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CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION
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**UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA**

Commodity Futures Trading Commission,
Plaintiff,
v.
Rabb Sabin, an individual; and Art Smith,
an individual,
Defendants.

CASE NO. SA CV 00-0940 DOC (EE~~x~~)

~~TENTATIVE~~ ORDER GRANTING
PLAINTIFF'S MOTION FOR ENTRY
OF A DEFAULT JUDGMENT AND
DISCHARGING THIS COURT'S
JANUARY 23, 2001, ORDER TO SHOW
CAUSE

Before the Court is a motion for entry of default judgment brought by Plaintiff Commodity Futures Trading Commission ("CFTC"). Defendants Rabb Sabin and Art Smith, against whom the judgment is sought, have failed to answer in this action and have not filed any papers with the Court concerning the motion. After consideration of the moving papers as well as other papers on file in this matter and oral argument on February 26, 2001, the Court GRANTS the motion.

**I.
BACKGROUND**

On a motion for default judgment, the Court takes as factually true the well-pled allegations of

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1 the complaint. Fed R. Civ P 8(d). Under this standard, the facts of this case are as follows Plaintiff
2 CFTC is the independent federal regulatory agency empowered to enforce the provisions of the
3 Commodity Exchange Act (the "Act"), 7 U S C § 1 *et seq* , and the regulations promulgated thereunder
4 (the "Regulations"), 17 C F.R. § 1 1 *et seq* Defendants Rabb Sabin and Art Smith, d/b/a Westar
5 Financial Services, The Cash Nursery ("TCN"), www the-cash-nursery com, have never been registered
6 with the CFTC in any capacity Defendants, while operating as commodity trading advisors, have made
7 and are making material misrepresentations concerning the following: (1) the profitability of their actual
8 commodities trading using TCN's trading methodology, (2) the presentation of hypothetical trades as
9 actual trades, (3) their trading backgrounds, and (4) customers' ability to view TCN's actual trades
10 before TCN places them. Compl ¶ 2 These actions violate §§ 4c(b) and 4o(1) of the Act and §§
11 4.41(a)-(b) and 33 10 of the Regulations.

12 On September 26, 2000, Plaintiff filed a complaint for equitable relief and civil penalties under
13 the Act. On October 10, 2000, Defendants, through their counsel, waived service of the summons and
14 acknowledged receipt of the Complaint. On October 27, 2000, Defendants consented to the entry of a
15 preliminary injunction. On December 22, 2000, the Clerk of this Court entered a default pursuant to
16 Federal Rule of Civil Procedure 55(a) On January 23, 2001, an Order to Show Cause re. Dismissal for
17 Lack of Prosecution was issued by this Court Plaintiff's Motion for Entry of Default Judgement is
18 sufficient to discharge the January 23, 2001 Order to Show Cause.

19
20 **II.**
DISCUSSION

21 The Court exercises federal question jurisdiction over Plaintiff's claims under the Act pursuant to
22 7 U.S.C. § 13a-1(a) and 28 U.S.C. § 1331

23 **A. Legal Standard**

24 Federal Rule of Civil Procedure 55(b) governs the entry of default judgments. When a party's
25 claim is "for a sum certain or for a sum which can by computation be made certain," the Clerk may
26 determine the amount of the judgment and enter a judgment of that amount. Fed R. Civ. P. 55(b)(1).
27 When the amount of a party's claim is not a sum certain, the party seeking a default must apply to the
28 court. Fed R. Civ. P. 55(b)(2) In entering a default judgment, a court usually considers and determines

1 the amount of damages, but it takes as established that the party in default is in fact liable to the
2 prevailing party See *Geddes v United Fin Group*, 559 F 2d 557, 560 (9th Cir 1977) ("The general rule
3 of law is that upon default the factual allegations of the complaint, except those relating to the amount of
4 damages, will be taken as true."), *TeleVideo Sys, Inc v Heidenthal*, 826 F 2d 915, 917-18 (9th Cir
5 1987) Courts in the Ninth Circuit carefully analyze the following factors in determining whether to
6 enter a default judgment (1) the possibility of prejudice to the plaintiff; (2) the merits of the plaintiff's
7 substantive claim; (3) the sufficiency of the complaint, (4) the sum of money at stake in the action; (5)
8 the possibility of a dispute concerning material facts, (6) whether the default was due to excusable
9 neglect; and (7) the strong policy favoring decisions on the merits *Eitel v McCool*, 782 F 2d 1470,
10 1471-72 (9th Cir. 1986). Under this standard, default judgments are more often granted than denied
11 *PepsiCo, Inc, v Trunfo-Mex, Inc*, 189 F.R.D 431, 432 (C D Cal 1999) (citing *Eitel*).

