

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

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|---------------------------|---|------------------|
| SECURITIES AND EXCHANGE |) | |
| COMMISSION, |) | |
| Plaintiff, |) | |
| |) | |
| vs. |) | IP 99-1767-C-Y/G |
| |) | |
| DONALD BARRY TAMRES d/b/a |) | |
| ABOUT TRADING COMPANY, |) | |
| Defendant, |) | |
| |) | |
| PAMELA TAMRES, |) | |
| F.K.M.C. CORPORATION, |) | |
| FRANKLIN KENNEDY, |) | |
| DORENE KENNEDY, |) | |
| DELMER C. GOWING III, |) | |
| PETER C. BRADY, |) | |
| Relief Defendants. |) | |

**ENTRY ON THE SECURITY AND EXCHANGE COMMISSION'S MOTION
FOR SUMMARY JUDGMENT AND PERMANENT INJUNCTION**

On July 3, 2000, Plaintiff, the Securities and Exchange Commission ("SEC"), filed the instant motion for summary judgment and for permanent injunction against the Defendant, Donald Barry Tamres ("Tamres"), and against the Relief Defendants, Pamela Tamres, F.K.M.C. Corporation, Franklin Kennedy, Dorene Kennedy, Delmer C. Gowing, III, and Peter C. Brady ("Relief Defendants"). Count I alleges that Tamres d/b/a About Trading Company violated Sections 5(a) and (c) of the Securities Act of 1933 ("Securities Act"). Count II alleges that Tamres violated Section 17(a)(1) of the Securities Act.

Count III alleges that Tamres violated Section 10(b) of the Securities Exchange Act of 1934 (“Exchange Act”) and Rule 10(b)(5) thereunder. The Amended Complaint also alleges that the Relief Defendants improperly received assets purchased with investor funds and/or improperly received money raised from investors. Neither Tamres nor the Relief Defendants filed a response to the instant motion.

The court, having read and reviewed the SEC’s motion, the accompanying brief in support, the record evidence, and the applicable law, now **grants** said motion.

This court has jurisdiction over this cause pursuant to Section 22(a) of the Securities Act, 15 U.S.C. § 77v(a), Section 27 of the Exchange Act, 15 U.S.C. § 78aa, and 28 U.S.C. § 1331.

I. Facts

A. Parties

1. Tamres is a resident of Carmel, Indiana, and, at all relevant times, president of About Trading Company. About Trading Company has not been identified as being incorporated or registered in any state. Prior to his involvement with About Trading Company, Tamres was a corporate ticket broker for a company he started. From 1994-1995, Tamres was a book salesman. *See* Exh. A at 17-18.
2. At all relevant times, Tamres was not a registered securities broker and did not have any securities registrations. *Id.* at 19-21.

B. Relief Defendants

3. Pamela Tamres is a resident of Carmel, Indiana. She is Tamres' wife. *Id.* at 12. She currently owns several cars that were purchased with investor funds by Tamres. *See* Exh. B.
4. F.K.M.C. Corporation is an Indiana Corporation that received specific real property from Pamela Tamres. *See* Exh. C. Tamres purchased the property with investor funds. *See* Ex. D.
5. Franklin Kennedy is a resident of Carmel, Indiana. At all relevant times, he was president of F.K.M.C. Corporation. *See* Exh. E.
6. Dorene Kennedy is a resident of Carmel, Indiana. At all relevant times, she was vice-president of F.K.M.C. Corporation. *Id.*
7. Delmer C. Gowing ("Gowing") is a resident of Delray Beach, Florida and is a licensed attorney admitted to practice in Illinois, Michigan, and Florida.
8. Peter C. Brady ("Brady") resides in Florida and is an acquaintance of Gowing's.

C. Money Diverted to Gowing and Brady

9. On or about the Fall of 1998, Gowing and Brady split a \$10,000 investment in the About Trading Company Program which purported to be a high yield trading program. *See* Exh. P at 17-18.
10. The terms of the investment were that Gowing and Brady would receive \$500,000 in about six to eight weeks. *Id.* at 20.

