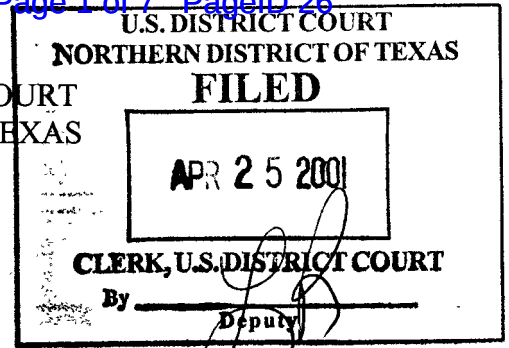


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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION



SECURITIES AND
EXCHANGE COMMISSION,

Plaintiff,

v.

LARRY W. ELLIS, individually
and d/b/a ATM Technology Systems,

Defendant.

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CIVIL ACTION NO:
3:00-CV-1040-P



ORDER

Presently before the Court is Plaintiff's Motion for Summary Judgment Against Defendant Larry W. Ellis pursuant to Rule 56 of the Federal Rules of Civil Procedure, filed on November 6, 2000. Defendant has not contested Plaintiff's motion. Having considered the record and Plaintiff's arguments in a light most favorable to the Defendant, the Court is of the opinion that Plaintiff's Motion for Summary Judgment Against Defendant Larry W. Ellis should be GRANTED.

BACKGROUND

Defendant, Larry W. Ellis, was the sole proprietor of ATM Technology from December 1995 until April 2000. ATM Technology purportedly manufactured and placed ATM machines at various retail locations in Texas, Louisiana, Kansas, Oklahoma, Missouri, and Arkansas. On behalf of ATM Technology, Ellis raised more than \$1 million from approximately 55 investors. Defendant raised these funds by selling promissory notes to investors in \$10,000 increments

bearing a 12% rate of return plus profit sharing interests in specific ATM machines.

On May 16, 2000, Plaintiff, the Securities and Exchange Commission, filed a complaint in this Court against Defendant for violations of Section 17(a) of the Securities Act of 1933,¹ Section 10(b) of the Securities Exchange Act of 1934² and Rule 10b-5 thereunder.³ Specifically, Plaintiff alleged that Defendant made false and misleading statements to investors in connection with the sale of the promissory notes, and that Defendant misappropriated investment proceeds for his personal benefit.

On June 30, 2000, this Court entered, with Defendant's consent, an Order of Permanent Injunction and Other Equitable Relief against Defendant. In accordance with the injunction, the Court required Defendant to pay disgorgement of investor proceeds plus prejudgment interest thereon. The Court instructed the parties to reach an agreement on the proper amount of disgorgement. If the parties failed to agree, however, the injunction required the Defendant to pay any such disgorgement amount as determined by the Court without the use of live testimony.

On July 14, 2000, Defendant prepared and provided to Plaintiff a sworn accounting. Defendant produced the accounting in the form of a signed affidavit with attached documents identifying investors by name, their corresponding investment amounts, the dates of investments and the unpaid balances Defendant still owed each investor. As of the date of this Order, Defendant owes investors approximately \$702,421, in aggregate.

¹ The Securities Act of 1933 is codified at 15 U.S.C. § 77 (1933); Section 17(a) is codified at 15 U.S.C. § 77q(a) (1933).

² The Securities Exchange Act of 1934 is codified at 15 U.S.C. § 78 (1934); Section 10(b) is codified at 15 U.S.C. § 78j(b) (1934).

³ Rule 10b-5 is codified at 17 C.F.R. § 240.10b-5 (1997, as amended).

According to a Joint Status Report filed on October 11, 2000, the parties related to the Court that they expected to reach an agreement on the disgorgement and prejudgment interest amounts by the end of October 2000. The parties have failed, however, to come to an agreement on any final amounts. Therefore, Plaintiff moves for summary judgment and requests the Court to determine and award appropriate disgorgement and prejudgment interest amounts to Plaintiff.

DISCUSSION

I. Summary Judgment Standard

Summary judgment is proper when the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *See* FED.R.CIV.P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25 (1986). A dispute about a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The moving party must identify the evidence on file in the case which establishes the absence of any genuine issue of material fact. *See Celotex*, 477 U.S. at 323.

Once the moving party has made an initial showing, the party opposing the motion must offer evidence sufficient to demonstrate the existence of the required elements of the party's case. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Mere assertions of a factual dispute unsupported by probative evidence will not prevent summary judgment; the party defending against a motion for summary judgment cannot defeat the motion unless it provides specific facts that show the case presents a genuine issue of material fact, such that a reasonable jury might return a verdict in its favor. *See Anderson*, 477 U.S. at 256-57.

All evidence and the inferences to be drawn therefrom "must be viewed in the light most favorable to the party opposing the motion." *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). If the nonmoving party fails, however, to make a showing sufficient to establish the existence of an element essential to its case on which it will bear the burden of proof at trial, summary judgment must be granted. *See Celotex*, 477 U.S. at 322-23. Finally, in reviewing the summary judgment evidence, the Court has no duty to search the record for triable issues; rather, it need rely only on those portions of the submitted documents to which the nonmoving party directs its attention. *See Society of Lloyds v. Webb*, 2001 WL 313924, *5 (N.D. Tex. Mar. 29, 2001).

