



DIVISION OF
ENFORCEMENT

3-16498
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UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
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November 6, 2015

Hon. James E. Grimes, Administrative Law Judge

Re: In the Matter of Russell C. Schalk, Jr. – AP / 33-9751

Dear Judge Grimes:

The Division of Enforcement writes in response to your November 2, 2015 Order. The Enforcement Division interprets the Order Instituting Administrative and Cease-and-Desist Proceedings in the Matter of Russell C. Schalk, Jr. (“OIP”) as requiring a ruling regarding the appropriate amount of disgorgement, prejudgment interest, and penalty that Mr. Schalk should be ordered to pay after additional proceedings to determine the sole remaining issue – his ability to pay. OIP, Section V; *see also* Offer of Settlement of Russell C. Schalk, Jr. (“Offer”) ¶9. Specifically, as explained in more detail below, if the hearing officer finds that Schalk has not met his burden of demonstrating his inability to pay, Schalk should be ordered to pay the full amount contemplated by the OIP. If the hearing officer finds that Schalk has met his burden and does not have the ability to pay the entire amount, then the hearing officer has discretion pursuant to Rule 630 of the SEC Rules of Practice to order that Schalk pay nothing, pay a reduced amount, or pay the full amount. The hearing officer also has discretion to establish a payment schedule.

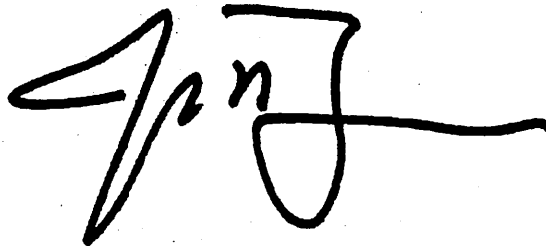
As stated in the SEC Opposition to Respondent Schalk’s Claimed Inability to Pay (“SEC Opposition”), which is incorporated herein by reference, according to the SEC Rules of Practice, “a respondent may present evidence of an inability to pay disgorgement, interest or a penalty,” and “the hearing officer may, in his or her discretion, consider evidence concerning ability to pay in determining whether disgorgement, interest or a penalty is in the public interest.” SEC Rules of Practice, Rule 630 (emphasis added); *see also In the Matter of Craig Berkman, et al.*, Release No. 599, 2014 WL 2089917, at *3 (May 19, 2014) (“It is well settled that an applicant bears the burden of demonstrating inability to pay.”) (citation omitted).

Respondent Schalk has failed to meet his burden. As a result, Schalk should be ordered to disgorge his ill-gotten gains and pay prejudgment interest and a third-tier penalty. Even if he had met his burden, Schalk’s purported inability to pay would not preclude an award of disgorgement, prejudgment interest, and a civil penalty in the full amount contemplated by the OIP. Rather, the overarching issue remains “whether disgorgement, interest or a penalty is in the public interest.” Rule 630; *see also Berkman*, 2014 WL

2089917, at *3 (denying Rule 630 motion despite finding that respondent had “a negative net worth”). This assessment remains grounded in the court’s analysis in *Steadman* and several subsequent cases identifying relevant factors to be considered. *See Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff’d on other grounds*, 450 U.S. 91 (1981); *In the Matter of Marshall E. Melton, et al.*, Release No. 2151, 2003 WL 21729839, at *2 (Jul. 25, 2003); *McCarthy v. SEC*, 406 F.3d 179, 189 (2d Cir. 2005); *In the Matter of Schield Management Co., et al.*, Release No. 53201, 2006 WL 231642, at *8 (Jan. 31, 2006). Each of these factors supports the conclusion that the sanctions contemplated by the OIP are in the public interest. *See SEC Opposition*, pp.11-12. Rather than addressing the relevant factors, Schalk noted his frustrated desire to “present a strong defense,” thus calling into question the sincerity of his assurances against future violations as well as his recognition of the wrongful nature of his conduct. *See Schalk 2015 Reply*, p.5; *Steadman*, 603 F.2d at 1140 (listing relevant factors). Requiring Schalk to pay the substantial disgorgement, prejudgment interest, and civil penalty agreed upon by the parties and ordered by the Commission “will have a deterrent effect,” both on Schalk and others. *See McCarthy*, 406 F.3d at 189.

Based on the foregoing, regardless of the state of Schalk’s finances, an award of disgorgement, interest and penalty is in the public interest. *See Rule 630; see also Berkman*, 2014 WL 2089917, at *3. Therefore, the Division of Enforcement requests an order requiring Schalk to pay disgorgement, prejudgment interest, and a third-tier penalty in the amounts agreed upon by the parties and ordered by the Commission.

Sincerely,

A handwritten signature in black ink, appearing to read "John J. Bowers". The signature is stylized with a large initial "J" and a long horizontal stroke extending to the right.

John J. Bowers