IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, vs. TRAVIS E. CORRELL, individually and doing business as Horizon Establishment; et al. Defendants, and BANNER SHIELD, LLC; et al. Defendants Solely for Purposes of Equitable Relief.	§	Lead Case Case No.: 4:05-cv-472 RAS
SECURITIES AND EXCHANGE COMMISSION, Plaintiff, vs. GLOBAL FINANCE & INVESTMENTS, INC.; et al. Defendants, and USASSET & FUNDING CORP; et al. Defendants Solely for Purposes of Equitable Relief.	§	Consolidated Case Case No.: 4:07-cv-346 RAS

PLAINTIFF'S MOTION FOR FINAL JUDGMENTS ORDERING DISGORGEMENT PLUS PREJUDGMENT INTEREST AND A CIVIL PENALTY AND RECITING INJUNCTIONS PREVIOUSLY IMPOSED AGAINST DEFENDANTS GREGORY W. THOMPSON, DWIGHT W. JOHNSON, AND GRANT CARDNO

Plaintiff Securities and Exchange Commission (the "Commission" or "Plaintiff") submits this motion requesting the Court to issue separate final judgments against Defendants Gregory W. Thompson, Dwight W. Johnson, Grant Cardno, and Neulan Midkiff, reciting permanent injunctions previously imposed against them in this case and ordering each to pay disgorgement plus prejudgment interest and a civil penalty. The Commission would respectfully show the Court as follows:

I. Relevant Litigation History

On December 7, 2005, the Commission filed this action against multiple defendants, seeking, among other things, permanent injunctive relief from violations of certain securities-registration and anti-fraud provisions of the federal securities laws, specifically Sections 5(a), 5(c), and 17(a) of the Securities Act of 1933 ("Securities Act") [15 U.S.C. §§ 77e(a), 77e (c), and77q(a)] and Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder, [17 C.F.R. § 240.10b-5]. Against each Defendant, the Commission also seeks orders requiring disgorgement of ill-gotten gains, plus prejudgment interest, and a civil monetary penalty.

At the inception of this case, the Court issued orders appointing S. Gregory Hays Receiver over all of the assets of the Defendants and Relief Defendants in this case. (Dkt. 7 and 17). To date, the Court has issued judgments providing for the full injunctive relief sought against Defendants Travis E. Correll (Dkt. 179), Cardno (Dkt. 129), Thompson (Dkt. 180), Johnson (Dkt. 182), Midkiff (Dkt. 191), Harry Robinson "Robbie" Gowdey (deceased) (Dkt. 181). Except for the Cardno judgment, which was entered by default, each judgment was agreed and provided that, upon future motion of the Commission, the Court would determine whether it is appropriate to order disgorgement of ill-gotten gains and a civil penalty against the respective

defendants. In addition, each agreed judgment provided that the Defendant would pay prejudgment interest on any disgorgement amount ordered, calculated from January 1, 2002. Finally, in connection with the Commission's motion for disgorgement or civil penalties or both, each agreed judgment limited the Defendant as follows:

> (a) Defendant will be precluded from arguing that he did not violate the federal securities laws as alleged in the *Complaint*; (b) Defendant may not challenge the validity of the *Consent* or this *Agreed Judgment*; (c) solely for the purposes of such motion, the allegations of the *Complaint* shall be accepted as and deemed true by the Court; and (d) the Court may determine the issues raised in the motion on the basis of affidavits, declarations, excerpts of sworn deposition or investigative testimony, and documentary evidence, without regard to the standards for summary judgment contained in Rule 56(c) of the Federal Rules of Civil Procedure.

(Dkt. 179-182; 191).

The Cardno judgment provided that disgorgement plus prejudgment interest and a penalty should be entered against him. It further provided that the amounts of such monetary relief would be set by the Court upon application by the Commission. (Dkt. 129, ¶ IV).

II. Disgorgement, Prejudgment Interest, and Penalty against Defendants Thompson, Johnson, and Cardno

In keeping with the provisions of the judgments entered against Thompson, Johnson, and Cardno, described above, the Commission now moves for a separate final judgment against each of them that orders disgorgement and prejudgment-interest in the amounts specified below, imposes a civil penalty, and recites previously imposed permanent injunctions.

