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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 19-1243

[Filed November 8, 2019]

SECURITIES AND EXCHANGE COMMISSION, *Plaintiff-Appellee*,	)
v.	)
GARY S. WILLIKY, *Defendant-Appellant.*	)

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 1:15-cv-00357-WTL-MJD —
William T. Lawrence, *Judge.*

SUBMITTED SEPTEMBER 16, 2019* —
DECIDED NOVEMBER 8, 2019

* We have agreed to decide this case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. Fed. R. App. P. 34(a)(2)(C).

Before BAUER, BRENNAN, and ST. EVE, *Circuit Judges*.

BAUER, *Circuit Judge*. Gary Williky appeals a judgment in favor of the Securities and Exchange Commission ("SEC") that followed a bifurcated settlement agreement regarding Williky's fraudulent conduct while working for the Indiana-based company Imperial Petroleum, Inc. ("Imperial"). This court addressed the details of Imperial's fraudulent scheme in *United States v. Wilson*, 879 F.3d 795 (7th Cir. 2018). Imperial fraudulently purchased finished biodiesel and resold it while claiming government incentives and tax-credits available to companies producing biodiesel from raw feedstock. Jeffery Wilson, Imperial's ex-CEO, hired Williky to artificially inflate Imperial's stock through a series of "wash and match trades" and "scalping" emails. In the 1990s, Williky similarly engaged in a pattern of "wash and match trades" for another company led by Wilson. As part of Imperial, Williky acquired millions of shares of its stock but failed to lawfully report his ownership levels when his shares surpassed five percent. At issue in this appeal is Williky's conduct once the Imperial fraud unraveled. By July 2011, Williky knew Imperial misrepresented the source of its biodiesel to investors and, by November, knew the complete extent of Imperial's fraud. Williky sold off the entirety of his Imperial shares by February 27, 2012, and avoided a loss of $798,217.

The SEC sued to permanently enjoin Williky from violating federal securities law, to enjoin Williky from acting as an officer or director of a public company, and

to disgorge his financial gains. The SEC further sought to impose financial penalties, including a civil penalty for Williky's insider trading. Before Williky faced his deposition, he entered into a bifurcated settlement with the SEC, conceding his involvement in the fraudulent scheme and agreeing that the district court would determine the financial remedies to be assessed. The SEC requested the statutory maximum civil penalty of $2,394,651 for insider trading, calculated as three times Williky's avoided losses. Williky objected, arguing that the SEC's proposed judgment ignored his cooperation with various governmental agencies investigating Imperial's fraud. The district court denied the request for the maximum civil penalty as excessive and entered a judgment of $1,596,434, equal to two times the avoided losses. On appeal, Williky argues that the judgment still ignores his cooperation as a whistleblower and is thus an abuse of discretion. We find that the district court adequately assessed the value of Williky's cooperation and affirm.

I. BACKGROUND

In 2009, Gary Williky entered into confidential negotiations with Imperial's ex-CEO Jeffery Wilson and accepted a financial public relations role with Imperial. In reality, Wilson hired Williky to artificially inflate Imperial's stock through illegal market manipulation. This was not the first time Wilson and Williky engaged in securities fraud. Williky's long-standing relationship with Wilson dated back to the 1990s. Williky settled a lawsuit with the SEC for illegal "wash and match trades" that he committed for another company led by Wilson. *SEC v. Williky, et al.*,

94-cv-2088 (N.D. Tex.). Although Williky's involvement in the Imperial scheme is not directly at issue in this appeal, we recount some of his fraudulent activities as context for Williky's insider trading.

Williky first sought to artificially raise Imperial's stock price by increasing its trading volume through "wash and match trades." Wash trades refer to trades that occur without a change in beneficial ownership. Match trades, or "matched orders," are trades in which orders are entered with the knowledge that substantially equivalent orders will be made by the same or different person. These fraudulent tactics create a false perception of market activity that does not reflect the true supply and demand for the securities. Inflating the volume of trades attracts additional market participants and thereby artificially increases stock price. Williky used multiple brokerage accounts in his and his wife's names to conduct a series of at least twenty "wash and match trades" from March 4, 2010, to January 11, 2012. On many days within this time period, Williky was responsible for between 50% to 100% of Imperial's trading volume.

Second, Williky personally sent out "scalping" emails touting the potential value of Imperial's stock without disclosing his own relationship to Imperial or his intention to contemporaneously sell Imperial stock. Williky sent these emails out to more than 200 recipients. In the days following the emails, Williky sold Imperial stock and earned profits of over $60,000. During this time, Williky acquired millions of shares and at many points owned more than five percent of

the company's stock without disclosing his ownership levels as required by federal securities law.

By July 10, 2011, Williky learned that Imperial was lying to investors about its biodiesel production. Specifically, a confidential memo informed Williky that Imperial was using partially processed oil or fat to make biodiesel. This information directly contradicted representations Williky had previously made that the fuel came from raw feedstock. Moreover, a hedge fund informed Imperial that it would not invest since the production of biodiesel from such materials failed to qualify for the government incentives that Imperial claimed. By November 18, 2011, Williky learned the complete extent of Imperial's fraud after the new Imperial CEO, John Ryer, secretly recorded a conversation with the owner of Imperial's main suppler, Joe Furando. Ryer told Williky that Imperial was purchasing finished fuel from Furando's company and later provided Williky with the tape. While in possession of all this confidential information, Williky sold off the entirety of his shares by February 27, 2012, avoiding a loss of $798,217.

As he sold his shares, Williky contacted federal authorities with the hopes of becoming a whistleblower. However, though Williky believes he provided the critical information that toppled Imperial, the SEC presented evidence that it and other federal agencies believed the Imperial scheme was already unraveling. Williky anonymously called the Environmental Protection Agency on December 27, 2011, to discuss suspected wrongdoing without naming Imperial. Although Williky claims this led to the investigation of

Imperial, the SEC began investigating Imperial as early as November 2011 and interviewed its first witness on January 23, 2012, weeks before Williky first reported Imperial's violations on March 13, 2012. Williky also contends that on this day he provided authorities with the confidential tape recording between Ryer and Furando, which he argues was the "smoking gun" that led to the indictment and conviction of several co-conspirators in the Imperial scheme. Furthermore, Williky says that as part of his productions to the SEC, he provided 36 documents that were ultimately used in Wilson's trial.

On March 2, 2015, the SEC charged Williky with violating federal securities laws through market manipulation and insider trading. On August 10, 2015, the district court *sua sponte* administratively closed the case pending the resolution of the criminal actions related to the Imperial scheme. The case was reopened on January 19, 2017, but Williky did not file his answer to the complaint until February 21, 2017, only after the SEC had moved for a clerk's entry of default. Once discovery commenced, Williky objected to the deposition of himself and his wife because of scheduling issues that the district court found had "absolutely no basis." Finally, instead of facing his deposition, Williky entered into a bifurcated settlement with the SEC in which Williky would accept the SEC's proposed injunctions, and the district court would determine the financial remedies to be assessed against Williky based on the facts of the complaint.

