

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

UNITED STATES SECURITIES AND)
EXCHANGE COMMISSION,)

Plaintiff,)

v.)

Civil Action No. 1:06-cv-01354 GBL/TRJ

INTERNATIONAL FIDUCIARY)
CORP., S.A. et al.,)

Defendants,)

TERRY MARTIN et al.,)

Relief Defendants.)

**Brief in Support of Motion of Relief Defendants
Terry Martin, CD2E, Inc., Winchell Corp.,
and M&M Technologies, Inc.
to Clarify and Modify Judgment
Against Defendant International Fiduciary Corp.**

Relief defendants Terry Martin, CD2E, Inc., Winchell Corp., and M&M Technologies, Inc. move pursuant to Fed. R. Civ. P. 60 that the Court clarify and modify the judgment entered against defendant International Fiduciary Corp. on July 20, 2007 (DE 106) ("the Judgment"), on the ground that the Judgment can be misinterpreted as entering judgment against the relief defendants in this action, which (a) we believe was not the Court's intention, and (b) would be inappropriate given that the Judgment was entered without any adjudication of the relief defendants' liability.

Specifically, we ask that the Court—

1. declare that the Judgment does not constitute, and was not intended to constitute, a judgment against relief defendants Terry Martin, CD2E, Inc.,

M&M Technologies, and Winchell Corp., Robert Lowery, and/or SZE Coast Operating Corp., and

2. modify the Judgment, nunc pro tunc as of July 20, 2007, by deleting the following language from the first sentence of section IV: “and Relief Defendants Terry Martin (and his affiliated entities—CD2E, Inc., M&M Technologies, and Winchell Corp.) and Robert Lowery (and his affiliated entity—SZE Coast Operating Corp.)”.

We have contacted the SEC and the receiver to determine their position regarding this motion. Our understanding is that they agree that the Judgment was not intended to constitute a judgment against the relief defendants. However, that parties have not at this point agreed on the specific form of relief that the Court should grant.

Statement of Facts

This is an enforcement action in which the SEC asserted claims against two different categories of defendants. The first category comprises the defendants who were culpable participants in the fraudulent scheme at issue and who were charged with violating the Securities Act. The second category comprises “relief defendants”: nominal parties who were not alleged to have broken the law but who were alleged to have received funds generated by the fraud, which funds the SEC sought to recover from them as part of obtaining complete relief against the culpable defendants. These relief defendants were themselves investors in the fraudulent scheme. There is no independent jurisdiction over them, and no judgment going to the merits of the SEC’s fraud claims may be entered against them. The relief defendants include movants Terry Martin; CD2E, Inc.; M&M Technologies; and Winchell Corp. The question whether any of the relief defendants may

be required to make restitution of funds they received in this action has not yet been adjudicated.

On July 20, 2007, a consent judgment (“the Judgment”) was entered against defendant International Fiduciary Corp. (“IFC”)¹ The Judgment included language to the effect that IFC’s monetary liability was joint and several with the relief defendants:

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant *is liable, jointly and severally with Defendants Daniel Eric Byer and Malcolm Cameron Boyd Stevenson and Relief Defendants Terry Martin (and his affiliated entities—CD2E, Inc., M&M Technologies, and Winchell Corp.) and Robert Lowery (and his affiliated entity—SZE Coast Operating Corp.)* for disgorgement in the amount of \$24,037,362.95, plus prejudgment interest thereon in the amount of \$971,109.46, for a total amount of \$25,008,472.41, representing profits gained as a result of the conduct alleged in the Amended Complaint, together with prejudgment interest thereon.²

Separate judgments were also entered against the individual culpable defendants, Preston Pinkett, Malcolm Stevenson, and Daniel Byer, but none of those judgments contained any reference to the relief defendants.

Our understanding is that the SEC did not intend that the Judgment would constitute a judgment against any of the relief defendants; indeed, the SEC’s recent motion seeking summary judgment against the relief defendants in amounts far less than the total amount of the Judgment indicates that the SEC does not believe that the Judgment imposes liability on the relief defendants. Moreover, we believe that the Court similarly did not intend it to have the effect of a judgment against the relief defendants.

However, it is possible to misinterpret the Judgment’s reference to the relief defendants as meaning that they are jointly and severally liable for the amount of the

1. DE 106.

2. *Id.* at 4 (emphasis added).

judgment against IFC—more than \$25 million. In fact, the Judgment has been misinterpreted in that manner, to the movants' prejudice.

Relief defendant M&M Technologies has been sued in state court in Washington state by a company named NuPower Technologies, LLC, which is a party (as assignee) to three contracts with M&M, one of which required the payment to M&M of \$5 million in license fees relating to M&M's Everseal pump technology.³ NuPower filed the suit after the Judgment was entered, alleging that the Judgment constituted a judgment against Martin and M&M for more than \$25 million:

After investing \$600,000 (and matching funds of \$400,000) in accordance with the exclusive License Agreement, [the licensee/assignor] learned of M & M Technologies' and Terry Martin's involvement in an investigation and case brought by the Securities and Exchange Commission. the case is titled *United States Securities and Exchange Commission v. International Fiduciary Corp., S.A., et al.*, U.S. Eastern District of Virginia Case No. 1:06CV1354 The SEC has secured a judgment in the amount of \$25,008,472.41 together with prejudgment interest from all Defendants *including Terry Martin and M&M Technologies, Inc.* . . . A Receiver has been appointed to collect the funds. With the SEC's pending judgment and assets seizure [sic], M&M Technologies, Inc. is no longer a viable company.⁴

Thus, the Judgment's reference to the relief defendants is seriously adversely affecting movant M&M, and is doing so in a way that the Court could not have anticipated. Indeed, the cloud cast by that reference is interfering with M&M's ability to finance its operations and to obtain funds that might be used in connection with resolving the claims against them.

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3. A copy of NuPower's complaint is attached as Exhibit 1. M&M has filed its own suit against NuPower; a copy of the complaint in that action is attached as Exhibit 2.
 4. Ex. 1 hereto at 4 (emphasis added).

Argument

Under Fed. R. Civ. P. 60, the Court may grant relief from a judgment or order because of “mistake” or “inadvertence” or for “any other reason that justifies relief.”⁵ Such relief is appropriate here, because the language at issue has had consequences that we believe that neither the SEC nor the Court intended or anticipated.

The Judgment does not purport to enter judgment against any of the relief defendants. Indeed, it could not have legitimately done so, given that the SEC’s claims against the relief defendants has not yet been adjudicated. But events have shown that the Judgment creates the misimpression that the relief defendants have been held liable for more than \$25 million—a sum far in excess of the amount of the SEC’s claims against the relief defendants.

It is in the interest of justice for the Court to correct the record to reflect that no judgment has been entered against any of the relief defendants. In order to accomplish that goal, we ask that the Court enter an order clarifying and modifying the Judgment as follows:

1. Declaring that the Judgment does not constitute, and was not intended to constitute, a judgment against the relief defendants.
2. Modifying the Judgment, nunc pro tunc as of the date of its entry by deleting the existing reference to the relief defendants.

The relief we seek will have no effect on IFC’s liability under the Judgment. Nor would it affect the SEC’s claims against the relief defendants. Its only effect would be to

5. Fed. R. Civ. P. 60(b)(1), (6).

correct the misimpression that the Judgment appears to have conveyed and to prevent any future misunderstanding.



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Respectfully submitted,

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WINCHELL CORP., AND
M&M TECHNOLOGIES, INC.

By Counsel