A. Thompson Disgorgement and Prejudgment Interest Amounts

As set forth in the Declaration of Ralph S. Freeman (**Exhibit A**; App at 1-25), a licensed private investigator and certified fraud examiner retained by the Receiver in this case, Thompson received $1,208,539 in gains derived from the misconduct at issue in this case. (Freeman Dec. ¶ 5; App. at 3). Accordingly, the Court should order Thompson to pay disgorgement in the amount

of $1,208,539. Of this amount, the Receiver has already collected $1,167,629, leaving a balance owed of $40,909. (Freeman Dec. ¶ 7; App. at 3). The Court should therefore order Thompson to pay prejudgment interest of $24,421 on the $40,909 balance for a total payment of $65,330. **Exhibit B** (App. at 25A), attached, shows the calculation of the prejudgment interest on $40,909 on a quarterly basis from January 1, 2002, through March 3, 2010, using the method required under the law as explained in the legal analysis below.

The Commission incorporates the allegations of its amended Complaint (Dkt. 138) by reference as if set forth in full herein and notes that, for the purposes of this motion, they are "accepted and deemed true by the Court" for the purposes of this motion in accordance with Thompson's agreed judgment (Dkt. 180).

B. Johnson Disgorgement and Prejudgment Interest Amounts

As set forth in the Declaration of Scott S. Askue (**Exhibit C**; App. at 26-61), a certified restructuring and insolvency advisor retained by the Receiver in this case, Johnson received $1,785,189 in gains derived from the misconduct at issue in this case. (Askue Dec. ¶ 3; App. at 27). Accordingly, the Court should order Johnson to pay disgorgement in the amount of $1,785,189. The Court should order Johnson to pay prejudgment interest of $1,065,702 on the $1,785,189 balance for a total payment of $2,850,891. **Exhibit D** (App. at 61A), attached, shows the calculation of the prejudgment interest on $1,785,189 on a quarterly basis from January 1, 2002, through March 3, 2010, using the method required under the law as explained in the legal analysis below.

The Commission incorporates the allegations of its amended Complaint (Dkt. 138) by reference as if set forth in full herein and notes that, for the purposes of this motion, they are

"accepted and deemed true by the Court" for the purposes of this motion in accordance with Johnson's agreed judgment (Dkt. 182).

C. Cardno Disgorgement and Prejudgment Interest Amounts

As set forth in the Declaration of Scott S. Askue (**Exhibit E**; App. at 62-65), a certified restructuring and insolvency advisor retained by the Receiver in this case, Cardno received $100,000 in gains derived from the misconduct at issue in this case. (Askue Dec. ¶ 5; App. at 64-65). Accordingly, the Court should order Cardno to pay disgorgement in the amount of $100,000. The Court should order Cardno to pay prejudgment interest of $59,696 on the $100,000 balance for a total payment of $159,696. **Exhibit F** (App. at 66), attached, shows the calculation of the prejudgment interest on $100,000 on a quarterly basis from January 1, 2002, through March 3, 2010, using the method required under the law as explained in the legal analysis below.

The Commission incorporates the allegations of its amended Complaint (Dkt. 138) by reference as if set forth in full herein. By his default, a defendant admits the well-pleaded allegations of fact in the plaintiff's complaint. *Nishimatsu Constr. Co., Ltd. v. Houston Nat'l Bank*, 515 F.2d 1200, 1206 (5th Cir.1975). In its Complaint, the Commission pleaded facts supporting its claims that Cardno violated securities-registration and anti-fraud provisions of the federal securities laws, specifically Sections 5(a), 5(c) and 17(a) of the Securities Act [15 U.S.C. §§ 77e(a), 77e (c) and77q(a)] and 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].

D. Fair Fund

Because Hays has been appointed as Receiver in this case and is in the process of distributing the assets in the Receiver Estate to investors in accordance with a Court-approved

Distribution Plan (Dkt. 369), the SEC believes that Hays is well situated to serve as Funds Administrator for the distribution of all penalties and disgorgement paid in this case in accordance with the Fair Fund provisions of Section 308(a) of the Sarbanes-Oxley Act of 2002. Under Section 308(a), money a defendant pays as a civil penalty may be distributed to investors instead of paid to the Treasury when the defendant has also been ordered to pay disgorgement. Here, Section 308(a) would apply if the Court orders payment of disgorgement and penalty. Accordingly, the SEC respectfully requests that Hays be appointed as Funds Administrator to administer and distribute both the penalty and disgorgement ordered as to each defendant in accordance with the Fair Fund provisions of Section 308(a).

