UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

SECURITIES EXCHANGE ACT OF 1934
Release No. 65422 / September 28, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14139

In the Matter of HECTOR GALLARDO, MICHAEL ZURITA, and ORION TRADING, LLC	: : : : :	ORDER MAKING FINDINGS AND IMPOSING REMEDIAL SANCTIONS BY DEFAULT AS TO RESPONDENT HECTOR GALLARDO

INTRODUCTION

The Securities and Exchange Commission (Commission) issued its Order Instituting Administrative and Cease-and-Desist Proceedings (OIP) against Respondents on November 24, 2010, pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 (Exchange Act).[1] The OIP alleges that Respondent Hector Gallardo (Gallardo) willfully violated Section 17(a) of the Securities Act of 1933 (Securities Act), and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, which prohibit fraudulent conduct in the offer and sale of securities and in connection with the purchase or sale of securities.

On September 14, 2011, the Division of Enforcement (Division) filed a Motion for a Default Order Imposing Sanctions (Motion) and a Declaration of Matthew J. Watkins, including nine exhibits, which are admitted as Division Exhibits (Div. Ex.) A-I.[2] In its Motion, the

[1] The proceeding has been stayed as to Respondents Michael Zurita and Orion Trading, LLC. See Hector Gallardo, Admin. Proc. 3-14139 (A.L.J. June 6, 2011) (unpublished).

[2] Exhibit A is a copy of the OIP; Exhibit B is a copy of an envelope addressed to Gallardo at a Woodside, New York, address; Exhibit C is a copy of the docket in the matter Sofia Gallardo v. Hector Gallardo, Case No. 522009DR000396XXDFD (Pinellas County, Florida), filed Jan. 14, 2009; Exhibit D is a copy of an invoice to the Commission dated June 28, 2011 from Serving by Irving, Inc.; Exhibit E is an email received by the Division from John DiCanio (DiCanio) of Serving by Irving, Inc. on April 29, 2011; Exhibit F is a copy of an email exchange between DiCanio and the Division dated May 10, 2011; Exhibit G is a copy of Certifications of Publication stating Notices to Gallardo were published in the New York Times on August 14 and August 21, 2011; Exhibit H is a copy of an Affidavit of Publication stating Notices to Gallardo

Division requests that Gallardo be deemed to have been served by publication and that he be found to be in default for failing to file an Answer. Motion at 1. The Division requests that Gallardo be: (1) ordered to cease and desist from committing or causing certain violations or future violations; (2) permanently barred from association with all entities authorized by Section 15(b)(6) of the Exchange Act, as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank); (3) required to pay disgorgement and prejudgment interest; and (4) required to pay a civil penalty. Motion at 1.

Between November 2010 and June 2011, the Division attempted service on Gallardo by various means set forth in 17 C.F.R § 201.141(a)(2)(i) including, service by U.S. Postal Service, personal service, and process server. Div. Exs. B, D-F. At the June 15, 2011, prehearing conference,[3] this Office informed the Division that it would consider a motion for default predicated on service of Gallardo by publication.[4] (Tr. at 8-9.)

The Division published notices informing Gallardo of the proceeding against him in the New York Times on August 14 and August 21, 2011, and in El Diario, a Spanish-language newspaper, on August 12 and August 19, 2011. Div. Exs. G, H. This Office deems Gallardo served by publication as of August 21, 2011.[5] Gallardo's Answer was due twenty days from the date of service. See OIP at 8; 17 C.F.R. § 201.220(b). Gallardo has not filed an Answer or otherwise defended himself in this proceeding. Gallardo is deemed to be in default, and this proceeding may be determined against him. See 17 C.F.R. §§ 201.155(a), .220(f), .221(f). As authorized by 17 C.F.R. § 201.155(a), the allegations of the OIP are deemed true.

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were published in El Diario on August 12 and August 19, 2011; and Exhibit I is a copy of the Division's prejudgment interest report.

[3] References to the transcript of the June 15, 2011, telephonic prehearing conference will be cited as "(Tr. __.)"