The SEC thereafter filed its motion for financial remedies, requesting the disgorgement of $2,101,334 in

ill-gotten gains plus $427,931 in prejudgment interest, along with a civil penalty for insider trading of at least $2,394,651. Williky objected to the request for a civil penalty at the statutory maximum of three times his avoided losses on the basis that it "completely ignore[d] his cooperation with multiple governmental agencies as well as his whistleblowing activities." The SEC argued Williky's claims of cooperation were exaggerated, but even if true, would not warrant a substantial reduction in the civil penalty. The district court found that the request for the maximum penalty was "excessive" and instead decided that a "penalty of $1,596,434, equal to two times the amount of disgorgement, is appropriate." The district court explained this was not the first time Williky had to settle a securities fraud dispute and that Williky had not taken responsibility for his actions by claiming he only committed insider trading because he was stressed and not thinking clearly. Finally, the district court found Williky's cooperation was "of limited value." Williky then filed a motion for reconsideration arguing the court did not accurately determine the extent of his cooperation. The district court denied the motion, having found "no misapplication of law" and characterizing Williky's arguments as a "disagreement with the conclusion and a bare assertion that the conclusion must have been due to a mistaken reliance on the evidence."

II. DISCUSSION

Williky appeals the civil penalty of $1,596,434 for insider trading and asks this court to order a penalty of no more than $798,217. Williky argues that the trial court incorrectly assessed the value of his cooperation

with federal authorities and ignored the fact he entered into a bifurcated settlement, which further proved his cooperation.

Along with other circuits, we review the district court's decision to impose a civil penalty for abuse of discretion. *SEC v. Happ*, 393 F.3d 12, 32 (1st Cir. 2004); *SEC v. Rajaratnam*, 918 F.3d 36, 41 (2d Cir. 2019); *SEC v. Life Partners Holdings, Inc.*, 854 F.3d 765, 781 (5th Cir. 2017). A court abuses its discretion only if "the record contains no evidence upon which the court could have rationally based its decision; the decision is based on an erroneous conclusion of law; the decision is based on clearly erroneous factual findings; or the decision clearly appears arbitrary." *United States v. Z Investment Properties, LLC*, 921 F.3d 696, 698 (7th Cir. 2019) (numerical ordering omitted).

Both parties concur that in determining a civil penalty for violations of federal securities law, the court should generally consider factors such as: "the seriousness of the violation; the defendant's scienter; the repeated nature of the violations; whether the defendant has admitted wrongdoing; the losses or risk of losses caused by the conduct; any cooperation provided to enforcement authorities; and ability to pay." *SEC v. Zenergy Int'l, Inc.,* 2016 WL 5080423, at *16 (N.D. Ill. Sept. 20, 2016) (numerical ordering omitted); *see also SEC v. Custable*, 1996 WL 745372, at *2–5 (N.D. Ill. Dec. 26, 1996), *aff'd*, 132 F.3d 36 (7th Cir. 1997). These factors are certainly relevant, but we should also point out that the civil penalty for insider trading comes from its own independent statutory provision, the Insider Trading Sanctions Act. 15 U.S.C.

§ 78u-1(a)(2). Whereas typical civil penalties follow a three-tier system that are assessed per violation or are otherwise limited to the gross amount of ill-gotten gain, the Insider Trading Sanctions Act calculates the penalty as a multiple of the losses avoided due to insider trading. It is therefore clear that the overriding concern of the civil penalty against insider trading is to "effect general deterrence and to make insider trading a money-losing proposition." *Rajaratnam*, 918 F.3d at 41.

In this light, Williky's focus on the nobility of his whistleblowing endeavors misses the mark since the civil penalty's main design is to deter insider trading, not to encourage whistleblowing and cooperation after the fact. Thus, absent any evidence of extraordinary cooperation, the most pertinent facts on record are that Williky is a recidivist federal securities law offender who attempted to avoid responsibility in his district court proceedings and, on appeal, still fails to admit any wrongdoing related to insider trading. Given all of the facts and circumstances, the district court properly determined that a civil penalty was necessary to serve as an effective deterrent. Even when considering the factors the parties proposed, Williky has only addressed the cooperation he provided to federal authorities and made assertions about his innocence that are precluded by the terms of the bifurcated settlement stating he would accept the complaint as true.

The district court also properly weighed the value of Williky's cooperation. Williky argues that the award of two times the disgorgement amount "ignored Williky's

cooperation with multiple governmental agencies as well as his whistleblowing activities." Rather, the district court explicitly stated that his cooperation was of limited value. Williky further contends that the tape and evidence he provided were directly used in the indictment, prosecution and conviction of the criminal defendants in the Imperial fraud. The SEC argues that Imperial was under investigation before Williky's tip, that Williky never admitted his wrongdoing in his interviews with federal authorities, and that he was not an essential part of the criminal prosecution since he was not called to testify in Wilson's criminal trial. The SEC adds that all the documents that Williky provided were only given in response to compulsory subpoenas. Here, the district court assessed the value of Williky's cooperation and determined his overall conduct did not warrant the maximum statutory penalty. We do not agree that the district court abused its discretion in deciding to impose a civil penalty of two times Williky's avoided losses.

Finally, Williky also argues that he is entitled to a reduced penalty because he entered into a bifurcated settlement with the SEC. Williky seems to view this as another example of his cooperation and claims that the SEC consequentially spent little to no funds to prosecute him. Williky then cites a string of district court opinions to assert that courts assessing penalties in bifurcated settlements either do not assert a penalty or assert a penalty equaling the ill-gotten gain. Not only are all of these cases about the general statute providing for civil penalties as opposed to the Insider Trading Sanctions Act, but not one of the cited cases discusses the bifurcated settlement as a basis for

determining the civil penalty. Regardless, even if entering into a bifurcated settlement may be a means of cooperation that merits consideration, Williky has been notably uncooperative throughout the course of litigation, from failing to answer the complaint in a timely manner to attempting to object to his deposition on flimsy grounds. The litigation has been pending for multiple years and the SEC has undoubtedly spent significant resources in litigating the matter against Williky. Allowing Williky to flagrantly commit insider trading and then settle to avoid civil penalties would create a perversive incentive that undermines the purpose of the statute.

III. CONCLUSION

We conclude that the district court did not abuse its discretion in deciding to impose a civil penalty of $1,596,434 on Williky. The court adequately assessed the extent of Williky's cooperation and whistleblowing activities when it determined to set a civil penalty equal to two times the amount of the losses he avoided. The judgment of the district court is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Cause No. 1:15-cv-0357-WTL-MJD

[Filed January 9, 2019]

U.S. SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

GARY S. WILLIKY,

Defendant.

ENTRY ON MOTION FOR RECONSIDERATION

This cause is before the Court on the Defendant's Motion for Reconsideration and the Plaintiff's response thereto (Dkt. Nos. 64 and 66). The Defendant did not file a reply in support of the motion, and the time for doing so has expired. The Court, being duly advised, **DENIES** the Defendant's motion for the reasons set forth below.

I. PROCEDURAL BACKGROUND

On August 3, 2018, pursuant to the bifurcated settlement agreement, Dkt. No. 34, and upon a determination of the Plaintiff's motion for penalties, Dkt. No. 48, the Court ordered that the Defendant pay (1) disgorgement of $798,217 for insider trading, along with $159,110.13 in prejudgment interest; (2) disgorgement of $65,617 for scalping emails, along with $14,866.97 in prejudgment interest; (3) a civil penalty of $150,000 for the non-insider trading counts; and (4) a civil penalty of $1,596,434 for insider trading. On August 30, 2018, the Defendant moved for reconsideration of the Court's decision to impose a civil penalty of $1,596,434 for insider trading, an amount equal to two times the ill-gotten gains.