11. In November of 1998, Richard Muto (“Muto”) wired a total of \$1 million to Gowing. Gowing told Muto that he was acting as Tamres’s escrow agent. *Id.* at 43, 65, 71.
12. In November of 1998, Gowing wired Muto’s money to Tamres. *Id.* at 71.
13. In December of 1998, Tamres wired \$500,000 back to Gowing. *Id.* at 74; Exh. F.
14. Gowing kept \$250,000 and gave Brady \$250,000. *Id.* at 77.
15. At the time that Tamres wired the money to Gowing, all of the money in Tamres’s account came from investors. *See* Exh. G.
16. Tamres never invested any money in a high yield trading program. *Id.*
17. The money paid to Gowing and Brady came from investors. *Id.*

D. The Asset Enhancement Program

18. Tamres, from August of 1998 through February of 1999, perpetuated a fictitious Prime Bank investment called the Asset Enhancement Program. Tamres, through the distribution of promotional materials that he prepared, misrepresented to investors that the investment “exists as a result of the United States Federal Reserve’s practice of securing short to medium-term liquidity outside of customary on-market channels.” *See* Exh. F. Tamres also misrepresented to all investors, in the Asset Placement Agreement, that the investments were guaranteed by a prime European Insurance Company. *See* Exh. L. In the materials, Tamres also described to the investors the investment as a “low entry” “high yield trading

program” in which an approximate \$30,000 initial investment would yield \$1,500,000 in six weeks. *See* Exh. F; Exh. A at 30, 35, 37, 97.

19. Tamres claimed to the investors that such returns were possible because the Federal Reserve “contracts with Europe’s most credit worthy financial institutions to issue large blocks of their corporate bank paper, which is then distributed through the Federal Reserve’s private capital market.” *See* Exh. F. Tamres stated that the traders would be able to trade ten times the amount of capital raised by the registered traders. *Id.* Therefore, the traders would then be able to trade in large amounts of volume but with little capital. *Id.* Tamres also represented that he was associated with the traders and was pooling together investors to provide the traders with the capital needed to make the trades. *See* Exh. A at 30-35. Finally, Tamres also stated that “considerable time and effort has been expended over the last two and a half years by About Trading and its affiliates to review and qualify the quality and capability of several trading programs offered by a variety of groups.” *See* Exh. F.
20. Investors were instructed, either by Tamres or intermediaries, to wire money either to Tamres’s Merrill Lynch brokerage account or to his NationsBank About Trading Company Account. *See* Exh. A at 104, 107.
21. In some instances, Gowing, while acting as an escrow agent, received money from investors and forwarded it to Tamres. *See* Exh. M at 13.

22. Tamres met with several investors and provided documents describing the Asset Enhancement Program. *See* Exh. A at 47-48, 51-52, 80-81; Exh. M at 9-10, 74. Tamres flew to Nigeria and New York, and met with Muto and several investors. *See* Exh. A at 80-81; Exh. M at 74.
23. Approximately 25 investors invested a total of about \$2.8 million in the Asset Enhancement Program. *See* Exh. M at 13; Exh. A at 39; Exh. G.; Exh. L.

E. Asset Enhancement Program

24. The Asset Enhancement Program does not exist. The SEC previously issued an investor alert regarding Prime Bank schemes entitled "Information for Investors" informing investors of the fraudulent nature of these investments. *See* Exh. H. Also, on October 21, 1993, the federal financial institution supervisory agencies issued an Interagency Advisory to regulated financial institutions warning them of Prime Bank schemes. *Id.*
25. Herbert A. Biern ("Biern"), Associate Director in the Division of Banking Supervision and Regulation of the Board of Governors of the Federal Reserve System, reviewed the documents prepared and disseminated by Tamres. Mr. Biern described the Asset Enhancement Program as

entirely nonsensical and provides a totally inaccurate description of the functions of the Federal Reserve. For example, the Federal Reserve does not engage in the 'practice of securing short to medium-term liquidity outside of customary on-market channels', and the Federal Reserve has not 'registered a small number of high volume traders to facilitate and maintain a secure, private placement, capital market to fund its liquidity

requirements.' The Asset Placement Agreement includes numerous phrases and statements that are often used by fraudsters who are involved with illegal financial instrument, "prime" bank, or high yield investment program type scams and the like.

See Declaration of Herbert A. Biern ("Biern Dec.").

