IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SECURITIES AND EXCHANGE COMMISSION,	§	
	§	
Plaintiff,	§	
	§	
vs.	§	**Civil Action No. 4:13-CV-2233**
	§	
ROBERT GANDY, ET AL.,	§	
	§	
Defendants.	§	

ORDER

Pending before the Court is Plaintiff Securities and Exchange Commission ("SEC")'s Motion for Final Judgment as to Civil Penalties Against Defendants Robert Gandy ("Gandy") and Alvin Ausbon ("Ausbon") in the third-tier penalty level. (Instrument No. 46).

I.

A.

On July 31, 2013, the SEC filed a complaint against Defendants Robert Gandy, Alvin Ausbon, and Marcellous McZeal ("McZeal"), alleging that Defendants participated in a fraudulent scheme to sell restricted stock of PGI Energy, Inc. into the public market. (Instrument No. 1). This Court entered Final Judgment by consent against McZeal on August 1, 2013, thereby resolving all claims against McZeal. (Instrument No. 6). On May 4, 2015, the Court entered Final Judgments as to Defendants Gandy and Ausbon and permanently enjoined Gandy and Ausbon from violating securities-registration and anti-fraud provisions of federal securities laws, including Sections 5 and 17(a) of the Securities Act of 1933 ("the Securities Act") (15 U.S.C. § 77e, q(a)) and Section 10(b) (15 U.S.C. § 78j(b)) and Rule 10b-5 (17 C.F.R. § 240.10b-

5) of the Securities Exchange Act of 1934 ("the Exchange Act"). (Instruments No. 44; No. 45). The Court's Final Judgment also ordered Defendants Gandy and Ausbon to disgorge $113,762 and $15,750, respectively, plus prejudgment interest. (Instruments No. 44; No. 45).

On May 12, 2015, the SEC filed a Motion for Final Judgment as to Civil Penalties against Defendants Gandy and Ausbon. (Instrument No. 46). Defendants Gandy and Ausbon filed a response on May 14, 2015 (Instrument No. 47), and the SEC filed its reply on May 19, 2015 (Instrument No. 48). On October 5, 2013, Defendant Ausbon filed a petition under Chapter 13 of the Bankruptcy Code. The Court held a hearing on October 30, 2015. On November 5, 2015, Plaintiff SEC submitted a revised proposed final judgment to remove the payment-period provisions from its original proposed final judgment to prevent any appearance that the SEC is attempting to enforce a money judgment during Ausbon's pending bankruptcy case. (Instrument No. 50 at 1-2).

B.

In its motion for civil penalties against Defendants Gandy and Ausbon, the SEC seeks a civil penalty against Defendants Gandy and Ausbon under Section 20(d) of the Securities Act (15 U.S.C. § 77t(d)) and Section 21(d)(3) of the Securities Exchange Act (15 U.S.C. § 78u (d)(3)) in the amount of $150,000 each. (Instrument No. 46 at 3-5). First, the SEC asserts that the Court should impose civil penalties against Defendants Gandy and Ausbon because civil penalties aim to punish the violators and deter future violations. The SEC asserts that Defendants Gandy and Ausbon deserve civil penalties because their scheme was extremely egregious and involved numerous material falsehoods, because Defendants acted with a high level of scienter, because Defendants' misconduct subjected investors to losses exceeding one million dollars,

because Defendants' conduct was recurrent, and because Defendants have not demonstrated any basis for a reduced penalty based on financial condition. (Instrument No. 46 at 5). Second, the SEC requests the Court to impose third-tier civil penalties against Defendants Gandy and Ausbon because their violations involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement, and directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons. (Instrument No. 46 at 4).

In a response filed on May 14, 2015, Defendants Gandy and Ausbon assert that their conduct was not so egregious as to warrant civil penalty and, in the alternative, that their conduct did not rise to the level of requiring third-level penalties. (Instrument No. 46 at 2-3). First, Defendants contend that although Gandy and Ausbon gained $113,762 and $15,750, respectively, from their violations, both Defendants personally invested more funds in the company than they gained. (Instrument No. 46 at 2). Second, Defendants assert that they have surrendered all common shares of stock they owned back to the company transfer agent, resulting in no sale or gain therefrom, and that both Defendants suffered significant loss of earning capacity as a result of the SEC's civil action which destroyed their public reputations. (Instrument No. 46 at 2). Finally, Defendants request the Court to deny the SEC's request for civil penalties because both Defendants are legally bankrupt and unemployed, their dependent family members are in great financial distress, and that Defendants have already suffered the loss of public trust. (Instrument No. 46 at 2-3).