[4] The Commission Rules of Practice do not specifically provide for service by publication on a respondent believed to be in the United States. However, under 17 C.F.R. § 201.111, this Office is given broad authority to "do all things necessary and appropriate to discharge [its] duties." The Division made various attempts to serve Gallardo in accordance with the methods established in 17 C.F.R. § 201.141(a)(2)(i); however, such attempts were unsuccessful. (Div. Exs. 2, 4-6; Tr. 4-8.) The Division's various attempts at serving Gallardo and its contact with Gallardo's family gave the Division reason to believe that Gallardo was aware of the proceedings against him and that he was in the New York City area. Accordingly, New York City area newspapers were employed for service.

[5] Several cases support service by publication. See SEC v. Nnebe, No. 01 Civ. 5247(KMW)KNF, 2003 WL 402377 (S.D.N.Y. Feb. 21, 2003) (permitting SEC to serve defendant whose whereabouts were unknown by publication in the USA Today); SEC v. HGI, Inc., No. 99 Civ. 3866(DLC), 1999 WL 1021087 (S.D.N.Y. Nov. 8, 1999) (same); Grant Ivan Grieve, Investment Advisers Act Release No. IA-3061 (July 29, 2010) (ALJ decision accepting service by publication on defendant in foreign country after previous service attempts were unsuccessful).

FINDINGS OF FACT

Gallardo, thirty-nine years old and believed to be a resident of Venezuela, was a registered representative in the New York office of Orion Trading, LLC (Orion), from January 2007 to September 2007. OIP at 2. Gallardo held both Series 7 and Series 63 licenses. Id. Orion is a California limited liability company with its principal place of business in Orlando, Florida, and from 2005 to 2007, it maintained a branch office in New York. OIP at 1.

In 2006, a foreign finder that Orion employed in Bolivia solicited two Bolivian citizens, Jose Moscoso and Williams Baina (collectively, the Bolivian investors), to invest in U.S. equity markets through Orion. OIP at 2; Motion at 3. The Bolivian investors formed an entity called Orion Bolivia and solicited and bundled funds from other Bolivian retail investors for the purpose of investing those funds in the U.S. equity markets through Orion. OIP at 2; Motion at 3. In early 2007, Gallardo convinced the Bolivian investors to name him their registered representative for their accounts, telling them that he could provide better investment returns. OIP at 2; Motion at 3.

The Bolivian investors provided Gallardo with approximately $1.2 million and Gallardo promised that he would invest the funds in unspecified initial public offerings or investment vehicles offered or managed by Ventel Enterprises Corporation (Ventel). OIP at 2; Motion at 3-4. Gallardo falsely told the Bolivian investors that Ventel was a group of "professional traders" who bought and sold stock for investors, that Ventel could guarantee a nine to fifteen percent monthly return regardless of market volatility, and that he would return a portion of their principal in six months if he did not obtain the promised returns. OIP at 2; Motion at 4. Gallardo later returned approximately $275,000 as illusory "distributions" to the Bolivian investors to maintain the ruse that their investments were performing well. OIP at 2; Motion at 4.

Gallardo provided the Bolivian investors with a phony investment contract which described Ventel as a "private complex offering professionally managed investment portfolios," including a fund called the "Capital Partners Fund." OIP at 3; Motion 4. In fact, Ventel, its "professional traders," its trading strategy, and its purported investments were a complete sham fabricated by Gallardo. OIP at 3; Motion at 4. Ventel never was an investment "complex," and Gallardo did not have any "professional traders" who could invest the Bolivian investors' money or guarantee any returns at all, let alone nine percent monthly returns. OIP at 3; Motion at 4. Gallardo never invested any of the Bolivian investors' money in any initial public offerings. OIP at 3; Motion at 4. Instead, Gallardo invested approximately $190,000 of the Bolivian investors' funds in stocks and options through nominee accounts at three brokerages and lost virtually the entire amount - a fact that he did not disclose to the Bolivian investors. OIP at3; Motion at 4. Gallardo misappropriated the remainder of the Bolivian investors' money, approximately $685,000. OIP at 3; Motion at 4. After transferring hundreds of thousands of dollars to a personal checking account, Gallardo used money in that account to pay his and his family's personal expenses, including airline tickets and multiple trips to Atlantic City, where Gallardo liked to gamble. OIP at 3; Motion at 4-5.

