

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Honorable Marcia S. Krieger

Case No. 01-MK-1340 (PAC)

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

WILLIAM L. BROTHERTON and
INTERNATIONAL BUSINESS CONSORTIUM, INC.,

Defendants.

FILED
United States District Court
Denver, Colorado

JUN 16 2003

GREGORY C. LANGHAM
CLERK

**ORDER ON PENDING MOTIONS
AND
JUDGMENT**

THIS MATTER comes before the Court on Defendant Brotherton's motion to transfer this action to the United States District Court for the District of Florida (#83), Magistrate Judge Coan's recommendation that the motion to transfer be denied (#100), a motion to dismiss filed by Defendant Brotherton on January 27, 2003 (#85), a motion filed by Defendant Brotherton requesting mercy in the imposition of damages (#105), and Magistrate Judge Coan's recommendation regarding the amount of disgorgement, prejudgment interest, and civil penalties to be imposed against both Defendants (#107). Having reviewed these documents, the Court

FINDS and CONCLUDES that:

I. JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1331.

II. FACTS

Plaintiff Securities and Exchange Commission (the SEC or Plaintiff) filed this action pursuant to Sections 5(a), 5(c), and 17(a) of the Securities Act,¹ Section 10(b) of the Securities and Exchange Act of 1934,² and Rule 10b-5.³ The complaint alleges that Defendants William L. Brotherton (Brotherton) and International Business Consortium, Inc. (IBC) defrauded numerous purchasers of IBC stock out of more than \$300,000.

On May 7, 2002, the Court ordered IBC to enter an appearance through counsel within twenty days or a default would be entered against IBC. Brotherton filed an answer to the complaint on May 15, 2002. Although he purported to file the answer on behalf of IBC, he was not authorized to appear on behalf of IBC. The answer was stricken on March 3, 2003, upon the SEC's motion. On May 30, 2002, default was entered against IBC.

On November 6, 2002, the SEC moved for the entry of default judgment against IBC. It simultaneously moved for summary judgment against Brotherton. No responses were filed to either motion.

In January 2003, Brotherton filed a motion to transfer this action to the United States District Court for the District of Florida for personal reasons. He also filed a motion to dismiss this action.

On March 3, 2003, default judgment was entered against IBC. The Court ordered that

¹ 15 U.S.C. §§ 77e(a), 77e(c), 77q(a).

² 15 U.S.C. § 78j(b).

³ 17 C.F.R. § 240.10b-5.

IBC "is permanently enjoined from future violations of the Antifraud Provisions and Registration Provision of the Securities and Exchange Act and ordered to disgorge the ill-gotten gains [derived] from its violation of the securities laws, and to pay prejudgment interest." A determination on the exact amount of disgorgement and prejudgment interest was referred to the Magistrate Judge. The Court also referred to the Magistrate the question as to whether civil penalties should be assessed against IBC under Section 21(d)(3) of the Securities and Exchange Act, 15 U.S.C. § 78u(d)(3).

On March 4, 2003, the Court granted the SEC's motion for summary judgment. The Court found that judgment should enter in favor of the SEC on its claims for relief, but it declined to order permanent injunctive relief against Brotherton. Instead, it ordered that Brotherton must disgorge the profits he derived from his securities fraud violation and pay prejudgment interest. The Court referred a determination on the amount of disgorgement and prejudgment interest to the Magistrate Judge. The Court additionally referred to the Magistrate the question as to whether civil penalties should be assessed against Brotherton.

III. ISSUES PRESENTED

- (1) Whether the motion to transfer this action to the United States District Court for the District of Florida should be granted or whether the recommendation to deny the motion should be adopted;
- (2) Whether the motion to dismiss should be denied as moot;
- (3) Whether the Court should adopt the Magistrate's recommendation addressing the amounts of disgorgement, prejudgment interest, and civil penalties to be imposed against both Defendants; and

- (4) Whether this matter should proceed to trial on any issue.

IV. ANALYSIS

A. Motion to Transfer

Brotherton filed a motion asking the Court to transfer this action to the United States District Court for the District of Florida. This motion was referred to Magistrate Coan, who recommended that the motion be denied. Brotherton did not file any objections to this recommendation.

Under Fed. R. Civ. P. 72 and 28 U.S.C. § 636(b)(1), a party may file objections to the recommendation of a magistrate judge within ten days after receiving a copy of the recommendation. If objections are filed, the district court must review the recommendation *de novo*. *Garcia v. City of Albuquerque*, 232 F.3d 760, 766 (10th Cir. 2000). If no objections are filed, then the district court may review the recommendation under any standard of review it deems appropriate. *Summers v. State of Utah*, 927 F.2d 1165, 1167 (10th Cir. 1991).

Under 28 U.S.C. § 1404(a), "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." When venue is improper, an action may also be transferred to another district under 28 U.S.C. § 1406(a). Judge Coan concluded that venue in this district is proper, it would not further the interest of justice to transfer this action to Florida, and it is more convenient for this action to be resolved by this Court.

Judge Coan's conclusions are not clearly erroneous. The Court will therefore deny Brotherton's motion to transfer this action to Florida, and the Court will adopt Judge Coan's recommendation on this motion.

