UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. INVEST BETTER 2001, COLE A. BARTIROMO, and JOHN/JANE DOES 1-10, Defendants.	01 Civ. 11427(BSJ) **Order**

BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

The Securities and Exchange Commission ("SEC") brought this action against Cole Bartiromo ("Bartiromo"); Bartiromo's internet enterprise Invest Better 2001 ("IB2001"); and John/Jane Does 1-10.

On January 7, 2002, Plaintiff filed an Amended Complaint alleging that Bartiromo, via Invest Better 2001, had engaged in a Ponzi-style investment fraud. In addition, the Amended Complaint alleged that Bartiromo manipulated the securities of at least 15 publicly traded companies by making fraudulent Internet postings and then selling the securities at inflated prices. The IB2001 fraud involved outright falsehoods – "investment programs" like the "2500% Christmas Miracle Program," which guaranteed a 2500% return on monies invested between November 10, 2001 and December 15, 2001. (Plaintiff's

Rule 56.1 Stat. ¶14.) This fraud netted Defendants at least $1 million in profit. (Id. ¶83.) The manipulation of the publicly traded companies – the "Pump and Dump" scheme – netted approximately $91,000 in ill-gotten profit.

On the day the Amended Complaint was filed, this Court entered a Partial Final Judgment and Order on Consent ("Partial Final Judgment") against Bartiromo. That order, as amended on May 29, 2002, did not admit liability, but it permanently enjoined Bartiromo and IB2001 from violating Sections 5(a), 5(c), and 17(a) of the Securities Act of 1933 and Sections 77q(a) and 10(b) of the Securities Exchange Act of 1934. It also served to disgorge the bulk of Bartiromo's ill-gotten gains from the scams.

Since the consent order was entered, Bartiromo and his parents have declined to answer substantively the SEC's deposition questions, the Second Amended Complaint (filed April 29, 2002), or to otherwise cooperate with the SEC's investigation. (Plaintiff's Mot'n at 1.)

The SEC now makes made two motions: one for an order precluding Bartiromo or his parents from offering any evidence relating to those areas in which they asserted their Fifth Amendment privilege against self-incrimination and refused to answer the SEC's deposition questions; and one for summary judgment as to the remaining issues in this litigation: (1) the

violation of the antifraud statutes and Section 5 Registration provisions; (2) the residual disgorgement, and (3) the imposition of a civil penalty.

The Court will first address the preclusion motion, then the motion for summary judgment.

I. Preclusion

The SEC has moved this Court to preclude Bartiromo and his parents from introducing any evidence in response to the motion for summary judgment, during trial, or elsewhere, relating to those areas in which the Bartiromos asserted their Fifth Amendment privilege.

The SEC alleges that the Bartiromos' assertion of the privilege has prejudiced the Commission. In particular, the SEC claims that it was unable to (1) learn of Bartiromo's defenses, (2) trace all ill-gotten gains, (3) learn the true scope of Bartiromo's frauds, and (4) determine the complete scope of Bartiromo's assets.

The Fifth Amendment privilege against self-incrimination applies in both criminal and civil cases. United States v. 4003-4005 Fifth Ave., 55 F.3d 78, 82 (2d Cir. 1995). However, "[u]nlike the rule in criminal cases...reliance on the Fifth Amendment in civil cases may give rise to an adverse inference against the party claiming its benefits." SEC v. Graystone

Nash, Inc., 25 F.3d 187, 190 (3d Cir. 1994) (citing Baxter v. Palmigiano, 425 U.S. 308, 318 (1976)). This is because invocation of the privilege necessarily results in a disadvantage to opposing parties by "keep[ing] them from obtaining information they could otherwise get." 4003-4005 Fifth Ave., 55 F.3d at 82 (citing Graystone Nash, 25 F.3d at 190).

Therefore, when a party invokes the Fifth Amendment privilege in a civil case, courts may then preclude that party from introducing evidence that was not previously available to his or her adversary due to the party's invocation of the privilege. As this Court has stated:

> [The d]efendant has...chosen the tactic of seeking to bar plaintiff's access to the evidence. At least to the extent of pleading the Fifth Amendment, that is his right. But, in a civil case, he cannot have it both ways. By hiding behind the protection of the Fifth Amendment as to his contentions, he gives up the right to prove them.

SEC v. Benson, 657 F.Supp. 1122, 1129 (S.D.N.Y. 1987).

This Court has also noted that granting preclusion does not impermissibly infringe a party's Fifth Amendment rights:

> The court does not deny that it may not make the invocation of a party's fifth amendment right costly, however [the defendant]'s risk of losing this case on the merits without the use of the evidence is not the type of cost that is prohibited.

