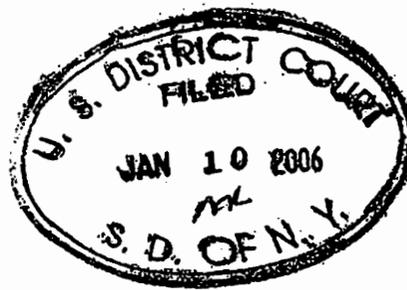


UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

#55



SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

- against -

JAMES J. McDERMOTT, JR.,
KATHRYN B. GANNON
(a/k/a MARYLIN STAR), and
ANTHONY P. POMPONIO,

Defendants.

99 Civ. 12256 (MBM)

Findings of Fact,
Conclusions of Law
and
Final Judgment

06,0045

Plaintiff, the Securities and Exchange Commission (the "SEC"), filed its Complaint in this action on December 21, 1999. On the same day a parallel criminal complaint was filed, followed by an indictment on January 20, 2000 against defendant Anthony P. Pomponio and two others. Pomponio was charged with one count of conspiracy to commit securities fraud, five counts of securities fraud, and one count of perjury during the SEC investigation of this matter. *United States v. Anthony P. Pomponio, et al.*, 00 Cr 0061-03 (KMW).

The SEC's Complaint alleges, *inter alia.*, that defendant Pomponio directly or indirectly violated Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10B-5] when he received material, nonpublic information about Barnett Bank, Inc. ("Barnett"), First Commerce Corp. (1st Commerce"), First Commercial Corp. ("1st Commercial") and California State Bank (West Covina) ("Cal. State Bank"), which information he knew, should have known, or acted in

reckless disregard of the fact that this information had been disclosed in breach of a fiduciary duty or other duty of trust and confidence, and then purchased shares of stock in each of these companies. The SEC's Complaint as to defendant Pomponio sought a judgment (1) permanently enjoining defendant Pomponio from violating Exchange Act Section 10(b) and Rule 10b-5, (2) ordering disgorgement of Pomponio's realized profits on these transactions plus prejudgment interest and (3) ordering Pomponio to pay a civil penalty under Exchange Act Section 21A [15 U.S.C. § 78u-1].

This Court stayed all proceeding in the SEC's case by Order dated March 2, 2000.

On December 14, 2000, defendant Pomponio was convicted on the criminal conspiracy count, three counts for securities fraud (with respect to his trading in the stocks of Barnett, 1st Commerce and 1st Commercial) and one count for perjury in the parallel criminal case, *United States v. Pomponio, et al.*, 00 Cr 0061-03. Thereafter he was sentenced to 21 months incarceration, followed by two years of supervised release, and ordered to pay a criminal monetary penalty of \$5,000.

This Court lifted the stay in this case by Order, dated May 19, 2003. One month later, on June 20, 2003, Defendant Pomponio's legal counsel filed Pomponio's Answer in this case wherein Pomponio denies violating Exchange Act Section 10(b) and Rule 10b-5 notwithstanding his criminal conviction.

In April 2005, the SEC moved for a summary judgment against Pomponio for his trading in Barnett, 1st Commerce and 1st Commercial securities¹ based, in part, on his criminal conviction (the "Motion"). The SEC certified that defendant Pomponio's legal counsel was

¹ While the SEC's Complaint includes a claim for defendant Pomponio's trading in Cal. State Bank stock, Pomponio was acquitted on the parallel criminal count for this trading. The SEC did not include a claim for the Cal. State Bank trades in the Motion and noted in its papers that, if the SEC prevails in the Motion, as it has, the claim for Pomponio's Cal. State Bank trading will be withdrawn.

served with the SEC's Motion papers. The SEC also has advised the Court that it was not served with any papers opposing the Motion and no such opposing papers have been filed with the Court. This Court granted the unopposed Motion against defendant Pomponio on September 27, 2005. Since defendant did not oppose the Motion, this Court accepts and admits in the record the statements made in, and the exhibits attached to, the Declaration of Jordan A. Thomas, dated April 7, 2005, and the statements made in the Declaration of Charles E. Cain, dated April 7, 2005 submitted in support of the Motion. Moreover, since defendant Pomponio did not specifically controvert any of the factual assertions in the SEC's *Statement of Facts not in Issue* supporting the Motion, each such fact is deemed admitted for purposes of the Motion. Rule 56.1.(c) Local Rules of Civil Procedure.