B. Motion to Dismiss

Defendant Brotherton filed a motion to dismiss on January 27, 2003. He purportedly filed the motion on behalf of himself and IBC, though he had already been instructed that he cannot represent IBC.

Although a permanent injunction was not issued against Brotherton, the Court has already determined that the SEC is entitled to judgment as a matter of law on its claims. As a result, the motion to dismiss is now moot, and it will be denied.

C. Disgorgement, Prejudgment Interest, and Civil Penalties

On May 29, 2003, Magistrate Judge Coan issued a recommendation regarding the monetary penalties to be imposed against Brotherton. She concluded, *inter alia*:

- (1) Brotherton obtained \$325,144 through his fraudulent sales of IBC securities;
- (2) Brotherton and IBC should be required (jointly and severally) to disgorge \$325,144;
- (3) Prejudgment interest should be calculated from June 25, 2001 until March 31, 2003;
- (4) The Internal Revenue Service's (IRS) interest rate for delinquent taxes should be applied to calculate the amount of prejudgment interest due;
- (5) At the recommended rate, prejudgment interest in the amount of \$36,602.03 would be due;
- (6) Brotherton's conduct was egregious, was based upon a high degree of scienter, caused substantial losses to IBC's investors, and was recurring; and
- (7) A third tier civil penalty in the amount of \$50,000 should be imposed against

Brotherton and IBC (jointly and severally) under Section 21(d)(3) of the Exchange Act, 15 U.S.C. § 78u(d)(3).

Neither Brotherton nor IBC has filed any objections to this recommendation.

The Court has reviewed the recommendation for clear error and has found none. Factually, the recommendation is consonant with the Order granting the SEC's motion for summary judgment. The Court may properly utilize the IRS' delinquent tax interest rate in calculating prejudgment interest. *See Towerridge, Inc. v. T.A.O., Inc.*, 111 F.3d 758, 764 (10th Cir. 1997) (a court may select the applicable rate); *see also S.E.C. v. First Jersey Securities, Inc.*, 101 F.3d 1450, 1476-77 (2d Cir. 1996) (applying IRS rate for delinquent taxes to prejudgment interest on a disgorgement amount). Joint and several liability on the disgorgement amount is also proper. *See id.* at 1475-76. The Court finds that a \$50,000, joint and several, third tier civil penalty against Brotherton and IBC is reasonable in light of the fraudulent acts committed by Brotherton in his capacity as CEO, vice president, secretary, treasurer, and sole director of IBC.

D. Trial

On April 22, 2003, a trial preparation order was issued setting this matter for a ten-day jury trial. Because the SEC is entitled to judgment as a matter of law, no trial is necessary. The Court will therefore vacate the trial preparation order and the trial itself.

V. CONCLUSION

This action will not be transferred to Florida. Because the Court has already resolved the SEC's claims in favor of the SEC and against Brotherton and IBC, no trial is necessary, and Brotherton's motion to dismiss will be denied as moot. Brotherton and IBC will be held jointly and severally liable for the disgorgement, prejudgment interest, and civil penalties.

IT IS THEREFORE ORDERED that Brotherton's motion to transfer this action to the United States District Court for the District of Florida (#83) is **DENIED**.

IT IS FURTHER ORDERED that Magistrate Judge Coan's recommendation that the motion to transfer be denied (#100) is **ADOPTED**.

IT IS FURTHER ORDERED that Brotherton's motion to dismiss filed January 27, 2003 (#85) is **DENIED** as moot.

IT IS FURTHER ORDERED that the recommendation addressing disgorgement, prejudgment interest, and civil penalties (#107) is **ADOPTED**.

IT IS FURTHER ORDERED that Defendants Brotherton and IBC shall disgorge, jointly and severally, a total sum of \$361,746.03, which is the sum of their ill-gotten gains (\$325,144) and prejudgment interest on the disgorgement amount (\$36,602.03).

IT IS FURTHER ORDERED that a civil penalty in the amount of \$50,000 is imposed on Defendants Brotherton and IBC, jointly and severally.

IT IS FURTHER ORDERED that Brotherton's motion requesting mercy in the imposition of damages (#105) is **DENIED** as moot.

IT IS FURTHER ORDERED that the trial preparation order (#103 and #104)⁴ issued April 22, 2003 is **VACATED**. The trial presently set to begin on February 23, 2003, is **VACATED**.

IT IS FURTHER ORDERED that the Clerk of Court is directed to enter judgment in favor of Plaintiff and against both Defendants jointly and severally on Plaintiff's request for

⁴ For reasons unknown, this order was docketed twice.

disgorgement, prejudgment interest, and civil penalties in the amount of \$411,746.03. The Clerk of Court is further directed to enter judgment in favor of Plaintiff and against Defendant IBC on Plaintiff's request for permanent injunctive relief. The Clerk of Court is also directed to enter judgment in favor of Defendant Brotherton on Plaintiff's request for permanent injunctive relief.

Dated this 13th day of June, 2003.

BY THE COURT:



Marcia S. Krieger
United States District Judge