SEC v. Cymaticolor, 106 F.R.D. 545, 550 (S.D.N.Y. 1985). Indeed, the Supreme Court has also found that "the dilemma demanding a choice between complete silence and presenting a defense has never been thought an invasion of the privilege against compelled self-incrimination." United States v. Rylander, 460 U.S. 752, 759 (1983) (internal citations omitted).

The defense argues that the preclusion order is premature, as neither a trial nor a hearing is scheduled. However, a summary judgment motion is pending – a motion which the Plaintiff repeatedly warned the Defendants it intended to file. The question of whether undisclosed Fifth Amendment material may be introduced to rebut the motion for summary judgment is certainly ripe.

The preclusion which the SEC seeks relates to the accounting list and asset list provided to them by the Defendants. The SEC asserts that the accounting list is not a genuine accounting of the defendants' assets; rather, it is merely a regurgitation of the data provided by the SEC itself, as obtained from the accounts to which Defendants revealed the passwords. Instead of being definitive, the accounting list is no more reliable than the passwords already provided – and the SEC does not believe that those passwords reflected the totality of the accounts controlled by Bartiromo and IB2001. After providing that list, and the list of his assets, Bartiromo and

his parents exercised their Fifth Amendment right against self-incrimination and did not provide the SEC with any explanation of the lists.

It will be obvious from the discussion of disgorgement, *infra*, that the Defendants' refusal to assist with the investigation has prejudiced the SEC. The resources spent to determine the scope of the harm caused by the Defendants were dramatically increased by the Defendants' decision not to cooperate.

For the foregoing reasons, the motion to preclude Bartiromo and his parents from introducing evidence in response to the motion for summary judgment is granted. In addition, Bartiromo is precluded from relying on his accounting and asset lists at any trial or other hearing in this matter.

II. Summary Judgment Motion

Summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED.R.CIV.P. 56(c). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial,'" and summary judgment should be

granted. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 581 (1986).

a. Antifraud and Section 5 Claims

The SEC alleges that Defendants have violated Sections 5(a) and 5(c) of the Securities Act by (1) offering to sell or selling a security; (2) using the mails or interstate means to sell or offer the security; (3) without filing a registration statement. 15 U.S.C. §§ 77e(a), (c). In addition, the SEC alleges that Defendants have violated the antifraud provisions of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 by using manipulative or deceptive devices or contrivances in the offer and sale, and in connection with the purchase and sale of securities. 15 U.S.C. §§ 77q(a), 78j(b); 17 C.F.R. § 240.10b-5.

The SEC has provided a voluminous record of declarations, computer and telephone records, and investigative transcripts. (See Decl. of Craig S. Warkol, SEC Staff Att'y, Vol. 1-4.) These documents provide ample evidence which makes out a prima facie case as to each element of these claims. For their part, the Defendants have not submitted any competent evidence, or even argument, in opposition to the claims. Summary judgment on the securities law violations is therefore granted.

b. Residual Disgorgement

The partial judgment order specified that Bartiromo was to disgorge monies and assets held in his or IB2001's accounts.

There is a dispute about how much money Bartiromo should have disgorged, as well as how much he actually has disgorged. This is unsurprising, given that according to the SEC, Bartiromo's accounting records are incomplete and his refusal to participate in the investigation has made it impossible to accurately determine how much money changed hands. In addition, mathematical errors in the Plaintiff's brief have perpetuated the confusion. (See Plaintiff's Mot. at 19.)

To clarify matters, the Court makes the following findings: Defendant Bartiromo took in $2,146,778 from unwitting IB2001 depositors. In the course of the fraud, he repaid $964,047, which leaves a total of $1,182,731 in ill-gotten gains. Bartiromo asserts – and the records of the Southern District of New York Cashier's Office corroborate – that he has already disgorged $1,135,515. Subtracting the disgorgement figure from the ill-gotten gains results in a difference of $47,216, which is the amount still owed by Bartiromo. The parties agree that $75,000 is held by a company called E-Gold, which refuses to transfer the funds without an express order from the Court. The SEC is ordered to submit a proposed order directing E-Gold to transfer the funds. The transfer will satisfy the $47,216 which

Bartiromo owes. As the money is indisputably ill-gotten gains from the IB2001 fraud, Bartiromo is not entitled to the remainder.

c. Civil penalties

Bartiromo has already agreed to pay a civil penalty. (See Amended Partial Final Order § V.)

Section 20(d) of the Securities Act and Section 21(d)(3) and 21A of the Exchange Act state that the amount of such a penalty shall be determined by the Court "in light of the facts and circumstances." 15 U.S.C. §§ 77t(d), 78u(d).

