

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.
★ FEB 11 2005 ★

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

HERMAN'S WORLD OF SPORTS, INC.,
THOMAS J. DZWILEWSKI,
MICHAEL EISEMANN, and LOUIS
MONTAINO,

Defendants.

P.M. _____
TIME A.M. _____

05 Civ No. 438 (ILG)

**FINAL CONSENT JUDGMENT OF PERMANENT INJUNCTION AND OTHER
RELIEF AS TO DEFENDANT THOMAS J. DZWILEWSKI**

Plaintiff Securities and Exchange Commission ("Commission"), having commenced this action by filing a complaint ("Complaint") for injunctive and other relief on January 26, 2005, alleging that defendant Thomas J. Dzwilewski ("Defendant") 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), and Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. §§ 78(a) and 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. §§240.10b-5, and Defendant having executed the annexed Consent to Final Judgment of Permanent Injunction and Other Relief as to Thomas J. Dzwilewski ("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 Consent Judgment of Permanent Injunction and Other Relief as to Thomas J. Dzwilewski ("Final Consent Judgment"), and having waived any right to appeal from this Final Consent Judgment, without further notice:

I.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendant be and hereby is permanently enjoined and restrained 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 security; 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 security; 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 security, or while a registration statement as to such security 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, 15 U.S.C. §§77e(a), 77e(c).

II.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant be and hereby is permanently enjoined and restrained 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 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 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 is liable, jointly and severally with Herman's World of Sports, Inc. ("Herman's Sports"), for disgorgement of \$641,500.00, representing money raised as a result of the conduct alleged in the Complaint, together with prejudgment interest thereon in the amount of \$22,185.65, for a total of \$663,685.65, together with post-judgment interest thereon ("Disgorgement Liability"), and Defendant shall pay a civil penalty in the amount of \$30,000.00, together with post-judgment interest thereon ("Civil Penalty Liability"), pursuant to Section 20(d) of the Securities Act, 15 U.S.C. § 77t(d), and Section 21(d)(3) of the Exchange Act, 15 U.S.C. § 78u(d)(3).

Defendant is responsible, jointly and severally with Herman's Sports, for satisfying the Disgorgement Liability and shall pay, or cause Herman's Sports to pay, \$135,000.00 within ten business days of the entry of the Final Consent Judgment and make, or cause Herman's Sports to make, the following subsequent payments: (a) \$69,835.71 within 90 days of the entry of the Final Consent Judgment; (b) \$69,835.71 within 180 days of the entry of the Final Consent Judgment; (c) \$69,835.71 within 270 days of the entry of the Final Consent Judgment; (d) \$69,835.71 within 360 days of the entry of the Final Consent Judgment; (e) \$69,835.71 within 450 days of the entry of the Final Consent Judgment; (f) \$69,835.70 within 540 days of the entry of the Final Consent Judgment; (g) \$69,835.70 within 630 days of the entry of the Final Consent Judgment;

and (h) \$39,835.70 within 720 days of the entry of the Final Consent Judgment. In addition, payments (a) through (h) in this paragraph shall be accompanied by a payment of post-judgment interest, calculating interest from the date of entry of this Order through the date of payment, applying the quarterly Internal Revenue Service tax underpayment rates for the periods of non-payment to all outstanding Disgorgement Liability owed (including interest on any payments being made). Moreover, if Defendant fails to make, or cause Herman's Sports to make, any payment required under this paragraph within the time-periods prescribed, all remaining payments of the Disgorgement Liability and Civil Penalty Liability shall become immediately due and payable.

Defendant is solely responsible for satisfying the Civil Penalty Liability and, in doing so, shall pay \$30,000.00 within 720 days of the entry of the Final Consent Judgment. In addition, the Civil Penalty Liability shall be accompanied by a payment of post-judgment interest, calculating interest from the date of entry of this Order through the date of payment, applying the quarterly Internal Revenue Service tax underpayment rates for the periods of non-payment to all outstanding Civil Penalty Liability owed (including interest on any payments being made). Moreover, if Defendant fails to pay the Civil Penalty Liability within the time-period prescribed, it shall become immediately due and payable.

All payments made towards satisfying the Disgorgement Liability and Civil Penalty Liability shall be made to the "Clerk of Court – Eastern District of New York" at the United States District Court for the Eastern District of New York, 225 Cadman Plaza East Brooklyn, New York 11201, under cover of a letter that identifies: the Defendant; the name and civil action number of this litigation; the name of this Court; and specifying that payment is made pursuant to

this Final Consent Judgment. Simultaneously with payments made towards satisfying the Disgorgement Liability and Civil Penalty Liability, copies of the cashier's check, certified check, or postal money order, front and back, as well as any accompanying correspondence, shall be transmitted to David Markowitz, Senior Trial Counsel, United States Securities and Exchange Commission, 233 Broadway, New York, New York 10279.

