

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

GRANT R. CURTIS, LEO MANGAN, TIMOTHY H. MASLEY, JAMES W. NEAREN, RAIMOND IRNI, PEDRO DIBRITO GOMEZ, DONALD E. KESSLER, DAVID R. BEHANNA, ANDREA VARSI, JONATHAN D. LYONS, KENNETH A. ORR, LILLIAN M. VINCI, ANN MARIE NOEL, MICHAEL V. LIPKIN, JOSHUA S. SHAINBERG, PHILLIP J. MILLIGAN, AND ROBERT L. SHATLES,

Defendants.

GERSHON, J.

CV 99 Civ. 7357

CADEN

US DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
NOV 10 12 53 PM '99

**FINAL JUDGMENT OF PERMANENT INJUNCTION
AND OTHER RELIEF AS TO DONALD E. KESSLER**

Plaintiff Securities and Exchange Commission ("Commission"), having commenced this action by filing a Complaint For Injunctive And Other Relief on ^{November} September 10, 1999, alleging that defendant Donald E. Kessler ("Kessler") violated Sections 5(a), 5(c), and 17(a) of the Securities Act of 1933 ("Securities Act"), 15 U.S.C. §§ 77e(a), 77e(c), and 77q(a), Sections 10(b) and 13(b) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. §§ 78j(b) and 78m(b), Rules 10b-5, 13b2-1 and 13b2-2 thereunder, 17 C.F.R. §§ 240.10b-5, 240.13b2-1 and 240.13b2-2, and that, as a controlling person of Windswept Environmental Group, Inc. ("Windswept"), defendant Kessler is liable pursuant to Section 20(a) of the Exchange Act, 15 U.S.C. § 78t(a), for Windswept's violations of Sections 13(a) and 13(b) of the Exchange Act, 15 U.S.C. §§ 78m(a) and 78m(b), and Rules 12b-20, 13a-1, 13a-13, and 13b2-1 thereunder, 17 C.F.R.

ATTEST
DATED JUN 18 2003
ROBERT C. HEINEMANN
CLERK
BY.....
DEPUTY CLERK

§§ 240.12b-20, 240.13a-1, 240.13a-13, and 240.13b2-1, and defendant Kessler having executed the annexed Consent To Final Judgment Of Permanent Injunction And Other Relief As To Donald E. Kessler ("Consent"), 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 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, having consented to the entry of this Final Judgment Of Permanent Injunction And Other Relief As To Donald E. Kessler ("Final Judgment") without further notice:

I.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that defendant Kessler be and hereby is permanently enjoined from, directly or indirectly, singly or in concert:

- (A) making use of any means or instrument of transportation or communication in interstate commerce or of the mails to sell any security of any issuer, through the use or medium of any prospectus or otherwise, unless and until a registration statement is in effect as to such securities; or
- (B) carrying or causing to be carried through the mails or in interstate commerce, by any means or instrument of transportation, for the purpose of sale or for delivery after sale, any security of any issuer, unless and until a registration statement is in effect as to such securities; or
- (C) making use of any means or instrument of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security of any issuer, unless and

until a registration statement has been filed with the Commission as to such securities, or while a registration statement as to such securities is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding of examination under Section 8 of the Securities Act,

in violation of Sections 5(a) and 5(c) of the Securities Act.

II.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that defendant Kessler be and hereby is permanently enjoined from, directly or indirectly, singly or in concert, in the offer or sale of any security, by the use of any means or instrument of transportation or communication in interstate-commerce or by use of the mails:

- (A) employing any device, scheme or artifice to defraud; or
- (B) obtaining money or property by means of an untrue statement of a material fact or omitting 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) engaging in any transaction, practice or course of business which operates or would operate as a fraud or deceit upon the purchaser,

in violation of Section 17(a) of the Securities Act, 15 U.S.C. § 77q(a).

