UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 0:12-cv-61074-RSR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

KEVIN P. BRENNAN, DONALD G. HUGGINS, MARC S. PAGE, AND OPTIMIZED TRANSPORTATION MANAGEMENT, INC.,

Defendants.
_____/

ORDER GRANTING PLAINTIFF'S MOTION FOR ENTRY OF DEFAULT JUDGMENT OF PERMANENT INJUNCTION AND OTHER RELIEF AGAINST DEFENDANT KEVIN P. BRENNAN

This matter is before the Court on Plaintiff Securities and Exchange Commission's Motion for Entry of Default Judgment of Permanent Injunction and Other Relief Against Defendant Kevin P. Brennan. [ECF No. 51]. Having considered the motion and the entire record, the Court enters this order granting Plaintiff's motion.

FINDINGS OF FACT

On June 4, 2012, Plaintiff filed this action against Defendant Kevin P. Brennan alleging fraud in violation of Section 17(a)(1) of the Securities Act of 1933, 15 U.S.C. § 77q(a)(1); Section 10(b) of the Securities Act of 1934, 15 U.S.C. § 78j(b); and Exchange Act Rule 10b-5(a) and (c), 17 C.F.R. 240.10b-5(a)and (c). *See* ECF No. 1. The Complaint sets forth detailed facts alleging that Defendant Brennan, who was the Chief Executive Officer and Chief Financial Officer of Defendant Optimized Transportation Management, Inc., engaged in a fraudulent market-manipulation scheme involving the company's stock. Defendant Brennan was properly served with a summons and a copy of the

Complaint pursuant to Rule 4 of the Federal Rules of Civil Procedure. [ECF No. 42]. Thus, he had proper notice of this action.

When Defendant Brennan failed to file a response to the Complaint, Plaintiff moved for entry of a clerk's default. *See* ECF No. 45. The Clerk of the Court entered a default against Defendant Brennan on March 18, 2013. [ECF No. 46]. Plaintiff then filed a motion for default final judgment against Defendant Brennan. [ECF No. 51]. After Plaintiff filed the pending Motion for Entry of Default Final Judgment, the Court issued an Order directing Defendant Brennan to show cause why the Court should not grant the Motion for Default Judgment. ECF No. 52. The Order indicated that failure to file a timely response to the Order may result in the granting of the Motion by default. *Id.* To date, Defendant has not responded to Plaintiff's Motion for Default Final Judgment.

By virtue of his default, Defendant Brennan is taken to admit the well-pleaded allegations of fact Plaintiff's Complaint. *Eagle Hosp. Physicians, LLC v. SRG Consulting, Inc.*, 561 F.3d 1298, 1307 (11th Cir. 2009) (quoting *Nishimatsu Const. Co., Ltd. v. Houston Nat'l Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975)). Thus, the Court finds that Defendant Brennan committed the violations alleged in the Complaint. The Court also finds that it has personal jurisdiction over Defendant Brennan and the subject matter of this action. Venue is proper in the Southern District of Florida.

CONCLUSIONS OF LAW

Brennan's fraudulent conduct violated Section 17(a)(1) of the Securities Act of 1933 ("Securities Act"), Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), and Exchange Act Rule 10b-5(a). These provisions prohibit essentially the same type of conduct. *U.S. v. Naftalin*, 441 U.S. 768, 773 (1979); *SEC v. Unique Financial Concepts, Inc.,* 119 F. Supp. 2d 1332, 1339 (S.D. Fla. 1998), *aff'd*, 196 F.3d 1195 (11th Cir. 1999).

A defendant engages in a fraudulent scheme in violation of these statutes and rules when he (1) commits a deceptive or manipulative act; (2) in furtherance of a scheme to defraud; and (3) with scienter. *In re Alstom*, 406 F. Supp. 2d 433, 474 (S.D.N.Y. 2005) (citing *In re Global Crossing,* 322 F. Supp. 2d 319, 336 (S.D.N.Y. 2004)). Further, under Exchange Act Section 10(b) and Rule 10b-5, the deceptive acts must be carried out "in connection with the purchase or sale of any security." *Stoneridge Investment Partners, LLC v. Scientific Atlanta, Inc.,* 552 U.S. 148, 160 (2008); 15 U.S.C. §78j(b).

