



and Daniel Eric Byer (“Byer”) (collectively “the Defendants”) from further violations of the federal securities laws and freezing the assets of the defendants pending the resolution of this case. The Commission alleged in its Complaint that defendants raised over \$18.2 million from at least 182 investors by selling contracts to participate in the returns from an asset growth program that purports to invest in “prime bank” instruments. The Complaint further alleged that, rather than make the investments as represented to investors, the Defendants used investor funds to make monthly payments to prior investors, and also to other bank accounts and entities unrelated to the investment marketed by the Defendants.

The Court granted a Temporary Restraining Order on December 4, 2006, which provided assorted relief including enjoining the defendants from further violations of the securities laws and freezing their assets. On December 11, 2006, the Court entered a Preliminary Injunction, which extended the asset freeze as to each of the defendants, pending a hearing on a permanent injunction. On January 22, 2007, the Court entered an Order fixing the close of discovery in this matter at March 30, 2007. By Order of February 7, 2007, the discovery cutoff was extended to April 30, 2007. The February 7, 2007 Order also provided that “[a]ny motion to amend the pleadings or to join a party shall be made as soon as possible after counsel becomes aware of the grounds for the motion.”

On January 19, 2007, the Court entered an Order appointing a receiver over defendant IFC. Defendants Pinkett and IFC filed an Answer to the Complaint on February 12, 2007. On February 23, 2007, Plaintiff filed a motion for entry of default judgment against defendants Byer and Stevenson, who have failed to answer the original Complaint. On March 29, 2007, Magistrate Jones entered a Report and Recommendation concluding that the motion for entry of default against both Byer and Stevenson should be granted.

## **THE COMMISSION HAS TIMELY BROUGHT THIS MOTION**

The Commission has met the requirement of the Scheduling Order that “[a]ny motion to amend the pleadings or to join a party shall be made as soon as possible after counsel becomes aware of the grounds for the motion.” The most substantial evidence detailing the payments to the relief defendants is contained in the accounting records of IFC, which were contained in ten (10) boxes produced to both defendant Pinkett and the SEC by the Receiver for IFC on February 7, 2007. Pursuant to an agreement with counsel for Pinkett, the SEC agreed not to examine the documents until counsel for Pinkett had reviewed the documents for potentially privileged materials. The SEC asked Pinkett’s counsel to designate any documents as privileged by February 16, 2007. Defense counsel requested an extension of this deadline, which the SEC granted. When the SEC received no objections by the close of business on February 28, 2007, we informed opposing counsel that while we would continue to consider and make efforts to preserve any objections or claims of privilege, we could no longer wait to review the documents and our document review began. On or about March 14, 2007, it became clear that each of the proposed relief defendants had received funds from IFC as “finder” payment for funds deposited by IFC investors pursuant to the scheme alleged in the Complaint. On or about March 19, 2007, counsel for the SEC sought Commission approval for adding the additional relief defendants to the Complaint in this matter. That approval was granted on March 29, 2007. A draft of the Amended Complaint was provided to counsel for defendant Pinkett on April 2, 2007, to determine whether Pinkett had any objection to the filing of the Amended Complaint. On April 5, 2007, counsel for Pinkett informed counsel for the Plaintiff that he had no objection to the filing of the Amended Complaint, provided that Plaintiff does not object to a request for a brief extension to the period of available discovery. As Plaintiff does not object to this request,

Pinkett does not object to the filing of the Amended Complaint. Thus, the Commission has brought this motion as soon as possible, as required by the Court's Scheduling Order.

## ARGUMENT

### I. Leave to File an Amended Complaint Should be Granted

Federal Rule of Civil Procedure 15(a) requires that leave to file an amended complaint be "freely given when justice so requires." The Supreme Court has explained that "[i]n the absence of . . . undue delay, bad faith or dilatory motive . . . undue prejudice . . . futility of amendment, etc.--the leave sought should . . . be "freely given." "Foman v. Davis, 371 U.S. 178, 182 (1962). No such prejudice exists here. The facts described in the Amended Complaint describe the same scheme alleged in the original complaint, and provide only greater detail that will assist the defendants in understanding the factual allegations against them. There is no prejudice to the defendants relative to their ability to conduct discovery, in that the only discovery that the Defendants have conducted to this point is a document request from Defendant Pinkett directed to the Plaintiff, who has substantially completed the process of providing to Defendant Pinkett all discoverable material in the Plaintiff's possession.

