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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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SECURITIES AND EXCHANGE  
COMMISSION,

Plaintiff,

v.

CMKM DIAMONDS, INC.; URBAN  
CASAVANT; JOHN EDWARDS; GINGER  
GUTIERREZ; JAMES KINNEY; ANTHONY  
TOMASSO; KATHLEEN TOMASSO; 1<sup>ST</sup>  
GLOBAL STOCK TRANSFER, LLC;  
HELEN BAGLEY; NEVWEST SECURITIES  
CORPORATION; DARYL ANDERSON;  
SERGEY RUMYANTSEV; ANTHONY  
SANTOS; and BRIAN DVORAK,

Defendants.

2:08-CV-00437-LRH-RJJ

ORDER

Before the court is Defendant Security and Exchange Commission’s (“Commission”) Application for Entry of Default Judgment Against Defendant NevWest Securities Corporation (#134<sup>1</sup>). NevWest has not responded to this suit in any manner.

**I. Facts and Procedural History<sup>2</sup>**

This case arises out of the fraudulent sale of unregistered stock of CMKM Diamonds, Inc.

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<sup>1</sup> Refers to the court’s docket entry number.

<sup>2</sup>The court accepts the following facts, taken from the complaint, as true.

1 (“CMKM”), a diamond and gold mining company. In November of 2002, five private Canadian  
2 companies owned by Defendant Urban Casavant entered into a reverse merger with CMKM, a  
3 corporation owned by Defendant John Edwards. As a result of the merger, in exchange for  
4 \$2,000,000 and 2.8 billion shares of common stock, CMKM acquired mineral claims in Canada  
5 from the Canadian companies. Casavant became the sole director, as well as the president and  
6 CEO, of CMKM.

7 From January of 2003, through May of 2005, CMKM issued hundreds of billions of shares  
8 of unrestricted stock to Edwards and Casavant and their nominees. However, this stock was  
9 unregistered. Further, CMKM had no legitimate operations, and its only activities were illegally  
10 issuing and falsely promoting its own stock.

11 In September of 2002, Edwards opened at least 36 brokerage accounts at NevWest, then a  
12 full service retail broker-dealer in Las Vegas, Nevada. These accounts were handled by one of  
13 NevWest’s registered representative, Defendant Daryl Anderson. Beginning in February of 2003,  
14 Edwards would visit NevWest’s offices weekly to hand-deliver CMKM stock certificates to  
15 Anderson. In total, Edwards deposited 597 CMKM stock certificates at NevWest, totaling more  
16 than 261 billion shares.

17 Upon receiving the stock certificates, NevWest contacted the transfer agent to verify that  
18 the certificates were unrestricted and validly issued. The transfer agent vouched for each of the  
19 stock certificates, and NevWest deposited the certificates into its accounts. By May of 2005,  
20 through NevWest, Edwards had sold more than 32 percent of CMKM’s total authorized shares.

21 Initially, NevWest primarily sold the CMKM stock to another broker-dealer. However, in  
22 mid-October of 2004, the broker-dealer informed NevWest that it would no longer trade the shares  
23 because a Canadian regulator had issued a cease-and-desist order regarding CMKM stock.  
24 NevWest then found a new buyer and continued selling CMKM stock.

25 In 2004, Anthony Santos, Anderson’s supervisor, and Sergey Rummyantsev, NevWest’s  
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1 president and head trader, began to have concerns about Edwards' trading activities. Anderson,  
2 Santos, and Rumyantsev each considered CMKM to be a questionable issuer about which reliable  
3 information was not publicly available. They each knew that Edwards had previously been  
4 involved with CMKM, and they had each reviewed CMKM's past Commission filings, which  
5 listed the same address that Edwards used to open most of his NevWest accounts. In response to  
6 their inquiries, Edwards declined to identify his "clients," and told NevWest that he was not an  
7 affiliate of CMKM and that no proceeds from his sales were returned to the company or its  
8 affiliates.

9 The Commission faults Anderson, Santos, and Rumyantsev for failing to investigate the  
10 validity of the CMKM stock and Edwards' relationship to CMKM. In particular, the Commission  
11 faults NevWest for the following: (1) failing to ask Edwards to describe his current involvement  
12 with CMKM beyond whether he was an affiliate; (2) not attempting to contact the company itself to  
13 ask about Edwards; (3) not asking Edwards for more information about his sources of CMKM  
14 stock; (4) failing to inquire why Edwards' shares were unrestricted; (5) failing to obtain any  
15 information about Edwards' unidentified "clients"; and (6) not contacting anyone other than  
16 Edwards in connection with Edwards' accounts. The Commission further faults NevWest for,  
17 months after the Commission requested NevWest's records relating to Edwards and after the  
18 Commission suspended trading in CMKM stock and initiated de-registration proceedings,  
19 continuing to permit Edwards to sell CMKM stock.