FINDINGS OF FACT

Based on the record in this case as to defendant Pomponio, the SEC's unopposed Motion and the doctrine of *collateral estoppel*, which provides that a prior judgment "precludes relitigation [in a second suit] of issues [of fact or law] actually litigated and necessary to the outcome of the first action", *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 327 n.5 (1979); *see also, e.g., Allen v. McCurry*, 449 U.S. 90, 94 (1980); *Beck v. Levering*, 947 F.2d 639, 642 (2d Cir. 1991), this Court finds that:

Defendant Pomponio has entered a general appearance in this case, has been represented by legal counsel and this Court has jurisdiction over defendant Pomponio and the subject matter of this action.

Defendant Pomponio is a resident of North Caldwell, New Jersey.

From at least June 1997 through September 1998, defendant Pomponio was the Chief Executive Officer of an industrial diamond wheel manufacturing company called Pomponio Industries located in Cedar Grove, New Jersey.

From at least June 1997 through September 1998, James J. McDermott, Jr. was the President, Chairman and/or CEO of Keefe, Bruyette & Woods, Inc. ("Keefe Bruyette"), an investment banking firm engaged in the business of, among other things, providing merger and acquisition advisory services to its clients. In 1997 and 1998, Keefe Bruyette was one of the leading financial advisors for mergers and acquisitions in the banking industry.

As President, Chairman and CEO of Keefe Bruyette, McDermott had access to confidential, material and non-public information from Keefe Bruyette about its clients and potential takeovers, including Barnett /SunTrust Banks, Inc., 1st Commerce/Banc One Corp., and 1st Commercial/Regions Financial Corp.

From at least June 1997 through September 1998, Keefe Bruyette's Employee Trading and Insider Information policy strictly prohibited employees from disclosing any confidential or proprietary information learned or developed in the course of employment. Specifically, written Keefe Bruyette policy stated that:

"employees . . . may not engage in, or recommend to or otherwise cause another person or entity to engage in, any securities transaction while the employee is in possession of (i) Confidential Information relating to the securities learned of in the course of employment with KBW, (ii) Inside Information relating to the securities, from whatever source learned, whether inside or outside KBW, . . ."

Moreover, Keefe Bruyette maintained an internal "Watch List" of companies from which Keefe Bruyette received confidential, material and non-public information. The Watch List was

regularly updated and contained the names of Keefe Bruyette's clients and their potential acquisition targets. During this period, McDermott was on the Watch List distribution list.

As a senior executive and employee privy to confidential, material and non-public information, McDermott was required by fiduciary and other duties of trust and confidence that he owed to Keefe Bruyette and its clients, to refrain from trading in securities, making any recommendations for any securities transactions or disclosing information related to matters learned as a Keefe Bruyette employee, e.g. which appeared on Keefe Bruyette's Watch List.

From at least June 1997 through September 1998, Kathryn B. Gannon was an exotic dancer and actress in adult movies using the screen name "Marylin Star."

In October 1996, Pomponio began an intimate relationship with Gannon.

From June 1997 through September 1998, Gannon had an intimate relationship with McDermott.

During the period from June 1997 to September 1998, McDermott disclosed to Gannon confidential, material and non-public information about Keefe Bruyette and its clients with the understanding that Gannon would purchase and sell securities while in possession of that information, and thereby receive substantial profits, all in violation of the law.

On June 13, 1997, Gannon opened a brokerage account at Charles Schwab & Co., Inc. with an initial deposit of \$25,800. Prior to opening the account, Gannon had minimal investment experience; her only other securities investment up to this time was an IRA account at Schwab, which was opened in April 1997 and invested in money market funds.