26. Biern also stated that the investment opportunity described by Tamres is entirely bogus. *Id.*

F. Misappropriation of Investor Funds

27. Tamres neither generated any revenues nor invested the money he received from the investors. *See* Exh. M at 15, 21-22; Exh. G.
28. Instead of investing the funds raised from investors in the purported program, Tamres misappropriated all of the money. Tamres transferred approximately \$1.7 million from the NationsBank account to purchase a home and lot, located at 3552 Hintocks Circle, Carmel, Indiana, in his wife's name. Tamres also used approximately \$215,000 of the investor funds to purchase a second home, located at 13556 Silver Spur, Carmel, Indiana, in his wife's name. *See* Exh. M at 15, 22; Exh. G; Exh. J.
29. The title to the Hintocks Circle property was eventually taken by F.K.M.C. Corporation as security for a loan it issued to Tamres and Pamela Tamres. *See* Exhs. C, E.
30. Pamela Tamres sold the second home at Silver Spur in August 1999. Tamres and his wife financed the purchase of the home, with a no interest mortgage, and are

- receiving mortgage payments, totaling \$800 per month, from the purchasers. The purchasers paid approximately half the market price for the home. *See* Exh. J.
31. Tamres spent \$210,000 on home furnishings. He withdrew \$70,000 in cash and used another \$36,000 to purchase several automobiles in his wife's name. Tamres also donated \$50,000 to charity and used \$79,000 to purchase Indiana Pacers basketball tickets and a corporate box. Finally, Tamres wired \$500,000 to Gowing. *See* Exh. G.
 32. Tamres admits that he spent the money investors sent him. Transcript of Plaintiff's Motions for Temporarily Freezing Assets and Imposing Constructive Trust ("Hearing Transcript") at 15-17; Exh. M at 13-15.
 33. During the hearing on Plaintiff's Motions for Temporarily Freezing Assets and Imposing Constructive Trust, Tamres stated that the money received from the investors was wired, from his Merrill Lynch account, to either London or Lichtenstein. Hearing Transcript at 13-14.
 34. There are no wire transactions from either the NationsBank account or the Merrill Lynch account transferring money out of the account to any location overseas. *See* Exh. G. Tamres now states that the investors' money was spent and that he simply diverted \$2.8 million in proceeds from a commodities contract to invest in the Asset Enhancement Program. *See* Exh. M at 13-15. Tamres claims that he was paid \$ 4.5 million on a commodities contract for sugar. *See id.* at 14-16. Tamres,

however, refused to provide the identity of the entity that provided him with the \$4.5 million. *Id.* at 17-18. Tamres went on to state that all the documentation confirming the payment of the \$4.5 million and the investment for the Asset Enhancement Program were overseas and would “be provided at the appropriate time.” *Id.* at 15, 19-20, 23, 54. Tamres has never provided documents establishing either the payment of \$ 4.5 million or that he invested money in the Asset Enhancement Program.

35. Tamres has stated on numerous occasions that the investor funds were wired overseas. *See* Exh. A at 109; Hearing Transcript at 13-15.
36. Tamres has been repeatedly asked for information or documents relating to the investor funds. Tamres has received letters, a subpoena, a request for production of documents and interrogatories requesting this information. Tamres has not complied with any of the SEC’s requests to identify where the investor funds were wired.

II. Summary Judgment Standard

Rule 56(c) of the Federal Rules of Civil Procedure provides that a motion for summary judgment shall be granted “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.” The record and all reasonable inferences therefrom must be viewed in

the light most favorable to the non-moving party. *National Soffit & Escutcheons, Inc. v. Superior Systems, Inc.*, 98 F.3d 262, 264 (7th Cir. 1996).

The moving party bears the burden of demonstrating the absence of a triable issue. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden may be met by demonstrating “that there is an absence of evidence to support the non-moving party’s case.” *Id.* at 325. If the moving party meets its burden, the adverse party “may not rest upon the mere allegations or denials of the adverse party’s pleading,” but must present specific facts to show that there is a genuine issue of material fact. FED.R.CIV.P. 56(e); *see also National Soffit*, 98 F.3d at 265 (citing *Hughes v. Joliet Correctional Center*, 931 F.2d 425, 428 (7th Cir. 1991)).

