UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

-v-

JOHN AFRIYIE

Defendant.

16-cv-2777 (JSR)

MEMORANDUM ORDER

JED S. RAKOFF, U.S.D.J.

Plaintiff Securities and Exchange Commission ("SEC") brings this action against Defendant John Afriyie for allegedly trading on inside information to generate approximately $1.56 million in illegal profits in violation of Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") and Rule 10b-5 promulgated thereunder. Plaintiff seeks injunctive relief, disgorgement of defendant's gains, and imposition of a civil penalty.

On October 24, 2018, this case was reassigned from Judge Sullivan to the undersigned upon Judge Sullivan's ascent to the Second Circuit. Presently before the Court are defendant's motion to dismiss the complaint and plaintiff's motion for summary judgment. For the reasons that follow, defendant's motion is denied and plaintiff's motion is granted in full.

I. Background

A. Facts[1]

This action arises out of a series of trades Afriyie made in January and February 2016 while employed as an analyst at MSD, a family investment office. Pl's 56.1 ¶¶ 1, 11. In this position, beginning January 27, 2016, Afriyie had access to material nonpublic information about the planned acquisition of The ADT Corporation ("ADT") by affiliates of Apollo Global Management, LLC ("Apollo"). Id. ¶ 14. Between January 28 and February 12, 2016, Afriyie purchased 2,279 ADT short-term, out-of-the-money call option contracts for a total cost of $24,254.02 in a brokerage account held in the name of his mother, Lawrencia Afriyie. Id. ¶¶ 14, 18. On February 16, before the market opened, it was announced that Apollo was acquiring

[1] The following facts are drawn from the SEC's Statement Pursuant to Local Civil Rule 56.1(a) ("Pl's 56.1"). Afriyie failed to file a document containing "a correspondingly numbered paragraph responding to each numbered paragraph" in Pl's 56.1, as is required by Local Civil Rule 56.1(b), and consequently, all of the SEC's assertions are deemed admitted. See Local Civil Rule 56.1(c). It should be noted that in his opposition to summary judgment, however, Afriyie appears to dispute a few of the facts set out in Pl's 56.1, primarily concerning his exposure to material nonpublic information and motivations for his trades. See Defendant Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment ("Def. Opp."), Dkt. 74. However, as discussed below, "proceeding pro se does not otherwise relieve a litigant from the usual requirements of summary judgment, and a pro se party's bald assertion, unsupported by evidence, is not sufficient to overcome a motion for summary judgment." Cole v. Artuz, No. 93-cv-5981, 1999 U.S. Dist. LEXIS 16767, at *8 (S.D.N.Y. Aug. 20, 1999). Accordingly, the Court accepts the facts put forward in Pl's 56.1, noting any disagreement where appropriate.

ADT for $42 per share, and, after the announcement, defendant sold the ADT options for a gain of approximately 6,000 percent, obtaining approximately $1.56 million in actual profits. Id. ¶¶ 19-20.

On January 30, 2017, a jury found Afriyie guilty of securities fraud in violation of Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder, as well as wire fraud in violation of 18 U.S.C. § 1343, for trading on the basis of material nonpublic information concerning the ADT deal. Id. ¶ 7. On January 31, 2017, the same jury unanimously found in an accompanying civil forfeiture trial that $2,648,862.46 in funds located in the seized brokerage account and defendant's bank account "constitute[d] proceeds, or property derived from the proceeds, obtained by the defendant...as a result of the defendant's conviction." Id. ¶ 8. On July 26, 2017, Judge Engelmayer sentenced defendant to 45 months imprisonment and three years of supervised release, later ordering Defendant to pay $663,028.92 in restitution to MSD. Id. ¶ 9. Defendant has appealed his conviction and sentence, and that appeal is currently pending.