II. LEGAL STANDARD[1]

The purpose of a motion to alter or amend judgment under Federal Rule of Civil Procedure 59(e) is to have the Court reconsider matters "properly encompassed in a decision on the merits." *Osterneck v. Ernst and Whinney*, 489 U.S. 169, 174 (1988). To receive relief under Rule 59(e), the moving party "must clearly establish (1) that the court committed a manifest error of law or fact, or (2) that newly discovered evidence precluded entry of judgment." *Edgewood Manor Apartment Homes, LLC v. RSUI Indem. Co.*, 733 F.3d

[1] Although the Plaintiff cites both Federal Rules of Civil Procedure 59(e) and 60(b) in his motion, because the Plaintiff filed his motion within twenty-eight days of the entry of judgment, the Court considers the Plaintiff's motion pursuant to Federal Rule of Civil Procedure 59(e).

761, 770 (7th Cir. 2013). A "manifest error" means "wholesale disregard, misapplication, or failure to recognize controlling precedent." *Oto v. Metropolitan Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000). Relief through a Rule 59(e) motion for reconsideration is an "extraordinary remed[y] reserved for the exceptional case." *Foster v. DeLuca*, 545 F.3d 582, 584 (7th Cir. 2008).

III. DISCUSSION

The Defendant makes several arguments in support of its motion for reconsideration. The Court will address each of these arguments in turn.

First, the Defendant argues "that the Court's August 3, 2018 order was a result of mistake . . . in that the Court was not presented with a clear understanding of the extent of [the Defendant's] cooperation . . . ." Dkt. No. 64 at 5. Specifically, the Defendant argues that "he was not able to respond to the Declarations of Victoria Madtson or Scott Hlavecek, which were attached as Exhibits 5 and 12 to the [Plaintiff's] Reply . . . ." *Id.* Notably, however, the Defendant did not seek leave to file a sur-reply to rebut the Plaintiff's claims.

However, even considering the substance of the Defendant's arguments, the Defendant's arguments fail. As the Plaintiff notes, the Defendant "presents no new, let alone newly discovered, evidence." Dkt. No. 66 at 4. Instead, the Defendant points to previously submitted evidence and argues that to the extent Court relied on such evidence, it did so mistakenly and therefore reconsideration is required. The Defendant,

however, fails to point to any part of the Court's opinion which suggests that any error was made. The Defendant's argument amounts to a disagreement with the conclusion and a bare assertion that the conclusion must have been due to a mistaken reliance on the evidence. Without more, the Court is not convinced that reconsideration of its decision is appropriate.

Second, the Defendant cites the Plaintiff's reliance on *S.E.C. v. Alanar, Inc.*, No. 1:05-cv-1102, 2008 WL 2410422 (S.D. Ind. May 6, 2008), in its reply brief as somehow indicative of an error on the part of the Court requiring reconsideration. Again, the Defendant did not seek leave to file a sur-reply. Nevertheless, the Defendant seems to argue that because his case is distinguishable from *Alanar*, his penalty should be reduced. The Defendant, however, fails to point to any misapplication of *Alanar* by the Court which would require reconsideration. Indeed, *Alanar* is not even cited in the Court's August 3, 2018, entry. Finding no misapplication of law, the Court rejects the Defendant's argument.

The remainder of the Defendant's brief is spent describing evidence provided by the Defendant to the government and its alleged value. Nowhere, however, does the Defendant present new evidence or argue that the Court misconstrued the evidence. Instead, the Defendant's contention is that because the Court did not consider the Defendant's cooperation in a manner that led to a lesser penalty, it was erroneous. The Court, however, rejects this contention, and notes that it did consider the Defendant's cooperation. *See* Dkt. No. 62 at 16 ("While [the Defendant] argues that his

penalty should be reduced as result of his cooperation, his cooperation was of limited value.") (internal citations omitted). Accordingly, the Court **DENIES** the Defendant's motion for reconsideration.

IV. CONCLUSION

For the reasons set forth above, the Defendant's motion for reconsideration, Dkt. No. 64, is **DENIED**.

SO ORDERED: 1/9/2019

/s/William T. Lawrence
Hon. William T. Lawrence, Senior Judge
United States District Court
Southern District of Indiana

Copies to all counsel of record via electronic notification

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Cause No. 1:15-cv-0357-WTL-MJD

[Filed August 3, 2018]

U.S. SECURITIES AND EXCHANGE COMMISSION,	)
Plaintiff,	)
vs.	)
GARY S. WILLIKY,	)
Defendant.	)

ENTRY ON PENDING MOTIONS

This cause is before the Court on the Securities and Exchange Commission's ("SEC") Motion for Entry of Judgment, by Consent, of Permanent Injunction and Other Relief, Dkt. No. 34, and Motion for Injunctions, Disgorgement, Civil Penalties, and Entry of Final Judgment, Dkt. No. 38. The motions are fully briefed and the Court, being duly advised, grants the relief set forth below.

I. Facts

The parties have entered into a bifurcated settlement agreement in which the parties agree that (1) Gary S. Williky shall be enjoined from violating the provisions of the federal securities laws at issue in the Complaint; (2) Williky shall be enjoined from serving as an officer or director of a public company; and (3) the Court shall determine the financial penalties to be assessed against Williky via motion. Dkt. No. 34-2 at 1-2. The SEC seeks to disgorge Williky of profits and prejudgment interest and to impose civil penalties against Williky. Pursuant to the consent order, Williky is precluded from arguing that he did not violate the federal securities laws as alleged in the Complaint, and the Court is to accept the allegations in the Complaint as true. Dkt. No. 34-2 at 2-3.

A. Stipulated Wrongdoing

As noted, the parties have stipulated that the Court is to accept the allegations in the Complaint as true. Dkt. No. 34 at 2. These allegations, in relevant part, are summarized below.

Gary S. Williky is a 55-year-old resident of Colleyville, Texas, who was an investor-relations consultant for the Evansville, Indiana-based public company Imperial Petroleum, Inc., from February 2010 through December 2011.

1. Williky's Market Manipulation

While working for Imperial, Williky attempted to increase Imperial's trading volume, which conveys to investors liquidity of — and public demand for — a

stock. Between 2009 and 2012, Williky traded Imperial stock in multiple brokerage accounts. At least three of these accounts were in his wife's name, but Williky controlled all trading in his own accounts and in his wife's accounts. From March 4, 2010, through January 11, 2012, Williky used at least five of these accounts to conduct a series of at least twenty wash and match trades.[1]

Williky's trading made up a substantial percentage of Imperial's trading volume between at least March 4, 2010, and January 11, 2012. Williky's trades resulted in increased trade volume and a higher stock price. On many days, to increase volume and stock price, Williky both bought and sold Imperial shares. On more than seventy days within that time period, Williky's trading was responsible for more than fifty percent of the trading volume. At least five of his wash and match trades were made on such days. On more than fifteen days, Williky was responsible for one hundred percent of Imperial's trading volume.