Gallardo repeatedly took steps to conceal his scheme from the Bolivian investors. OIP at 3; Motion at 4. Initially, when they requested a contract from Ventel setting forth the nine percent guarantee, Gallardo demurred and offered a nonsensical explanation, stating that no contract existed because Ventel was not a bank but rather was comprised of "professional traders." OIP at 3. Thereafter, Gallardo orchestrated a meeting with the Bolivian investors in New York in August 2007. Id. At the meeting, Gallardo and two associates represented that they were affiliated with Ventel and reassured the Bolivian investors that Ventel was a legitimate enterprise. Id. Shortly after the meeting, Gallardo provided the Bolivian investors with a phony investment which described Ventel as a "private complex offering professionally managed investment portfolios," when in fact Ventel was a sham fabricated by Gallardo. OIP at 3; Motion at 4. A few weeks later, Gallardo fabricated an email to one of the Bolivian investors from Ventel's "back office" to give the impression that Ventel was a legitimate investment business and to stymie the investor's demands for the returns Gallardo had promised. OIP at 3.

In September 2007 the Bolivian investors demanded to see returns on the initial public offerings of stock in which Gallardo told them he had invested. OIP at 3; Motion at 5. Because Gallardo could not produce these, the Bolivian investors refused to invest further and subsequently lost all contact with Gallardo. OIP at 3; Motion at 5. The Bolivian investors lost $876,193 of their and the other 375 investors' money. OIP at 3; Motion at 5.

SANCTIONS

The OIP alleges that Gallardo willfully violated Section 17(a) of the Securities Act, and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, which prohibit fraudulent conduct in the offer and sale of securities and in connection with the purchase or sale of securities. The Division seeks a cease-and-desist order, a collateral bar, disgorgement of ill-gotten gains, and a civil penalty.

A. Cease-and-Desist

Section 21C of the Exchange Act authorizes the Commission to impose a cease-and-desist order on any person who "is violating, has violated, or is about to violate" any provision of the Exchange Act or rules thereunder. The Commission may also impose a cease-and-desist order against any person that "is, was, or would be a cause of the violation, due to an act or omission the person knew or should have known would contribute to such violation." 15 U.S.C. § 78u-3(a). The Division requests that Gallardo be ordered to cease and desist from committing or causing violations of Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, and Exchange Act Rule 10b-5. Motion at 9.

To determine whether a cease-and-desist order is appropriate in the public interest, the Commission considers six factors: (1) the egregiousness of the respondent's actions; (2) whether the violations were isolated or recurrent; (3) the degree of scienter; (4) the sincerity of the respondent's assurances against future violations; (5) the respondent's recognition of the wrongful nature of his or her conduct; and (6) the likelihood that the respondent's occupation will present opportunities for future violations. See Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981).

In KPMG Peat Marwick LLP, the Commission addressed the standard for issuing cease-and-desist relief. Exchange Act Release No. 43862 (Jan. 19, 2001), 54 S.E.C. 1135, 1183-1192 (2001). In considering these factors, the Commission concluded that although the Division must show some risk of future violations, such showing should be "significantly less than that required for an injunction" and that, "absent evidence to the contrary," a single past violation ordinarily suffices to establish a risk of future violations. Id. at 1185, 1191.

Gallardo's violations were serious and recurrent. Gallardo willfully violated Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 of the Exchange Act by fabricating an investment vehicle to secure investment money from the Bolivian investors, misrepresenting his intentions, and misappropriating the Bolivian investors' funds for personal gain. Gallardo's fabrication and misrepresentations were egregious and demonstrate a high degree of scienter. Gallardo's failure to appear, defend, or otherwise confront the allegations against him demonstrate his failure to recognize his wrongful conduct and provide no assurance against future violations. Gallardo's occupation and experience working in the investment industry presents opportunities for future violations. Accordingly, a cease-and-desist order is in the public interest and necessary for the protection of investors.

B. Collateral Bar

A permanent associational bar is also appropriate, and for the same reasons. This sanction will serve the public interest and the protection of investors, pursuant to Section 15(b) of the Exchange Act. It accords with Commission precedent and the sanction considerations set forth in Steadman, 603 F.2d at 1140.