B. Procedural History

The SEC initiated the instant action on April 13, 2016 against both the Defendant and Lawrencia Afriyie. Dkt. 1.[2] It was subsequently stayed pending resolution of the criminal case. Dkt. 28. The stay was lifted in February 2018. Dkt. 52. The Court subsequently set a schedule for the instant motion for summary judgment. Dkt. 58. However, after Defendant's time to respond to the complaint was extended in consideration of his pro se and incarcerated status, the Court received a letter from Defendant, which Defendant characterized as a "response" to the complaint but which appeared to be a motion to dismiss. Judge Sullivan deemed Defendant to have filed a motion to dismiss and set a schedule for briefing to proceed on that motion simultaneously. Dkt. 59. Both motions were fully submitted before the case was reassigned to the undersigned.[3]

II. Defendant's Motion to Dismiss

A. Standard of Review

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[2] The SEC subsequently voluntarily dismissed its claims against Lawrencia Afriyia without prejudice pursuant to Fed. R. Civ. P. 41(a)(1)(A)(i). Dkt. 55.

[3] Defendant never submitted a reply in response to the SEC's Memorandum of Law in Opposition to Defendant's Motion to Dismiss ("Pl. Opp.") (Dkt. 60). However, this may be attributable to an apparent error in Judge Sullivan's scheduling order, which read "Plaintiff shall respond to Defendant's motion to dismiss" and then "Plaintiff may reply to Defendant's opposition." Order dated May 22, 2018, Dkt. 59. Accordingly, the Court will presume that defendant did not intend to waive any arguments.

To survive a motion to dismiss for failure to state a claim, plaintiff must plead "only enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). In evaluating a motion to dismiss, the Court "must accept as true all well-pleaded factual allegations in the complaint, and draw all inferences in the plaintiff's favor." Goonan v. Fed. Reserve Bank of New York, 916 F. Supp. 2d 470, 478 (S.D.N.Y. 2013).[4]

Insider trading claims are subject to Federal Rule of Civil Procedure Rule 9(b)'s requirement that circumstances constituting fraud be plead "with particularity." This requirement is intended to ensure that the complaint "provide[s] fair notice of the substance of a plaintiff's claim in order that the defendant may prepare a responsive pleading." SEC v. Alexander, 160 F. Supp. 2d 642, 649 (S.D.N.Y. 2001) (also holding that the Rule 9(b) standard is "relaxed" in insider trading cases "where specific facts are peculiarly within the knowledge of defendants").

[4] Unless otherwise indicated, case quotations omit all internal quotation marks, alterations, footnotes, and citations.

In sum, to survive a motion to dismiss, "the SEC must make particular factual allegations supporting a reasonable inference that the defendant[] violated Section 10(b) and Rule 10b-5" and "the SEC's allegations must strongly support an inference that the defendant acted with intent to defraud." SEC v. Yin, No. 17-cv-972, 2018 U.S. Dist. LEXIS 51580, at *7-8 (S.D.N.Y. Mar. 26, 2018).

B. Discussion

Afriyie argues that the complaint fails to state a claim for insider trading with the particularity required under Rule 9(b). Specifically, Afriyie argues that the complaint fails to allege that he was "bound by a confidentiality agreement to Apollo" and therefore "attempts to unilaterally impose duties of confidentiality Afriyie was never put on notice of." Defendant Letter Motion for Dismissal "Def. Let."), Dkt. 59, at 1. However, this is a misreading of the complaint and the legal standard. The operative allegation is that Afriyie breached a duty of confidentiality to his employer, MSD, which encompassed MSD's interactions with Apollo, not that he breached a separate duty of confidentiality to Apollo. And the complaint contains ample allegations that Afriyie owed and breached this duty. See Compl. ¶¶ 11-13. There is no legal requirement that Afriyie have or breach a duty owed directly to the original holder of the material nonpublic information. See Exchange Act Rule 10b5-1(a)

(the applicable "breach of a duty of trust or confidence" may be one "owed directly, indirectly or derivatively to the issuer of that security...or to any other person who is the source of the material non-public information.").

Afriyie also argues that the complaint offers inadequate detail concerning what material nonpublic information Afriyie accessed, and why that information qualified as either material or nonpublic. Def. Let. at 2-3. However, the complaint details the categories of documents at issue, their location in files accessible only by MSD employees, their labeling as confidential, and their materiality, illustrated in part by the impact on stock prices when the merger agreement was announced. See Compl. ¶¶ 10-15. With respect to Afriyie, the Complaint alleges specifically that Afriyie executed the ADT trades upon learning the material nonpublic information through his position at MSD. Id. ¶ 13. This more than satisfies Rule 9(b)'s particularity requirements and provides Afriyie with ample notice of the substance of the claims against him.