20 From March of 2003, through May 11, 2005, NevWest sold more than 259 billion shares of  
21 CMKM stock in 569 separate transactions. The sales generated more than \$53.3 million total and  
22 more than \$2,575,000 in commissions for the firm. Over the period of the fraud, Edward's  
23 commissions amounted to 35.7 percent of NevWest's total revenue. Pursuant to his contract with  
24 NevWest, Anderson received approximately 90 percent of the commissions he generated, and thus  
25 earned approximately \$2,300,000 for his handling of Edwards' trades in CMKM stock.

1 As of July 16, 2007, NevWest de-registered as a broker-dealer and currently has no  
2 operations.

3 The Commission initiated this action on April 7, 2008. The same day, the court issued  
4 summonses against all fourteen defendants, including NevWest. On May 12, 2008, the  
5 Commission emailed a copy of the Complaint, the Summons, and a request for waiver of service of  
6 summons to Santos, the president of NevWest. Santos executed the waiver and returned it to the  
7 Commission via email on May 12, 2008. The Commission filed the waiver with the court the  
8 following day.

9 On August 12, 2008, in light of NevWest's failure to respond to the Complaint, the Clerk of  
10 the Court entered default against NevWest (#85). The Commission now seeks the following relief:  
11 (1) a permanent injunction preventing NevWest from future violations of the registration provisions  
12 of the federal securities laws; (2) disgorgement in the amount of \$275,000 and payment of  
13 prejudgment interest; and (3) a third-tier civil penalty.

## 14 **II. Discussion**

15 Obtaining a default judgment is a two-step process governed by Federal Rule of Civil  
16 Procedure 55. *Eitel v. McCool*, 782 F.2d 1470, 1471 (9th Cir. 1986). First, Rule 55(a) provides,  
17 "When a party against whom a judgment for affirmative relief is sought has failed to plead or  
18 otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the  
19 party's default." Second, after the clerk enters default, a party must seek entry of default judgment  
20 under Rule 55(b).

21 Upon entry of default, the court takes the factual allegations in the non-defaulting party's  
22 complaint as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987)  
23 (citation omitted). Nonetheless, while entry of default by the clerk is a prerequisite to an entry of  
24 default judgment, "a plaintiff who obtains an entry of default is not entitled to default judgment as a  
25 matter of right." *Warner Bros. Entm't Inc. v. Caridi*, 346 F. Supp. 2d 1068, 1071 (C.D. Cal. 2004)

1 (citation omitted). Instead, whether a court will grant a default judgment is in the court's  
2 discretion. *Id.* (citations omitted).

3 The Ninth Circuit has identified the following factors as relevant to the exercise of the  
4 court's discretion in determining whether to grant default judgment: (1) the possibility of prejudice  
5 to the plaintiff; (2) the merits of the plaintiff's substantive claims; (3) the sufficiency of the  
6 complaint; (4) the sum of money at stake in the action; (5) the possibility of a dispute concerning  
7 material facts; (6) whether the default was due to the excusable neglect; and (7) the strong policy  
8 underlying the Federal Rules of Civil Procedure favoring decisions on the merits. *Eitel*, 782 F.2d at  
9 1471-72. The court will consider these factors below.

#### 10 **A. Merits of the Commission's Substantive Claims**

11 The Commission alleges NevWest engaged in the unregistered offer and sale of securities in  
12 violation of Sections 5(a) and (c) of the Securities Act of 1933, 15 U.S.C. §§ 77e(a) and 77e(c).  
13 "Section 12(1) of the Securities Act of 1933 imposes liability on any person who 'offers or sells a  
14 security' in violation of Section 5 of the 1933 Act." *Anderson v. Autotek*, 774 F.2d 927, 929 (9th  
15 Cir. 1985) (*citing* 15 U.S.C. § 77e). Sections 5(a) and 5(c) prohibit the offer and sale of securities  
16 through the mail or interstate commerce unless a registration statement has been filed and is in  
17 effect. *Id.* (*citing* *SEC v. Murphy*, 626 F.2d 633, 640 (9th Cir. 1980)). To state a prima facie case  
18 for a violation of Section 5, the Commission must demonstrate the following: (1) the defendants,  
19 directly or indirectly, sold or offered to sell securities; (2) the offer or sale was made through the  
20 mail or interstate commerce; and (3) for those securities, no registration statement was in effect or  
21 had been filed with the SEC. Once the SEC establishes a prima facie violation, the burden shifts to  
22 the defendant to prove that one of the Act's exceptions to liability applies. *See SEC v. Ralston*  
23 *Purina Co.*, 346 U.S. 119, 126 (1953); 15 U.S.C. § 77d.