1. Legal Standard for Collateral Bars

The Division requests a bar from associating with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, and nationally recognized statistical rating organization (NRSRO), and from participating in a penny stock offering. (Motion at 10.) The requested sanction will be granted except as to the municipal advisor bar.

Dodd-Frank, enacted July 21, 2010, added collateral bar sanctions to Sections 15(b)(6)(A), 15B(c)(4), and 17A(c)(4)(C) of the Exchange Act and Section 203(f) of the Investment Advisers Act of 1940. The new sanctions authorize the Commission to simultaneously suspend or bar an individual who has engaged in certain unlawful conduct from association with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or NRSRO. Prior to Dodd-Frank, such sanctions were generally authorized only on a piecemeal basis, i.e., only when an individual sought association with that particular branch of the securities industry at issue. Teicher v. SEC, 177 F.3d 1016, 1020-21 (D.C. Cir. 1999) (the Commission cannot impose sanctions as to any specific branch until it could "show the nexus matching that branch"). The issue is whether Dodd-Frank's broader collateral bar can be applied to Gallardo, whose misconduct ended prior to Dodd-Frank's enactment.

"The presumption against statutory retroactivity is founded on elementary considerations of fairness dictating that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." Landgraf v. USI Film Products, 511 U.S. 244, 245 (1994). Under Landgraf, a statute has impermissibly retroactive effect when it "attaches new legal consequences to events completed before [the statute's] enactment." See Landgraf, 511 U.S. at 269-70.

The presumption against retroactivity, however, stands in tension with the principal that a court is to "'apply the law in effect at the time it renders its decision.'" Landgraf, 511 U.S. at 273 (quoting Bradley v. School Board of Richmond, 416 U.S. 696, 711 (1974)). The Supreme Court announced the following test for resolving this tension:

> When a case implicates a federal statute enacted after the events giving rise to the suit, a court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that the statute does not govern absent clear congressional intent favoring such a result.

511 U.S. at 280.

The Court then examined certain categories of cases, one of which – involving purely prospective relief – is implicated here: "When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive." Landgraf, 511 U.S. at 273. "A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment . . . or upsets expectations based in prior law." Id. at 269. This is because relief by injunction operates *in futuro* and the affected party has no vested right in the judge's decree. Id. at 274 (quoting American Steel Foundries v. Tri-City Central Trades Council, 257 U.S. 184, 201 (1921)).

American Steel Foundries dealt with an injunction imposed against labor picketers, which included a provision prohibiting peaceful "persuasion" while picketing. During the pendency of the appeal, the Clayton Act went into effect, which prohibited injunctions against peaceful persuasion. The Supreme Court held that the Clayton Act's prohibition "introduce[d] no new principle into the equity jurisprudence" because it was "merely declaratory of what was the best practice always." 257 U.S. at 203. The Court therefore applied the Clayton Act retroactively and upheld a modification to the injunction removing the prohibition against persuasion. Id. at 207-208.

Landgraf's Supreme Court progeny suggest that retroactive application of a statute involving purely prospective relief is appropriate only when no vested rights are infringed. INS v.

St. Cyr, 533 U.S. 289, 321 (2001), found that a provision of the Antiterrorism and Effective Death Penalty Act (AEDPA) eliminating discretionary relief from deportation for certain felons did not apply retroactively to felons who pled guilty before AEDPA's effective date, because doing so would attach a new disability to a completed transaction. Martin v. Hadix, 527 U.S. 343, 358 (1999), found that a reduction in attorney fees imposed by the Prison Litigation Reform Act (PLRA) applied to legal work performed after the PLRA's effective date, but not to work performed before its effective date, because imposing the new fees limitations "would attach new legal consequences to completed conduct" (internal quotation omitted). Hughes Aircraft v. U.S. ex rel. Schumer, 520 U.S. 939, 948-49 (1997), found that certain amendments to the False Claims Act (namely, eliminating one particular defense to a qui tam action and permitting a relator's qui tam action without participation by the government as a party) had retroactive effect because pre-enactment legal rights were altered, and the Court accordingly declined to apply the Act retroactively. Fernandez-Vargas v. Gonzales, 548 U.S. 30, 42-43 (2006), by contrast, found that a particular provision of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) had no retroactive effect, and was therefore retroactively applicable. However, this was, in part, because the predicate act to which IIRIRA applied was remaining in the U.S. (i.e., a continuing violation) after IIRIRA became effective. That is, the Supreme Court examined whether retroactive application of IIRIRA would impair "vested rights," and found that it would not. Fernandez-Vargas, 548 U.S. at 44 n.10.