Within days of opening her brokerage account at Schwab, Gannon began trading in the securities of regional banks. Each of the banks whose stock Gannon traded was either involved in merger negotiations with potential suitors or actually consummated a merger transaction

contemporaneously with her trading. In addition, with respect to all but one of Gannon's bank stock purchases, Keefe Bruyette represented the target in the merger transaction or was otherwise associated in some way with one of the parties to the transaction.

From June 1997 to September 1998, Gannon disclosed information to defendant Pomponio, which she knew had been misappropriated from Keefe Bruyette and its clients by McDermott, with the understanding that he, Pomponio, would purchase and sell securities while in possession of that information, and thereby receive substantial profits, all in violation of the law. Pomponio was also aware that this information had been misappropriated by McDermott from Keefe Bruyette and its clients.

Defendant Pomponio opened a brokerage account at Schwab on July 16, 1997. This was Pomponio's first securities brokerage account. Soon after opening the account, Pomponio began trading in the same regional bank stocks that Gannon purchased.

From June 1997 to September 1998, while in possession of the confidential, material and non-public information disclosed by McDermott, Gannon and Pomponio purchased and sold securities of companies that were the targets of potential merger or acquisition transactions.

Barnett Banks, Inc.

On August 25, 1997, SunTrust Banks, Inc. contacted Keefe Bruyette and informed the firm that Barnett Banks, Inc. was soliciting bids. SunTrust communicated this information directly to McDermott. SunTrust also informed the firm that the deadline for submitting bid proposals for Barnett was August 27, 1997. SunTrust then retained Keefe Bruyette to assist it in preparing a bid proposal for SunTrust to acquire Barnett. Keefe Bruyette placed Barnett on its restricted Watch List on August 28, 1997. Shortly after McDermott received the information about Barnett on August 25, 1997, he disclosed it to Gannon, who, in turn disclosed it to

Defendant Pomponio. McDermott, Gannon and Pomponio knew this information was confidential, material and non-public, and had been misappropriated and stolen by McDermott in breach of his duties of confidentiality.

On August 25, 1997, Gannon telephoned Pomponio and told him that "a very powerful and rich Wall Street-type friend" told her that she should buy Barnett stock. Gannon also told Pomponio that she planned to purchase Barnett stock and recommended that Pomponio do the same. In reliance upon Gannon's recommendation, Pomponio purchased 1,370 shares of Barnett stock on August 26, 1997.

On the same day, August 26, 1997, Gannon purchased 1,800 shares of Barnett stock.

Three days later, on August 29, 1997, NationsBank Corporation and Barnett announced that they had entered into an agreement whereby NationsBank would acquire Barnett. The announcement caused a 24% surge in the price of Barnett's stock.

Following the announcement, Gannon sold all of her Barnett stock for a profit of \$30,400, and, between October 13 and November 3, 1997, Pomponio sold all of his Barnett stock for a profit of \$26,793.

1st Commerce

On October 1, 1997, McDermott learned that 1st Commerce was a potential takeover target and was placed on Keefe Bruyette's Watch List. Shortly thereafter, McDermott disclosed this information to Gannon, who, in turn, disclosed it to Pomponio. McDermott, Gannon and Pomponio knew this information was confidential, material and non-public, and had been misappropriated and stolen by McDermott in breach of his duties of confidentiality.

On Friday, October 10, 1997, Gannon purchased 3,333 shares of First Commerce stock.

On the next trading day, Monday, October 13, 1997, Pomponio also purchased 3,013 shares of First Commerce stock.

One week later, on October 20, 1997, Banc One Corp. announced that it had a definitive agreement to acquire First Commerce. On the day of the announcement, the closing price of First Commerce's stock was up by \$8.25. Keefe Bruyette advised First Commerce in connection with the Banc One Corp. transaction.

Pomponio sold all of his First Commerce stock on October 27, 1997 for a profit of \$1,379.87.

1st Commercial

In or about December 1997, McDermott, as a Keefe Bruyette employee, learned that 1st Commercial was a potential takeover target by Regions Financial Corp. Keefe Bruyette represented First Commercial in merger negotiations with Regions Financial Corp. Shortly after learning this information, McDermott disclosed this information to Gannon, who, in turn, disclosed it to Pomponio. McDermott, Gannon and Pomponio knew this information was confidential, material and non-public, and had been misappropriated and stolen by McDermott in breach of his duties of confidentiality.