Bartiromo and IB2001 committed multiple securities violations involving outright fraud and deceit, violations which resulted in substantial losses to investors. Most egregious is the fact that even after the SEC had contacted Bartiromo regarding his "pump and dump" scheme, and he had retained counsel on that matter, he went ahead with the separate IB2001 fraud under different aliases. (Reply Mot'n at 3.) When caught, Bartiromo initially insisted he was only an "investor," not the mastermind of the IB2001 scheme. Not until the SEC discovered nearly $900,000 in Bartiromo's Costa Rican account did he admit he was responsible.

There are two different ways to calculate civil penalties. 15 U.S.C. §§ 77t(d), 78u(d). One approach is to multiply the

number of violations by a dollar amount; the other is to simply assess the gross amount of pecuniary gain. See, e.g., SEC v. Credit Bancorp, Fed. Sec. L. Rep. (CCH) ¶92,021 (S.D.N.Y. 2002).

The ceiling for the multiplier approach is determined by a three-tiered penalty system. Tier 1, for which no showing of scienter is required, allows penalties up to $5,000 per violation; Tier 2, for violations involving "fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement," provides for penalties up to $50,000 per violation; Tier 3, for intent plus substantial loss or significant risk of loss to the victims, allows penalties of as much as $100,000 per violation. 15 U.S.C. §§ 77t(d); 78U(d)(3).

The Court finds that Defendant belongs in Tier 3 because the boldness of the fraud conclusively demonstrates the Defendant's high level of scienter, and because the risk of loss and the actual loss to victims was substantial. The IB2001 scheme ensnared approximately 5,000 victims, and would have continued to mushroom had Bartiromo not been caught.

The Court found, *supra*, that Bartiromo violated Sections 5(a) and 5(c) of the Securities Act, through IB2001 offerings which were purchased by at least 5,000 investors. (Plaintiff's Mot. at 11.) The Court also found that Bartiromo committed numerous violations of the antifraud provisions of Section 17(a) of the Securities Act and Rule 10(b) of the Exchange Act.

The exact number of violations committed by the Defendants is nearly impossible to determine. Therefore, the Court imposes a flat penalty equal to the gross amount of pecuniary gain as a result of the total number of violations. As calculated above, the ill-gotten gains from the IB2001 fraud equal $1,182,731. Add to that the $91,000 in "pump and dump" profits, and the total pecuniary gain to the Defendant is $1,273,731.

In opposing the civil penalty, the Defendant claims that only $25,000 actually flowed to him, however, the same brief notes that "Cole disgorged an additional $93,731 on May 4, 2002." (Opp'n Mot'n at 5; 2 n.2.) In addition, more than a million dollars were disgorged from accounts Bartiromo controlled. He also asserts that he has no assets and is unable to pay, and that his age should bar the imposition of a civil penalty.

Bartiromo's age cannot excuse him from paying a civil penalty, given that he agreed to do so three years ago. (May 29, 2002 Order § V.) The only proof Bartiromo provides to support his claim that he has no assets is a self-serving list assembled by his attorney. (See Verified Accounting and Asset List, March 7, 2002.) After submitting the list, Bartiromo declined to answer the SEC's questions about his assets. The SEC has introduced evidence that his assets far exceed the proffered list, including exhibits at his deposition that

indicate he owned a collection of sports cards worth several hundred thousand dollars. (SEC Decl. ¶15; Exhs. 8, 65, 76, and 117.) Given the scope of the fraud undertaken by Bartiromo, and the hundreds of thousands of dollars that passed through his hands during his teenage years, the Court simply does not find his protestations of poverty to be credible.

Moreover, while a defendant's finances may be taken into account in levying a civil penalty, a defendant's unsupported assertion that he lacks assets does not shield him from civil penalties. SEC v. Robinson, 2002 U.S. Dist. LEXIS 12811, *10 (S.D.N.Y.). Congress enacted the civil penalties because disgorgement alone did not provide an adequate "financial disincentive to engage in securities fraud." H.R. Rep. No. 101-616 (1990).

In addition to the egregiousness of Bartiromo's conduct, his disdain for the law makes a substantial penalty appropriate. After this Court imposed a partial judgment enjoining Bartiromo from violating the federal securities laws, he attempted to defraud Wells Fargo Bank of $450,000. He also defrauded individuals purchasing items on Ebay, netting several thousand dollars. Bartiromo was prosecuted for these crimes and pled guilty in the Central District of California to bank fraud and conspiracy to commit mail and wire fraud. While Bartiromo's conduct in that case did not involve the federal securities

laws, and punishment for that conduct cannot be imposed by this Court, his actions manifest an utter disregard for lawful conduct. For the foregoing reasons, the Court imposes a civil penalty of $1,273,731.

The Clerk of the Court is directed to close the case.

SO ORDERED:

BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

Dated: New York, New York
April 29, 2005