24 Here, the complaint alleges (1) no registration statement was in effect for the CMKM  
25 securities and (2) NevWest sold approximately more than 259 billion shares of the unregistered  
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1 CMKM stock through means of interstate commerce. On its face, the complaint states a claim for a  
2 Section 5 violation. As a result, taking the allegations in the complaint as true, the court finds that  
3 the Commission has demonstrated that the merits of its substantive claim support awarding default  
4 judgment.

5 **B. Remaining Default Judgment Factors**

6 The remaining default judgment factors also favor the entry of default judgment. Given  
7 NevWest's failure to appear in this action and the likelihood that NevWest will continue to  
8 withhold the amounts the Commission seeks, the possibility of prejudice in the absence of a default  
9 judgment is great. Likewise, NevWest's failure to respond indicates its default was not due to  
10 excusable neglect, and, based on the information before the court, the likelihood of a dispute  
11 concerning material facts appears limited. Thus, despite the strong policy underlying the Federal  
12 Rules of Civil Procedure favoring decisions on the merits, the court finds that an entry of default  
13 judgment is appropriate.

14 **C. NevWest's Liability**

15 Having concluded that default judgment is warranted, the court must now consider the  
16 extent of NevWest's liability. As noted, the Commission seeks a permanent injunction,  
17 disgorgement and prejudgment interest, and a third tier civil penalty. The court will address each  
18 form of relief below.

19 **1. Permanent Injunction**

20 To obtain a permanent injunction, the Commission must show that there is a reasonable  
21 likelihood of future violations of the securities laws. *Murphy*, 626 F.2d at 655 (citations omitted).  
22 In considering the likelihood of future violations, the court evaluates the totality of the  
23 circumstances. *Id.* (citations omitted). The Ninth Circuit has identified the following factors as  
24 helpful in the court's analysis: (1) the degree of scienter involved; (2) the isolated or recurrent  
25 nature of the infraction; (3) the defendant's recognition of the wrongful nature of his conduct; (4)  
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1 the likelihood that future violations might occur; and (5) the sincerity of the defendant's assurances  
2 against future violations. *Id.*

3 Although it is a close question, the court finds that these factors support an injunction.  
4 NevWest sold billions of shares of purportedly unrestricted stock in violation of the securities laws.  
5 It engaged in these illegal sales for more than two years and received millions of dollars in gains as  
6 a result. Although the extent of NevWest's knowledge of the invalidity of the stock certificates is  
7 not clear, the Commission has identified significant information indicating that, at the very least,  
8 NevWest should have questioned the validity of the CMKM shares. Further, NevWest has not  
9 acknowledged its wrongdoing, and although NevWest is not currently operating, it may take up  
10 operations in the future. Accordingly, the court will enter an injunction prohibiting NevWest from  
11 engaging in future violations of the registration requirements.

## 12 **2. Disgorgement and Prejudgment Interest**

13 The court's authority to order disgorgement of ill-gotten gains and prejudgment interest is  
14 well-established. *See SEC v. First Pac. Bancorp*, 142 F.3d 1186, 1191 (9th Cir. 1998). The  
15 purpose of disgorgement is to deprive wrongdoers of unjust enrichment while deterring future  
16 violations of the securities laws. *Id.* To determine the appropriate disgorgement amount, the  
17 Commission need only show "a reasonable approximation of profits causally connected to the  
18 violation." *Id.* at 1192 n.6 (citation omitted). If this approximation appears unreasonable,  
19 defendants bear the burden of proving a more reasonable figure. *SEC v. First City Fin. Corp.*, 890  
20 F.2d 1215, 1232 (D.C. Cir. 1989).