On December 30, 1997 and January 23, 1998, Gannon purchased a total of 1,443 shares of First Commercial stock in her individual brokerage account at Schwab.

On January 22, 1998, 1st Commercial was placed on Keefe Bruyette's Watch List.

On January 26, 1998, Gannon and her brother jointly purchased 460 shares of First Commercial stock in a joint brokerage account they had at Schwab.

Pomponio purchased a total of 1,375 shares of First Commercial stock on December 23, 1997 and January 21, 1998.

On February 9, 1998, Regions Financial Corp. announced its agreement to acquire First Commercial for \$2.7 billion, or \$68.85 per share.

Pomponio sold his 1,375 shares of First Commercial stock on February 17, 1998 for a profit of \$6,875.

CONCLUSIONS OF LAW

The information Pomponio received via McDermott and Gannon about Barnett, 1st Commerce and 1st Commercial was "material" for purposes of Exchange Act Section 10(b) and Rule 10b-5 in that there was "a substantial likelihood that a reasonable investor would view it as significantly altering the 'total mix' of information available." *United States v. Cusimano*, 123 F.3d 83, 88 (2d Cir. 1997) (citing *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988)).

Based on the findings of facts herein and his conviction in the parallel criminal case, this Court finds that defendant Pomponio knew that the information he received from Gannon was confidential, nonpublic, and had been misappropriated or stolen by McDermott from his employer, Keefe Bruyette, and its clients. *Falcone*, 257 F.3d at 234; *SEC v. Sekhri*, No. 98 CIV 2320, 2002 WL 31100823, at *12 (S.D.N.Y. Jul. 22, 2002); *SEC v. Alexander*, 160 F. Supp. 2d 642, 650-651 (S.D.N.Y. 2001); *see also SEC v. Musella*, 678 F. Supp. 1060, 1062 (S.D.N.Y. 1988), *aff'd*, 898 F.2d 138 (2d Cir. 1990).

Pomponio's repeated securities purchases with the material information about the three companies and with his knowledge that this information was confidential and misappropriated demonstrates his intent to illegally exploit his informational advantage and establishes his *scienter*. *Aaron v. SEC*, 446 U.S. 680, 680 (1980). *Scienter* is a state of mind embracing intent to deceive, manipulate or defraud. *Aaron*, 446 U.S. at 686 n.5, 700-01; *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194 n.12 (1976).

The Court concludes that defendant Pomponio violated Exchange Act Section 10(b) and Rule 10b-5 with respect to his transactions in the securities of Barnett, 1st Commerce and 1st Commercial with the inside information noted above.

RELIEF

The SEC seeks three remedies.

First, the SEC requests that defendant Pomponio be permanently enjoined from violating Exchange Act Section 10(b) and Rule 10b-5. Defendant Pomponio violated these provisions on several occasions and with respect to shares of at least three different companies. In his post-conviction Answer in this case, he denies these violations and there is nothing in the record to suggest his acknowledgement of such violations or any expression of remorse. Defendant Pomponio's violations were egregious, resulting in his criminal conviction. Defendant Pomponio received substantial personal gain from his violative conduct. Moreover, Pomponio made false statements under oath to the SEC during its investigation preceding this action, and he was criminally convicted for this perjury. Finally, the record in this case shows that defendant Pomponio will have the opportunity to violate these securities laws. He used his personal relationship with Gannon and her relationship with McDermott to get and illegally exploit misappropriated, confidential material information via his securities transactions. Pomponio has offered no evidence to suggest that this type of opportunity will not recur or that he will not similarly try to exploit such circumstances in the future.