Afriyie's remaining arguments are primarily factual disputes about the actual confidentiality and materiality of the information concerned and his own motivations for trading that are inappropriate for consideration on a motion to dismiss.

Accordingly, Afriyie's motion to dismiss is denied.

III. Plaintiff's Motion for Summary Judgment

A. Standard of Review

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith 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); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). "An issue of fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. A fact is material for these purposes if it might affect the outcome of the suit under the governing law." Overton v. New York State Div. of Military & Naval Affairs, 373 F.3d 83, 89 (2d Cir. 2004). Plaintiff, as the moving party, bears the burden of proving that there is no genuine issue of material fact, but if plaintiff meets that burden, defendant "must come forward with specific facts showing that there is a genuine issue for trial." Caldarola v. Calabrese, 298 F.3d 156, 160 (2d Cir. 2002). Plaintiff is entitled to summary judgment "where the nonmovant's evidence is merely colorable, conclusory, speculative or not significantly probative." SEC v. McCaskey, No. 98-cv-6153, 2001 U.S. Dist. LEXIS 13571, at *6 (S.D.N.Y. Sept. 4, 2001) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986)). Any ambiguity

must be resolved in favor of defendant as the non-moving party. See Amnesty Am. v. Town of W. Hartford, 361 F.3d 113, 122 (2d Cir. 2004).

Pro se parties "are to be given special latitude on summary judgment motions." Byrd v. City of New York, No. 17-cv-2166, 2018 U.S. Dist. LEXIS 392, at *10 (S.D.N.Y. Jan. 2, 2018). "Nevertheless, proceeding pro se does not otherwise relieve a litigant from the usual requirements of summary judgment, and a pro se party's bald assertion, unsupported by evidence, is not sufficient to overcome a motion for summary judgment." Cole, 1999 U.S. Dist. LEXIS 16767, at *8 (collecting cases). Moreover, Afriyie's summary judgment papers give every indication that they were either ghost-written by a lawyer or that Afriyie possesses considerable legal knowledge.

I. Discussion

A. Collateral Estoppel

"Under the doctrine of collateral estoppel, when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." United States v. U.S. Currency in Amount of $119,984.00, More or Less, 304 F.3d 165, 172 (2d Cir. 2002). Collateral estoppel applies upon a determination that "(1) the issues in both proceedings are identical, (2) the issue in the prior proceeding was actually litigated and

actually decided, (3) there was full and fair opportunity to litigate in the prior proceeding, and (4) the issue previously litigated was necessary to support a valid and final judgment on the merits." NLRB v. Thalbo Corp., 171 F. 3d 102, 109 (2d Cir. 1999).

It is well-settled that "a criminal conviction, whether by a jury verdict or guilty plea, constitutes estoppel in favor of the United States in a subsequent civil proceeding as to those matters determined by judgment in the criminal case." U.S. Currency, 304 F.3d at 172. In the securities fraud context specifically, "[c]ourts in this district have consistently found that a defendant convicted of securities fraud in a criminal proceeding is collaterally estopped from relitigating the underlying facts in a subsequent civil proceeding." SEC v. Contorinis, No. 09-cv-1043, 2012 U.S. Dist. LEXIS 19961, at *7-8 (S.D.N.Y. Feb. 3, 2012) (collecting cases).

A person commits fraud under Section 10(b) and Rule 10b-5 when "he misappropriates confidential information for securities trading purposes, in breach of a duty owed to the source of the information." United States v. O'Hagan, 521 U.S. 642, 652 (1997). Such conduct violates Section 10(b) because "a fiduciary's undisclosed, self-serving use of a principal's information to purchase or sell securities, in breach of a duty

of loyalty and confidentiality, defrauds the principal of the exclusive use of that information." Id.