21 Disgorgement orders include all gains flowing from the illegal activity and include  
22 prejudgment interest. *SEC v. Cross Fin. Servs., Inc.*, 908 F. Supp. 718, 734 (C.D. Cal. 1995)  
23 (*citing SEC v. Lund*, 570 F. Supp. 1397, 1404 (C.D. Cal. 1983)). The purpose of ordering payment  
24 of prejudgment interest is to deny defendants any possible profit resulting from illegal activity. *Id.*  
25 (*citing Lund*, 570 F. Supp. at 1404). Generally, prejudgment interest is calculated at the post-  
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1 judgment rate specified in 28 U.S.C. § 1961. *W. Pac. Fisheries, Inc. v. S.S. President Grant*, 730  
2 F.2d 1280, 1289 (9th Cir. 1984). This removes any economic incentive to delay and ensures that  
3 “judicially-awarded interest rates are not less than the contemporary cost of money.” *Id.*

4 Here, the Commissions asks the court to order NevWest to disgorge \$275,000, representing  
5 \$2,575,000 in sales commissions less \$2,300,000 NevWest paid to Anderson. The court finds that  
6 this is a reasonable approximation of NevWest’s profits from its violations.

7 The court will further order NevWest to pay \$24,242.95 in prejudgment interest. Because  
8 this figure only represents interest accrued from March of 2003, through November, 13, 2009, the  
9 court will order that NevWest pay \$72.25 per week from November 14, 2009, until the date of this  
10 order. Therefore, NevWest shall pay an additional \$216.75 in prejudgment interest, for a total of  
11 \$299,459.70.

### 12 3. Civil Penalties

13 Under the Securities Act, civil penalties are “determined by the court in light of the facts  
14 and circumstances.” 15 U.S.C. § 77t(d)(2)(A). Unlike disgorgement, civil penalties are not only  
15 designed to deter future violations of securities laws but are imposed to punish the individual  
16 violator. *SEC v. Moran*, 944 F. Supp. 286, 296 (S.D.N.Y. 1996) (*quoting* H.R.Rep. No. 101-616,  
17 101st Cong., at 1384-1386 (1990)).

18 The Securities Act assesses civil penalties according to a three-tier system.  
19 15 U.S.C. § 77t(d). First-tier penalties are imposed for any violation of the Securities Act.  
20 15 U.S.C. § 77t(d)(2)(A). Second-tier penalties are imposed for violations involving “fraud, deceit,  
21 manipulation or deliberate or reckless disregard of a regulatory requirement.”

22 15 U.S.C. § 77t(d)(2)(B). Third-tier penalties are imposed for violations that (1) involve “fraud,  
23 deceit, manipulation, or reckless disregard for a regulatory requirement” and (2) “directly or  
24 indirectly resulted in substantial losses or created a significant risk of substantial losses to other  
25 persons.” 15 U.S.C. § 77t(d)(2)(C).



1 Here, the Commission seeks third-tier civil penalties. As discussed above, NevWest  
2 appears to have sold the shares of CMKM stock with at least a reckless disregard for the  
3 requirement that the stocks be registered in accordance with the Securities Act. In doing so,  
4 NevWest defrauded investors out of over \$53 million. Because NevWest engaged in reckless  
5 conduct resulting in substantial losses, the court finds that third-tier civil penalties are warranted.

6 Courts have calculated third-tier penalties in two ways. First, a court may multiply a  
7 defendant's violations by a dollar amount. *See SEC v. Coates*, 137 F. Supp. 2d 413, 430 (S.D.N.Y.  
8 2001); *see also* 15 U.S.C. § 77t(d)(2). Second, a court may impose a flat penalty equal to a  
9 defendant's gross pecuniary gain. *See SEC v. Solow*, 554 F. Supp. 2d 1356, 1368 (S.D. Fla. 2008);  
10 *SEC v. Haligiannis*, 470 F. Supp. 2d 373, 386 (S.D.N.Y. 2007). Courts routinely consider five  
11 factors, established in *SEC v. Murphy*, 626 F.2d 633 (9th Cir. 1980), when calculating civil  
12 penalties: (1) the degree of scienter involved; (2) the isolated or recurrent nature of the infraction;  
13 (3) the defendant's recognition of the wrongful nature of his conduct; (4) the likelihood, because of  
14 the defendant's professional occupation, that future violations might occur; and (5) the sincerity of  
15 the defendant's assurances against future violations. *See, e.g., SEC v. Alpha Telecom, Inc.*, 187 F.  
16 Supp. 2d 1250, 1263 (D. Or. 2002) (applying the factors to assess a civil penalty).