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[1] Wash trades, also called "wash sales," are trades in which the beneficial ownership of the securities does not change. Match trades, also called "matched orders" are trades in which orders are entered with the knowledge that orders of substantially the same size, at substantially the same time and price, have been or will be entered by the same or different persons. Such transactions operate as a fraud or deceit on the market because the trades, along with their contrived prices, are reported to the market and thereby create a false appearance of market activity that does not reflect the true supply and demand for the securities at issue. The inflated volume is designed to attract additional market participants and thereby artificially increase the stock price.

In conducting his manipulative wash and match trades, Williky acted with scienter. He: (1) controlled trading out of each of the relevant accounts, (2) placed the orders for the trades and (3) knew — or recklessly disregarded — that the trades he directed involved no substantive change of beneficial ownership and/or involved orders of substantially the same size and same price, placed at substantially the same time.

2. Williky's Scalping Emails

While working for Imperial and personally trading Imperial stock, Williky hired public relations firms to publicize Imperial and personally sent out emails to more than two hundred recipients, including friends, family members, and industry connections. In his emails, Williky promoted Imperial stock without disclosing that he intended to sell his Imperial shares.

For example, on October 5, 2010, a company Williky hired sent out a news release email reporting that Imperial's projected revenue for 2011 was more than $50 million, that Imperial was net profitable, and that the stock price had recently tripled. Williky then forwarded the message to his personal connections without disclosing that he was employed by Imperial or that he intended to sell Imperial shares.

Similarly, on December 6, 2010, Williky emailed another message promoting Imperial's stock. He claimed that the company was undervalued by more than four hundred percent and that the stock price, then trading around $0.55, should be in the range of $2.00 to $2.50. Williky again failed to disclose his

professional relationship with Imperial or the fact that he intended to sell Imperial shares.

Finally, Williky sent another mass email promoting Imperial stock on June 14, 2011. Williky told recipients that the stock had risen almost three hundred percent, but he expected that it still had "a long way to go." He advised "anyone who has not considered becoming a shareholder do so before the stock price is out of current levels of $1.20." Again, Williky failed to disclose his relationship with Imperial and the fact that he intended to sell Imperial shares.

In the days immediately following each of these emails — in which he told his family, friends and business connections that Imperial was a great buy — Williky was a net seller of Imperial stock and earned profits of more than $60,000.

Williky acted with scienter: he knew when he sent the promotional emails that he had an undisclosed conflict of interest in that he owned — and intended to sell — Imperial shares. This omission was material. A reasonable investor would have considered it important that Williky had a material conflict of interest because at the same time that he was recommending that investors purchase Imperial shares, Williky intended to sell his stock.

3. Williky's Ownership Levels

Between 2009 and February 2012, while working for Imperial and trading its stock, Williky acquired millions of shares of Imperial stock. At multiple points throughout this time period, he owned more than five percent of the company's outstanding stock.

In one example, at the end of August 2010, Williky owned more than 1.67 million shares of Imperial stock. At the time, Imperial had 21,364,813 shares outstanding. Thus, Williky owned more than 7.8 percent of Imperial's outstanding stock. He maintained this approximate ownership level until at least October 26, 2010.

Williky was required to file, but never filed, a beneficial ownership report form with the Commission disclosing that he owned more than five percent of the company's stock.

4. Williky's Insider Trading

a. The Imperial Fraud

Imperial falsely claimed that it produced more than 28 million gallons of biodiesel from at least May 2010 through at least January 2012. In reality, Imperial used middlemen to buy finished biodiesel and created fake invoices falsely describing the biodiesel as "feedstock."

By falsely claiming it had produced the biodiesel from raw materials, Imperial was able to illegally claim government incentives and tax credits for biodiesel production and sell the biodiesel for substantially more than its acquisition price. Specifically, Imperial was able to sell the fuel for more than $100 million, realizing gross profits of more than $50 million.

This illegal and unsustainable business model was hidden from Imperial's investors and prospective investors. Instead, in periodic reports filed with the Commission and provided to shareholders, and in

separate statements made to prospective investors, Imperial misrepresented the fundamental nature of its business model by falsely stating that it produced biodiesel from raw feedstock. Imperial failed to disclose that its business was almost entirely illegal and unsustainable because the substantial government incentives and tax credits it attached to its biodiesel were available only to those who manufactured biodiesel from raw materials.

By at least July 10, 2011, Williky knew that Imperial was not telling the investing public the truth about its operations. By at least that date, Williky was told that Imperial was using "off-spec" fuel in its manufacturing process. This was a nonpublic cover story Imperial circulated internally — and to select third parties subject to confidentiality agreements — to conceal the true extent of the Imperial fraud. By August 2011, Williky explicitly was told that manufacturing biodiesel from "off-spec" fuel was contrary to representations Imperial had made to investors. By November 2011, Williky knew that Imperial's purported biodiesel operations were a complete sham and that Imperial was lying to the investing public.

Williky took advantage of this material, nonpublic information by selling Imperial shares throughout the period between July 10, 2011, and February 27, 2012, when he sold his last shares. During this period, by selling his Imperial shares, Williky avoided total losses of approximately $800,000.

b. Williky's Knowledge of the "Off-Spec" Cover Story

In June 2011, Imperial's then-CEO, Jeff Wilson, and Williky began promoting Imperial to potential investors during multiple "Road Show" conference calls set up by the investment bank hired as an exclusive placement agent for a proposed offering of Imperial securities (the "Investment Bank"). During the Road Show calls, Wilson repeated false claims that Imperial produced biodiesel from raw feedstock, primarily premium white grease (i.e., chicken fat). But by July 10, 2011, Williky knew that Imperial's representations to investors were false. By that date, Imperial executives had informed Williky that Imperial was producing biodiesel from "off-spec" materials as opposed to raw feedstock.

Imperial's "off-spec" cover story was designed to prevent discovery of the true nature of its biodiesel operations. Imperial executives informed Williky that they were producing biodiesel from fuel that was not up to standards and required additional processing before it could be sold as biodiesel. In fact, Imperial did not use "off-spec" materials as feedstock: it purchased finished biodiesel, made no changes to it, and fraudulently certified that it produced the biodiesel to attach tax credits and government incentives.

Although it was a lie, the "off-spec" cover story was revealing. In hearing this story from Imperial executives, Williky was privy to the nonpublic — and true — information that Imperial was not producing its biodiesel from raw feedstock as it claimed in its public filings and representations to investors and potential investors. Notably, Williky also knew that the one

potential investor who heard Imperial's purported use of "off-spec" materials chose not to invest in Imperial.

In one of the Road Show calls, the Investment Bank introduced Imperial to a potential hedge fund investor. In mid-July, after entering into a nondisclosure agreement, the hedge fund agreed to provide Imperial up to $27.5 million in exchange for notes and Imperial stock, contingent on the satisfactory completion of its due diligence review. After the hedge fund tentatively agreed to invest, it began asking questions about Imperial's feedstock vendors and the sustainability of its profit margins.

