

UNITED STATES DISTRICT COURT DISTRICT OF NEVADA

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

INVESTMENT TECHNOLOGY, INC., et al.,

Defendants.

Case No. CV-S-03-0831-KJD-RJJ

<u>ORDER</u>

Presently before the Court is Plaintiff's Motion for Entry of Default Judgement (#42) and Motion for Entry of Default Judgment of Defendants Investment Technology, Rosenfeld Goldman & Ware, Inc., Small Cap Research, and Centennial Advisors (#43). Defendants filed a response in opposition (#52).

I. Procedural History

Plaintiff Securities and Exchange Commission ("SEC") filed this action on July 14, 2003 stating six claims and seeking injunctive relief against Defendants as to all claims. Service of the Summons and Complaint were properly made on all Defendants. On November 17, 2003, Defendants filed a motion to dismiss for failure to state a claim and for failure to plead fraud with particularity. The parties proposed a discovery plan, and a discovery Scheduling Order (#23) was

entered on March 5, 2004. During discovery, Defendants have failed to reply to document requests, failed to provide declarations regarding depositions, and filed a motion to stay discovery pending the motion to dismiss. The SEC asked the Court to deny the Defendants' motion to dismiss and motion to stay discovery, strike Defendants' motion to dismiss, enter default judgment against Defendants, and sanction Defendants and their counsel for Rule 11 violations, violations of court orders regarding discovery, and for filing frivolous motions.

On July 29, 2004, the Court denied Defendants' motions to dismiss, to stay discovery, for sanctions, and Plaintiff's motion to strike, to enter default as a sanction, and for Rule 11 sanctions. However, the Court found Defendants' motions to dismiss and to stay frivolous, granted Plaintiff's motion for discovery sanctions, *sua sponte* ordered Thomas Ware to show cause why he should not be sanctioned for filing a frivolous motion under Rule 11 of the Federal Rules of Civil Procedure, and revoked permission for Defendants' counsel to appear in this District without associating local counsel. The Court gave Defendants fifteen days from the entry of the order to associate local counsel. Defendants have since failed to associate local counsel and have failed to file an answer. On August 26, 2004, Plaintiff filed its Motion for Entry of Default Judgment (#42). Defendants received timely notice of the motion and filed a meritless opposition on September 15, 2004.

II. Motion for Default Judgment

Federal Rule of Civil Procedure 55(b)(2) permits the Court to enter a final judgment by default. There is no right to the entry of a default judgment, and its entry is entirely within this Court's discretion. See Draper v. Coombes, 792 F.2d 915, 924 (9th Cir. 1986); Aldabe v. Aldabe, 616 F.2d 1089, 1092 (9th Cir. 1980). This Court may find entry of a default judgment appropriate in consideration of: [1] the sufficiency of the complaint and the merits of a plaintiff's substantive claims; [2] the possibility of prejudice if entry is denied; [3] the sum of money at stake; [4] the possibility of a dispute concerning material facts; [5] whether default was due to excusable neglect; and [6] the strong policy favoring decisions on the merits. See Eitel v. McCool, 782 F.2d 1470, 1471-72 (9th Cir. 1986).

In support of their opposition to the motion for default, Defendants argue the following: (1) Plaintiff's motion is frivolous and Plaintiff's counsel does not understand complex laws and rules; (2) the Court relied upon matters outside the pleadings in resolving Defendants' motion to dismiss, thereby converting it to a motion for summary judgment; and (3) a rehash of its motion to dismiss. All of these arguments are completely frivolous, lacking in fact, and legally irrelevant. None of these arguments counsel against the Court entering default. Defendants do not dispute that they have failed to file an answer and have failed to associate local counsel. Defendants frivolously argue that the Court considered matters outside the complaint in resolving the motion to dismiss. This is simply untrue. In resolving a motion to dismiss under Federal Rule of Civil Procedure 12 (b)(6) and 9(b), the Court is required to take the allegations of the complaint as true. That is all the Court did in resolving the motion to dismiss. It was unnecessary to convert the motion to dismiss into a motion for summary judgment, because the Court did not need to consider extrinsic evidence in resolving the motion. Defendants' arguments in opposing default are another example of their bad faith supporting this final sanction of default.

Four of the six <u>Eitel</u> factors counsel that default judgment is appropriate in this case: (1) the Court has already ruled on the complaint's sufficiency; (2) because of Defendants' well documented misconduct, frivolous motions, arguments made in bad faith, and dilatory tactics Plaintiff would continue to be severely prejudiced if the Court denied entry of default; (3) the sum of money at stake is readily ascertainable; and (4) Defendants' failure to file an answer and associate local counsel is willful rather than due to excusable neglect. While this Court favors the resolution of cases on their merits, Defendants' conduct has obstructed the proceedings in this case and signals their reluctance to resolve any disputes of material fact. Furthermore, the Court has already considered and imposed less drastic alternatives than default. First, the Court ordered Defendants to associate local counsel, but Defendants have refused to do so. Second, the Court ordered monetary sanctions for discovery violations, but Defendants have continued to violate discovery rules. Third, the Court ordered Defendants' counsel to show cause why he should not be sanctioned for filing frivolous motions, but

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counsel has denied fault and continued to file motions making even more ludicrous arguments than before. Since lesser sanctions have not worked, and in light of Defendants' refusal to answer the complaint, the Court grants Plaintiff's Motion for Entry of Default Judgment (#42).

III. Final Judgment Granting Permanent Injunction and Other Relief as to All Defendants

This matter came before this Court on the motion of Plaintiff Securities and Exchange Commission, seeking entry of a final judgment by default, providing it with the relief requested in its Complaint against Defendants Investment Technologies, Inc. ("IT"), Investment Technology, Inc. ("IT"), Thomas D. Vidmar ("Vidmar"), Rosenfeld, Goldman & Ware, Inc. ("RGW"), Ulysses "Thomas" Ware ("Ware"), Small Cap Research Group, Inc. ("Small Cap"), and Centennial Advisors, L.L.C. ("Centennial") (collectively referred to as ("Defendants"), by reason of their failure to answer the Commission's Complaint in this civil action and as sanction for their continued misconduct.

This Court having considered the pleadings and declarations on file herein makes the following findings of fact and conclusions of law:

- The Commission's Complaint was filed on July 14, 2003. 1.
- Each of the Defendants were served with the Summons and Complaint in accordance 2. with the Federal Rules of Civil Procedure (Docket ## 2, 3, 4, 5, 6 and 11).
- Defendants entered an appearance on November 17, 2003 by filing a Motion to Dismiss 3. (Docket # 15).
- On July 29, 2004, the Court entered an Order denying Defendants' Motion to Dismiss 4. (Docket #35).
- According to Fed. R. Civ. P. 12(B)(4)(A), Defendants were required to file an answer 5. within 10 days after notice of the Court's July 29, 2004 Order.
- Defendants have failed to answer the Commission's Complaint. 6.
- Defendants have failed to associate local counsel as ordered by the Court. 7.

- 8. None of the Defendants are infants or incompetent. None of the Defendants are eligible for relief under the Soldiers' and Sailors' Civil Relief Act of 1940 [50 U.S.C. Appendix, § 501 et seq.].
- 9. The allegations in the Commission's Complaint as to the conduct and activities of Defendants are deemed admitted.
- 10. The Commission is entitled to entry of this final judgment of permanent injunction providing for the following relief, as set forth in the Commission's Complaint:
- A. Permanently enjoining Investment Technology, Inc. from violating 5(a), 5(c) and 17(a) of the Securities Act of 1933 ("Securities Act") [15 U.S.C. §§ 77e(a) and (c) and 77q(a)], and Sections 10(b) and 13(a) of the Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. §§ 78j(b) and 78m(a)] and Rules 10b-5, 12b-20, 13a-1, 13a-11, and 13a-13 thereunder [17 C.F.R. §§ 240.10b-5, 12b-20, 13a-1, 13a-11, and 13a-13].
- B. Permanently enjoining Thomas D. Vidmar from violating Sections 5(a), 5(c) and 17(a) of the Securities Act [15 U.S.C. §§ 77e(a) and (c) and 77q(a)], and Sections 10(b) and 16(a) of the Exchange Act [15 U.S.C. §§ 78j(b) and 78p(a)], and Rules 10b-5 and 16a-3 thereunder [17 C.F.R. §§ 240.10b-5 and 16a-3], and for aiding and abetting violations of Section 13(a) of the Exchange Act [15 U.S.C. § 78m(a)] and Rules 12b-20, 13a-1, 13a-11 and 13a-13 thereunder [17 C.F.R. §§ 240.12b-20, 13a-1, 13a-11, and 13a-13], ordering disgorgement with prejudgment interest and a civil penalty pursuant to Section 20(d) of the Securities Act [15 U.S.C. § 77t(d)], and Section 21(d) of the Exchange Act [15 U.S.C. § 78u(d)], ordering that Vidmar be barred permanently from acting as a director or officer of a public company, and ordering that Vidmar be barred permanently from participating in an offering of penny stock.
- C. Permanently enjoining Rosenfeld, Goldman & Ware, Inc. from violating Sections 5(a), 5(c), 17(a) and 17(b) of the Securities Act [15 U.S.C. §§ 77e(a) and (c), 77q(a), and 77q(b)], and Sections 10(b) and 13(d) of the Exchange Act [15 U.S.C. §§ 78j(b) and 78m(d)] and Rules 10b-5 and 13d-1 thereunder [17 C.F.R. §§ 240.10b-5 and 13d-1], ordering disgorgement

with prejudgment interest and a civil penalty pursuant to Section 20(d) of the Securities Act [15 U.S.C. § 77t(d)] and Section 21(d) of the Exchange Act [15 U.S.C. § 78u(d)], and ordering that RGW be barred permanently from participating in an offering of penny stock.

- D. Permanently enjoining Ulysses "Thomas" Ware from violating Sections 5(a), 5(c), 17(a) and 17(b) of the Securities Act [15 U.S.C. §§ 77e(a) and (c), 77q(a), and 77q(b)], and Sections 10(b) and 13(d) of the Exchange Act [15 U.S.C. §§ 78j(b) and 78m(d)] and Rules 10b-5 and 13d-1 thereunder [17 C.F.R. §§ 240.10b-5 and 13d-1], ordering disgorgement with prejudgment interest and a civil penalty pursuant to Section 20(d) of the Securities Act [15 U.S.C. § 77t(d)], and Section 21(d) of the Exchange Act [15 U.S.C. § 78u(d)], and ordering that Ware be barred permanently from participating in an offering of penny stock.
- E. Permanently enjoining Small Cap Research Group, Inc. and Centennial Advisors, LLC from violating Section 17(a) of the Securities Act [15 U.S.C. § 77q(a)], and Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5], ordering disgorgement with prejudgment interest and a civil penalty pursuant to Section 20(d) of the Securities Act [15 U.S.C. § 77t(d)], and Section 21(d) of the Exchange Act [15 U.S.C. § 78u(d)].
- and serve upon Plaintiff Commission, no later than 30 days after service on Defendants of this Order, an accounting, under oath, of (1) all monies and other assets they received, directly or indirectly, from investors in the securities described in the Commission's Complaint; (2) all assets in which Defendant has a beneficial interest, directly or indirectly, wherever they may be located and by whomever they are being held; and (3) all accounts with any financial institution or securities brokerage firm maintained in any of their names or for their benefit on or after June 1, 2001.
- 12. The Commission is entitled to an Order requiring Thomas Vidmar and Thomas Ware to disgorge an amount equal to the funds and benefits they obtained illegally as a result of the violations alleged in the Commission's Complaint, plus prejudgment interest on that amount. As set forth in the

Commission's Complaint, the Commission is entitled to obtain disgorgement against Thomas Vidmar in the amount of \$31,000 plus prejudgment interest thereon of \$3,811, for a total of \$34,811. As set forth in the Complaint, the Commission is entitled to obtain disgorgement against Thomas Ware in the amount of \$171,000 plus prejudgment interest thereon of \$21,025, for a total of \$192,025.

13. The Commission is also entitled to an order imposing a third-tier civil penalty against each Defendant pursuant to Section 20(d) of the Securities Act [15 U.S.C. § 77t(d)], and Section 21(d) of the Exchange Act [15 U.S.C. § 78u(d)]. In accordance with these statutory provisions, the Commission is entitled to civil penalties in the amount of \$120,000 each against Vidmar and Ware and \$600,000 each against IT, RGW, Small Cap and Centennial.

On the basis of the foregoing findings of fact and conclusions of law,

IT IS THEREFORE ORDERED:

I.

Defendants, their agents, servants, employees, attorneys, and all persons in active concert or participation with them who receive actual notice of this final judgment by personal service or otherwise, and each of them, are permanently restrained and enjoined from:

- A. Violating Section 17(a) of the Securities Act of 1933 ("Securities Act"), 15 U.S.C. § 77q(a), by directly or indirectly, in the offer or sale of any security by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails: (1) employing any device, scheme or artifice to defraud; or (2) obtaining money or property by means of any untrue statement of material fact or any omission to state a material fact necessary in order to make the statement(s) made, in the light of the circumstances under which they were made, not misleading; or (3) engaging in any transaction, practice or course of business which operates or would operate as a fraud or deceit upon the purchaser.
- B. Violating Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78j(b), by directly or indirectly, in the use of any means or instruments

of interstate commerce, of the mails or of any facility of any national securities exchange, using or employing in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered any manipulative or deceptive device or contrivance in contravention or a rule or regulation prescribed by the Securities and Exchange Commission.

C. Violating Rule 10b-5 of the Securities and Exchange Commission, 17 C.F.R. § 240.10b-5, by directly or indirectly, in the use of any means or instruments of interstate commerce, of the mails or of any facility of any national securities exchange: (1) employing any device, scheme or artifice to defraud; (2) making any untrue statement of a material fact or omitting to state a material fact necessary in order to make the statement(s) made, in the light of the circumstances under which were made, not misleading; or (3) engaging in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person.

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Defendants IT, Vidmar, RGW and Ware, their agents, servants, employees, attorneys, and all persons in active concert or participation with them who receive actual notice of this final judgment by personal service or otherwise, and each of them, are permanently restrained and enjoined from violating Sections 5(a) and 5(c) of the Securities Act, 15 U.S.C. § 77e(a) and (c), by directly or indirectly, (a) making use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell a security through the use or medium of any prospectus or otherwise; or (b) carrying or causing to be carried through the mails or in interstate commerce, by any means or instruments of transportation, a security for the purpose of sale or for delivery after a sale, unless a registration statement is in effect as to that security; or (3) making use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security unless a registration statement has been filed with the Securities and Exchange Commission as to that security or while the registration statement is the subject of a refusal order

or a stop order or (prior to the effective date of the registration statement) any public proceeding or examination under Section 8 of the Securities Act, 15 U.S.C. § 77h.

III.

IT, its agents, servants, employees, attorneys, and all persons in active concert or participation with him who receive actual notice of this final judgment by personal service or otherwise, and each of them, are permanently restrained and enjoined from violating Section 13(a) of the Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. §§ 78j(b) and 78m(a)] and Rules 10b-5, 12b-20, 13a-1, 13a-11, and 13a-13].

IV.

Vidmar, his agents, servants, employees, attorneys, and all persons in active concert or participation with him who receive actual notice of this final judgment by personal service or otherwise, and each of them, are permanently restrained and enjoined from aiding and abetting violations of Section 13(a) of the Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. §§ 78j(b) and 78m(a)] and Rules 10b-5, 12b-20, 13a-1, 13a-11, and 13a-13 thereunder [17 C.F.R. §§ 240.10b-5, 12b-20, 13a-1, 13a-11, and 13a-13].

V.

Vidmar, his agents, servants, employees, attorneys, and all persons in active concert or participation with him who receive actual notice of this final judgment by personal service or otherwise, and each of them, are permanently restrained and enjoined from violating 16(a) of the Exchange Act [15 U.S.C. § 78p(a)], and Rule 16a-3 thereunder [17 C.F.R. §§ 240.16a-3].

VI.

Ware and RGW, their agents, servants, employees, attorneys, and all persons in active concert or participation with them who receive actual notice of this final judgment by personal service or otherwise,

and each of them, are permanently restrained and enjoined from violating 13(d) of the Exchange Act [15 U.S.C. § 78m(d)] and Rule 13d-1 thereunder [17 C.F.R. § 240.13d-1].

VII.

Pursuant to Section 21(d)(2) of the Exchange Act [15 U.S.C. § 78u(d)(2)], Vidmar, his agents, servants, employees, attorneys, and all other persons in active concert or participation with him who receive actual notice of this final judgment, by personal service or otherwise, and each of them, are hereby prohibited from acting as an officer or director of any issuer that has a class of securities registered pursuant to Section 12 of the Exchange Act [15 U.S.C. § 78*l*] or that is required to file reports pursuant to Section 15(d) of the Exchange Act [15 U.S.C. § 78*o*(d)].

VIII.

Vidmar and Ware, their agents, servants, employees, attorneys, and all other persons in active concert or participation with him who receive actual notice of this final judgment, by personal service or otherwise, and each of them are permanently barred from participating in an offering of penny stock, including engaging in activities with a broker, dealer, or issuer for purposes of issuing, trading, or inducing or attempting to induce the purchase or sale of any penny stock. A penny stock is any equity security that has a price of less than five dollars, except as provided in Rule 3a51-1 under the Exchange Act [17 C.F.R. 240.3a51-1].

IX.

Each Defendant shall, within 30 (thirty) days of service of this Interlocutoary Judgment upon it, make an accounting (1) detailing all monies and other benefits which each of them received, directly and indirectly, as a result of the activities alleged in the Complaint (including the date on which the monies or other benefit was received and the name, address and telephone number of the person paying the money or providing the benefit), (2) listing all current assets of Defendants, and each of them, wherever they may be located and by whomever they are being held (including the name and address of the holder and the amount or value of the holdings) and (3) listing all accounts with any financial or brokerage

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institution maintained in the name of, on behalf of or for the benefit of Defendants (including the name and address of the account holder and the account number) and the amount held in each account at any point during the period from June 1, 2001, through the date of the accounting.

Χ.

Vidmar shall pay disgorgement of \$31,000 plus prejudgment interest thereon of \$3,811, for a total of \$34,811. Ware shall pay disgorgement of \$171,000 plus prejudgment interest thereon of \$21,025, for a total of \$192,025.

XI.

Pursuant to Section 20(d) of the Securities Act of 1933 [15 U.S.C. § 77t(d)] and Section 21(d)(3) of the Securities Exchange Act of 1934 [15 U.S.C. § 78u(d)(3)], Defendants Vidmar and Ware shall each pay a civil penalties in the amount of \$120,000 and Defendants IT, RGW, Small Cap and Centennial shall each pay a civil penalty in the amount of \$600,000.

XII.

Defendants shall satisfy the obligations set forth in Paragraphs XI and XII above within 30 business days after service of this final judgment by U.S. Postal money order, certified check, bank cashier's check, or bank money order to the Clerk of this Court, together with a cover letter identifying Defendants as defendants in this action; setting forth the title and civil action number of this action and the name of this Court; and specifying that payment is made pursuant to this Final Judgment. Defendants shall simultaneously transmit photocopies of such payment and letter to the Commission's counsel in this action. By making this payment, Defendants relinquish all legal and equitable right, title, and interest in such funds, and no part of the funds shall be returned to Defendants.

The Clerk shall deposit the funds into an interest bearing account with the Court Registry Investment System ("CRIS"). These funds, together with any interest and income earned thereon (collectively, the "Fund"), shall be held by the CRIS until further order of the Court. In accordance with

the guidelines set by the Director of the Administrative Office of the United States Courts, the Clerk is directed, without further order of this Court, to deduct from the income earned on the money in the Fund a fee equal to ten percent of the income earned on the Fund. Such fee shall not exceed that authorized by the Judicial Conference of the United States.

The Commission may by motion propose a plan to distribute the Fund subject to the Court's approval. Such a plan may provide that Fund shall be distributed pursuant to the Fair Fund provisions of Section 308(a) of the Sarbanes-Oxley Act of 2002. Regardless of whether any such Fair Fund distribution is made, amounts ordered to be paid as civil penalties pursuant to this Judgment shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Defendant shall not, in any Related Investor Action, benefit from any offset or reduction of any investor's claim by the amount of any Fair Fund distribution to such investor in this action that is proportionately attributable to the civil penalty paid by Defendant ("Penalty Offset"). If the court in any Related Investor Action grants such an offset or reduction, Defendants shall, within 30 days after entry of a final order granting the offset or reduction, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the United States Treasury or to a Fair Fund, as the Commission directs. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this Judgment. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against Defendant by or on behalf of one or more investors based on substantially the same facts as alleged in the Complaint in this action.

XIII.

This Court shall retain jurisdiction over this action for all purposes, including for purposes of entertaining any suitable application or motion by the Commission for additional relief within the jurisdiction of this Court, including but not limited to setting disgorgement, and prejudgment interest thereon, and all other relief requested by the Commission in its Complaint.

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XIV. This Order may be served upon Defendants in person, by electronic mail or by certified mail, either by the United States Marshal, the Clerk of the Court, or any member of the staff of the Securities and Exchange Commission or by a person designated by the staff of the Securities and Exchange Commission. XV. There being no just reason for delay, the Clerk of this Court is hereby directed to enter this Order pursuant to Rules 54, 58 and 79 of the Federal Rules Civil Procedure. DATED this 22 day of October 2004. Kent J. Dawson United States District Judge