Based on these facts, the SEC has established that, without a permanent injunction, there is a reasonable likelihood that Pomponio will again violate Exchange Act Section 10(b) and Rule 10b-5 and should be permanently enjoined from committing such violations. *SEC v. Cavanagh et al.*, 155 F.3d 129, 135 (2d Cir. 1998) (Involving the issuance of a preliminary injunction), *SEC*

v. First Jersey Sec., Inc., 101 F.3d 1450, 1477 (2d Cir. 1996); *SEC v. Lorin*, 76 F.3d 458, 461 (2d Cir. 1996); *SEC v. Commonwealth Chem. Secs., Inc.*, 574 F.2d 90, 100 (2d Cir. 1978); *SEC v. Management Dynamics, Inc.*, 515 F.2d 801, 807 (2d Cir. 1975).

The second remedy the SEC seeks is an order directing Pomponio to disgorge to this Court \$35,048 in ill-gotten gains from his illegal transactions in the securities of Barnett, 1st Commerce and 1st Commercial and to pay prejudgment interest on this amount at the rate set forth in 26 U.S.C. § 6621(A)(2) for underpayment of taxes to the Internal Revenue Service. The amount of defendant Pomponio's illegal profits, \$35,048.00, is not in controversy. (See the uncontested Declaration of Jordan A. Thomas in support of the Motion, Exhibit C, Paragraphs 32, 38 and 44.) Ordering Pomponio to disgorge this sum is both appropriate in this case, in that it denies Pomponio some of the economic benefit of his illegal acts, and is consistent with three decades of precedent in this Circuit. (See, e.g., *SEC v. Patel*, 61 F.3d 137, 139-40 (2d Cir. 1995); *SEC v. Tome*, 833 F.2d 1086, 1096 (2d Cir. 1987); *SEC v. Texas Gulf Sulphur Co.*, 446 F.2d 1301, 1307-08 (2d Cir. 1971)).

In conjunction with ordering disgorgement of defendant Pomponio's illegal profits, the SEC urges that Pomponio be ordered to pay prejudgment interest on this amount at the rate used by the Internal Revenue Service for underpayment of taxes as provided in 26 U.S.C. § 662(a)(2). Directing Pomponio to pay prejudgment interest at this rate justifiably deprives him of another economic benefit from his illegal acts, the time value of his disgorgement sum, and the IRS underpayment rate is appropriate in this case and is consistent with precedent in this Circuit. *First Jersey Sec.*, 101 F.3d at 1477; *SEC v. Drexel Burnham Lambert, Inc.*, 837 F. Supp. 587, 612 (S.D.N.Y. 1993), *aff'd sub nom. SEC v. Posner*, 16 F.3d 520 (2d Cir. 1994); *SEC v. Willis*, 825 F. Supp. 617, 623 (S.D.N.Y. 1993); *SEC v. Stephenson*, 732 F. Supp. 438, 439

(S.D.N.Y. 1990). The SEC submitted unopposed support for a determination that the prejudgment interest (at the IRS rate) on Pomponio's \$35,048.00 of illegal profits was \$22,437.00 as of March 31, 2005 (Declaration of Charles E. Cain, dated April 7, 2005, submitted in support of the Motion). The SEC, by letter, has updated this calculation to \$25,210.88, by adding \$2,773.88 in prejudgment interest accrued from April 1 through December 31, 2005. The Court accepts the SEC's methodology for this calculation and that the amount accrued as of December 31, 2005 is \$25,210.88.

For these reasons, the Court will order defendant Pomponio to pay to this Court \$60,258.88, consisting of disgorgement of \$35,048 and prejudgment interest thereon in the amount of \$25,210.88.

The SEC seeks civil penalties as the third remedy against defendant Pomponio. The Court may impose civil penalties for unlawful insider trading such as Pomponio's. Exchange Act Section 21A [15 U.S.C. § 78u-1] While the Court has discretion in determining the penalty amount "in light of the facts and circumstances" in this Motion, such a civil penalty may not exceed \$105,144.00 (i.e. three times Pomponio's illegal profits). Exchange Act Section 21A(a)(2). The Court agrees with the SEC that Pomponio's conduct was egregious, repeated, resulted in significant illegal profits, that Pomponio acted with *scienter*, perjured himself in the SEC's investigation, and to this day has neither acknowledged his violations, expressed remorse nor taken any steps to return his ill-gotten gains. These factors could justify a maximum penalty. *SEC v. Sekhri*, No. 98 CIV 2320, 2002 WL 31100823, at *18 (S.D.N.Y. Jul. 22, 2002); *SEC v. Lipson*, 129 F. Supp. 2d 1148, 1151 (N.D. Ill. 2001), *aff'd*, 278 F.3d 656 (7th Cir. 2002). The SEC urges, at a minimum, a "one time [the ill gotten gains] penalty" of \$35,048.00. The Court notes that, in the parallel criminal prosecution, defendant Pomponio was sentenced to 21 months