On October 5, 2013, Defendant Ausbon filed a petition under Chapter 13 of the Bankruptcy Code.

At the hearing conducted on October 30, 2015, Defendants Gandy and Ausbon appeared without legal representation and presented their opposition to Plaintiff's motion before the Court.

The Court questioned both Defendants and ascertained their current financial status, including any assets, debts, creditors, and bankruptcy proceedings in progress.

II.

Section 20(d) of the Securities Act and Section 21(d)(3) of the Exchange Act authorize the SEC to seek, and courts to impose, civil penalties. Civil penalties are designed to punish the individual violator and deter future violations of the securities laws." *S.E.C. v. AmeriFirst Funding, Inc.*, 2008 WL 1959843 at *7 (N.D. Tex. May 5, 2008) (citing *Sec. & Exch. Comm'n v. Opulentica, LLC*, 479 F.Supp.2d 319, 331 (S.D.N.Y.2007)). In determining whether a civil penalty is appropriate for securities law violations, and if so, in what amount, courts consider: "(1) the egregiousness of the defendant's conduct; (2) the degree of the defendant's scienter; (3) whether the defendant's conduct created substantial losses or the risk of substantial losses to other persons; (4) whether the defendant's conduct was isolated or recurrent; (5) whether defendant has admitted wrongdoing; and (6) whether the penalty should be reduced due to the defendant's demonstrated current and future financial condition." Securities Act of 1933, § 20(d), 15 U.S.C.A. § 77t(d); *S.E.C. v. Life Partners Holdings, Inc.*, 71 F. Supp. 3d 615 (W.D. Tex. 2014) (citing *SEC v. Razmilovic*, 822 F.Supp.2d 234 (E.D.N.Y.2011)); *S.E.C. v. Rockwell Energy of Texas, LLC*, 2012 WL 360191 at *4 (S.D. Tex. Feb. 1, 2012) (citing *AmeriFirst Funding*, 2008 WL 1959843, at *7).

Sections 21(d) and 21A of the Exchange Act provide three tiers of penalties applicable to Defendants who violate the Act and its rules. 15 U.S.C. § 78j(b) (West 2015). The first tier of penalties applicable to individuals under the Exchange Act provides that sanctions shall not exceed the greater of $6,500 for each violation occurring through March 3, 2009 and $7,500 for

each violation occurring after March 3, 2009, or the amount of the person's gross pecuniary gain resulting from the wrongdoing. 15 U.S.C. § 77t(d) (West 2015). A second-tier penalty requires that the violation "involve fraud, deceit, manipulation, or *deliberate or reckless disregard of a regulatory requirement." Id.* (emphasis added). Finally, the Exchange Act provides for third tier penalties against individual wrongdoers in an amount not to exceed the greater of $130,000 for each violation through March 3, 2009 and $150,000 for each violation after that date, or the amount of the wrongdoer's gross pecuniary gain. *Id.* Third-tier penalties may be imposed if the defendant's violation "involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement," 15 U.S.C. § 77t(d)(2)(C)(I), and the violation "directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons," 15 U.S.C. § 77t(d) (2)(C)(II); *S.E.C. v. Rockwell Energy of Texas, LLC*, 2012 WL 360191, at *4 (S.D. Tex. Feb. 1, 2012) (citing *AmeriFirst Funding*, 2008 WL 1959843, at *7). While the statutory tier determines the range of maximum penalties allowed per violation, the actual amount of the penalty to be imposed is left to the Court's discretion. *See S.E.C. v. Life Partners Holdings, Inc.*, 71 F. Supp. 3d 615, 622-24 (W.D. Tex. 2014) (quoting *SEC v. Kern*, 425 F.3d 143, 153 (2d Cir. 2005), *S.E.C. v. Universal Express, Inc.*, 646 F.Supp.2d 552, 567 (S.D.N.Y. 2009)).