III.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendant Kessler be and hereby is permanently enjoined and restrained from, directly or indirectly, singly or in concert, in connection with the purchase or sale of any security, by the use of any means or

instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange:

- (A) employing any device, scheme, or artifice to defraud;
- (B) making any untrue statement of a material fact or omitting 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 act, practice or course of business which operates or would operate as a fraud or deceit upon any person.

in violation of 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.

IV.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that defendant Kessler, while he directly or indirectly controls any issuer within the meaning of Section 20(a) of the Exchange Act, 15 U.S.C. § 78t(a), be and hereby is permanently enjoined and restrained from acting or omitting to act if such act or omission would result or results in such issuer:

- (A) failing 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) filing 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, in 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 or 240.13a-13, unless defendant Kessler acted in good faith and did not directly or indirectly induce the act or omission constituting such violation(s) within the meaning of Section 20(a) of the Exchange Act, 15 U.S.C. § 78t(a).

V.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendant Kessler be and hereby is permanently enjoined and restrained from, directly or indirectly, singly or in concert, 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), in violation of Section 13(b) of the Exchange Act, 15 U.S.C. § 78m(b) or Rule 13b2-1 thereunder, 17 C.F.R. § 240.13b2-1.

VI.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendant Kessler be and hereby is permanently barred, pursuant to Section 20(e) of the Securities Act and Section 21(d)(2) of the Exchange Act, from serving as an officer or director of any issuer that has a class of securities registered under Section 12 of the Exchange Act or that is required to file reports pursuant to Section 15(d) of the Exchange Act.

VII.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendant Kessler shall disgorge the sum of \$92,790, plus prejudgment interest thereon. Based upon defendant Kessler's sworn representations in his Statement of Financial Condition, dated as of March 19, 1999 ("Financial Statement"), payment of the disgorgement and prejudgment interest is waived, contingent upon the material accuracy and completeness of the Financial Statement.

VIII.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, based upon defendant Kessler's sworn representations in his Financial Statement, the Court is not ordering him to pay a civil penalty pursuant to Section 20(d) of the Securities Act, 15 U.S.C. § 77t(d), and Section 21(d) of the Exchange Act, 15 U.S.C. § 78u(d). The determination not to impose a civil penalty is contingent upon the material accuracy and completeness of the Financial Statement.

IX.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, if at any time following the entry of this Final Judgment, the Commission obtains information indicating that defendant Kessler's representations to the Commission in the Financial Statement concerning his assets, income, liabilities, or net worth were fraudulent, misleading, inaccurate or incomplete in any material respect as of the time such representations were made, the Commission may, at its sole discretion and with five days prior notice to Kessler, petition this Court for an order requiring Kessler to pay \$92,790 in disgorgement, plus prejudgment interest thereon, and imposing a civil penalty and postjudgment interest on these sums. In connection with any such petition, the only issue shall be whether the information provided by Kessler in the Financial

Statement was fraudulent, misleading, inaccurate or incomplete in any material respect as of the time such representations were made. In its petition, the Commission may move this Court to consider all available remedies, including, but not limited to, ordering defendant Kessler to pay funds or assets, directing the forfeiture of any assets, or sanctions for contempt of this Final Judgment, and the Commission may also request additional discovery. Kessler may not, by way of defense to such petition, challenge the validity of the annexed Consent or the Final Judgment, contest the allegations in the Complaint filed by the Commission, the amount of disgorgement and pre- or postjudgment interest, or assert that disgorgement, pre- or postjudgment interest or the payment of a civil penalty should not be ordered.

X.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, pursuant to Rule 65(d) of the Federal Rules of Civil Procedure, this Final Judgment is binding upon defendant Kessler, his employees, agents, servants, and attorneys, and upon those persons in active concert or participation with him who receive actual notice of this Final Judgment by personal service or otherwise.

XI.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the annexed Consent of defendant Kessler be, and hereby is, incorporated herein with the same force as if fully set forth herein.

XII.

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 Final Judgment.

XIII.