III. Discussion

A. Anti-Fraud Provisions

Counts II, III, and IV invoke Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, and Rule 10b-5. These provisions prohibit the use of devices, schemes or artifices to defraud in connection with the offer, purchase, or sale of securities. In order to prove a violation of these provisions, the SEC must establish that a person, acting with scienter, made a misstatement or omitted to state a material fact in the offer or sale or in connection with the purchase or sale of a security. *Ernst & Ernst v. Hochfelder*, 425

U.S. 185, 197 (1976); *Aaron v. SEC*, 446 U.S. 680 (1980).¹ To establish scienter, the SEC must show that the violative acts were knowing and intentional, or that such conduct was reckless. *SEC v. Blavin*, 557 F.Supp. 1304, 1313 (E.D.Mich. 1983), aff'd, 760 F.2d 706 (6th Cir. 1985). Reckless conduct has been defined as "highly unreasonable conduct which is an extreme departure from the standards of ordinary care." *Mansbach v. Prescott, Ball & Turben*, 598 F.2d 1017, 1023 (6th Cir. 1979); *Sundstrand Corp. v. Sun Chemical Corp.*, 553 F.2d 1033, 1044 (7th Cir. 1977). A misstatement or omission is material if a reasonable investor would consider the fact important in making an investment decision. *Basic Inc. v. Levinson*, 485 U.S. 224, 231-232 (1988); *TSC Industries, Inc. v. Northway Inc.*, 426 U.S. 438, 449 (1976).

1. Securities

A threshold issue that must be addressed is whether Tamres' scheme involved the offer and sale of securities. Section 2(1) of the Securities Act and Section 3(a)(10) of the Exchange Act define "security" to include investment contracts. "[F]or an interest to be classified as an investment contract there must be what is called 'horizontal commonality,' which means simply that each investor's interest is pooled with that of the other investors, so that each has an undivided share in a pool of assets rather than an individual asset. See *SEC v. Lauer*, 52 F.3d 667, 669 (7th Cir. 1995). Moreover, each

¹ Scienter is not required to establish violations of Section 17(a)(2) or (a)(3) of the Securities Act. See *Aaron*, 446 U.S. at 697. Negligent conduct is sufficient to establish a violation of those provisions. *Id.*

interest must be passive – that is, not managed by the investor. *Id.* Finally, “it is the representations of the promoters, not their actual conduct, that determine (sic) whether an interest is an investment contract.” *Id.*

Here, horizontal commonality exists. Each investor made an investment of money which, as promoted by Tamres, would be pooled together. (See Exhs. F & G). In addition, Tamres, through About Trading Company, acted as manager, and each investor owned a passive interest. Accordingly, the court finds the investments in the About Trading company are securities.

2. Misrepresentations

The next issue for the court is whether Tamres misrepresented key facts about the Asset Enhancement Program. The undisputed evidence reveals that he did. Tamres misrepresented to investors the existence of the investment itself when, in fact, Prime Bank instruments do not exist. (See Exhs. H & I; *see also* Findings of Fact ## 24 & 25). In addition, Tamres misrepresented to investors how he would use the funds. Rather than invest the funds as promised, Tamres used the funds to purchase items for his own personal use and to pay personal expenses. (See Exh. M at 13-15; Exhs. F & G; *see also* Findings of Fact ## 27-36). Further, Tamres misrepresented the existence of the Asset Enhancement Program and the due diligence performed. (See Exh. A at 30-35, 101, 103; Exh. M at 6-12; Exh. F; *see also* Findings of Fact ## 18-19). And lastly, Tamres misrepresented to investors and prospective investors the risk and rate of return of the

investment. (*See generally* Findings of Fact ## 18-36). Given the record evidence, the only reasonable conclusion is that Tamres misrepresented important facts about the Asset Enhancement Program. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (“[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is ‘no genuine issue for trial.’”) (citation omitted).

3. Scierter

The next issue is whether Tamres acted with the requisite scierter. As stated above, Tamres did not engage in any due diligence to determine whether these investments exist. *See* Exh. A at 30-35, 101, 103; Exh. M at 6-12; Exh. H; *see also* Findings of Fact ## 24-26. Tamres never contacted the Federal Reserve to verify that the program exists or to verify that an insurance company insured the funds. *See* Exh. A at 30-35, 101, 103; Exh. M at 6-12. Moreover, there is ample public information that these schemes do not exist, including information on the SEC’s website. *See* Exh. H. Given the record evidence, the only reasonable conclusion is that Tamres knew, or was reckless in not knowing, that the Prime Bank investments do not exist. No reasonable jury could find otherwise.