In this case, the SEC argues that third-tier civil penalties are appropriate because Defendants Gandy and Ausbon committed violations involving fraud and deceit and their conduct resulted in substantial losses exceeding $1 million to others. (Instrument No. 46). Defendants do not dispute that their misconduct involved fraud and deceit or that their conduct resulted in substantial losses to investors and others in this case. Based on the allowable amounts set forth in the statutes, the maximum civil penalty against Gandy is not to exceed the greater of

$100,000 or the gross amount of Gandy's pecuniary gain as a result of the violation, or $113,762.00. 15 U.S.C.A. § 78u (West).

In this case, in agreeing to the entry of judgment against them, Defendants Gandy and Ausbon waived the findings of fact, conclusions of law, and any right to appeal the judgment. Based on Gandy and Ausbon's Consents, the Court previously ordered that "solely for the purposes of such motion [for civil penalty pursuant to Section 20(d) of the Securities Act and Section 21(d)(3) of the Exchange Act], the allegations of [SEC's] Complaint shall be accepted as and deemed true by the Court." (Instruments No. 44; No. 45). Accordingly, the Court accepts as true the following:

> "In 2011, Gandy and McZeal took control of a public shell company, renamed it PGI Energy, Inc. ("PGI Energy") and engaged in a scheme to sell restricted PGI Energy shares into the public market. To accomplish their scheme, Gandy and McZeal created the false appearance that the restricted shares . . . were unrestricted. They created false promissory notes, signed misleading certifications, and altered PGI Energy's balance sheet to cause the company's transfer agent to issue millions of PGI Energy stock shares without restrictive legends. The stock issued in transactions that converted the false promissory notes into stock. For his role in the scheme, Ausbon signed false promissory notes and diverted stock-sale proceeds back to PGI Energy and Gandy. As a result of this fraud, Gandy, PGI Energy, and Ausbon collectively obtained at least $613,927 in illicit proceeds."

(Instrument No. 1). In response to the SEC's motion, Defendants Gandy and Ausbon claim to be currently unemployed and "legally bankrupt" and that their conduct was not so egregious to warrant a civil penalty because (1) they surrendered their stock to the company instead of selling it, (2) they have "suffered significant loss of earning capacity as a direct result of the SEC Civil action," and they have family members dependent on their financial support. (Instrument No. 47).

Looking to the factors laid out in *AmeriFirst Funding*, 2008 WL 1959843, the Court finds sufficient evidence of both Defendants' egregious conduct and high degree of scienter to impose civil penalties. *See* 15 U.S.C. §§ 77t(d), 78u(d)(3) (West). As to these first two factors, Defendants' scheme involved numerous material falsehoods to investors, securities attorneys, and PGI Energy's transfer agent, and both Defendants signed documents they knew or recklessly to be false or were recklessly unknowledgeable about in order to profit hundreds of thousands of dollars from the scheme. (Instrument No. 1). As to the third factor, the parties do not dispute that the Defendants' conduct created substantial losses or the risk of substantial losses to other persons. *See* 15 U.S.C. §§ 77t(d), 78u(d)(3) (West). As to the fourth factor, there is also no dispute as to whether Gandy and Ausbon's conduct was isolated or recurrent, given the numerous false promissory notes and false certifications made by both Defendants. *See* 15 U.S.C. §§ 77t(d), 78u(d)(3) (West). Plaintiff testified at the hearing that it sought third-tier civil penalties because Defendants' misconduct was "very egregious" and involved five false promissory notes, which should be considered five separate violations. Of the five false promissory notes, Defendant Ausbon was involved in three and Defendant Gandy was involved in all five. Defendants offered no rebuttal. Accordingly, the first four factors in this case persuade the Court in favor of imposing civil penalties against Defendants Gandy and Ausbon.

However, as to the fifth factor of admission of wrongdoing, both Defendants admit wrongdoing in their filed response and present before the Court that their "greatest lesson. . . [has been] the fact that it takes a lifetime to build a good name and reputation, and just five minutes to destroy it." (Instrument No. 47); *see* 15 U.S.C. §§ 77t(d), 78u(d)(3) (West). The Court recognizes that Defendants appear to express remorse for their actions, which dissuades the Court from imposing civil penalties against them.

