to defraud, made untrue statements of material facts, omitted to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, and engaged in acts, practices and courses of business which operated as a fraud or deceit.

Bensberg willfully violated Section 17(a)(1) of the Securities Act of 1933 [15 U.S.C. § 77q(a)(1)], Section], in that he directly or indirectly, in the offer or sale of securities by use of the means or instrumentalities of transportation in interstate commerce and by use of the mails, employed devices, schemes and artifices to defraud.

Bensberg willfully violated Sections 17(a)(2) and 17(a)(3) [15 U.S.C. § 77q(a)(2) and (3)] of the Securities Act in that he directly or indirectly, in the offer or sale of securities by use of the means or instrumentalities of transportation in interstate commerce and by use of the mails, obtained money and property by means of untrue statements of material facts, omitted to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, and engaged in transactions, practices and a course of business which operated as a fraud or deceit.

E. RELIEF

1. *Injunction*

A permanent injunction against future violations is appropriate because Bensberg's past conduct indicates that there is a reasonable likelihood that he will engage in future violations. See e.g., SEC v. Bonastia, 614 F.2d 908, 912 (3d Cir. 1980); SEC v. Youmans, 729 F.2d 413, 415 (6th Cir. 1984). Although the SEC must go beyond the mere fact of past violations in order to prove the likelihood of future violation, SEC v. Blatt, 583 F.2d 1325, 1334 (5th Cir. 1978), the existence of past violations gives rise to an inference that there will be future violations. SEC v. Washington County Utility District, 676 F.2d 218, 227 (6th Cir. 1982); SEC v. Koracorp Industries, Inc., 575 F.2d 692, 698 (9th Cir. 1978); SEC v. Management Dynamics, Inc., 515 F.2d 801, 807 (2d Cir. 1975) (previous conduct is "highly suggestive of the likelihood of future violations"). In the instant case, this Court finds that defendant Bensberg has repeatedly engaged in fraudulent schemes and thus an injunction is especially appropriate. Other aggravating factors adjudged by this Court include the egregiousness of the defendant's conduct, the recurrent nature of the violations, the high degree of scienter involved, the lack of assurances against future violations, the failure of defendant to acknowledge the wrongful nature of his conduct, and the likelihood that defendant's professional occupation will present opportunities for future violations. See SEC v. Bonastia, 614 F.2d at 912. The Court specifically finds defendant's conduct to be "flagrant and deliberate," as opposed to merely technical in nature. SEC v. First City Financial Corp., 890 F.2d 1215, 1228 (D.C. Cir. 1989). The repetitive nature of Bensberg's conduct and his unwillingness to accept responsibility provide ample basis for an injunction.

2. Disgorgement

Disgorgement is appropriate to deprive Bensberg of his ill-gotten gain. SEC v. Johnston, 143 F.3d. 260 (6th Cir. 1998); SEC v. Huffman, 996 F.2d 800 (5th Cir. 1993); SEC v. Commonwealth Chemical Securities, Inc., 574 F.2d 90 (2d Cir. 1978); SEC v. First City Financial Corp., 890 F.2d 1215 (D.C. Cir. 1989); SEC v. First Jersey Securities, 101 F.3d 1450 (2d Cir. 1996). Bensberg's pre-interest ill-gotten economic gain was $10,609,652, consisting of $4,271,976 received from Bank Leu, $6,375,000 received from Lehman Brothers, less $37,324 paid into the Court by the other defendants who had received funds from Bensberg as a result of the Bank Leu transaction. Adding interest, as required by law, brings Bensberg's total disgorgement figure to $16,593,396.

3. Civil Penalties

In light of Bensberg's wilfull violations of the antifraud provisions of the federal securities laws, it is appropriate to sanction Bensberg pursuant to Section Sections 20(d)(2)(C) of the Securities Act [15 U.S.C. § 77t(d)(2)(C)] and 21(d)(3)(B)(iii) of the Exchange Act Act [15 U.S.C. § 78u(d)(3)(B)(iii)] which prescribe as the sanction the gross pecuniary gain to the defendant. This degree of sanction is appropriate where the violation involves "fraud, deceit, manipulation or deliberate or reckless disregard" and "directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons." In the instant case, there is overwhelming evidence of fraud, deceit and manipulation resulting in a loss of $10,571,261 (the amount of ill-gotten pecuniary gain after offset, and before prejudgment interest) to the victims. In addition, there has been no showing of remorse by defendant Bensberg or any attempt to remedy the wrong by repaying any of the fraudulently obtained funds. Moreover, defendant twice, since perpetration of the frauds litigated in this case, has tried similar schemes to defraud. Accordingly, the recidivist nature of the conduct, the lack of remorse and the potential for recurrence demand the maximum allowable penalty of $10,571,261.

