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DISTRICT OF UTAH **JUDGE TENA CAMPBELL**
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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION**

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

v.

MERRILL SCOTT & ASSOCIATES, LTD.,
MERRILL SCOTT & ASSOCIATES, INC.,
PHOENIX OVERSEAS ADVISERS, LTD.,
PATRICK M BRODY,
DAVID E. ROSS, II, and
MICHAEL G. LICOPANTIS,

Defendants.

CIVIL NO: 2:02 CV 0039 C

~~PROPOSED~~ **ORDER GRANTING
MOTION FOR CIVIL MONETARY
PENALTY AGAINST DEFENDANT
PATRICK M. BRODY**

Judge Tena Campbell

On May 21, 2007, this Court granted the Securities and Exchange Commission's Second Motion for Summary Judgment against Defendant Patrick M. Brody ("Brody" or the "Defendant") permanently enjoining him from violating Section 17(a) of the Securities Act of 1933 [15 U.S.C. § 77q(a)]; Section 10(b) of the Securities Exchange Act of 1934 [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. § 240-10b-5]; Sections 206(1) and (2) of the Investment Advisers Act of 1940 [15 U.S.C. §§ 80b-6(1)

and (2)], and Section 15(a) of the Securities Exchange Act of 1934 [15 U.S.C. § 78o(a)]. The Court also ordered Brody to disgorge \$13,140,000.00, representing losses caused to investors of Merrill Scott & Associates, Ltd. (“MSA”), together with prejudgment interest in the amount of \$3,482,163.11, for a total of \$16,622,163.11. The Court deferred ruling on whether to impose a civil monetary penalty until further motion by the Commission, briefing thereon and a hearing.

Pursuant to the Court’s Order dated May 21, 2007, the Commission filed a Motion for Civil Monetary Penalty against Brody and a memorandum in support thereof on November 20, 2007 (Docket #s 1115 and 1116, respectively). Brody responded on December 5, 2007 (Docket # 1141). The Commission filed its Reply Memorandum in Support of Plaintiff’s Motion for Civil Monetary Penalty on December 21, 2007 (Docket # 1157). The Court heard oral argument on the civil monetary penalty briefing on February 1, 2008.

The Commission seeks a third-tier civil monetary penalty against Brody pursuant to Section 20(d)(1) of the Securities Act and Section 21(d)(3) of the Exchange Act in the amount of \$110,000. 15 U.S.C. §77t(d)(1); 15 U.S.C. §78u(d)(3). Civil monetary penalties encourage investor confidence. SEC v. Palmisano, 135 F.3d 860, 866 (2d Cir. 1998). Furthermore, civil monetary penalties deter violations of the federal securities laws. Id.

Third-tier civil monetary penalties are appropriate where the violation (1) involved “fraud, deceit, manipulation, or deliberate or reckless disregard of regulatory requirements;” and (2) “directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons.” 15 U.S.C. §§ 77t(d)(2)(c),

78u(d)(3)(B)(iii). Third-tier penalties, the highest civil penalty in the federal securities laws framework, allow up to a \$110,000 fine for each violation for natural persons during the period of time of Brody's conduct. 15 U.S.C. §§77t(d)(2)(c), 78u(d)(3)(B)(iii); 17 C.F.R. § 201.1002 (2001).

The evidence submitted by the Commission, together with the Court's May 21, 2007 Order, clearly demonstrate that Brody's violations of the federal securities laws satisfy the requirements necessary for the imposition of a third-tier civil penalty.

Specifically, the evidence shows – and this Court found – that Brody:

(1) “failed to inform the investors that their money would be used to pay for his personal expenses” such as “furnish[ing] a home, purchas[ing] art, tak[ing] extravagant vacations, leas[ing] expensive cars, pay[ing] for a housekeeper, and pay[ing] for a personal masseuse/nurse” May 21, 2007 Order at 10-11;

(2) “failed to inform the investors that their money would be used to pay the operating expenses and obligations of MSA[] (at his direction)” Id.;

(3) “failed to inform the investors that their money would be used to make unauthorized investments in high-risk start-up companies (at his direction)” Order at p. 11; and,

(4) “failed to inform the investors that their money would be used to fund a Ponzi scheme (at his direction).” Id.

The factors considered in determining the appropriate amount of a civil monetary penalty, include (1) the egregiousness of the defendant's conduct; (2) the degree of scienter; (3) whether the defendant's conduct created substantial losses to other persons; (4) whether the defendant's conduct was isolated or recurrent; and, (5) whether the

penalty should be reduced due to the defendant's demonstrated current and future financial condition. SEC v. Credit Bancorp, Ltd., 2002 U.S. Dist. LEXIS 20597, at *9-10 (Oct. 29, 2002), citing SEC v. Coates, 137 F. Supp. 2d 413, 428 (S.D.N.Y. 2001). Measured by these factors, a monetary civil penalty of \$110,000 is necessary and appropriate.

Brody's conduct was egregious. He enriched himself personally at the expense of many investors. As noted above, Brody knew that he made numerous misrepresentations to investors and omitted to tell them material facts. At a minimum, his actions were reckless and resulted in substantial financial loss and injury to hundreds of investors. Brody was the mastermind of MSA. Brody controlled all aspects of MSA, from development and implementation of MSA's various investment devices to exercising free reign over bank accounts. His conduct occurred over several years and did not stop until the filing of this action. There has been no demonstration that Brody is impecunious. Even impecuniosity, however, is not a dispositive factor in assessing a civil monetary penalty. Credit Bancorp, 2002 U.S. Dist. LEXIS 20597, at *11.

Wherefore, this Court GRANTS the Commission's motion. It is hereby ordered that Defendant Patrick M. Brody pay a third-tier civil monetary penalty in the amount of \$110,000.

Dated this 20th day of February, 2008.



Honorable Tena Campbell
United States District Court Judge