By making payments in satisfaction of the Disgorgement Liability and Civil Penalty Liability, Defendant relinquishes all legal and equitable right, title, and interest in such funds, and no part of the funds shall be returned to Defendant, his heirs, successors, or assigns. The Clerk shall deposit the funds into an interest bearing account with the Court Registry Investment System ("CRIS"). 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 by motion propose a plan to distribute the Fund subject to the Court's approval. Such a plan may provide that the Fund shall 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 Final Consent 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, in any Related Investor Action, benefit from any offset or reduction of any investor's claim

by the amount of any Fair Fund distribution to such investor in this action that is proportionately attributable to the civil penalty paid by Defendant (“Penalty Offset”). If the court in any Related Investor Action grants such an offset or reduction, Defendant shall, within 30 days after entry of a final order granting the offset or reduction, 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) of the Federal Rules of Civil Procedure, this Final Consent Judgment is binding upon the Defendant, his employees, agents, servants, and attorneys, and upon those persons in active concert or participation with him who receive actual notice of this Final Consent Judgment by personal service or otherwise.

VI.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the provisions of the annexed Consent be, and the same hereby are, incorporated in this Final Consent Judgment with the same force and effect as if fully set forth herein.

VII.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that this Court shall retain jurisdiction of this matter for the purposes of enforcing the terms of this Final Consent Judgment.

VIII.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that plaintiff Commission may effect service of this Final Consent Judgment, and all other papers in this action, by sending a copy via first-class mail to Defendant's attorney in this action, David Smith, Esq., The Law Firm of David Smith, Esq., 237 West 35th Street, 4th Floor, New York, NY 10001, or any other attorney entering an appearance for the Defendant in this action.

**CONSENT TO FINAL JUDGMENT OF PERMANENT INJUNCTION
AND OTHER RELIEF AS TO THOMAS J. DZWILEWSKI**

1. Defendant Thomas J. Dzwilewski ("Defendant") being fully apprised of his rights, having had the opportunity to confer with legal counsel, and having read and understood the terms of the Final Consent Judgment of Permanent Injunction and Other Relief as to Thomas J. Dzwilewski ("Final Consent 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 of the Final Consent Judgment without further notice.

2. Defendant agrees that this Consent to Final Judgment of Permanent Injunction and Other Relief as to Thomas J. Dzwilewski ("Consent") shall be incorporated by reference in, and made part of, the Final Consent Judgment to be presented to the Court for signature, filing and entry contemporaneously herewith.

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

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

5. Defendant acknowledges and agrees that this proceeding, and his Consent 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 Consent Judgment; (b) any administrative proceeding brought or to be brought before the Commission involving the Final Consent 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 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 acknowledges and agrees that this proceeding and his Consent are for the purposes of resolving this proceeding only, in conformity with the provisions of 17 C.F.R. 202.5(f), and do not resolve, affect, or preclude any other proceeding which may be brought against him. Consistent with the provisions of 17 C.F.R. 202.5(f), Defendant waives any claim of Double Jeopardy based upon the settlement of this proceeding, including the imposition of any remedy or civil penalty herein. Defendant acknowledges that the Court's entry of a permanent injunction may have collateral consequences under federal or state law and the rules and regulations of self-regulatory organizations, licensing boards, and other regulatory organizations.

Such collateral consequences include, but are not limited to, a statutory disqualification with respect to membership or participation in, or association with a member of, a self-regulatory organization. This statutory disqualification has consequences that are separate from any sanction imposed in an administrative proceeding.

8. Defendant agrees and understands that he is liable, jointly and severally with Herman's World of Sports, Inc. ("Herman's Sports"), for disgorgement of \$641,500.00, representing money raised as a result of the conduct alleged in the Complaint, together with prejudgment interest thereon in the amount of \$22,185.65, for a total of \$663,685.65, together with post-judgment interest thereon ("Disgorgement Liability").

9. Defendant agrees and understands that he is responsible, jointly and severally with Herman's Sports, for satisfying the Disgorgement Liability and agrees to make, or cause Herman's Sports to make, an initial payment of \$135,000.00 within ten business days of the entry of the Final Consent Judgment by the Clerk of the Court. Defendant agrees and understands that he is responsible for making, or causing Herman's Sports to make, the following further payments: (a) \$69,835.71 within 90 days of the entry of the Final Consent Judgment; (b) \$69,835.71 within 180 days of the entry of the Final Consent Judgment; (c) \$69,835.71 within 270 days of the entry of the Final Consent Judgment; (d) \$69,835.71 within 360 days of the entry of the Final Consent Judgment; (e) \$69,835.71 within 450 days of the entry of the Final Consent Judgment; (f) \$69,835.70 within 540 days of the entry of the Final Consent Judgment; (g) \$69,835.70 within 630 days of the entry of the Final Consent Judgment; and (h) \$39,835.70 within 720 days of the entry of the Final Consent Judgment. In addition, payments (a) through (h) in this paragraph shall be accompanied by a payment of post-judgment interest, calculating