A. Application of the Summary Judgment Standard to Defendant's Disgorgement of Investor Proceeds

Defendant has failed to contest any aspect of Plaintiff's motion. Under *Webb*, the Court is not required to search the entire record for triable issues. *See id.* Therefore, in light of Plaintiff's submissions and without any arguments by Defendant to the contrary, the Court finds no genuine issue of material fact. Accordingly, Plaintiff is entitled to judgment as a matter of law. *See Celotex* at 322-23. The Court will now determine the proper amount of disgorgement Defendant must pay.

Disgorgement of amounts received in violation of federal securities law is proper under Section 22(a) of the 1933 Securities Act, 15 U.S.C. § 77v(a) (1933), and Section 27 of the 1934 Exchange Act, 15 U.S.C. § 78aa (1934). The principal of disgorgement is "designed to deprive defendants of all gains flowing from their wrong, rather than to compensate the victims of the fraud. The purpose of disgorgement is to deter violations by making them unprofitable ..." *SEC v. AMX, Int'l, Inc.*, 872 F. Supp. 1541, 1544 (N.D. Tex. 1994) (quoting Thomas C. Mira Comment, *The Measure of Disgorgement in SEC Enforcement Actions Against Insider Traders Under Rule 10B-5*,

34 Cath.U. L. Rev. 445, n.1 (1985)) (emphasis in original). The Court has the sound discretion to require Defendant's disgorgement of his investor proceeds.

It is the Plaintiff, however, who bears the ultimate burden of establishing that the disgorgement figure "reasonably approximates the amount of unjust enrichment." *SEC v. First City Financial Corp.*, 890 F.2d 1215, 1231 (D.C. Cir. 1989). Plaintiff has carried its burden by relying on Defendant's own sworn accounting, in which Defendant precisely illustrates the scope of his unjust enrichment by listing each investor's unrecovered investment balance. Thus, according to the terms of the injunction, the undisputed facts, and the sworn accounting, the Court's grant of summary judgment for Plaintiff is appropriate and the Court orders disgorgement from Defendant of an amount of \$702,421, payable to Plaintiff.

B. Application of Summary Judgment Standard to Plaintiff's Request for Prejudgment Interest

The Court has the discretion to award, or not award, prejudgment interest on damages awarded under federal securities laws. *See SEC v. Hughes Capital Corp.*, 917 F. Supp. 1080, 1089 (D.N.J. 1996). Furthermore, in deciding if and how much prejudgment interest should be granted, "a district court must examine--or in the case of a postjudgment motion, reexamine--matters encompassed within the merits of the underlying action. For example, in a federal securities action such as this case, a district court will consider a number of factors, including whether prejudgment interest is necessary to compensate the plaintiff fully for his injuries, the degree of personal wrongdoing on the part of the defendant, the availability of alternative investment opportunities to the plaintiff, whether the plaintiff delayed in bringing or prosecuting the action, and other fundamental considerations of fairness." *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 176 (1989).

In the context of Section 10(b) and Rule 10b-5 actions, such as Plaintiff's action, proof of the defendant's reckless disregard of federal securities laws is sufficient to justify an award of prejudgment interest. *See SEC v. Musella*, 748 F.Supp. 1028, 1043 (S.D.N.Y. 1989), *aff'd*, 898 F.2d 138 (2d Cir.1990), *cert. denied*, 498 U.S. 816 (1990). Defendant clearly exhibited reckless disregard of securities laws in the manner in which he acquired capital for ATM Technology. Furthermore, Defendant has refused to agree with Plaintiff on any disgorgement amount, thereby forcing Plaintiff to bring this action. In the meantime, Defendant enjoys possession of the entire \$702,421. Finally, Defendant offers no evidence of an attempt to negotiate with Plaintiff to reach a suitable resolution. Therefore, in light of Defendant's general wrongdoing and his failure to cooperate, the Court finds it appropriate to award Plaintiff prejudgment interest.


In enforcement actions, courts have calculated prejudgment interest using the nominal interest rate modified quarterly by the Internal Revenue Service for money owed to the United States Treasury. *See SEC v. Hughes Capital Corp.*, 917 F. Supp. 1080, 1090 (D.N.J. 1996). Using this rate, Plaintiff has calculated the prejudgment interest at \$26,618. Defendant does not contest this calculation and the Court notes that this amount represents a little less than four percent of the total disgorgement amount. In accordance with Plaintiff's request, the Court awards the Plaintiff prejudgment interest in the amount of \$26,618.

CONCLUSION

Having thoroughly reviewed Plaintiff's arguments and the record in a light most favorable to the Defendant, the Court is of the opinion that Plaintiff's Motion for Summary Judgment Against Defendant Larry W. Ellis should be GRANTED. Defendant is thereby required to pay Plaintiff \$729,039, consisting of \$702,421 in disgorgement and \$26,618 in prejudgment interest.

SO ORDERED.

Signed this 25th day of April, 2001.



JORGE A. SOLIS
UNITED STATES DISTRICT JUDGE