4. Materiality

The last issue is whether Tamres’s misrepresentations and omissions about the existence of the program and the use of the funds were material. A misstatement or

omission is material if a reasonable investor would consider the fact important in making an investment decision. *Basic Inc. v. Levinson*, 485 U.S. 224, 231-232 (1988), *Rowe v. Maremont Corp.*, 850 F.2d 1226 (7th Cir. 1988). Tamres failed to disclose the non-existence of the Prime Bank instruments and the actual use of the investors' funds. Given the record evidence, the court finds that a reasonable investor would consider Tamres's failure to disclose the aforementioned information important in making an investment decision. No reasonable jury could find otherwise.

With respect to Counts II, III, and IV of the SEC's Amended Complaint, the court finds no genuine material issues of fact exist for trial. Accordingly, the court grants the SEC's motion for summary judgment with respect to Counts II, III, and IV of the SEC's Amended Complaint.

B. Unregistered Securities

Count I invokes Section 5(a) and Section 5(c) of the Securities Act. Section 5(a) provides that unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly, to sell the security through the use of any means or instruments of interstate commerce. Section 5(c) of the Securities Act provides for a similar prohibition against offers to sell, or offers to buy, unless a registration statement has been filed. Once an individual is shown to have sold securities, a prima facie case for a violation of Sections 5(a) and 5(c) of the Securities Act is established by showing that: (1) no registration statement was in effect as to the securities; (2) the

defendants, directly or indirectly, sold or offered to sell the securities; and (3) the sales were made through the use of interstate facilities or the mails. *SEC v. Continental Tobacco Co.*, 463 F.2d 137, 155 (5th Cir. 1972).

The evidence shows that the SEC has met its prima facie case. The SEC does not have a registration filed in connection with the offer and sale of the About Trading Company securities. *See* Exh. A at 47-48, 51-52, 80-81; Exh. M at 9-10, 74; Exh. L. In addition, Tamres used the means of interstate commerce to personally solicit offers and sales of these securities to investors in various states. *See id.* Tamres has offered no evidence to rebut the SEC's prima facie case; therefore, no material issue of fact exists warranting a trial on the merits. Accordingly, the court **grants** the SEC's motion with respect to Count I of the SEC's Amended Complaint.

IV. Relief

The SEC asks for the following relief: (1) a permanent injunction against Tamres; (2) disgorgement of all his ill-gotten gains; (3) third-tier civil penalties against Tamres; and (4) the appointment of a receivership to liquidate assets.

A. Permanent Injunctive Relief

An injunction based on the violation of securities laws is appropriate if the SEC demonstrates a reasonable and substantial likelihood that the defendant, if not enjoined, will violate securities laws in the future. *See* Securities Act § 20(b); Exchange Act § 21(d). Determination of the likelihood of future violations requires analysis of several

factors, including (1) the egregiousness of the violations; (2) the isolated or repeated nature of the violations; (3) the degree of scienter involved; (4) the sincerity of the defendant's assurances, if any, against future violations; (5) the defendant's recognition of the wrongful nature of his conduct; (6) the likelihood that the defendant's occupation will present opportunities (or lack thereof) for future violations; and (7) the defendant's age and health. *SEC v. Suter*, 732 F.2d 1294, 1301 (7th Cir. 1983). *See also SEC v. Youmans*, 729 F.2d 413, 415 (6th Cir.), *cert. denied*, 469 U.S. 1034 (1984).

As discussed in the previous section, the evidence shows that Tamres' conduct was egregious, repeated, and done with scienter. Moreover, there is a strong likelihood that Tamres will continue to engage in fraudulent activity absent the issuance of an injunction. Indeed, Tamres' sole occupation is defrauding investors of money for his own personal use. In fact, during the SEC's investigation, Tamres contacted an investor in the About Trading Company regarding an investment in Nigeria. *See* Exh. N. This investment was later determined to be bogus. *See* Exh. Q. Thus, there is no reason to believe that Tamres will refrain from engaging in fraudulent activity. Accordingly, the court **grants** the SEC's request for permanent injunctive relief.