17 The court will employ the second method for calculating third-tier civil penalties and  
18 impose a single fine on NevWest. When faced with a similar array of violations, courts often order  
19 penalties based on a defendant's gross pecuniary gain. *See Haligiannis*, 470 F. Supp. 2d at 386  
20 (ordering a \$15,000,000 penalty equal to the disgorgement amount "due to difficulty calculating  
21 total number of violations"); *SEC v. Interlink Data Network, Inc., et. al.*, No. 93-3073 R, 1993 WL  
22 603274, \*13 (C.D. Cal. Nov. 15, 1993) (ordering a \$12,285,035 penalty equal to the disgorgement  
23 amount for 565, 439, and 527 violations because "there are many ways to compute the amount of a  
24 civil penalty under the federal securities law"); *SEC v. Invest Better 2001*, No. 11427, 2005 WL  
25 2385452, \*5 (S.D.N.Y. May 4, 2005) (ordering civil penalty equal to disgorgement amount because  
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1 “the exact number of violations . . . is impossible to determine”); *SEC v. Yuen*, 272 Fed. App’x  
2 615, 618 (9th Cir. 2008) (affirming a district court’s penalty equal to the disgorgement amount as  
3 “well within [the district court’s] discretion”).

4 As noted repeatedly, NevWest recklessly defrauded thousands of investors out of over \$53  
5 million. Although it is not clear whether NevWest is likely to engage in future violations, by  
6 failing to appear in this dispute, it has refused to acknowledge its wrongdoing. As a result, in  
7 addition to ordering disgorgement of ill-gotten gains and prejudgment interest, the court will  
8 impose third-tier penalties equal to NevWest’s disgorgement amount.

9 IT IS THEREFORE ORDERED that the Commission’s Application for Default Judgment  
10 (#134) is GRANTED.

11 I.

12 IT IS FURTHER ORDERED that NevWest and its agents, servants, employees, attorneys,  
13 and all persons in active concert or participation with them who receive actual notice of this Final  
14 Judgment by personal service or otherwise are permanently restrained and enjoined from violating  
15 Section 5 of the Securities Act, 15 U.S.C. § 77e, by, directly or indirectly, in the absence of any  
16 applicable exemption:

17 (a) Unless a registration statement is in effect as to a security, making use of any means or  
18 instruments of transportation or communication in interstate commerce or of the mails to  
19 sell such security through the use or medium of any prospectus or otherwise;

20 (b) Unless a registration statement is in effect as to a security, carrying or causing to be  
21 carried through the mails or in interstate commerce, by any means or instruments of  
22 transportation, any such security for the purpose of sale or for delivery after sale; or

23 (c) Making use of any means or instruments of transportation or communication in  
24 interstate commerce or of the mails to offer to sell or offer to buy through the use or  
25 medium of any prospectus or otherwise any security, unless a registration statement has  
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1           The Commission may by motion propose a plan to distribute the Fund subject to the Court’s  
2 approval. Such a plan may provide that the Fund shall be distributed pursuant to the Fair Fund  
3 provisions of Section 308(a) of the Sarbanes-Oxley Act of 2002. Regardless of whether any such  
4 Fair Fund distribution is made, amounts ordered to be paid as civil penalties pursuant to this  
5 Judgment shall be treated as penalties paid to the government for all purposes, including all tax  
6 purposes. To preserve the deterrent effect of the civil penalty, NevWest shall not, after offset or  
7 reduction of any award of compensatory damages in any Related Investor Action based on  
8 NevWest’s payment of disgorgement in this action, argue that it is entitled to, nor shall it further  
9 benefit by, offset or reduction of such compensatory damages award by the amount of any part of  
10 NevWest’s payment of a civil penalty in this action (“Penalty Offset”). If the court in any Related  
11 Investor Action grants such a Penalty Offset, NevWest shall, within 30 days after entry of a final  
12 order granting the Penalty Offset, notify the Commission’s counsel in this action and pay the  
13 amount of the Penalty Offset to the United States Treasury or to a Fair Fund, as the Commission  
14 directs. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to  
15 change the amount of the civil penalty imposed in this Judgment. For purposes of this paragraph, a  
16 “Related Investor Action” means a private damages action brought against NevWest by or on

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1 behalf of one or more investors based on substantially the same facts as alleged in the Complaint in  
2 this action.

3 III.

4 IT IS FURTHER ORDERED that this Court shall retain jurisdiction of this matter for the  
5 purposes of enforcing the terms of this Final Judgment.

6 IV.

7 There being no just reason for delay, pursuant to Rule 54(b) of the Federal Rules of Civil  
8 Procedure, the Clerk is ordered to enter this Final Judgment forthwith and without further notice.

9 IT IS SO ORDERED.

10 DATED this 4<sup>th</sup> day of December, 2009.

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LARRY R. HICKS  
UNITED STATES DISTRICT JUDGE  
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