III. Legal Analysis

A. Ordering Disgorgement against Thompson, Johnson, and Cardno is Proper under the Law

The Commission seeks disgorgement of profits flowing from securities-law violations because "[t]he effective enforcement of the federal securities laws requires that the SEC be able to make violations unprofitable." *SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1104 (2d Cir. 1972). "The purpose of disgorgement is to force 'a defendant to give up the amount by which he was unjustly enriched' rather than to compensate the victims of fraud." *SEC v. Blavin*, 760 F.2d 706, 713 (6th Cir.1985) *citing SEC v. Commonwealth Chemical Securities, Inc*., 574 F.2d 90, 102 (2d Cir.1978). By preventing unjust enrichment, disgorgement has the effect of "deterring violations of law." *CFTC v. British American Commodity Options Corp.*, 788 F.2d 92, 94 (2d Cir.), *cert. denied*, 479 U.S. 853 (1986). "The deterrent effect of an SEC enforcement action would be greatly undermined if securities law violators were not required to disgorge illicit profits." *Manor Nursing*, 458 F.2d at 1104.

Once the Commission has established the defendant's securities-law violations, the district court is empowered to order the defendant to "disgorge a sum of money equal to all the illegal payments he received." *Blavin*, 760 F.2d at 713. Here, the securities-law violations against Johnson and Thompson are amply shown in the allegations in the Commission's amended Complaint (Dkt. 138), deemed admitted pursuant to the Johnson and Thompson agreed judgments (Dkt. 180 and 182). Likewise, Cardno's violations are established because the allegations against him in the amended Complaint are deemed admitted by virtue of his default. *Nishimatsu Constr. Co., Ltd.*, 515 F.2d at 1206.

In calculating the amount the defendant must disgorge, "the entire amount of profits which were illicitly received must be disgorged." *SEC v. Blackwell*, 477 F.Supp.2d 891, 914 (S.D. Ohio 2007) *quoting SEC v. Great Lakes Equities Co.*, 775 F.Supp. 211, 214 (E.D.Mich.1991) *aff'd*, 12 F.3d 214 (6th Cir. 1993). The law does not require precision in determining the proper amount of disgorgement. "The District Court has broad discretion not only in determining whether or not to order disgorgement but also in calculating the amount to be disgorged." *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1475 (2d Cir. 1996), *cert. denied*, 522 U.S. 812 (1997). Furthermore, "disgorgement need only be a reasonable approximation of profits causally connected to the violation." *Id.*; *see also SEC v. Better Life Club of Am., Inc.*, 1999 U.S. App. LEXIS 7319 at *13 (D.C. Cir.), *cert. denied*, 528 U.S. 867 (1999); *SEC v. First Pacific Bancorp*, 142 F.3d 1186, 1192 n.6 (9th Cir. 1998), *cert. denied*, 525 U.S. 1121 (1999); *SEC v. First City Fin. Corp., Ltd*., 890 F.2d 1215, 1231 (D.C. Cir. 1989). The D.C. Circuit has explained:

> If exact information were obtainable at negligible cost, we would not hesitate to impose upon the government a strict burden to produce that data to measure the precise amount of the ill-gotten gains. Unfortunately, we encounter imprecision and imperfect information. . . . Rules for calculating disgorgement must recognize that separating legal from illegal profits exactly may at times be a near-impossible task.

First City, 890 F.2d at 1231.

"If the Court chooses to order disgorgement, all doubts concerning the amount of disgorgement 'are to be resolved against the defrauding party.'" *Blackwell*, 477 F.Supp.2d at 913 *citing Great Lakes Equities*, 775 F.Supp. at 214. The Commission must simply show that the disgorgement amount requested is a "reasonable approximation of profits causally connected to the violation." *Blackwell*, 477 F.Supp.2d at 914-915, quoting *SEC v. First Financial Ltd.*, 688 F.Supp. 705, 727 (D.D.C.1988), *aff'd*, 890 F.2d 1215 (D.C.Cir.1989).