The Commission additionally proposes to add six nominal, or "relief" defendants -- defendants who are not alleged to have violated the federal securities laws, but have received proceeds of the fraud. As the Fourth Circuit has explained, a nominal defendant may be joined without the Court asserting subject matter jurisdiction over the claim to the funds -- "[b]ecause a nominal defendant has no ownership interest in the funds at issue, once the district court has acquired subject matter jurisdiction over the litigation regarding the conduct that produced the funds, it is not necessary for the court to separately obtain subject matter jurisdiction over the

claim to the funds held by the nominal defendant; rather, the nominal defendant is joined purely as a means of facilitating collection.” CFTC v. Kimberlynn Creek Ranch, 276 F.3d 187, 191-192 (4<sup>th</sup> Cir.2002). Consequently, “a nominal defendant is part of a suit only as the holder of assets that must be recovered in order to afford complete relief; no cause of action is asserted against a nominal defendant.” Id. at 192 (citation omitted). “Federal courts may order equitable relief against a person who is not accused of wrongdoing in a securities enforcement action where that person: (1) has received ill-gotten funds; and (2) does not have a legitimate claim to those funds.” Id. (quotation omitted). As the proposed amended complaint alleges, the relief defendants received substantial proceeds as “finders” for bringing investors into a massive Ponzi scheme. Including such individuals as relief defendants will further this Court’s “equitable powers to effectuate relief,” and consequently leave to amend to add these individuals should be granted. See FTC v. Bronson Partners, LLC, 2005 WL 1366459, \*1-2.

## II. **The Defaulting Defendants**

Currently pending before the Court is a motion for the entry of a default judgment against Defendants Byer and Stevenson, who have failed to answer the original Complaint. Should the Court grant leave to amend the original Complaint, Plaintiff does not intend to serve the Amended Complaint on Byer and Stevenson, pending the Court’s determination of Plaintiff’s motion for entry of default against those defendants. Service is excused by Rule 5 of the Federal Rules of Civil Procedure, which provides that “[n]o service need be made on parties in default<sup>1</sup> for failure to appear” with the exception of “pleadings asserting new or additional claims for relief against them.” See Combs v. Coal & Mineral Management Services, 105 F.R.D 472, 473-

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<sup>1</sup> No formal determination that the defendants are in default need be made. “Where the defendants were served with the summons and do not appear and answer within the required period, they are ‘parties in default’ for Rule 5(a) purposes.” Cutting v. Town of Allenstown, 936 F.2d 18, 19, n.1 (1<sup>st</sup> Cir.1991).

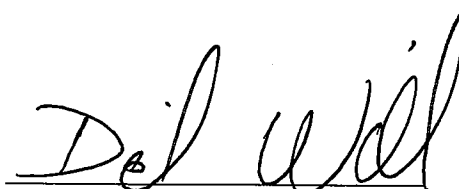
474 (D.D.C 1984)(amended complaint asserting no new claim for relief need not be served); see Saint-Gobain Autover USA v. Fuyao Glass Industry, 2005 WL 3454402 (E.D.Mich)(“Because Defendant’s Answer to the Original Complaint had not been received within twenty days of service, Defendant [] was in default, and Plaintiffs were not obliged to serve Defendant with the Amended Complaint”). The Amended Complaint contains no new or additional claims against Byer or Stevenson – the claims against them are identical to those in original Complaint. Because an amended complaint supersedes an original complaint only “when the amended complaint is served on the parties, not when it is filed with the court,” Pritt v. The Republican National Committee, 1 F.Supp.2d 590, 591 (S.D.W.V 1998), the Court may therefore properly enter a default judgment against Byer and Stevenson on the basis of the original Complaint, assuming the Court is otherwise inclined to adopt Magistrate Jones’ report and recommendation and grant Plaintiff’s motion. International Controls Corp. v. Vesco, 556 F.2d 665, 668-669 (2<sup>nd</sup> Cir.1977)(default judgment properly entered on the basis of original complaint where defendant was never served with amended complaint.); see Anunciation v. West Capital Financial Services, 97 F.3d 1458 (9<sup>th</sup> Cir.1996) (unpublished) (default judgment properly entered on basis of original complaint where there was no proper service of amended complaint).

### **CONCLUSION**

For the above reasons, Plaintiffs’ Motion for Leave to File Amended Complaint should be granted.

Dated: Washington, D.C.  
April 9, 2007

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

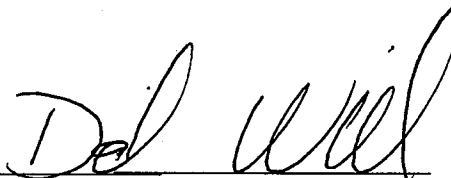
I HERBY CERTIFY that on April 9, 2007, I mailed the foregoing Plaintiff's

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