Thus, notwithstanding Landgraf's suggestion to the contrary, retroactive application of a new law authorizing or affecting the propriety of prospective relief requires more than simply identifying the relief as injunctive. It also requires inquiry into whether the new law would impair vested rights – that is, "rights a party possessed when he acted." Landgraf, 511 U.S. at 280; Fernandez-Vargas, 548 U.S. at 44 n.10 (noting that vested rights are "something more substantial than inchoate expectations and unrealized opportunities," and include "an immediate fixed right of present or future enjoyment"). Consequently, in those cases where the question of retroactivity cannot be resolved by statutory construction, and the new law authorizes injunctive relief, the question of retroactive application essentially reduces to the question of whether such application would impair vested rights. See Wilson v. Gonzales, 471 F.3d 111, 121 (2d Cir. 2006) (describing two-step analysis under Landgraf).

2. Application to Gallardo

Dodd-Frank lacks an express retroactivity provision, and normal rules of statutory construction do not reveal Congress' intent regarding retroactivity. Pezza v. Investors Capital Corp., 767 F. Supp. 2d 225, 228 (D. Mass. 2011) (quoting Lindh v. Murphy, 521 U.S. 320, 326 (1997)); see also SEC v. Daifotis, Fed. Sec. L. Rep. P 96,325, 2011 WL 2183314 at *14 (N.D. Cal. 2011). The requested relief is injunctive, and the question, then, is whether retroactive application of Dodd-Frank's collateral bar would impair vested rights.

Gallardo plainly had no such vested right to associate with brokers and dealers. He willfully violated Section 17(a) of the Securities Act, and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, which prohibit fraudulent conduct in the offer and sale of securities and in connection with the purchase or sale of securities. 15 U.S.C. § 77q(a); 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5. Before Dodd-Frank's enactment, and before Gallardo began his

misconduct, any person who "willfully violated any provision" of the Securities Act while associated with a broker or dealer was subject to a broker and dealer associational bar under Sections 15(b)(4)(D) and 15(b)(6)(A)(iii) of the Exchange Act. 15 U.S.C. §§ 78o(b)(4)(D), 78o(b)(6)(A)(iii) (2006).

But the broker and dealer associational bar is direct, not collateral, because Gallardo was associated with a broker/dealer while he committed the underlying misconduct. The more important question is whether he had vested rights in associating with other securities industry segments, which rights became impaired once Dodd-Frank became effective. Put another way, the question is whether Gallardo had a reasonable expectation that his misconduct would not impair his ability to associate with industry segments other than brokers and dealers.

Before Dodd-Frank, willful violation of Section 17(a) of the Securities Act, while associated with a broker or dealer, subjected a person to a collateral bar from associating with investment advisers, municipal securities dealers, and transfer agents, even though the bar could not be imposed until the person actually sought such association. 15 U.S.C. § 78o-4(c)(4) (2002); 15 U.S.C. § 78q-1(c)(4)(C) (2002); 15 U.S.C. § 80b-3(e)(5), (f) (2006); Teicher, 177 F.3d at 1020-21. A similar bar existed as to penny stock offerings, although it was direct, not collateral. 15 U.S.C. §§ 78o(b)(4)(D), 78o(b)(6)(A)(iii) (2006). Gallardo, thus, had no vested right to associate with investment advisers, municipal securities dealers, or transfer agents, or to participate in a penny stock offering.