As to the sixth factor of current and future financial condition, Defendants urge the Court to reduce any civil penalty given because both Defendants "currently meet the definition of being legally bankrupt," have financially dependent family members, and are both currently unemployed with no guaranteed income source. (Instrument No. 47); *see* 15 U.S.C. §§ 77t(d), 78u(d)(3) (West). Defendants present exhibits purportedly showing that Defendants sustained grave losses from investing directly in the company, including an alleged $300,000.00 loss for Gandy's unpaid professional services to the company, $300,000.00 loss for Gandy's unpaid signing bonus plus $300,000.00 annual salary, and a $91,990.33 loss for Gandy and the Pythagoras Group's payment of PGI Energy and PEF's expenses. (Instrument No. 47 at 3-4). Additionally, Defendants' exhibits allegedly show that Gandy suffered a $53,007.00 loss for unpaid contractual services and operating expenses through June 30, 2010, a $13,000.00 loss from his investment in the company in November 2010, and a $62,819.00 loss for expenses he paid on behalf of the company through September 30, 2010. (Instrument No. 47 at 3-4). Defendants assert that these financial losses demonstrate their current and future financial condition as such that civil penalties would serve no purpose because Defendants have no opportunity to re-offend after the loss of public trust. (Instrument No. 47 at 3-4). Defendants assert that they both suffered significant losses as investors in the company and that "there exists no opportunity for the defendants to re-offend" without offering any explanation for this assertion. (Instrument No. 47 at 3). Ironically, Defendants appear to be attempting to levy their losses resulting from their illegal corporate misconduct against civil penalties sought to punish that same misconduct. There is no dispute that Defendants' conduct plainly created a risk of substantial losses in its investors since they deprived investors of information necessary to properly value the company. Additionally, there is no dispute that Defendants Gandy and

Ausbon committed serious violations of this nation's securities laws and the evidence more than suffices to establish that their conduct was—at the very least—reckless.

In this case, Defendant Ausbon testified that he filed for bankruptcy and is currently represented by the Shegrew Law Firm located in Houston, Texas. Ausbon also testified that he has a daughter in college, a son in high school, a 10-year-old child, and a 7-year-old child. In response to the Court's skepticism as to the propriety of ordering civil penalties against a defendant in bankruptcy proceedings, Plaintiff alleges that under the law, the SEC may seek, and the District Court may enter, a judgment imposing civil money penalties against a defendant who has filed for bankruptcy. However, the SEC may not seek to enforce any such judgment except within the bankruptcy case. (Instrument No. 50).

As to Defendant Gandy, Plaintiff testified that it had not considered Defendants' financial condition in filing its motion for civil penalties, but had discovered from Horner, Townsend, and Kent, a Pennsylvania brokerage firm, that Gandy had filled out paperwork indicating that he had a $3.5 million net worth and an annual income of $300,000. In response, Gandy testified that Smart Ventures is an oil and gas company which acquired a Canadian company he owned which was once valued at $3.5 million. However, Gandy testified that when the Canadian company was acquired, there was a mandatory trading suspension on Smart Ventures. Furthermore, Gandy testified that the $3.5 million figure was a "wishlist" of what he sought to own in his family trust, including a $1 million insurance policy. Gandy also testified that the $3.5 million figure included a trucking company he owned with his sons, which has since failed, and his wife's income from her consulting work, which is now the sole source of support for their family.

At the October 30th hearing, each Defendant's testimony established his current and future financial condition. The Court finds that Defendants have demonstrated their current and

future financial conditions weigh against the imposition of additional civil penalties against Defendants. The proffered testimony shows that both Defendants are unemployed and effectively indigent. Accordingly, Plaintiff SEC's Motion for Final Judgment against Defendants Gandy and Ausbon is **DENIED**. (Instrument No. 46).

III.

Based on the foregoing, Plaintiff SEC's motion for civil penalties against Defendants Robert Gandy and Alvin Ausbon is **DENIED. (Instrument No. 46)**.

The Clerk shall enter this Order and provide a copy to all parties.

SIGNED on this the 18th day of November, 2015, at Houston, Texas.

VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE