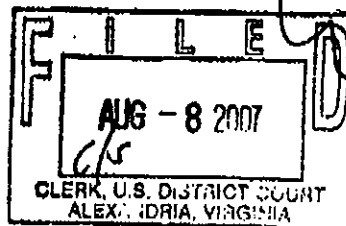


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IN THE UNITED STATES DISTRICT COURT FOR  
THE EASTERN DISTRICT OF VIRGINIA  
Alexandria, Virginia

United States Securities and Exchange )  
Commission, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
International Fiduciary Corp., S.A., )  
et al. )  
 )  
Defendants. )  
\_\_\_\_\_ )



C.A. No. 1:06cv1354

**REPORT AND RECOMMENDATION**

This matter is before the court on plaintiff's verified supplemental motion for entry of default judgment against defendants Daniel Eric Byer and Malcolm Cameron Boyd Stevenson (docket no. 90). The magistrate judge makes findings as follows, and recommends that default judgment granting the additional relief sought by plaintiff be entered against defendants Byer and Stevenson.

**Fact Summary**

Defendant International Fiduciary Corporation (IFC) is a Virginia corporation. Defendants Stevenson and Byer are individual residents of British Columbia; defendant Pinkett is an individual resident of Virginia. All three individual defendants were the principals of defendant IFC. Plaintiff alleges that since at least July 2003, defendants have engaged in a Ponzi scheme in which they raised at least \$18.2 million from 182 investors. They offered contracts to "invest" at least \$100,000 in a non-existent debt trading operation in what plaintiff calls a classic

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pyramid scheme. Defendants misrepresented multiple material facts to secure investments and never applied the money they collected as promised. Defendants have been ordered to cease trading as IFC by authorities in Canada.

Plaintiff's four count complaint alleges that defendants: 1) violated Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934; 2) violated Section 17(a)(1) of the Securities Act of 1933; 3) violated Sections 17(a)(2) and (3) of the Securities Act of 1933; and 4) violated Section 5(c) of the Securities Act of 1933.

### **Procedural Summary**

Plaintiff filed the complaint in this action on December 4, 2006. On the same date, Judge Lee issued a temporary restraining order ("TRO") and other emergency relief against defendants which provided, among other things, that service of the TRO, the summons and the complaint could be made by various means, including any manner authorized by Rule 5 of the Federal Rules of Civil Procedure.

In a Report and Recommendation entered on March 29, 2007, the magistrate judge found that both defendants had been properly served and recommended that default judgment be entered against both in the form of injunctive relief. Judge Lee, in an opinion concurring with the findings of the magistrate judge on the service of Stevenson, denied Stevenson's motion to quash (docket no. 95). Judge Lee also granted the injunctive relief sought by plaintiff in its first motion for default judgment, in the form of "Final Judgment of Default" against both defendants (docket nos. 99, 100).

In the March 29 Report and Recommendation, pursuant to plaintiff's request, the magistrate judge further recommended that plaintiff be allowed to prove amounts of

disgorgement at an appropriate time. Plaintiff now brings this supplemental motion for default judgment seeking the additional relief of disgorgement and pre-judgment interest. Plaintiff also seeks a statutory penalty in an amount determined by the court. All amounts are to be paid to the receiver appointed by the court.

### Findings

With service established as to both defendants Bycr and Stevenson and injunctive and declaratory relief already granted, the magistrate judge finds that the monetary relief now requested by plaintiff is appropriate. The magistrate judge finds that plaintiff has provided an appropriate basis for judgment through the well-pled complaint and the declarations in support of default judgment. The findings made by Judge Lee in his preliminary injunction order (docket no. 14), exhibits attached to the motions for default judgment and motions for summary judgment, and entry of final injunctive relief against defendants provide the appropriate basis for entry of the permanent injunctive relief now sought, where defendants have admitted to the allegations of the complaint by virtue of their default.

Plaintiff requests disgorgement in an amount of \$5,929,802.00 as to defendant Stevenson and \$3,122,243.00 as to defendant Bycr. Disgorgement is an equitable remedy available to redress the violation of securities laws. *See S.E.C. v. First City Financial Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989). It is a method of forcing a defendant to give up the amount by which he was unjustly enriched. *S.E.C. v. Commonwealth Chem. Sec., Inc.*, 574 F.2d 90, 102 (2d Cir. 1978). As support for the amounts requested, plaintiff attaches to its motion as Exhibit A the "Client Principals and Withdrawals Reports," produced by an accountant for defendant IFC and filed as part of the Sworn Accounting of defendant Preston David Pinkett, II. "Estimating

ill-gotten profits to fashion a disgorgement remedy is an imprecise science . . . [and though] the government always retains the burden of persuasion . . . [o]nce the government establishes the defendants' liability and produces a reasonable approximation of the illegal profits, it is up to the wrongdoers to come forward with evidence to rebut the approximation." See *U.S. Dept. of Housing & Urban Development v. Cost Control Marketing & Sales Management of Virginia, Inc.*, 64 F.3d 920, 927 (4th Cir. 1995), citing *First City Financial Corp.*, 890 F.2d 1215. Plaintiff has made a reliable showing and defaulting defendants have made no showing to rebut the amounts. The magistrate judge therefore finds the requested amounts appropriate.

Plaintiff requests prejudgment interest of \$199,241.35 as to defendant Stevenson and \$104,907.36 as to defendant Byer. It arrives at this figure by applying an interest rate of 8% to the disgorgement amounts, calculated at the annual rate imposed by the IRS for interest on tax underpayments and refunds, running from the filing of this action to the present. This rate is derived from 26 C.F.R. 301.6621-1 and according to plaintiff is intended to reflect market conditions. The magistrate judge finds the rate appropriate and recommends that the requested amounts of prejudgment interest be awarded.

Section 20(D) of the Securities Act of 1933, the text of which is provided in the margin<sup>1</sup>, provides for the imposition of a civil penalty at the discretion of the district court; this provision is mirrored at Section 21(d)(3) of the Securities Exchange Act of 1934.

In determining whether civil penalties should be imposed, and the amount of the fine, courts look to a number of factors, including 1) the egregiousness of the defendant's conduct; 2)

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**<sup>1</sup>d. Money penalties in civil actions.**

1. Authority of Commission. Whenever it shall appear to the Commission that any person has violated any provision of this title, the rules or regulations thereunder, or a cease-and-desist order entered by the Commission pursuant to section 8A, other than by committing a violation subject to a penalty pursuant to section 21A of the Securities Exchange Act of 1934, the Commission may bring an action in a United States district court to seek, and the court shall have jurisdiction to impose, upon a proper showing, a civil penalty to be paid by the person who committed such violation.

2. Amount of penalty.

A. First tier. The amount of the penalty shall be determined by the court in light of the facts and circumstances. For each violation, the amount of the penalty shall not exceed the greater of (i) \$5,000 for a natural person or \$50,000 for any other person, or (ii) the gross amount of pecuniary gain to such defendant as a result of the violation.

B. Second tier. Notwithstanding subparagraph (A), the amount of penalty for each such violation shall not exceed the greater of (i) \$50,000 for a natural person or \$250,000 for any other person, or (ii) the gross amount of pecuniary gain to such defendant as a result of the violation, if the violation described in paragraph (1) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement.

C. Third tier. Notwithstanding subparagraphs (A) and (B), the amount of penalty for each such violation shall not exceed the greater of (i) \$100,000 for a natural person or \$500,000 for any other person, or (ii) the gross amount of pecuniary gain to such defendant as a result of the violation, if:

1. the violation described in paragraph (1) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; and
2. such violation directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons.

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. *S.E.C. v. Coates*, 137 F.Supp.2d 413, 428-29 (S.D.N.Y. 2001). In *S.E.C. v. Opulentica, LLC*, 479 F.Supp.2d 319, 331 (S.D.N.Y. 2007), the court found that a third-tier penalty was appropriate for a defendant who had "allocated to a principal role in a fraudulent scheme that deprived investors of \$443,962.10, and he is further admitted to diverting at least \$185,000 for his personal use." Defendants have admitted the allegations of the complaint which alleges they were key players in a scheme of greater scale. The magistrate judge recommends that the court enter a third-tier penalty.

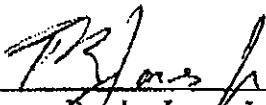
#### **Recommendation**

The magistrate judge recommends that the court enter the "Proposed Final Judgement Of Default against Defendant Daniel Eric Byer" and "Proposed Final Judgement Of Default against Defendant Malcolm Cameron Boyd Stevenson," attachments B and C to the supplemental motion for entry of default judgment (docket no. 90). The magistrate judge recommends that where plaintiff has asked the court to determine a civil penalty, the court impose a penalty of \$100,000.

#### **Notice**

By mailing copies of this report and recommendation, the parties are notified as follows. Objections to this report and recommendation must be filed within ten (10) days of service on you of this report and recommendation. A failure to file timely objections to this report and

recommendation waives appellate review of the substance of the report and recommendation and waives appellate review of a judgment based on this report and recommendation.

  
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Thomas Rowles Jones, Jr.  
United States Magistrate Judge

August 8, 2007  
Alexandria, Virginia