On August 1, 2011, Wilson informed the hedge fund that Imperial used "off-spec" materials to produce biodiesel and that in doing so Imperial achieved favorable margins. An Investment Bank official working with Imperial expressed concern about this revelation. After he learned of Wilson's statement, the Investment Bank official had a telephone conversation with Wilson and Williky. In that conversation, Wilson acknowledged that very little of Imperial's revenue came from processing raw feedstock, but he falsely stated that most of the company's revenues came from its use of "off-spec" materials.

The Investment Bank official further told Wilson and Williky that none of Imperial's Commission filings mentioned the use of "off-spec" materials and asked whether they thought that Imperial's Forms 10-K and 10-Q should be updated so that investors were not misled. Wilson agreed that Imperial's filings should be amended. Imperial never amended any of its public filings to disclose that it was using "off-spec" materials.

By August 5, 2011, the hedge fund informed Imperial that any biodiesel manufactured from "off-spec" materials would not qualify for government incentives and therefore Imperial's sale of such fuel with attached incentives was illegal. That same day, Wilson relayed these concerns to Williky by email and reiterated the hedge fund's conclusion that if Imperial was in fact using "off-spec" materials, it could not attach the valuable government incentives to its biodiesel, because they were available only if Imperial was producing biodiesel from raw feedstock. By August 9, 2011, the hedge fund informed Imperial that because Imperial was not manufacturing biodiesel from raw materials, it would not invest in Imperial.

Imperial's disclosure in August 2011 to the prospective hedge fund investor regarding its use of "off-spec" fuel reflected material information never disseminated to the investing public: Imperial was not manufacturing biodiesel from raw materials.

While in possession of — and on the basis of — the nonpublic information that Imperial did not exclusively manufacture biodiesel from raw feedstock, Williky was a significant net seller of Imperial stock and avoided significant losses. From July 10, 2011 until November 18, 2011, Williky avoided losses of approximately $495,365 by trading in Imperial stock.

c. Williky's Knowledge of the Imperial Fraud

After August 2011, Williky gained even more material, nonpublic knowledge regarding Imperial's fraudulent business model and yet continued to be a net seller in Imperial stock. Aside from occasional

purchases of Imperial shares in the market, Williky spent the next several months unloading his shares.

In early November 2011, Wilson resigned as Imperial's president and Chairman of the Board. Imperial named Williky's long-time friend John Ryer to succeed Wilson. After Ryer was named president, Joe Furando, the owner of Imperial's main supplier, demanded an in-person meeting at Furando's offices in New Jersey. Williky advised Ryer to secretly record his conversation with Furando.

On November 17, 2011, Ryer met with Furando in New Jersey and recorded their conversation. Ryer's recording captured Furando explaining Imperial's true, illegal business model. Furando explained that Imperial purchased finished fuel, as opposed to feedstock or "off-spec" materials, from Furando's company, pretended to manufacture that fuel so that it could claim government incentives, and then resold the fuel unchanged. The recording established that Imperial's true business model was far different from what it represented to the public and investors.

On or before November 18, 2011, Ryer called Williky and told him that Furando revealed that Imperial was cheating by purchasing finished fuel, not feedstock, from Furando's company. The following week, Ryer provided Williky with the secret recording Ryer had made.

The information Williky learned from Ryer and Ryer's recording about Imperial was not disclosed to the general public before or after the date of the recording. At this time, Williky knew that Imperial was

not only lying to investors about manufacturing fuel from feedstock, but also that its entire biodiesel business was a fraud. From November 19, 2011, until February 27, 2012 — while in possession of, and on the basis of, that material nonpublic information — Williky took advantage, using that information to avoid losses of approximately $302,852 by selling Imperial stock.

5. Williky's Threat to Report Imperial to the SEC and the Environmental Protection Agency

In addition to trading Imperial stock for his personal accounts while in possession of secret information from Ryer's recording, Williky used that information to extort $1.24 million in cash and an additional 300,000 shares from Imperial in the form of additional compensation.

On November 30, 2011, Williky told Imperial's counsel that if Imperial did not pay him $1.3 million and issue him new Imperial shares and warrants, he would report the company to the SEC and EPA.

Williky's effort to profit from his knowledge of Imperial's fraud was successful. On December 2, 2011, Williky and Imperial entered into a Severance, Confidentiality and Nondisclosure Agreement providing that Imperial would pay Williky $1,237,500 and issue him 300,000 shares of common stock. In return, Williky would keep confidential information he had learned in the course of his relationship with the company and would not disparage Imperial.

After receiving the 300,000 shares of Imperial stock — but before the public learned of the Imperial fraud — Williky sold those shares.

II. Discussion

A. Disgorgement and Prejudgment Interest

The SEC seeks to disgorge Williky of his illegal profits. "Disgorgement is a form of restitution," *SEC v. Lipson*, 278 F.3d 656, 662-63 (7th Cir. 2002), which "extends only to the amount with interest by which the defendant profited from his wrongdoing," *SEC v. MacDonald*, 699 F.2d 47, 54 (7th Cir. 1983). The amount disgorged "need only be a reasonable approximation of profits causally connected to the wrongdoing" and "any risk of uncertainty in calculating disgorgement should fall on the defendant whose conduct created the uncertainty." *SEC v. Patel*, 61 F.3d 137, 139-40 (2d Cir. 1995) (internal quotation marks and alterations omitted). An award of prejudgment interest should accompany disgorgement because "'prejudgment interest is an element of complete compensation.'" *SEC v. Koenig*, 557 F.3d 736, 745 (7th Cir. 2009) (quoting *West Virginia v. United States*, 479 U.S. 305, 310 (1987)) (alteration removed). Williky does not contest the validity of the SEC's calculations, but argues that the SEC has overreached with regard to certain amounts sought.

1. Proceeds of Insider Trading

The SEC seeks to disgorge $798,217 in proceeds of Williky's insider trading. Dkt. No. 39 at 13. Williky categorizes these proceeds as "$495,365 for trading from July 10, 2011, to November 18, 2011 based on Williky's 'knowledge of the off-spec' fuel in the manufacturing process," and "$302,852 for trading from November 19, 2011 – February 27, 2012 after

Williky received the transcript of the Furando/Ryer conversation." Dkt. No. 48 at 20. Williky does not dispute the disgorgement of $302,852 based on his trading after receiving the transcript, but does dispute the disgorgement of $495,365 based on his knowledge of the "off-spec" cover story.