incarceration and served this time, that he was sentenced to two years of supervised release and that he was ordered to pay a criminal penalty of \$5,000.00. While there are abundant facts weighing toward a maximum civil penalty, in light of all of these circumstances, the Court will order defendant Pomponio to pay a civil penalty of \$35,048.00.

FOR THE FOREGOING REASONS,

I.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Anthony P. Pomponio be and hereby is permanently enjoined and restrained from violating 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], directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange by

- (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 light of the circumstances under which they were made, not misleading, or
- (c) engaging in any act, practice, or course of business that operates or would operate as a fraud upon any person,

in connection with the purchase or sale of any security.

II.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Anthony P. Pomponio is liable for and shall pay disgorgement of \$35,048.00, representing profits gained as a result of his illegal transactions in the securities of Barnett, 1st Commerce and 1st Commercial, together with prejudgment interest thereon in the amount of \$\$25,210.88, for a

total of \$60,258.88. Defendant shall satisfy this obligation by paying and causing to be paid \$60,258.88 to the Clerk of the Court as provided in paragraph IV. herein below.

III.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, pursuant to Exchange Act Section 21A, defendant Pomponio is liable for and shall pay \$35,048.00 as a civil penalty to the Clerk of this Court as provided in paragraph IV. herein below.

IV.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, within ten (10) business days of the entry of this judgment, defendant Pomponio shall make and cause to be made all payments ordered pursuant to paragraphs II. and III. herein to the Clerk of this Court, together with a cover letter identifying himself - Anthony P. Pomponio 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 under which paragraph(s) herein (paragraph II. and/or III.) each payment is made pursuant to this Final Judgment. Defendant shall simultaneously transmit photocopies of such payment and letter to Charles E. Cain, Esq., Branch Chief, Division of Enforcement, Securities and Exchange Commission, 100 F St. NE, Washington, DC 20549-0001. Each such payment shall be hand delivered to the Clerk of the Court and shall be made by United States postal money order, certified check, bank cashier's check or bank money order payable to the Clerk of the Court. By making any such payments, defendant Pomponio will relinquish all legal and equitable right, title, and interest in such funds, and no part of the funds shall be returned to Pomponio. The Clerk shall deposit the funds into an interest bearing account with the Court Registry Investment System ("CRIS"). Defendant Pomponio shall pay post-judgment interest on any delinquent accounts pursuant to 28 U.S.C. § 1961.

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 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.

The Commission may propose a plan to distribute the Fund subject to this Court's approval. Such a plan may provide that any civil penalty portions in the Fund may 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, Defendant shall not, after offset or reduction of any award of compensatory damages in any Related Investor Action based on Defendant's payment of disgorgement in this action, further benefit by offset or reduction of such compensatory damages award by the amount of any part of Defendant's payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Defendant 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

Defendant by or on behalf of one or more investors based on substantially the same facts as alleged in the Complaint in this action.

V.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, pursuant to Rule 65(d) Fed. R. Civ. P., this Final Judgment shall be binding on Anthony P. Pomponio, his agents, servants, employees and attorneys, and those persons in active concert or in participation with them who receive actual notice of this Final Judgment by personal service or otherwise.

VI.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this Court shall retain jurisdiction of this action for all purposes, including the implementation and enforcement of this Final Judgment.

Dated: January 2, 2006
New York, NY



CHIEF UNITED STATES DISTRICT JUDGE

THIS DOCUMENT WAS ENTERED
ON THE DOCKET ON 1/11/06