The situation is more complicated with respect to NRSRO's and municipal advisors. There is no associational bar or similar provision predating Dodd-Frank with respect to municipal advisors, nor was there a formal associational bar with respect to NRSRO's. See, e.g., Commissioner Kathleen L. Casey, Address to Practising Law Institute's SEC Speaks in 2011 Program (Feb. 4, 2011) (noting the absence of these two bars before Dodd-Frank). As to association with municipal advisors, therefore, Gallardo possessed a right approximating an "immediate fixed right of present or future enjoyment." Fernandez-Vargas, 548 U.S. at 44 n.10. However, in 2007, before Dodd-Frank's enactment but during the time that Gallardo committed his violations, there existed a statutory provision for revoking the registration of an NRSRO if any person associated with it was found to have willfully violated any provision of the Securities Act and if it was necessary for the protection of investors and in the public interest. 15 U.S.C. § 78o-7(d)(1) (2006). Gallardo had no reasonable expectation of, and no vested right in, association with an NRSRO, if such an association would subject the NRSRO to revocation of registration. Although this provision is not formally an associational bar, for practical purposes it amounts to one, because it is unlikely any NRSRO would ever have hired him or otherwise associate with him.

Thus, Gallardo had no vested rights in association with a broker, dealer, investment adviser, municipal securities dealer, transfer agent, or NRSRO, or in participating in a penny stock offering, but did have such rights with respect to municipal advisors. A permanent bar is therefore warranted, but only with respect to brokers, dealers, investment advisors, municipal securities dealers, transfer agents, NRSRO's, and penny stock offerings.

C. Disgorgement and Prejudgment Interest

Pursuant to Section 21C(e) of the Exchange Act, the Division seeks an order requiring disgorgement of ill-gotten gains that were obtained by Gallardo, plus prejudgment interest. (Motion at 12-13.)

Section 21C(e) of the Exchange Act authorizes the Commission to order disgorgement of ill-gotten gains based on willful violations of the Exchange Act or rules thereunder. "Disgorgement is an equitable remedy designed to deprive a wrongdoer of his unjust enrichment and to deter others from violating the securities laws." See SEC v. First City Fin. Corp., 890 F.2d 1215, 1230 (D.C. Cir. 1989). The Commission is authorized to order violators of the federal securities laws to disgorge the value of the proceeds they obtained by virtue of their wrongdoing. SEC v. Fishbach Corp., 133 F.3d 170, 175 (2d. Cir. 1997). Requiring a violator to pay prejudgment interest prevents the violator from profiting from their securities violation. See SEC v. Moran, 944 F. Supp. 286, 295 (S.D.N.Y. 1996).

Exchange Act Section 21C(e) also provides that the Commission may order "reasonable interest" be paid on disgorged funds. This statutory provision authorizes the Commission to adopt rules and regulations and issue orders concerning rates of interest and periods of accrual, which it has done through Commission Rule of Practice 600. 17 C.F.R. § 201.600. Under this Rule, "[p]rejudgment interest shall be due on any sum required to be paid pursuant to an order of disgorgement." 17 C.F.R. § 201.600(a). The amount of prejudgment interest is calculated from "the first day of the month following each … violation through the last day of the month preceding the month in which payment of disgorgement is made." 17 C.F.R. § 201.600(a).

The Division seeks total disgorgement of $1,054,875.58, consisting of $876,193 of loss to the Bolivian investors and $178,682.58 of prejudgment interest.[6] Motion at 13; Div. Ex. I. Gallardo's willful fabrications and misrepresentations directly caused the Bolivian investors to lose $876,193. Accordingly, Gallardo shall be required to disgorge all ill-gotten gains and pay prejudgment interest. Respondent shall pay $876,193 of ill-gotten gains and $178,682.58 of prejudgment interest, plus any additional prejudgment interest that accrues. Additional prejudgment interest will accrue for each month preceding the month in which Respondent pays the required disgorgement. The Division will be responsible for calculating the additional accrued prejudgment interest in accordance with Rule 600 of the Commission's Rules of Practice. 17 C.F.R. § 201.600.

D. Civil Penalty

An order of disgorgement (even without prejudgment interest) merely requires the return of wrongfully obtained profits. Disgorgement does not result in any actual economic penalty or act as a financial disincentive to engage in securities laws violations. See Moran, 944 F. Supp. at

[6] The amount of prejudgment interest was calculated by the Division beginning from October 1, 2007, and ending on August 31, 2011. Div. Ex. I. Additional prejudgment interest may be calculated in accordance with 17 C.F.R. § 201.600(a).