With respect to the first two elements, a defendant commits deceptive or manipulative acts in furtherance of a fraudulent scheme if he has "engaged in conduct that had the principal purpose and effect of creating a false appearance of fact in furtherance of the scheme." *SEC v. Patel,* 2009 WL 3151143, *9 (D.N.H. 2009) (quoting *Simpson v. AOL Time Warner Inc.,* 452 F.3d 1040, 1048 (9th Cir. 2006)); *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1471 (2d Cir. 1996) (holding that scheme liability extends to those "who had knowledge of the fraud and assisted in its perpetration").

The third element, scienter, is a mental state embracing intent to deceive, manipulate or defraud. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976). The Eleventh Circuit has concluded that scienter may be established by a showing of knowing misconduct or severe recklessness. *SEC v. Carriba Air, Inc.*, 681 F.2d 1318, 1324 (11th Cir. 1982).

Finally, the Commission must establish the use of interstate commerce, the mail, or a national securities exchange. *SEC v. Corporate Relations Group*, 2003 WL 25570113 at *7 (M.D. Fla. March 28, 2003). [1]

[1]Although liability under Rule 10b-5(b) requires a showing of the materiality of a misstatement or omission, materiality is not an element of scheme liability claims under Rule 10b-5(a) or (c). *Compare* 17 C.F.R. § 240.10b-5(b) with 10b5-(a) and (c) (subsection (b) expressly prohibits only misstatements or omissions that are "material" while subsections (a) and (c) together prohibit "any" device, scheme, artifice to defraud, act,

The facts in the Complaint establish that Brennan, as CEO and CFO of Optimized Transportation Management was an instrumental participant in a fraudulent scheme in connection with the purchase and sale of the company's common stock in violation of Securities Act Section 17(a)(1) and Exchange Act Rule 10b-5(a) and (c). ECF No. 1, at ¶¶ 7, 19-26, 29-30, 32. When Brennan and the other Defendants agreed to bribe a purportedly corrupt broker to induce the purchase of shares of Optimized Transportation Management and took steps in furtherance of that scheme by issuing unrestricted shares, Brennan engaged in a course of deceptive conduct in violation of those antifraud provisions of the securities laws. ECF No. 1 at ¶¶ 15-32.

The Complaint also establishes that when Brennan engaged in the deceptive conduct, he acted with scienter. Brennan acted solely to "pump up" the value of Optimized Transportation Management's stock share prices. *Id.* at ¶¶ 19-26. In addition, the conduct was directly in connection with the purchase of a security, namely Optimized Transportation Management's stock. *SEC v. Zandford*, 535 U.S. 813, 819 (2002) (courts should interpret the "in connection with" requirement broadly to effectuate the remedial purpose of the federal securities laws). ECF No. 1, at ¶¶ 16-32.

Finally, Brennan and the other Defendants used interstate commerce to carry out the Optimized Transportation Management scheme. The Defendants sent checks and certificates for Optimized Transportation Management stock by United States mail. *Id.* at ¶¶ 27-28.

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practice or course of business); *In re Alstom*, 406 F. Supp. 2d at 474 (listing elements of 10b-5(a) and (c) "scheme liability" claim and not including materiality). Nevertheless, a reasonable investor considering purchasing or selling OPTZ's stock would certainly want to know if the company's CEO was paying bribes to institutional investors to purchase the company's stock to inflate the stock's price and create the appearance of market interest.

REMEDIES

Permanent Injunctive Relief Against Brennan Is Warranted

The Complaint seeks injunctive relief against Brennan for future violations of Securities Act Section 17(a)(1), Exchange Act Section 10(b), and Exchange Act Rule 10b-5(a). The Commission is entitled to injunctive relief when it establishes (1) a violation of the federal securities laws; and (2) a reasonable likelihood of future violations. *SEC v. Calvo*, 378 F.3d 1211, 1216 (11th Cir. 2004); *Unique Financial Concepts,* 196 F.3d at 1199 n.2.

The Commission has already established the first prong by showing that Brennan violated the federal securities laws. In determining whether a defendant is reasonably likely to continue to violate the securities laws, courts consider the following factors:

(1) the egregiousness of the defendant's actions;

(2) the isolated or recurrent nature of the violations;

(3) the degree of scienter involved;

(4) the sincerity of the defendant's assurances against future violations;

(5) the defendant's recognition of the wrongful nature of his conduct; and

(6) the likelihood that the defendant's occupation will present opportunities for future violations.

SEC v. Carriba Air, Inc., 681 F.2d 1318, 1322 (11th Cir. 1982), (citing *SEC v. Blatt*, 583 F.2d 1325 (5th Cir. 1978)); *SEC. v. Youmans*, 729 F.2d 413, 415 (6th Cir. 1984).