In disputing this disgorgement, Williky argues

> The test for materiality is that "there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *TSC Indus., Inc. v. Northway*, 426 U.S. 438 (1976). However, Imperial never stated to the public that it was producing biodiesel EXCLUSIVELY from "raw feedstock" as stated by the SEC. Imperial's statement in its Form 10-Q, publicly filed on October 14, 2011, stated that "E-biofuels uses waste grease and oils including premium white grease (chicken fat) as its primary feedstock for the production of its products." [Exh. 10] The memo provided to Williky on August 1, 2011 discussed processing partially processed oil or fat into biodiesel and certifies that the product imported by Caravan is a 'feedstock with a pathway that is approved and qualifies under RFS2." [See, Exh. 5] Thus, the public statement in the 10-Q and the "propriety information" in the "highly confidential" memorandum provided to Williky are not inconsistent, particularly to the lay person (which Williky certainly was). There is no

substantial likelihood that a reasonable shareholder would have considered whether e-Biofuels was creating its biofuel EXCLUSIVELY (which is what the SEC seems to read the work "primary" to mean) from "waste grease and oils" as disclosed on the 10-Q versus at least some of E-biofuels product being produced from imported materials that were a feedstock "with a pathway that is approved and qualifies under RFS2." Certainly, Williky did not think the work "primary" meant "exclusively" or that "waste grease and oils" was contrary to or inconsistent with the memo mention of "feedstock with a pathway that is approved and qualifies under RFS2" so long as the end product is the same—which Williky believed to be the case. [Williky Declaration, ¶ 6]

Further, from the date Williky was provided with multiple opinions from experts saying Imperial's product was viable, Williky firmly believed that the company and product were solid and sustaining. [Williky Declaration, ¶ 7] Williky's August 2011 review of the "Off Spec Methly Ester" memo (Exh. 5) and the Third-Party Engineering Review (Exh. 6) written by persons with engineering degrees from prestigious school who were clearly more knowledgeable in the biofuel field than Williky with his liberal arts degree in physical education from Arizona State left him with no concerns that Imperial's product was anything but a green energy gold mine for investors. [Williky Declaration, ¶ 7] He did not consider the

> difference to be material and his knowledge of the memo was never a factor in his decision to trade. [Williky Declaration, ¶ 7]
>
> Dkt. No. 48 at 20-22.

While it is unclear to the Court exactly what Williky means by the above, he appears to be claiming that he did not violate the federal securities law as alleged in the Complaint because the "off-spec" cover story was not material to investors. However, the parties have stipulated that Williky is precluded from arguing that he did not violate the federal securities law as alleged in the Complaint. Dkt. No. 34-2 at 2. The above seems to be an attempt to do so. Therefore, the Court finds it appropriate to order disgorgement of this amount as well, and **AWARDS $798,217** in disgorgement.

2. Proceeds of Scalping Emails

The SEC seeks to disgorge **$65,617** related to Williky's "scalping emails," which Williky earned by promoting Imperial stock while at the same time selling his own shares. Dkt. No. 39 at 14. Williky does not contest the disgorgement of these proceeds, Dkt. No. 48 at 26, and the Court **AWARDS $65,617** in disgorgement.

3. Extortion/Severance Payment

The SEC seeks to disgorge $1,237,500 from Williky for what it characterizes as an extortion payment and what Williky characterizes as a severance package. In response to the SEC's request, Williky argues he was not put on notice that the SEC would seek such an award and that "[t]here was no cause of action asserted

for 'extorting' and it is not part of the requested disgorgement in the complaint." Dkt. No. 48 at 26. In response to this argument, the SEC notes that the Complaint does provide the allegations which form the basis of this award and that therefore Williky was put on notice.

The Court agrees with Williky. While the SEC points to a section in the Complaint entitled "Williky's Threat to Report Imperial to the SEC and EPA" as a basis for this disgorgement, Williky correctly points out that there is no specific cause of action addressing the alleged extortion. *See* Dkt. No. 1. In its Complaint, the SEC included causes of action related to market manipulation (Counts I – II), insider trading (Counts III – V), scalping (Counts VI – VIII), and ownership disclosure (Count IX), but none related to extortion. Dkt. No. 1 at 16-22. In fact, the section to which the SEC points appears to have been included not to address extortion, but rather the insider trading of the shares received as part of the "severance." Dkt. No. at 15 ("After receiving the 300,000 shares of Imperial stock – but before the public learned of the Imperial fraud – Williky sold those shares . . . ."). Thus the factual allegation was not sufficient to put Williky on notice that the SEC would seek disgorgement of the $1,237,500,[2] as opposed to the gains made as a result of

[2] In its Complaint, the SEC did not specify what the disgorgement should cover, instead broadly requesting in its prayer for relief that the Court "[o]rder Defendant to disgorge all ill-gotten gains and illegally avoided losses, with prejudgment interest." Dkt. No. 1 at 23. It is reasonable to read this as referring to gains obtained through market manipulation, insider trading, and scalping, and not through the alleged extortion of his employer.

those trades. Accordingly, the SEC's request for such an award is **DENIED**.[3]

4. Prejudgment Interest

The SEC has provided calculations of the amount of prejudgment interest associated with each of the above categories of disgorgement. The parties have stipulated as to the interest rate to be used, Dkt. No. 34-2 at 2, and Williky does not contest the calculations provided. Instead, Williky argues that prejudgment interest should not be awarded for the time period during which the case was administratively closed.[4] Dkt. No. 48 at 29. However, Williky cites no authority for the proposition that prejudgment interest should not be awarded for a period in which a case is administratively closed, nor has the Court located any Seventh Circuit ruling stating such.[5] Denying prejudgment interest for the period during which the

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[3] Because the Court denies the SEC's request for disgorgement of the alleged extortion payment, it will likewise deny the SEC's request for associated prejudgment interest.

[4] On August 26, 2015, Judge Jane Magnus-Stinson, who was previously assigned to this case, stayed and administratively closed the action pending the resolution of three related criminal actions. Dkt. No 8. Pursuant to the stay order, the SEC moved to reopen the case on January 13, 2017, following the resolution of the criminal cases, and the Court granted the motion on January 19, 2017. Dkt Nos. 13 & 15.

[5] Williky also claims that the SEC requested that the case be administratively closed, Dkt. No. 48 at 29, however, Judge Magnus-Stinson's order does not reference such a request, nor is there any evidence of Williky opposing such an action, *see* Dkt. No. 8.

case was administratively closed would provide a benefit to Williky because "[g]iven inflation and the power of money to earn an economic return, a dollar received [between 2010 and 2012] is worth considerably more than a dollar in [2018]." *Koenig*¸ 557 F.3d at 745. Accordingly, the Court will **AWARD** prejudgment interest that includes the time during which the case was administratively closed: **$159,110.13** in connection with Williky's insider trading profits and **$14,866.97** in connection with the scalping emails.

B. Civil Penalties

The purpose of penalties is to punish and deter wrongdoers. *SEC v. Moran*, 944 F. Supp. 286, 296 (S.D.N.Y. 1996) (citing H.R. Rep. No. 101-616 (1990)). Penalties may appropriately accompany disgorgement because "[d]isgorgement is remedial and not punitive." *MacDonald*, 699 F.2d at 54. In determining penalties, "the court should consider the seriousness of the violations, the defendant's intent, whether the violations were isolated or recurring, whether the defendant has admitted wrongdoing, the losses or risks of losses caused by the conduct, and any cooperation the defendant provided to enforcement authorities." *SEC v. Church Extension of the Church of God*, 429 F. Supp. 2d. 1045, 1051 (S.D. Ind. 2005). Other sanctions the defendant faces and ability to pay may also be considered. *Id*. at 1051.

1. Non-Insider Trading Penalties

For the non-insider trading violations, the SEC seeks penalties of varying degrees. For the ownership disclosure cause of action, the SEC seeks first or second

tier penalties. Dkt. No. 39 at 15. First tier penalties can amount to the greater of $5,000 or the gross amount of pecuniary gain to the defendant as a result of the violation, while second tier penalties, which can be applied if the action "involved fraud, deceit, manipulation, or deliberate or reckless disregard for a regulatory requirement," can amount to the greater of $50,000 or the gross amount of the pecuniary gain. 15 U.S.C. § 78u(d)(3)(B)(i) & (ii). For the five remaining counts, addressing market manipulation and scalping emails, the SEC seeks third tier penalties, which may not exceed the greater of the $150,000 or the pecuniary gain to the defendant.[6] Dkt. No. 39 at 14-15. Such penalties are appropriate if the violation "involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; and such violation directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons." 15 U.S.C. § 78u(d)(3)(B)(iii).

