UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

SECURITIES AND EXCHANGE COMMISSION,	)	
Plaintiff,	)	
	)	
v.	)	**Civ. No. 96-10609-NG**
	)	
MICHAEL G. SARGENT,	)	
DENNIS J. SHEPARD, and	)	
ROBERT J. SCHARN,	)	
Defendants.	)	

GERTNER, D.J.:

AMENDED[1] FINAL JUDGMENT
March 27, 2002

In accordance with the jury verdict of November 1, 2001, and this Court's Order of December 20, 2001, under which Defendants Michael G. Sargent ("Sargent") and Dennis J. Shepard ("Shepard") were found civilly liable for violations of § 14(e) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(e), and Rule 14e-3, 17 C.F.R. § 240.14e-3, judgment is hereby **ENTERED** as follows:

I. INJUNCTION

This Court has held that the proper standard for the issuance of an injunction in securities fraud cases is "the reasonable likelihood of future violations of the statutory provisions." SEC v. Ingoldsby, Civ. A. No. 88-1001-MA, 1990 WL

[1] The final judgment is amended only to correct an error in citation: judgment is entered as to the defendants' liability for violations of § 14(e) and Rule 14e-3.

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120731 (D. Mass. May 15, 1990), at *1. "[T]he moving party must prove that 'there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive.'" Ingoldsby, 1990 WL 120731, at *1 (quoting United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953)). "Recognition that an injunction is a drastic remedy, not a mild prophylactic, . . . has led courts to require not only positive proof of a realistic likelihood that past wrongdoing will recur, . . . but also a demonstration that recurring violations are a relatively imminent threat." Ingoldsby, 1990 WL 120731, at *2 (internal citations omitted); see also SEC v. John Adams Trust Corp., 697 F. Supp. 573, 577 (D. Mass. 1988). Compare, e.g., SEC v. Bilzerian, 29 F.3d 689, 695 (D.C. Cir. 1994) (upholding injunction where "there is no genuine issue of material fact regarding whether Bilzerian's securities violations were part of a pattern or whether they were flagrant and deliberate in nature; they unquestionably were . . . . Courts have often found that the combination of these two factors justifies injunctive relief prohibiting future violations of the securities laws.").

In the present case, I find that the SEC has not carried its burden of proving that recidivism is particularly likely as to either defendant. Accordingly, I decline to issue an injunction.

II. DISGORGEMENT

Although disgorgement may not be a mandatory remedy under the securities laws, it is an appropriate one here. The only question remains as to the amount and nature of the defendants' respective liabilities. Although the First Circuit has not ruled explicitly on the issue of joint and several liability for tipper and tippee, other circuits have ruled that such liability is available regardless of whether the tippee was actually found liable himself. For example, as one court explained,

> A tippee's gains are attributable to the tipper, regardless whether benefit accrues to the tipper. The value of the rule in preventing misuse of insider information would be virtually nullified if those in possession of such information, although prohibited from trading in their own accounts, were free to use the inside information on trades to benefit their families, friends, and business associates.

SEC v. Yun, 148 F. Supp. 2d 1287, 1292 (M.D. Fla. 2001) (quoting SEC v. Warde, 151 F.3d 42, 49 (2d Cir. 1998)). The Second and Ninth Circuits have agreed. See SEC v. Clark, 915 F.2d 439, 454 (9th Cir. 1990); SEC v. Texas Gulf Sulphur Co., 446 F.2d 1301, 1307 (2d Cir. 1971). See also SEC v. Hughes Capital Corp., 124 F.3d 449, 455 (3d Cir. 1997) (noting that courts have broad discretion to impose joint and several liability for disgorgement of profits).

Thus, the fact that Mr. Scharn was not found liable for insider trading does not mean that his $33,100 in profits are to be excluded from the disgorgement calculus here. However, as to the profits allegedly realized by Hubert Scoble, Jr. ($3,310), and Brian Kelly ($2,061), my analysis is different. Unlike with Scharn, we do not have a jury finding that they in fact traded at all; I have only the SEC's word for it. Although I mean in no way to cast aspersions on the SEC, I decline to hold defendants Sargent and Shepard responsible for disgorgement of profits whose existence was never established before me.

Accordingly, I hereby **ORDER** defendants Sargent and Shepard jointly and severally liable for the disgorgement of $174,868: Sargent's gains, as assessed by the SEC, in the amount of $141,768, plus Scharn's gains, as assessed by the SEC, in the amount of $33,100.

III. PREJUDGMENT INTEREST

As the First Circuit has observed, "[a]n award of prejudgment interest in a case involving violations of securities laws rests within the equitable discretion of the district court to be exercised according to considerations of fairness." Riseman v. Orion Research, Inc., 749 F.2d 915, 921 (1st Cir. 1984); see also Ingoldsby, 1990 WL 120731, at *6. Among the

factors to be considered are "the willfulness of the insider's violation, the type and degree of the insider's inadvertence, the position of the insider in the corporation, the length of time between the purchase and the repayment, and other circumstances of the case." Riseman, 749 F.2d at 921 (citing Whittaker v. Whittaker Corp., 639 F.2d 516, 533 (9th Cir.), cert. denied, 454 U.S. 1031 (1981)); see also SEC v. First Jersey Securities, Inc., 101 F.3d 1450, 1476 (2d Cir. 1996) (explaining that courts consider (1) the need to fully compensate the wronged party for actual damages suffered, (2) considerations of fairness and the relative equities of the award, (3) the remedial purpose of the statute involved, and/or (4) such other general principles as deemed relevant by the court).

In light of the nature of the violations and the balance of the equities here, I decline to hold defendants Sargent and Shepard liable for prejudgment interest on the amounts in question.

IV. CIVIL PENALTIES

Both the award of a civil penalty and the amount of that penalty are also matters within the court's discretion. Courts have considered factors including: (1) the egregiousness of the violations; (2) the isolated or repeated nature of the

violations; (3) the degree of scienter involved; (4) the defendant's financial worth; (5) whether the defendant concealed his trading; (6) what other penalties arise as the result of the defendant's conduct; and (7) whether the defendant is employed in the securities industry. See Yun, 148 F. Supp. 2d at 1295; SEC v. Falbo, 14 F. Supp. 2d 508, 528-29 (S.D.N.Y. 1998).

Viewed in terms of these factors, I do not believe that civil penalties are warranted as to either defendant, and accordingly I decline to impose them in this case.

V. CONCLUSION

Accordingly, judgment is hereby **ENTERED** against defendants Sargent and Shepard in the amount of $174,868, for which sum they are jointly and severally liable.

SO ORDERED.

Dated: March 27, 2002

NANCY GERTNER, U.S.D.J.