All but the second factor are present here. First, Brennan's conduct in connection with Optimized Transportation Management was egregious. Brennan agreed to and directly participated in a stock purchase scheme involving a purportedly corrupt broker. Over the course of several

months, Brennan agreed to, and helped orchestrate a scheme to generate the appearance of market interest in Optimized Transportation Management, induce public purchases of the stock, and artificially increase its trading price and volume. The egregious nature of Brennan's actions is further demonstrated by the fact that he has been convicted of criminal violations of the securities laws for the very same behavior. ECF No. 1, at ¶¶ 15-32. These same facts also demonstrate the third element, Brennan's high degree of scienter.

With respect to the fourth and fifth factors, Brennan has not responded to this lawsuit. Given his failure to appear in this action, the Court does not have any assurances that he will avoid future misconduct. Similarly, there is no way to know what Brennan will do in the future; therefore, it is entirely possible that his future occupation will provide the opportunity to re-offend if the Court does not enjoin him. His failure to answer this lawsuit raises doubts that he will avoid such opportunities. As a result, Brennan's conduct warrants the Court's entering of a permanent injunction against him.

Penny Stock Bar

Pursuant to Section 21(d)(6) of the Exchange Act, 15 U.S.C. §78u(d)(6), and Section 20(g) of the Securities Act, 15 U.S.C. §77t(g), the Court may permanently bar Brennan from participating in any offering of any penny stock. Section 21(d)(6) of the Exchange Act and Section 20(g) of the Securities Act permit a federal court to impose a penny stock bar against any person participating in, or, at the time of the alleged misconduct, who was participating in, an offering of penny stock.

During the period of the fraud in this case, Optimized Transportation Management stock qualified as a penny stock because it did not meet any of the exceptions from the definition of a penny stock, as defined by Section 3(a)(51) of the Exchange Act and Rule 3a51-1 thereunder. The securities were equity securities (1) that were not an "NMS stock" as defined in 17 C.F.R.

§242.600(b)(47); (2) that traded below five dollars per share during the relevant period; (3) whose issuer had net tangible assets and average revenue below the threshold of Rule 3a51-1(g)(1); and (4) did not meet any of the other exceptions from the definition of "penny stock" contained in Rule 3a51-1 of the Exchange Act. ECF No. 1 at ¶ 11. Brennan participated in an offering of a penny stock because he engaged in activities for the purpose of issuing, trading, and inducing or attempting to induce the purchase or sale of securities. *Id.* at ¶¶ 15-32.

Officer and Director Bar

An officer-and-director bar is appropriate in this case against Brennan pursuant to Section 20(e) of the Securities Act and Section 21(d)(2) of the Exchange Act. In determining whether to impose an officer and director bar, a court may consider the following factors: (1) the egregiousness of the underlying securities law violation; (2) the defendant's repeat-offender status; (3) the defendant's role or position when he engaged in the fraud; (4) the defendant's degree of scienter; (5) the defendant's economic stake in the violation; and (6) the likelihood that misconduct will recur. *SEC v. First Pac. Bancorp*, 142 F.3d 1186, 1193 (9th Cir. 1998) (quoting *SEC v. Patel*, 61 F. 3d 147, 141 (2d Cir. 1995).

Optimized Transportation Management was a publicly traded company during the relevant period. ECF No. 1 at ¶ 10. In this case, all but the second factor weigh in favor of an officer-and-director bar. Brennan's actions in seeking out this market-manipulation fraud and orchestrating its execution were egregious, as set forth above. Similarly, Brennan displayed scienter as discussed previously in this section. Moreover, he specifically abused his corporate office by seeking to fraudulently increase the stock price of Optimized Transportation Management, where he was CEO and CFO at the time. ECF No. 1 at ¶¶ 7, 19-26. Further, Brennan's role in this fraud was as the ring

leader, seeking out other participants to get involved with the scheme. *Id.* at ¶¶ 19-26. Finally, given Brennan's pattern of repeated violations of the securities laws, it is likely that he will continue such schemes unless barred by this Court. Therefore, an officer-and-director bar against Brennan is appropriate.

Accordingly, it is **ORDERED AND ADJUDGED** that Plaintiff's Motion for Entry of a Default Judgment of Permanent Injunction and Other Relief Against Defendant Kevin P. Brennan [ECF No. 51] is **GRANTED**. Default Judgment is entered against Defendant Brennan as follows:

I.