Accordingly:

II.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Bensberg, his agents, employees, servants, attorneys-in-fact, and all those persons in active concert or participation with them who receive actual notice of this Final Judgment by personal service or otherwise, and each of them, be and hereby are permanently enjoined and restrained from violating Section 17(a) of the Securities Act, by, in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly:

(a) employing any device, scheme or artifice to defraud;

(b) obtaining money or property by means of any untrue statement of a material fact or any omission 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) engaging in any transaction, 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 Bensberg, his agents, servants, employees, attorneys-in-fact, and all those persons in active concert or participation with them who receive actual notice of this Final Judgment by personal service or otherwise, and each of them, be and hereby are permanently enjoined and restrained from violating Section 10(b) of the Exchange Act, and Rule 10b-5 thereunder, by, directly or indirectly, using any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange to:

(a) employ any device, scheme or artifice to defraud;

(b) 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 light of the circumstances under which they were made, not misleading; or

(c) engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

IV.

IT IS FURTHER ORDERED ADJUDGED AND DECREED, that Bensberg pay disgorgement in the amount of $10,609,652 representing his gains from his improper conduct plus prejudgment interest thereon in the amount of $5,983,744, for a total of $16,593,396, which amount shall be paid within thirty (30) days of the entry of this Final Judgment. Payment shall (i) be made by postal money order, certified check, or cashier's check, made payable to "Clerk, U.S. District Court for the Southern District of California"; (ii) bear on its face the caption "Sec v. Ferracone, et al."; (iii) be transmitted by certified mail (return receipt requested) to United States District Clerk, c/o Financial Administrator, U.S. District Court for the Southern District of California, U.S. Courthouse, 880 Front Street, Room 4290, San Diego, California 92101-8900; and (iv) be made under cover of a letter that identifies the defendant, the name and case number of this action, the name of this Court, and the SEC's file number (HO-2986). A copy of the cover letter and the check or money order shall be transmitted simultaneously to counsel for the SEC.

V.

IT IS FURTHER ORDERED ADJUDGED AND DECREED, that Bensberg pay a civil penalty in the amount of $10,571,261 pursuant to Section 20(d)(2)(C) of the Securities Act and 21(d)(3)(B)(iii) of the Exchange Act. Payment shall (i) be made by postal money order, certified check, or cashier's check, made payable to the "Securities and Exchange Commission"; (ii) bear on its face the caption "Sec v. Ferracone, et al."; (iii) be transmitted by certified mail (return receipt requested) to the Comptroller, U.S. Securities and Exchange Commission, Mail Stop 0-3, 450 Fifth Street, N.W., Washington, D.C. 20549; and (iv) be made under cover of a letter that identifies the defendant, the name and case number of this action, the name of the Court, and the SEC's file number (HO-2986). A copy of the cover letter and the check or money order shall be transmitted simultaneously to counsel for the SEC.

VI.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Clerk shall place all such funds received into the Registry of the Court in an interest-bearing passbook account. The total amount of funds to be invested will be $16,593,396, which total shall be paid by Bensberg according to the terms set forth in Paragraph IV of this Final Judgment. The clerk shall place the funds into an interest bearing passbook account and shall maintain the funds in the account until such time as the Court directs that all of the funds be disbursed. The clerk shall deduct ten percent (10%) from the income earned on the investment as authorized by the Judicial Conference of the United States and set by the Director of the Administrative Office, whenever such income becomes available for deduction in the investment and without further order of the Court. After such time as said monies are paid into the Court, the SEC may propose a plan of distribution of the disgorged monies, which plan shall be subject to Court approval, or may request that the monies be paid to the United States Treasury.

VII.

IT IS FURTHER ORDERED that this Court shall retain jurisdiction of this matter for the purposes of enforcing the terms of this Final Judgment.

VIII.

IT IS FURTHER ORDERED that counsel presenting this order personally serve a copy thereof on the clerk or the chief deputy. Absent the aforesaid service, the clerk is hereby relieved of any personal liability relative to compliance with this order.

IX.

There being no just cause for delay, the Clerk of the Court is hereby directed, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, to enter this Final Judgment forthwith.

Dated: 10-10-01

Rudi M. Brewster

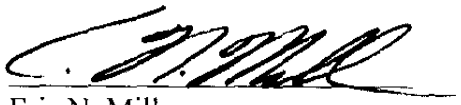
HONORABLE RUDI M. BREWSTER
United States Senior District Court Judge

Certificate of Service

I hereby certify that, on the 1st day of October, 2001 I caused a true and correct copy of the SEC's Proposed Findings of Fact and Conclusions of Law to be served by overnight mail, postage prepaid on:

Morton Robson, Esq.
Robson, Ferber, Frost, Chan & Essner
530 Fifth Avenue
New York, New York 10036

Attorney for Defendant Guido Bensberg



Eric N. Miller