Once the Commission presents evidence reasonably approximating the amount of ill-gotten gains, the burden of proof shifts to the defendant. *See First City*, 890 F.2d at 1232; *see also SEC v. Hughes Capital Corp.*, 917 F. Supp. 1080, 1085 (D.N.J. 1996), *aff'd*, 124 F.3d 449 (3d Cir. 1997). The defendant is then "obliged clearly to demonstrate that the disgorgement figure [is] not a reasonable approximation." *First City*, 890 F.2d at 1232; *see also SEC v. Benson*, 657 F. Supp. 1122, 1133 (S.D.N.Y. 1987).

As the Freeman and Askue declarations amply demonstrate, Thompson received $1,208,539, Johnson received $2,377,264, and Cardno received $100,000 in gains derived from the misconduct at issue in this case. These are reasonable approximations of disgorgement as to each of these defendants based upon the work done by the Receiver and the professionals retained to assist him.

Moreover, if the Defendants were to contend that they have lost or dissipated some or all of the proceeds of his wrongful conduct, such a contention would not affect the proper amount of disgorgement. A securities-law violator cannot diminish his responsibility to cough up illegal profits by claiming he no longer possesses the funds due. *See SEC v. Shapiro*, 494 F.2d 1301, 1309 (2d Cir. 1974). "[A] defendant's claim that his profits were wiped out by subsequent losses is no

defense to disgorgement." *SEC v. Grossman*, 1997 U.S. Dist LEXIS 6225 at *29 (S.D.N.Y. 1997), *vac'd and remanded in part on other grounds, SEC v. Hirshberg*, 1999 U.S. App. LEXIS 4764 (2d Cir. 1999); *see also SEC v. Commonwealth Secur., Inc.*, 410 F. Supp. 1002, 1021 (S.D.N.Y. 1976) (stating that "[t]o allow [defendants] to credit their subsequent losses against their prior gains would be to permit them to profit from their own wrongs"), *modif. in part on other grounds and aff'd in part*, 574 F.2d 90 (2d Cir. 1978).

In addition, the Defendants cannot diminish their obligation to disgorge by offering to prove that they spent some or all of the unlawful profits on legitimate business expenses. The "overwhelming weight of authority hold[s] that securities law violators may not offset their disgorgement liability with business expenses." *SEC v. Kenton Capital, Ltd.*, 69 F.Supp.2d 1, 16 (D.D.C. 1998); *see also Hughes*, 917 F. Supp. at 1087. "The manner in which [the defendant] chose to spend his misappropriations is irrelevant as to his objection to disgorge. Whether he chose to use this money to enhance his social standing through charitable contributions, to travel around the world, or to keep his co-conspirators happy is his own business." *SEC v. Benson*, 657 F. Supp. 1122, 1134 (S.D.N.Y. 1987); *see also Great Lakes Equities*, 775 F. Supp. at 214.

The Commission concedes, however, that these three defendants should be given credit for the amounts the Receiver has already collected from them. In Thompson's case, the Receiver has already collected $1,167,629, leaving a balance owed of $40,909. The Court should therefore order Thompson to pay this balance, plus prejudgment interest. On the other hand, Johnson and Cardno have not paid any amount to the Receiver, so they should be ordered to pay an amount equal to the full amount of their ill-gotten gain.

B. The Court Should Order Thompson, Johnson, and Cardno to Pay Prejudgment Interest

The purpose of prejudgment interest is to prevent a defendant from obtaining the benefit of what amounts to an interest free loan' on the proceeds of an illegal activity." *Blackwell*, 477 F.Supp.2d at 913 (*citing SEC v. Moran*, 944 F.Supp. 286, 295 (S.D.N.Y.1996)). "The calculation of prejudgment interest follows the delinquent tax rate for unpaid taxes as determined by the Internal Revenue Service, and is assessed on a quarterly basis." *Id*. *(citing First Jersey*, 101 F.3d at 1476). "An award of pre-judgment interest in a case involving violations of the federal securities laws rests within the equitable discretion of the district court to be exercised according to considerations of fairness." *Chris-Craft Indus., Inc. v. Piper Aircraft Corp.*, 516 F.2d 172, 191 (2d Cir. 1975), *rev'd on other grounds*, 430 U.S. 1 (1977).

Requiring the Defendants to pay prejudgment interest in this case is proper and fair. By violating the securities laws, Thompson, Johnson, and Cardno acquired $1,208,539, $2,377,264, and $100,000, respectively received. Thompson subsequently paid the Receiver $1,167,629, leaving a balance owed of $40,909, on which he should pay prejudgment interest. Johnson and Cardno have paid the Receiver nothing and, therefore, should pay prejudgment interest on the full amount they illegally obtained.