For market manipulation, the Court will impose one maximum penalty of $150,000. Taking into account Williky's prior settlement with the SEC regarding match and wash trading and the injunction ordered against him, *see In re Gary Williky*, SEC Release No. 36986, 1996 SEC LEXIS 741 (Mar. 18, 1996),[7] the

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[6] As the SEC notes, while the statute reads $100,000, 17 C.F.R. § 201.1004 raised this amount to $150,000.

[7] The Court takes judicial notice of the prior SEC proceedings against Williky. *Ennenga v. Starns*, 677 F.3d 766, 773–74 (7th Cir. 2012) ("A court may take judicial notice of facts that are (1) not subject to reasonable dispute and (2) either generally known within the territorial jurisdiction or capable of accurate and ready

Court believes that the maximum amount of deterrence is required. Williky has repeatedly committed these serious violations and worked to create false impressions of the markets for certain stocks, putting investors at risk.

The Court, however, declines to impose penalties for Williky's scalping emails and failure to report beneficial ownership. Here the Court notes that it has already ordered the disgorgement of Williky's scalping profits, and that, in light of the penalties to be imposed for insider trading, further penalties for these actions would be unduly cumulative. In sum, for the non-insider trading counts, the Court will **AWARD** a penalty of **$150,000**.

2. Insider Trading Penalties

Pursuant to 15 U.S.C. § 78u-1(a)(2), the court may impose a penalty of up to "three times the profit gained or loss avoided" for insider trading. Therefore the SEC asks the Court to impose a penalty of three times the amount of disgorgement, $798,217, totaling $2,394,651. While the Court finds a tripling of disgorgement to be excessive in this case, the Court does find that a penalty of $1,596,434, equal to two times the amount of disgorgement, is appropriate. Again, the Court notes that this is not the first time Williky has had to settle a dispute with the SEC, and that Williky has not fully taken responsibility for his actions. Generally speaking, Williky has "consented to [the bifurcated settlement] without admitting . . . the allegations of the

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determination through sources whose accuracy cannot be questioned.").

Complaint," Dkt. No. 34-1, and even when Williky does admit that he committed some of the insider trading alleged, he fails to take full responsibility, claiming he "did so only because he was not thinking clearly while stressed from threats and worried about providing for his family." Dkt. No. 48 at 22. While Williky argues that his penalty should be reduced as a result of his cooperation, *id*. at 25, his cooperation was of limited value, *see* Dkt. No. 58 at 16-18. Therefore, the Court will **AWARD** a penalty of **$1,596,434** for Williky's insider trading.

III. Conclusion

Pursuant to the bifurcated settlement and the pending motions, the Court awards the following:

- Disgorgement of $798,217 for insider trading, along with $159,110.13 in prejudgment interest;
- Disgorgement of $65,617 for scalping emails, along with $14,866.97 in prejudgment interest;
- A civil penalty of $150,000 for the non-insider trading counts; and
- A civil penalty of $1,596,434 for insider trading.

The total amount awarded is $2,784,245.10.

SO ORDERED: 8/3/18

/s/William T. Lawrence
Hon. William T. Lawrence, Judge
United States District Court
Southern District of Indiana

Copies to all counsel of record via electronic notification

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Cause No. 1:15-cv-0357-WTL-MJD

[Filed August 3, 2018]

U.S. SECURITIES AND EXCHANGE COMMISSION,	)
Plaintiff,	)
vs.	)
GARY S. WILLIKY,	)
Defendant.	)

JUDGMENT

The Court **ENTERS** judgment in favor of the Plaintiff, the Securities and Exchange Commission ("SEC"), and against the Defendant, Gary S. Williky, as follows.

I.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendant is 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.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Judgment by personal service or otherwise: (a) Defendant's officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Defendant or with anyone described in (a).

II.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendant is permanently restrained and enjoined from violating, directly or indirectly, Section 9(a) of the Exchange Act [15 U.S.C. § 78i(a)], by directly or indirectly, by use of the mails or any means or instrumentality of interstate commerce, or any facility or member of any national securities exchange,

for the purpose of creating a false and misleading appearance of active trading in any security: (a) effecting transactions in securities which involved no change in the beneficial ownership thereof; (b) entering an order or orders for the purchase of securities with the knowledge that an order or orders of substantially the same size, at substantially the same time, and at substantially the same price, for the sale of the securities, had been or would be entered by or for the same or different parties; or (c) entering an order or orders for the sale of securities with the knowledge that an order or orders of substantially the same size, at substantially the same time, and at substantially the same price, for the purchase of the securities, had been or would be entered by or for the same or different parties.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Judgment by personal service or otherwise: (a) Defendant's officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Defendant or with anyone described in (a).

III.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant is permanently restrained and enjoined from violating Section 13(d) of the Exchange Act [15 U.S.C. § 77m(d)] and Rule 13d-1 [17 C.F.R. § 240.13d-1] promulgated thereunder by: failing to file with the Commission a

statement containing the information required by Schedule 13D (as provided in 17 C.F.R. § 240.13d-101), within 10 days after acquiring directly or indirectly the beneficial ownership of more than five percent of any equity security of a class which is specified in Exchange Act Rule 13d-1(i) [17 C.F.R. § 240.13d-1(i)].

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Judgment by personal service or otherwise: (a) Defendant's officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Defendant or with anyone described in (a).

IV.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant is 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.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Judgment by personal service or otherwise: (a) Defendant's officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Defendant or with anyone described in (a).

V.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, pursuant to Section 21(d)(2) of the Exchange Act [15 U.S.C. § 78u(d)(2)] and Section 20(e) of the Securities Act [15 U.S.C. § 77t(e)], Defendant is prohibited 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. § 78l] or that is required to file reports pursuant to Section 15(d) of the Exchange Act [15 U.S.C. § 78o(d)].

VI.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant shall

pay financial remedies in the amount of $2,784,245.10 to the SEC. This includes: (1) disgorgement of $863,834; (2) $173,977.10 of prejudgment interest; and (3) $1,746,434 in civil penalties.

VII.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, solely for purposes of exceptions to discharge set forth in Section 523 of the Bankruptcy Code, 11 U.S.C. §523, the allegations in the complaint are true and admitted by Defendant, and further, any debt for disgorgement, prejudgment interest, civil penalty or other amounts due by Defendant under this Judgment or any other judgment, order, consent order, decree or settlement agreement entered in connection with this proceeding, is a debt for the violation by Defendant of the federal securities laws or any regulation or order issued under such laws, as set forth in Section 523(a)(19) of the Bankruptcy Code, 11 U.S.C. §523(a)(19).

VIII.

The Court shall retain jurisdiction of this matter for the purposes of enforcing the terms of this Judgment.

