Articles + Publications | January 4, 2022

Second Circuit Affirms De Maison Disgorgement Amount as Reasonable

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Executive Summary

On December 16, 2021, the Second Circuit affirmed a lower court's judgment, ordering disgorgement and imposing a civil penalty involving a defendant (Ms. de Maison) charged with participating in a microcap "pump and dump" scheme. The underlying case had been vacated and remanded on the basis of the Supreme Court's decision in *Liu v. SEC*, and Ms. de Maison appealed, arguing that the district court had not appropriately taken her expenses into account when the court ordered the revised disgorgement amount. The Second Circuit affirmed the lower court's decision, which was that the SEC had demonstrated that Ms. de Maison had misappropriated investor funds by inappropriately transferring those funds into her own personal accounts. The Second Circuit also found that the civil penalty reasonably reflected Ms. de Maison's gross pecuniary gain, and was thus affirmed.

Underlying Case

The original underlying action against Ms. de Maison commenced in 2014 after the SEC accused her of being part of a ring of individuals engaging in a microcap "pump and dump" scheme. Ms. de Maison settled with the SEC in 2015, and the consent judgment ordered Ms. de Maison to disgorge $4,240,049.30 and to pay a civil penalty in the same amount. The Second Circuit affirmed this order, and Ms. de Maison petitioned the Supreme Court for certiorari. While her petition was pending, the Supreme Court decided *Liu v. SEC*, which held that disgorgement may not exceed a defendant's net profits from the alleged conduct. In light of this landmark decision, the Second Circuit granted, vacated, and remanded Ms. de Maison's petition to the district court for reevaluation in a manner consistent with *Liu*.

Under *Liu's* rationale, the SEC revised its disgorgement amount to $524,885, and the district court found that this amount was a reasonable approximation of the net profits connected to the fraud. This was not satisfactory for Ms. de Maison, however, who still opposed the civil penalty and argued that the penalty amount should be equal to the revised disgorgement amount. The district court, on account of Ms. de Maison's "egregious and recurrent conduct," disagreed and refused to amend the civil penalty amount in excess of $4 million.

Second Circuit's Opinion

On appeal, Ms. de Maison argued that (1) the revised disgorgement amount ($524,885) exceeded her net profits of $184,652; and (2) the court's reimposition of the civil penalty ($4,240,049.30) was excessive in light of the

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revised disgorgement amount.

Regarding the disgorgement, Ms. de Maison argued that $340,000 of the funds at issue were used for the investors' benefit. However, the Second Circuit affirmed the district court's finding that Ms. de Maison failed to overcome the SEC's showing that investor funds were transferred to Ms. de Maison's personal account for her own personal use. Notably, the Second Circuit held that the *Liu* decision does not override the principle that specific tracing is not required for disgorgement.

As for the civil penalty, Ms. de Maison argued that the dollar amount was disproportionate when compared to the revised disgorgement amount. The Second Circuit disagreed, finding that the district court had wide discretion to impose civil penalties. Penalties are not addressed by *Liu*, and the law is bereft of any stated proportionality requirement between civil penalties and disgorgement.

Ultimately, the Second Circuit affirmed the lower court's findings that (1) regarding the revised disgorgement amount, the SEC had fulfilled its obligation to demonstrate that the dollar amount was a reasonable approximation of the profits causally connected to Ms. de Maison's fraud; and (2) concerning the civil penalties, the dollar amount was within the lower court's discretion and appropriate in light of Ms. de Maison's egregious and recurrent conduct.

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