The IRS underpayment rate is appropriate for calculating prejudgment interest in Commission enforcement actions such as this one. That rate of interest "reflects what it would have cost to borrow the money from the government and therefore reasonably approximates one of the benefits the defendant derived from its fraud." *First Jersey*, 101 F.3d at 1476. Based on principal amounts of $40,909, $2,377,264, and $100,000 for Thompson, Johnson, and Cardno, respectively, they owe prejudgment interest of $24,421, $1,419,153, and $59,696, respectively, as calculated from January 1, 2002, through March 3, 2010.

C. The Court Should Order Thompson, Johnson, and Cardno to Pay Civil Money Penalties

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)] authorize the Commission to seek, and the Court to impose, a third-tier civil money penalty if the defendant's violation (1) "involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement" and (2) "directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons." Under Section 20(d) of the Securities Act and Section 21(d) of the Exchange Act, third-tier civil penalties are limited to the greater of $130,000 for a natural person and $650,000 for any other person (per the inflation adjustment specified by 17 C.F.R. § 201.1003), or the gross amount of pecuniary gain to such defendant as a result of the violation. Because of their fraudulent scheme, described in the Amended Complaint and deemed true and accepted for the purposes of this motion, the Defendant's misconduct directly caused losses of "as much as $390 million" and created a significant risk of substantial loss to investors. Accordingly, the Commission requests that the Court order Defendants Thompson, Johnson, and Cardno each to pay a third-tier civil penalty.

IV. Conclusion

For the foregoing reasons, the Commission respectfully requests the Court to enter separate final judgments against Defendants Thompson, Johnson, and Cardno, reciting the previously imposed injunctions against them in this case and ordering them to pay as follows:

Thompson: $40,909 in disgorgement plus prejudgment interest of $24,421 plus a third-tier penalty.

Johnson: $1,785,189 in disgorgement plus prejudgment interest of $1,065,702 plus a third-tier penalty.

Cardno: $100,000 in disgorgement plus prejudgment interest of $59,696 for a total payment of $159,696.

Proposed final judgments that would effect this relief are submitted herewith.[1]

March 15, 2010

Respectfully submitted,

By: *s/Timothy S. McCole*
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CERTIFICATE OF CONFERENCE

On March 15, 2010, counsel for the Commission conferred by email with counsel for Thompson and Johnson, who opposed the motion. Commission counsel did not confer with Defendant Cardno, as he has been deemed in default in this case.

[1] Commission counsel intends to recommend to the Commission that it seek the voluntary dismissal of all unadjudicated claims against Defendants Travis E. Correll, individually and d/b/a Horizon Establishment; Travis Correll & Co., Inc.; The Net Worth Group, Inc.; TNT Office Supply, Inc.; Harry Robinson "Robbie" Gowdey (deceased), individually and d/b/a Atlas and Jericho Productions; Joshua Tree Group, LLC; Sovereign Capital Investments, S.A.; The Liberty Establishment, Inc.; and Relief Defendants Banner Shield LLC; Hospitality Management Group, Inc.; Creative Wealth Ventures, LLC; and JTA Enterprises. If the Commission approves such recommendation, Commission counsel will file the appropriate motion to effect such dismissals. Commission counsel acknowledges that, after ruling on the motion for monetary relief against Thompson, Johnson, and Cardno, the Court might consider administratively closing this case for docket-management or other reasons. If the case has been administratively closed when the Commission approves the aforementioned dismissals, then the Commission will move to re-open the case for the limited purpose of effecting such dismissals.

CERTIFICATE OF SERVICE

I do hereby certify that on March 15, 2010, I electronically filed the foregoing Document with the Clerk of this Court using the CM/ECF system, which will automatically send notification of such filing to the following:

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I further certify that on March 15, 2010, the foregoing was served on the following non-CM/ECF participants by depositing a copy in the Federal Express addressed as follows:

via Federal Express **Ronald J. Linn** 650 Cherry St Brea, CA 92821 *(defendant)*	*via Federal Express* **Travis Correll** 220 26th St NW Atlanta, GA 30309 *(defendant)*
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