12 B. Application

13 An analysis of the above factors reveals that a default judgment is warranted in this case. Further
14 delay in this case would prejudice Plaintiff's ability to locate witnesses and marshal evidence.
15 Moreover, Plaintiff has made a compelling showing that Defendants violated the Act and the
16 Regulations by making false statements to customers regarding their trading activities and career
17 backgrounds. The Complaint, along with supporting declarations and investigative testimony,
18 sufficiently alleges fraud and demonstrates that Defendants' fraudulent activity violates §§ 4c(b) and
19 4a(1) of the Act and §§ 4 41(a) and (b) and 33 10 of the Regulations In sworn investigative testimony,
20 Defendant Smith admitted making misrepresentations as to Defendants' actual trading and profitability.
21 Obie Decl, Ex. 2, Smith Tr. at 55.13-17 Defendant Sabm admitted to making false statements about
22 possessing an M.B A degree and being a Vietnam war veteran. Obie Decl., Ex. 1, Sabm Tr. at 155.17-
23 156.9. In addition, Plaintiff's well-pled complaint and supporting evidence demonstrate that there is
24 little likelihood of there being a significant dispute as to the material facts involved. There is also no
25 evidence to suggest that Defendants' failure to defend was due to excusable neglect While the amount
26 of money at stake in this action is significant, the amount is not so large that it outweighs the other
27 factors. The above considerations demonstrate that a default judgment is proper

28 Plaintiff has fulfilled the procedural requirements of Rule 55 and Local Rule 14 12 for entry of a

1 default judgment. Local Rule 14.12 requires a party seeking a default judgment to submit a declaration
2 setting forth the procedural history of the default, that the party in default is not an infant or incompetent
3 person, and that the Soldiers' and Sailors' Civil Relief Act of 1940 does not apply. Pursuant to Local
4 Rule 14.12 1, notice must be given to the defaulting party regarding the motion and the amount
5 requested. Plaintiff submitted a sufficient declaration detailing its compliance with these requirements,
6 and Defendants were served with the motion and its supporting documents on February 1, 2001. Obie
7 Decl. ¶¶ 4-9.

8 Plaintiff requests six forms of relief, each of which will be discussed in turn.

9 **1. Restitution**

10 Plaintiff requests an order requiring Defendants to pay \$384,771.25 in restitution. This amount
11 is based on Defendants' response to civil investigative interrogatory number 6 propounded by Plaintiff
12 Obie Decl., Ex. 3. The \$384,771.25 amount is the total gross sales revenues for 1996, 1997, 1998, and
13 1999.

14 Plaintiff's Complaint specifically seeks restitution, but it does not allege a dollar amount.
15 Federal Rule of Civil Procedure 54(c) states that a judgment by default cannot exceed in type or amount
16 the relief demanded in the complaint. While Rule 54(c) appears to be straightforward, there is a
17 significant difference of opinion as to whether Rule 54(c) should be applied broadly or strictly. See
18 Charles Alan Wright et al., *Federal Practice and Procedure* § 2663 (3d ed. 1998). The rationale behind
19 a strict application of Rule 54(c) is that a defaulting defendant is only on notice of the amount sought in
20 the original complaint, and thus it would be unfair to surprise the defendant with a larger or different
21 type of award. See *Fong v United States*, 300 F.2d 400 (9th Cir. 1962) (applying Rule 54(c) strictly by
22 holding that actual damages were unavailable as part of a default judgment when the original petition
23 only sought liquidated damages). Other cases, including a leading Second Circuit case widely cited by
24 other courts, favor a more flexible approach, one that looks to whether the defaulting defendant had
25 adequate notice of the damages sought. *Au Bon Pain Corp. v Arctect, Inc.*, 653 F.2d 61, 65-66 (2d Cir.
26 1981) (holding that when a defaulting defendant is put on adequate notice as to the type of damages
27 sought, courts should afford relief on the merits rather than focusing on technical procedural concerns).

28 Both *Fong* and *Au Bon Pain* are concerned with a difference as to the type of damages, not the

1 amount of damages. The Court was unable to locate specific authority as to the issue of amount of
2 damages. In the circumstances of this case, the Court will allow Plaintiff to recover restitution even
3 though the Complaint does not allege a specific dollar amount. In the Complaint, Plaintiff clearly
4 requested restitution to every customer of Defendants in the amount of the funds received or utilized in
5 violation of the Act and Regulations. The exact amount of such restitution was uniquely within
6 Defendants' knowledge. In responding to the civil interrogatories, Defendants themselves produced the
7 \$384,771.25 figure. In doing so, Defendants were put on notice that the amount sought for restitution
8 would be approximately \$384,771.25. The Court concludes that Defendants had constructive
9 knowledge of the amount demanded. This unique situation warrants a broad interpretation of Rule
0 54(c). Therefore, restitution shall be ordered in the amount of \$384,771.25.