Dated: 8/3/18

/s/William T. Lawrence
Hon. William T. Lawrence, Judge
United States District Court
Southern District of Indiana

Laura Briggs, Clerk

BY: /s/
Deputy Clerk, U.S. District Court

Distribution to all registered counsel by electronic notification via CM/ECF

APPENDIX D

15 U.S.C. § 78u-1. Civil penalties for insider trading

(a) Authority to impose civil penalties

(1) Judicial actions by Commission authorized

Whenever it shall appear to the Commission that any person has violated any provision of this chapter or the rules or regulations thereunder by purchasing or selling a security or security-based swap agreement while in possession of material, nonpublic information in, or has violated any such provision by communicating such information in connection with, a transaction on or through the facilities of a national securities exchange or from or through a broker or dealer, and which is not part of a public offering by an issuer of securities other than standardized options or security futures products, the Commission--

(A) may bring an action in a United States district court to seek, and the court shall have jurisdiction to impose, a civil penalty to be paid by the person who committed such violation; and

(B) may, subject to subsection (b)(1), bring an action in a United States district court to seek, and the court shall have jurisdiction to impose, a civil penalty to be paid by a person who, at the time of the violation, directly or indirectly

controlled the person who committed such violation.

(2) Amount of penalty for person who committed violation

The amount of the penalty which may be imposed on the person who committed such violation shall be determined by the court in light of the facts and circumstances, but shall not exceed three times the profit gained or loss avoided as a result of such unlawful purchase, sale, or communication.

(3) Amount of penalty for controlling person

The amount of the penalty which may be imposed on any person who, at the time of the violation, directly or indirectly controlled the person who committed such violation, shall be determined by the court in light of the facts and circumstances, but shall not exceed the greater of $1,000,000, or three times the amount of the profit gained or loss avoided as a result of such controlled person's violation. If such controlled person's violation was a violation by communication, the profit gained or loss avoided as a result of the violation shall, for purposes of this paragraph only, be deemed to be limited to the profit gained or loss avoided by the person or persons to whom the controlled person directed such communication.

(b) Limitations on liability

(1) Liability of controlling persons

No controlling person shall be subject to a penalty under subsection (a)(1)(B) unless the Commission establishes that--

(A) such controlling person knew or recklessly disregarded the fact that such controlled person was likely to engage in the act or acts constituting the violation and failed to take appropriate steps to prevent such act or acts before they occurred; or

(B) such controlling person knowingly or recklessly failed to establish, maintain, or enforce any policy or procedure required under section 78*o*(f) of this title or section 80b-4a of this title and such failure substantially contributed to or permitted the occurrence of the act or acts constituting the violation.

(2) Additional restrictions on liability

No person shall be subject to a penalty under subsection (a) solely by reason of employing another person who is subject to a penalty under such subsection, unless such employing person is liable as a controlling person under paragraph (1) of this subsection. Section 78t(a) of this title shall not apply to actions under subsection (a) of this section.

(c) Authority of Commission

The Commission, by such rules, regulations, and orders as it considers necessary or appropriate in the public interest or for the protection of investors, may exempt, in whole or in part, either unconditionally or upon specific terms and conditions, any person or transaction or class of persons or transactions from this section.

(d) Procedures for collection

(1) Payment of penalty to Treasury

A penalty imposed under this section shall be payable into the Treasury of the United States, except as otherwise provided in section 7246 of this title and section 78u-6 of this title.

(2) Collection of penalties

If a person upon whom such a penalty is imposed shall fail to pay such penalty within the time prescribed in the court's order, the Commission may refer the matter to the Attorney General who shall recover such penalty by action in the appropriate United States district court.

(3) Remedy not exclusive

The actions authorized by this section may be brought in addition to any other actions that the Commission or the Attorney General are entitled to bring.

(4) Jurisdiction and venue

For purposes of section 78aa of this title, actions under this section shall be actions to enforce a liability or a duty created by this chapter.

(5) Statute of limitations

No action may be brought under this section more than 5 years after the date of the purchase or sale. This section shall not be construed to bar or limit in any manner any action by the Commission or the Attorney General under any other provision of this chapter, nor shall it bar or limit in any manner any action to recover penalties, or to seek any other order regarding penalties, imposed in an action commenced within 5 years of such transaction.

(e) Definition

For purposes of this section, "profit gained" or "loss avoided" is the difference between the purchase or sale price of the security and the value of that security as measured by the trading price of the security a reasonable period after public dissemination of the nonpublic information.

(f) Limitation on Commission authority

The authority of the Commission under this section with respect to security-based swap agreements shall be subject to the restrictions and limitations of section 78c-1(b) of this title.

(g) Duty of Members and employees of Congress

(1) In general

Subject to the rule of construction under section 10 of the STOCK Act and solely for purposes of the insider trading prohibitions arising under this chapter, including section 78j(b) of this title and Rule 10b-5 thereunder, each Member of Congress or employee of Congress owes a duty arising from a relationship of trust and confidence to the Congress, the United States Government, and the citizens of the United States with respect to material, nonpublic information derived from such person's position as a Member of Congress or employee of Congress or gained from the performance of such person's official responsibilities.

(2) Definitions

In this subsection--

(A) the term "Member of Congress" means a member of the Senate or House of Representatives, a Delegate to the House of Representatives, and the Resident Commissioner from Puerto Rico; and

(B) the term "employee of Congress" means--

(i) any individual (other than a Member of Congress), whose compensation is disbursed by the Secretary of the Senate or the Chief Administrative Officer of the House of Representatives; and

(ii) any other officer or employee of the legislative branch (as defined in section 109(11) of the Ethics in Government Act of 1978 (5 U.S.C. App. 109(11))).

(3) Rule of construction

Nothing in this subsection shall be construed to impair or limit the construction of the existing antifraud provisions of the securities laws or the authority of the Commission under those provisions.

(h) Duty of other Federal officials

(1) In general

Subject to the rule of construction under section 10 of the STOCK Act and solely for purposes of the insider trading prohibitions arising under this chapter, including section 78j(b) of this title, and Rule 10b-5 thereunder, each executive branch employee, each judicial officer, and each judicial employee owes a duty arising from a relationship of trust and confidence to the United States Government and the citizens of the United States with respect to material, nonpublic information derived from such person's position as an executive branch employee, judicial officer, or judicial employee or gained from the performance of such person's official responsibilities.

(2) Definitions

In this subsection--

(A) the term "executive branch employee"--

(i) has the meaning given the term "employee" under section 2105 of Title 5;

(ii) includes--

(I) the President;

(II) the Vice President; and

(III) an employee of the United States Postal Service or the Postal Regulatory Commission;

(B) the term "judicial employee" has the meaning given that term in section 109(8) of the Ethics in Government Act of 1978 (5 U.S.C. App. 109(8)); and

(C) the term "judicial officer" has the meaning given that term under section 109(10) of the Ethics in Government Act of 1978 (5 U.S.C. App. 109(10)).

(3) Rule of construction

Nothing in this subsection shall be construed to impair or limit the construction of the existing antifraud provisions of the securities laws or the authority of the Commission under those provisions.

(i) Participation in initial public offerings

An individual described in section 101(f) of the Ethics in Government Act of 1978 may not purchase securities that are the subject of an initial public offering (within the meaning given such term in section 78*l* (f)(1)(G)(i)) of this title) in any manner other than is available to members of the public generally.