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 Final Judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

XIV.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff Commission may effect service of this Final Judgment, and all other papers in this action, upon defendant Kessler by delivering a copy to defendant Kessler's attorney, Mark Cohen, Esq., at Arkin, Schaffer & Kaplan, 1370 Avenue of the Americas, 28th Floor, New York, New York 10019, or any other attorney entering an appearance for defendant Kessler in this action.

**CONSENT TO FINAL JUDGMENT OF PERMANENT INJUNCTION
AND OTHER RELIEF AS TO DEFENDANT DONALD E. KESSLER**

1. Defendant Donald E. Kessler ("Kessler"), being fully apprised of his rights, having had the opportunity to confer with legal counsel, having read and understood the terms of the Final Judgment Of Permanent Injunction And Other Relief As To Donald E. Kessler ("Final Judgment"), appears and admits the in personam jurisdiction of this Court over him and the subject matter jurisdiction of this Court, waives the entry of findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure, and, without admitting or denying the allegations contained in the Complaint of plaintiff Securities and Exchange Commission ("Commission"), except as to jurisdiction, hereby consents to the entry, without further notice, of the Final Judgment.

2. Defendant Kessler agrees that this Consent To Final Judgment Of Permanent Injunction And Other Relief As To Donald E. Kessler ("Consent") shall be incorporated by reference in and made part of the Final Judgment to be presented to the Court for signature, filing and entry contemporaneously herewith.

3. Defendant Kessler waives any right he may have to appeal from the Final Judgment.

4. Defendant Kessler acknowledges that any willful violation of any of the terms of the Final Judgment may place him in contempt of this Court and subject him to civil or criminal sanctions.

5. Defendant Kessler acknowledges that he enters into this Consent voluntarily, and that this Consent, the Final Judgment, and defendant Kessler's Statement of Financial Condition, dated March 19, 1999 ("Financial Statement"), submitted to the Commission, embody the entire

understanding of the parties. Defendant Kessler acknowledges and agrees that this proceeding, and his consent to the entry of the Final Judgment, are for the purposes of resolving this civil action only, that no tender, offer, promise, threat or representation of any kind has been made by plaintiff Commission or any member, officer, attorney, agent, or representative thereof, with regard to: (A) this civil action, that is not explicitly stated in this Consent and the Final Judgment; (B) any administrative proceeding brought or to be brought before the Commission involving the Final Judgment or the facts underlying this action; (C) any other Commission civil action or administrative proceeding not involving the facts underlying this action; (D) any administrative, civil or criminal liability arising from the facts underlying this action in any action or proceeding brought or to be brought by any third party, other agency or criminal authority; or (E) immunity from any such administrative, civil or criminal action or proceeding.

6. Defendant Kessler acknowledges that he has been informed and understands that plaintiff Commission, at its sole and exclusive discretion, may refer or grant access to this matter, or any information or evidence gathered in connection therewith or derived therefrom, to any person or entity having appropriate administrative, civil, or criminal jurisdiction, if the Commission has not already done so.

7. Defendant Kessler acknowledges and agrees that his consent to the entry of the Final Judgment is for the purposes of resolving this civil action only, in conformity with the provisions of 17 C.F.R. § 202.5(f), and do not resolve, extend to, affect or preclude any other proceeding which may be brought against him. Among other things, defendant Kessler waives any right he may have to assert that, under the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, the relief sought or consented to in this civil action, including

the seeking or imposition of any remedy or civil penalty herein, bars any criminal action, or that any criminal action bars the relief consented to in this action.

8. Defendant Kessler acknowledges that the Court is not ordering him to pay a civil penalty pursuant to Section 20(d) of the Securities Act, 15 U.S.C. § 77t(d), and Section 21(d) of the Exchange Act, 15 U.S.C. § 78u(d), and that not requiring defendant Kessler to pay the sum of \$92,790, plus prejudgment interest thereon, is based upon the accuracy and completeness of defendant Kessler's sworn representations to the Commission concerning his assets, income, liabilities, and net worth, as described in his Financial Statement.