1 2. Disgorgement

2 Plaintiff also seeks disgorgement in the same amount as sought for restitution, \$384,771.25. A
3 district court has broad equity powers to order the disgorgement of a defendant's "ill-gotten gains." *SEC*
4 *v. First Pac Bancorp*, 142 F.3d 1186, 1191 (9th Cir. 1998). However, the Court declines to do so in this
5 situation. Plaintiff has not established that Defendants' profits from their illegal activity amount to
6 \$384,771.25. That amount was the Defendants' gross sales revenue from 1996 to 1999. Obie Decl., Ex.
7 3. In response to civil interrogatory number 7, which asked for Defendants' total net profits from 1996
8 to 1999, Defendants stated that the amount was \$0.00. Plaintiff has not submitted any other contrasting
9 evidence. While Defendants likely profited from their illegal activity, the evidence provided by Plaintiff
0 does not establish that \$384,771.25 is a reasonable estimate of such profits. Furthermore, the purposes
1 of disgorgement will be furthered by the other remedies obtained in this action. The restitution award
2 will deprive Defendants of their gross sales from 1996 to 1999 and return those funds to defrauded
3 customers. In addition, the civil penalty and permanent injunction will deter Defendants, and similar
4 offenders, from engaging in such activity in the future.

3. Civil Monetary Penalties

Plaintiff seeks a civil monetary penalty of \$1,154,313.75 pursuant to 7 U.S.C. § 13a-1(d). This
provision of the Act provides that courts have jurisdiction to impose a civil penalty in an amount "not
more than the higher of \$100,000, or triple the monetary gain to the person for each violation." The

1 \$1,154,313.75 figure was calculated as three times the \$384,771.25 amount sought for restitution. As
2 discussed above, Plaintiff has not made an adequate showing that Defendants' monetary gain from the
3 illegal activity amounted to \$384,771.25. Accordingly, using that figure in calculating the civil penalty
4 is improper. However, the Court does find that a penalty is warranted for Defendants' fraudulent
5 violations of the Act. Because the actual amount of Defendants' monetary gain is unclear, the Court will
6 impose a civil penalty of \$50,000 on each Defendant.

7 4. Permanent Injunction

8 Pursuant to 7 U.S.C. § 13a-1(a), Plaintiff seeks to permanently enjoin Defendants from
9 defrauding persons in violation of the Act. An injunction prohibiting a party from violating the
10 provisions of a statute is appropriate when there is a likelihood that, unless enjoined, the violations will
11 continue. *CFTC v. Co Petro Mktg Group, Inc*, 680 F.2d 573, 582 n.16 (9th Cir. 1982). Further, a
12 district court may properly infer a likelihood of future violations from a defendant's past unlawful
13 conduct. *CFTC v British Am Commodity Options Corp*, 560 F.2d 135, 142 (2d Cir. 1977).
14 Defendants' fraudulent activities were willful violations of the Act perpetrated as part of an ongoing
15 business. In order to ensure that Defendants do not engage in similar activity in the future, a permanent
16 injunction is warranted.

7 5. Costs

8 Plaintiff also seeks costs pursuant to 28 U.S.C. §§ 1920 and 2412(a)(2). Plaintiff has prevailed
9 in this action and shall recover costs pursuant to 28 U.S.C. §§ 1920 and 2412(a)(2), Rule 54(d), and
10 Local Rules 16.1 and 16.4.

6 6. Interest

Plaintiff seeks pre-judgment interest on the restitution amount of \$384,771.25. Granting of pre-
judgment interest in these circumstances is a matter that lies within the Court's sound discretion.
Whittaker v Whittaker Corp, 639 F.2d 516, 533 (9th Cir. 1981) (allowing discretion to grant pre-
judgment interest for damages under the Securities Exchange Act of 1933). In considering the equities
of this case, a pre-judgment interest award is warranted.

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III.

CONCLUSION

The Court GRANTS Plaintiff's motion for entry of default judgment Defendants shall pay restitution in the amount of \$384,771.25 plus pre-judgment interest Defendants shall each pay a civil penalty of \$50,000 and be permanently enjoined from engaging in activity that violates the Act. Plaintiff shall recover costs

IT IS SO ORDERED.

DATED February 26, 2001



DAVID O. CARTER
United States District Judge