interest from the date of entry of this Order through the date of payment, applying the quarterly Internal Revenue Service tax underpayment rates for the periods of non-payment to all outstanding Disgorgement Liability owed (including interest on any payments being made). Moreover, if Defendant fails to make, or cause Herman's Sports to make, any payment required under this paragraph within the time-periods prescribed, all remaining payments of the Disgorgement Liability and Civil Penalty Liability, as defined and described in Paragraphs 10 and 11 below, shall become immediately due and payable.

10. Defendant agrees and understands that he shall pay a civil penalty of \$30,000.00, together with post-judgment interest thereon ("Civil Penalty Liability").

11. Defendant is solely responsible for satisfying the Civil Penalty Liability and, in doing so, shall pay \$30,000 within 720 days of the entry of the Final Consent Judgment. In addition, the Civil Penalty Liability shall be accompanied by a payment of post-judgment interest, calculating interest from the date of entry of this Order through the date of payment, applying the quarterly Internal Revenue Service tax underpayment rates for the periods of non-payment to all outstanding Civil Penalty Liability owed (including interest on any payments being made). Moreover, if Defendant fails to pay the Civil Penalty Liability within the time-period prescribed, it shall become immediately due and payable.

12. Defendant 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 agrees not to take any action or to 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 breaches this agreement, the Commission may petition the Court to vacate the Final Consent Judgment and restore this action to the Court's active docket. Nothing in this provision affects Defendant's: (i) testimonial obligations; or (ii) right to take legal positions in litigation in which the Commission is not a party.

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

14. Defendant hereby waives any rights under the Equal Access to Justice Act, the Small Business Regulatory Enforcement Fairness Act of 1996 or any other provision of law to pursue reimbursement of attorney's fees or other fees, expenses or costs expended by the Defendant to defend against this action. For these purposes, Defendant agrees that Defendant is not the prevailing party in this action since the parties have reached a good faith settlement.

15. Defendant agrees that, promptly after the Court has entered the Final Consent Judgment, Defendant will execute and return to the Commission an acknowledgment of receipt of the Final Consent Judgment.

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

17. Defendant waives the entry of findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure.

18. Defendant will not oppose enforcement of the Final Consent Judgment on the

grounds, if any exist, that the Final Consent Judgment fails to comply with Rule 65(d) of the Federal Rules of Civil Procedure.

19. In connection with this action and any related judicial or administrative proceeding or investigation commenced by the Commission or to which the Commission is a party, Defendant: (i) agrees to appear and be interviewed by Commission staff at such times and places as the staff requests upon reasonable notice; (ii) will accept service by mail or facsimile transmission of notices or subpoenas for documents or testimony at depositions, hearings, or trials, or in connection with any related investigation by Commission staff; (iii) with respect to such notices and subpoenas, waives the territorial limits on service contained in Rule 45 of the Federal Rules of Civil Procedure and any applicable local rules, provided that the party requesting the testimony reimburses Defendant's travel, lodging, and subsistence expenses at the then-prevailing U.S. Government per diem rates; and (iv) consents to personal jurisdiction over Defendant in any United States District Court for purposes of enforcing any such subpoena.

20. Defendant agrees that first-class and certified mail to Defendant's attorney in this action, David Smith, Esq., The Law Firm of David Smith, Esq., 237 West 35th Street, 4th Floor, New York, NY 10001, or any other attorney entering an appearance for Defendant in this action, shall be deemed personal service for all correspondence, service and notices as to any matters related to the Final Consent Judgment, unless Defendant notifies the Commission of any

alternative address by certified mail at the following address: David Markowitz, Senior Trial Counsel, U.S. Securities and Exchange Commission, Northeast Regional Office, 233 Broadway, New York, New York 10279.

Dated: 12/2, 2004


Thomas J. Dzwilewski

Acknowledged by:

STATE OF)

ss.:


COUNTY OF)

On this 2nd day of December 2004, Thomas J. Dzwilewski a person known to me, personally appeared before me and acknowledged executing the foregoing Consent.


NOTARY PUBLIC


MICHAEL J. TWERSKY
Notary Public, State of New York
No. 02TW6020107
Qualified in New York County
Commission Expires 02/22/2007

Approved as to form:


David Smith, Esq.
The Law Firm of David Smith, Esq.,
237 West 35th Street, 4th Floor,
New York, NY 10001,
646 473-7596

SO ORDERED.

Dated: Feb 2nd, 2004 
Brooklyn, New York


United States District Judge