9. Defendant Kessler further agrees and understands that, if at any time following the entry of this Final Judgment, the Commission obtains information indicating that Kessler's representations to the Commission concerning his assets, income, liabilities, or net worth were fraudulent, misleading, inaccurate or incomplete in any material respect as of the time such representations were made, the Commission may, at its sole discretion and with five days prior notice to Kessler, petition this Court for an order requiring Kessler to pay \$92,790 in disgorgement, plus prejudgment interest thereon, and imposing a civil penalty plus postjudgment interest on these sums. In connection with any such petition, the only issue shall be whether the financial information provided by Kessler was fraudulent, misleading, inaccurate or incomplete in any material respect as of the time such representations were made, and the amount of civil penalty to be imposed. In its petition, the Commission may move this Court to consider all available remedies, including, but not limited to, ordering defendant Kessler to pay funds or assets, directing the forfeiture of any assets, or sanctions for contempt of this Final Judgment, and the Commission may also request additional discovery. Kessler may not, by way of defense

to such petition, challenge the validity of this Consent or the Final Judgment, contest the allegations in the Complaint filed by the Commission, the amount of disgorgement and pre- or postjudgment interest, or assert that disgorgement, pre- or postjudgment interest or the payment of a civil penalty should not be ordered.

10. Defendant Kessler understands and agrees to comply with the Commission's policy "not to permit a defendant or respondent to consent to a judgment or order that imposes a sanction while denying the allegation in the complaint or order for proceedings," 17 C.F.R. § 202.5(e). In compliance with this policy, defendant Kessler agrees not to take any action or make or permit to be made any public statement denying, directly or indirectly, any allegation in the Complaint or creating the impression that the Complaint is without factual basis. If defendant Kessler breaches this agreement, the Commission may petition the Court to vacate the Final Judgment and restore this action to the Court's active docket. Nothing in this provision affects defendant Kessler's: (i) testimonial obligations; or (ii) right to take legal positions in litigation in which the Commission is not a party.

11. Defendant Kessler hereby consents and agrees that the Final Judgment may be presented by the Commission to the Court for signature and entry without further notice and delay.

12. Defendant Kessler agrees that, promptly after the Final Judgment has been entered by the Court, he will execute and return to the Commission an acknowledgment of receipt of the Final Judgment.

13. Defendant Kessler agrees that this Court shall retain jurisdiction of this matter for all purposes, including the implementation, modification and enforcement of the Final Judgment.

14. Defendant Kessler agrees that first class and certified mail to his attorney, Mark Cohen, Esq., at Arkin, Schaffer & Kaplan, 1370 Avenue of the Americas, 28th Floor, New York, New York 10019, or any other attorney entering an appearance for defendant Kessler in this action, shall be deemed personal service for all correspondence, service and notices as to any matters related to the Final Judgment, unless defendant Kessler notifies the Commission of any alternative address by certified mail at the following address: Associate Regional Director (Enforcement), U.S. Securities and Exchange Commission, Northeast Regional Office, 7 World Trade Center, New York, New York 10048, Attn: David Rosenfeld, Esq.

15. Defendant Kessler acknowledges that this Consent embodies the entire understanding of the parties concerning resolution of this action.

Dated: ~~August~~ 28 1999
~~September~~

Donald E. Kessler
Donald E. Kessler

Acknowledged by:

STATE OF)
)
COUNTY OF) ss.:

On this 28th day of September, 1999, before me personally appeared Donald E. Kessler, to me known to be the person who executed the foregoing Consent, and he acknowledged to me that he executed the same.

[Signature]
NOTARY PUBLIC

My commission expires:

CLAUDIA DAJER
Commissioner of Deeds
City of New York-No. 4-4608
Cert. Filed in Queens Co.
Commission Expires June, 1 2001

SO ORDERED.

Mina Pleurh
United States District Judge

Dated: November 19
September, 1999
Brooklyn, New York