SECTION 10(B) OF THE SECURITIES EXCHANGE ACT OF 1934

It is **ORDERED AND ADJUDGED** that Defendant Brennan and his agents, servants, employees, attorneys, and all persons in active concert or participation with them who receive actual notice of this Judgment by personal service or otherwise are permanently restrained and enjoined from violating, directly or indirectly, Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") [15 U.S.C. § 78j(b)] and Rule 10b-5 promulgated thereunder [17 C.F.R. § 240.10b-5], by using any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, in connection with the purchase or sale of any security:

(a) to employ any device, scheme, or artifice to defraud;

(b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or

(c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person by, directly or indirectly, (i) creating a false appearance or otherwise deceiving any person about the price or trading market for any security, or (ii) making any false or misleading statement, or disseminating any false or misleading documents, materials, or information, concerning matters relating to a decision by an investor or prospective investor to buy or sell securities of any company.

II.

SECTION 17(A) OF THE SECURITIES ACT OF 1933

It is further **ORDERED AND ADJUDGED** that Defendant Brennan and his agents, servants, employees, attorneys, and all persons in active concert or participation with them who receive actual notice of this Judgment by personal service or otherwise are permanently restrained and enjoined from violating Section 17(a) of the Securities Act of 1933 (the "Securities Act") [15 U.S.C. § 77q(a)] in the offer or sale of any security by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly:

(a) to employ any device, scheme, or artifice to defraud;

(b) to obtain money or property by means of any untrue statement of a material fact or any omission of 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) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser by, directly or indirectly, (i) creating a false appearance or otherwise deceiving any person about the price or trading market for any security, or (ii) making any false or misleading statement, or disseminating any false or misleading documents, materials, or information, concerning matters relating to a decision by an investor or prospective investor to buy or sell securities of any company.

III.

PENNY STOCK BAR

It is further **ORDERED AND ADJUDGED** that Defendant Brennan is permanently barred from participating in an offering of penny stock, including engaging in activities with a broker, dealer, or issuer for purposes of issuing, trading, or inducing or attempting to induce the purchase or sale of any penny stock. A penny stock is any equity security that has a price of less than five

dollars, except as provided in Rule 3a51-1 under the Exchange Act, 17 C.F.R. 240.3a51-1. During the relevant period, the security Brennan attempted to manipulate qualified as a penny stock because it did not meet any of the exceptions from the definition of a penny stock, as defined by Section 3(a)(51) of the Exchange Act and Rule 3a51-1 thereunder. The securities were equity securities (1) that were not an "NMS stock" as defined in 17 C.F.R. § 242.600(b)(47); (2) that traded below five dollars per share during the relevant period; (3) whose issuer had net tangible assets that average revenue below the threshold of Rule 3a51-1(g)(1); and (4) did not meet any of the other exceptions from the definition of "penny stock" contained in Rule 3a51-1 of the Exchange Act. Brennan participated in manipulative offering of a penny stock because he engaged in activities for the purpose of issuing, trading, and inducing or attempting to induce the purchase or sale of securities.

IV.

OFFICER AND DIRECTOR BAR

It is further **ORDERED AND ADJUDGED** that pursuant to Section 21(d)(2) of the Exchange Act, 15 U.S.C. § 78u(d)(2), Defendant Brennan is permanently barred from acting as an officer or director of any issuer that has a class of securities registered pursuant to Section 12 of the Exchange Act, 15 U.S.C. § 781, or that is required to file reports pursuant to Section 15(d) of the Exchange Act, 15 U.S.C. § 78o(d).

V.

DISGORGEMENT AND CIVIL PENALTY

It is further **ORDERED AND ADJUDGED** that Plaintiff's claims for disgorgement and civil penalty are dismissed because of, among other things, his sentencing in the parallel criminal case. *See United States v. Brennan*, Case No. 12-CR-60064-RWG.

VI.

RETENTION OF JURISDICTION

It is further **ORDERED AND ADJUDGED** that this Court shall retain jurisdiction over this matter and Defendant Brennan in order to implement and carry out the terms of all Orders and Decrees that may be entered and to entertain any suitable application or motion for additional relief within the jurisdiction of this Court, and will order other relief that this Court deems appropriate under the circumstances.

VII.

RULE 54(b) CERTIFICATION

It is further **ORDERED AND ADJUDGED** that there being no just reason for delay, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the Clerk is ordered to enter this Judgment forthwith and without further notice.

DONE AND ORDERED in Fort Lauderdale, Florida, this 9th day of December 2013.

ROBIN S. ROSENBAUM
UNITED STATES DISTRICT JUDGE

Copies to:

Counsel of record