In this case, the facts established by Afriyie's criminal conviction constitute all of the elements necessary to support civil liability under Section 10(b) of the Exchange Act and Rule 10b-5. To convict Afriyie of securities fraud, the jury in his criminal case was instructed that it must find that Afriyie "had a relationship of trust and confidence with his employer MSD, that he violated that duty "by using material, nonpublic information that he obtained by virtue of his relationship with MSD Capital to trade ADT securities for his own personal benefit," that he acted "knowingly, willfully, and with intent to defraud," and that he used "an instrumentality of interstate commerce, or...facility of national securities exchange" to do so." Pl. 56.1 ¶ 6 (quoting jury instructions in the criminal case). Because Afriyie was found to have traded on material, nonpublic information for personal gain in knowing violation of MSD policies without disclosure to MSD, he deprived his employer and its clients of their exclusive use of confidential information in violation of Section 10(b) and Rule 10b-5.

Afriyie acknowledges that the elements of securities fraud in the criminal case "overlap entirely" with those in this case. Def. Opp. at 14. However, he maintains that the issues in the criminal and civil proceedings are not identical as it was the

jury's forfeiture verdict, and not its criminal verdict, that specified that all the ADT trades at issue (as opposed to any of them) were illegal. Id. at 14-15. Afriyie appears to believe that the forfeiture verdict was a "sentencing finding[]," and, accordingly, cannot form a basis for collateral estoppel. Id. at 15-16. But the forfeiture verdict was not a sentencing finding; it was a trial on the merits of the forfeiture allegations and therefore its verdict has collateral estoppel effect.[5] As noted above, Afriyie also makes factual claims in his opposition memorandum that purport to controvert the proof of his exposure to material nonpublic information and his motivation for trading in ADT options. See Def. Opp. at 3-4. However, these statements are exactly the type of effort to relitigate a criminal conviction that collateral estoppel is intended to bar, and such "bald assertion[s], unsupported by evidence, [are] not sufficient to overcome a motion for summary judgment." Cole, 1999 U.S. Dist. LEXIS 16767, at *8.

[5] Afriyie also argues that the SEC's motion fails as it "flatly ignores the second, third, and fourth requirements" for collateral estoppel. Def. Opp. at 14. However, the SEC motion clearly establishes that the issues in question were "actually litigated and actually decided," were necessary to support a final judgment in the criminal case, and, as to the requirement for "a fair and full opportunity for litigation," that defendant was represented by counsel in a full jury trial before his conviction. Afriyie points to no such issues that he did not have an opportunity to litigate, and does not meaningfully assert that any such requirement was not met. Accordingly, the Court finds his argument meritless.

For all of these reasons, summary judgment in the SEC's favor is granted on the SEC's Section 10(b) and Rule 10b-5 claims.

B. Damages

The SEC seeks three forms of relief against Afriyie: (i) a permanent injunction that would enjoin Afriyie from violating section 10(b)of the Securities Act of 1934 and Rule 10b-5 promulgated thereunder; (ii) disgorgement of Afriyie's gains along with pre-judgment interest; and (iii) the imposition of a civil penalty. See Compl. ¶ 28; see also Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment Against Defendant John Afriyie ("Pl. Mem."), Dkt. 62.

i. Injunctive Relief

"Injunctive relief is expressly authorized by Congress to proscribe future violations of federal securities laws." SEC v. Cavanagh, 155 F.3d 129, 135 (2d Cir. 1998). In determining whether to grant a permanent injunction, courts consider:

> the fact that defendant has been found liable for illegal conduct; the degree of scienter involved; whether the infraction is an "isolated occurrence;" whether defendant continues to maintain that his past conduct was blameless; and whether, because of his professional occupation, the defendant might be in a position where future violations could be anticipated.

SEC v. Commonwealth Chem. Sec., Inc., 574 F.2d 90, 100 (2d Cir. 1978).

Applying these factors, the Court finds that a permanent injunction is clearly warranted. The jury found Afriyie liable for illegal conduct for all the trades concerned, which required a finding that he acted with scienter. The crime involved numerous trades over a period of weeks, not an isolated instance of bad judgment. As Afriyie's opposition to the present motion for summary judgment indicates, he continues to dispute the blameworthiness of his conduct.[6] Finally, Afriyie is an established investment professional.