296 (S.D.N.Y. 1996). As such, the Commission is authorized to impose a civil monetary penalty if a respondent has willfully violated or willfully aided and abetted or willfully caused any violation of the Exchange Act or rules thereunder. See 15 U.S.C. §§ 78u-2(a)(1)-(3). The Commission must also find that such a penalty is in the public interest. Six factors are relevant: (1) fraud; (2) harm to others; (3) unjust enrichment; (4) prior violations; (5) deterrence; and (6) such other matters as justice may require. See 15 U.S.C. §§ 78u-2(c). "Not all factors may be relevant in a given case, and the factors need not all carry equal weight." See Robert G. Weeks, Initial Decision Release No. 199 (Feb. 4, 2002), 76 SEC Docket 2609, 2671; see also Robert G. Weeks, Exchange Act Release No. 48684 (Oct. 23, 2003).

A three-tier system identifies the maximum amount of a civil penalty.[7] 15 U.S.C. § 78u-2(b). Gallardo's conduct occurred between January 2007 and September 2007. During that time, for each "act or omission" by a natural person, the maximum penalty in the first tier is $6,500; in the second tier, $65,000; and in the third tier, $130,000. 15 U.S.C. § 78u-2(b) (2006). A first-tier penalty is imposed for each statutory violation. 15 U.S.C. § 78u-2(b)(1). A second-tier penalty is permissible where the conduct involves fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement. 15 U.S.C. § 78u-2(b)(2). A third-tier penalty involves conduct where such state of mind is present and where the conduct directly or indirectly (i) resulted in substantial losses, (ii) created a significant risk of substantial losses to other persons, or (iii) resulted in substantial pecuniary gain to the person who committed the act or omission. 15 U.S.C. § 78u-2(b)(3).

The Division requests a maximum third-tier penalty of $130,000 be imposed on Gallardo for each of his two violations. Motion at 13-14. The Division charged Gallardo with a violation of the Exchange Act and a violation of the Securities Act. As such, the Division seeks a total penalty of $260,000. Gallardo's willful, fraudulent actions and misrepresentations resulted in substantial losses to the Bolivian investors while unjustly enriching him. In an effort to deter future violations, and because it is in the public interest, a civil penalty in the amount of $260,000 will be ordered.

ORDER

IT IS ORDERED, pursuant to Section 21C of the Securities Exchange Act of 1934, that Hector Gallardo cease and desist from committing or causing any violations, or any future violations, of Section 17(a) of the Securities Act of 1933, Section 10(b) of the Exchange Act of 1934, and Rule 10b-5, thereunder;

IT IS FURTHER ORDERED, pursuant to Section 15(b)(6)(A) of the Securities Exchange Act of 1934, that Hector Gallardo is barred from association with brokers, dealers, investment advisers, municipal securities dealers, transfer agents, NRSRO's, and participating in any penny stock offerings;

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[7] These amounts reflect inflationary adjustments, as required by the Debt Collection Improvement Act of 1996, as of January 2007, the time of Gallardo began his violative conduct. See 17 C.F.R. § 201.1003.

IT IS FURTHER ORDERED, pursuant to Section 21C of the Securities Exchange Act of 1934, that Hector Gallardo shall disgorge $876,193 in ill-gotten gains; $178,682.58 of prejudgment interest as computed by the Division for the period beginning October 1, 2007, and ending August 31, 2011, plus any additional prejudgment interest that accrues after this period as computed by the Division of Enforcement in accordance with Rule 600 of the Commission's Rules of Practice, 17 C.F.R. § 201.600(b);

IT IS FURTHER ORDERED, pursuant to Section 21B of the Securities Exchange Act of 1934, that Hector Gallardo shall pay a civil monetary penalty of $260,000.

Payment of the disgorgement, prejudgment interest, and civil monetary penalty shall be made no later than twenty-one days after the date of this Order. Payment shall be made by certified check, United States postal money order, bank cashier's check, wire transfer, or bank money order, payable to the Securities and Exchange Commission. The payment, and a cover letter identifying Respondent and Administrative Proceeding No. 3-14139, shall be delivered to: Office of Financial Management, Accounts Receivable, 100 F Street, N.E., Mail Stop 6042, Washington, DC 20549. A copy of the cover letter and instrument of payment shall be sent to the Commission's Division of Enforcement, directed to the attention of counsel of record.

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Cameron Elliot
Administrative Law Judge