B. Disgorgement

Disgorgement is an equitable remedy, the purpose of which "is not to punish the wrongdoer but rather to prevent the unjust enrichment of the wrongdoer by depriving him of ill-gotten gains." *SEC v. Bilzerian*, 814 F.Supp. 116, 120 (D.D.C. 1993). The

disgorgement amount need only be a reasonable approximation of profits connected to the wrongful conduct. *SEC v. First City Financial Corp.*, 890 F.2d 1215, 1231 (D.C.Cir. 1989). Once the SEC has shown that the disgorgement amount is a reasonable approximation of ill-gotten gains, the burden of proof shifts to the defendant. *Id.* at 1232. Further, if there is any uncertainty as to the amount to be disgorged, the “risk of uncertainty should fall on the wrongdoer whose illegal conduct created that uncertainty.” *Id.* In determining the amount of disgorgement, “it is proper to assume that all profits gained while defendants were in violation of the law constituted ill-gotten gains.” *Bilzerian*, 814 F.Supp. at 120 .

Here, the SEC has shown that \$2.3 million was invested by over 25 investors. *See* Exh. G. The SEC has also shown that \$500,000 was received by Gowing and Brady as an alleged return in this fraudulent investment. Exh. P. at 20. The SEC has presumptively satisfied its burden of coming forward with evidence of actual profits on the tainted transactions. Tamres, to whom the burden of going forward shifted, is now obliged to clearly demonstrate that the disgorgement figure was not a reasonable approximation. He has failed in this regard. Accordingly, the court finds that Tamres and Relief Defendants Gowing and Brady profited from violations of the Securities Act and the Exchange Act through transactions in the Asset Enhancement Program. Tamres is therefore required to disgorge \$2.3 million and Gowing and Brady are each to disgorge \$250,000.

C. Third-Tier Civil Penalties

Civil penalties are available under the Securities Act § 20(d)(2) and Exchange Act § 21(d)(3). Pursuant to these statutes, the court may impose third-tier penalties of up to \$100,000 per violation because Tamres' violations included fraud and resulted in substantial losses to investors. Given the egregious nature of Tamres' violations, in its discretion, **grants** the SEC's request for civil penalties. To determine the appropriate penalty, the court will set this matter for hearing within thirty (30) days after the issuance of this Entry.

D. Receivership

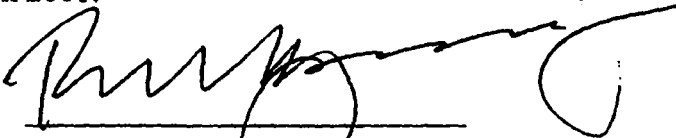
A federal court has the "inherent equitable power to appoint a receiver to manage a defendant's assets during the pendency of litigation." *In the Matter of Guy E. McGaughey, Jr.*, 24 F.3d 904, 907 (7th Cir. 1994). Appointment of a receiver is especially appropriate in cases involving fraud and possible dissipation of assets. *Id.*

Here, the court finds that a receivership is appropriate and necessary to protect the assets and interests so that they are available for the order of disgorgement and penalties in this case. Therefore, the court appoints a receiver to liquidate the property purchased by Tamres including the 3552 Hintocks Circle property, the 3552 Hintocks Circle lot and the 13556 Silver Spur property. The court will name the appointed receiver in a separate entry.

V. **Conclusion**

For the foregoing reasons, the court **grants** the SEC's Motion for Summary Judgment and now enters permanent injunctive relief against Defendant Tamres. The court **orders** Tamres to disgorge his ill-gotten gains of \$2.3 million, and to pay a civil penalty in an amount to be determined after a hearing on the same. In addition, the court **grants** the SEC's request for the appointment of a receiver. The court further **orders** Relief Defendants Gowing and Brady to disgorge the \$250,000 they each received from Defendant Tamres.

IT IS SO ORDERED this 30 day of March 2001.



RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

Distribution:

David J. Medow
Peter K.M. Chan
Steven B. Levine
Securities and Exchange Commission
500 West Madison Street
Chicago, IL 60661

Mr. Donald Barry Tamres
3552 Hintocks Circle
Carmel, IN 46032-9184

Mr. Steven Cracraft
McHale Cook & Welch
320 North Meridian Street, Suite 1100
Indianapolis, IN 46204-1781

Mr. Delmer C. Gowing III
101 S.E. 6th Avenue
Delray Beach, FL 33483

Mr. Peter C. Brady
7851 9th Avenue South
St. Petersburg, FL 33707-2730