Accordingly, Plaintiff's request that the Court permanently enjoin Defendant from violating Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder is granted.

ii. Disgorgement

Where a district court "has found federal securities law violations, it has broad equitable power to fashion remedies, including ordering that culpable defendants disgorge their profits." SEC v. First Jersey Sec., Inc., 101 F.3d 1450, 1474 (2d Cir. 1996) (finding that disgorgement serves the deterrent purpose of securities laws by "depriv[ing] violators of their ill-gotten gains"). The Court also has discretion to determine whether prejudgment interest, usually calculated at the IRS's

[6] However, the Court gives this factor little weight, since a criminal defendant whose appeal from his conviction is still pending can hardly be expected to admit his guilt.

underpayment rate, should be paid. Id. at 1474-76. "Requiring the payment of prejudgment interest prevents a defendant from obtaining the benefit of what amounts to an interest free loan procured as a result of illegal activity." SEC v. Moran, 944 F. Supp. 286, 295 (S.D.N.Y. 1996).

The SEC seeks disgorgement in the amount of $1,576,445.98, representing the total profits Afriyie realized in his ADT trades, and prejudgment interest in the amount of $94,038, for a total of $1,670,483.98. Pl. Mem. at 10; Declaration of Walter Newell in Support of Motion for Summary Judgment as to Defendant John Afriyie ("Newell Dec."), Dkt. 64, ¶¶ 17-19. However, the SEC also "requests that any disgorgement order by this Court provide that disgorgement and prejudgment interest be deemed satisfied by the criminal orders," as Afriyie "already been ordered to pay well in excess of $2 million" in his criminal case. Pl. Mem. at 11 n.6. Aside from his meritless argument that the verdicts in the criminal case did not represent a determination that that all ADT trades were illegal, Afriyie does not specifically dispute the request for disgorgement. As Afriyie has presented no evidence to dispute the SEC's calculation and no argument that he should not be required to disgorge funds, the Court finds disgorgement with prejudgment interest warranted in the amount of $1,670,483.98, to be deemed satisfied by the prior criminal case orders.

iii.Civil Penalties

Section 21A of the Exchange Act authorizes civil money penalties for insider trading up to three times the profit gained or loss avoided because of the illegal act. 15 U.S.C. §78u-1(a). "Congress intended the penalty to serve as a deterrent mechanism because disgorgement alone 'merely restores a defendant to his original position without extracting a real penalty for his illegal behavior.'" SEC v. Sekhri, No. 98-cv-2320, 2002 U.S. Dist. LEXIS 13289, at *18 (S.D.N.Y. July 22, 2002) (quoting H.R. Rep. No. 98-355, 98th Cong., 2d Sess., 7-8 (1984)). To determine whether civil penalties should be imposed, courts consider factors such as "(1) the egregiousness of the defendant's conduct; (2) the degree of the defendant's scienter; (3) whether the defendant's conduct created substantial losses or the risk of 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. Haligiannis, 470 F. Supp. 2d 373, 386 (S.D.N.Y. 2007).

Applying these factors, the Court finds that the civil penalty the SEC requests - $1,576,445.98, i.e., the amount of Afriyie's insider trading profits - is appropriate under the objectives of the Exchange Act. Afriyie bears full responsibility for his actions, by which he profited immensely.

Afriyie obtained these gains through multiple illegal trades conducted over the course of several weeks, and had made previous attempts to profit from company confidential information. He took numerous steps to evade detection, for instance, trading in his mother's name. Accordingly, a fine is necessary to promote general and specific deterrence. However, a civil penalty greater than the amount of his profits would be excessively harsh given the substantial monetary criminal penalties already imposed on Afriyie.

IV. Conclusion

For the foregoing reasons, defendant's motion to dismiss is denied and plaintiff's motion for summary judgment is granted. Defendant is permanently restrained and enjoined from violating, directly or indirectly, Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder, 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: (i) to employ any device, scheme, or artifice to defraud; (ii) 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 light of the circumstances under which they were made, not misleading; or (iii) to engage in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any person.

Defendant is ordered to disgorge his profits, with prejudgment interest, in the amount of $1,670,483.98, but this order shall be deemed satisfied if the corresponding criminal case orders are satisfied. Finally, defendant is ordered to pay a civil penalty of $1,576,445.98.

The Clerk of Court is directed to terminate all open docket entries and enter judgment closing the case.

SO ORDERED

Dated: New York, NY
November 26, 2018

JED S. RAKOFF, U.S.D.J.