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ATTEST:  
RICHARD W. WIEKING  
Clerk, U.S. District Court  
Northern District of California

By THELMA NUDO  
Deputy Clerk

Date JAN 24 2001

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RICHARD W. WIEKING  
CLERK  
U.S. DISTRICT COURT  
NO. INST. OF CA

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SECURITIES AND EXCHANGE  
COMMISSION,

No. C 99-02191 TEH

Plaintiff,

ORDER

v.

ABACUS INTERNATIONAL  
HOLDING CORP. and  
ARTHUR AGUSTIN,

Defendants.

ENTERED IN CIVIL DOCKET

8/10/01

This matter comes before the Court on Plaintiff Securities and Exchange Commission ("SEC") Motions for Judgment by Default pursuant to Federal Rule of Civil Procedure 55(b) and for Imposition of Civil Penalties against Defendants Arthur Agustin ("Agustin") and Abacus International ("Abacus"). For the reasons stated herein, Plaintiff's Motions are GRANTED.

**BACKGROUND AND PROCEDURAL HISTORY**

The SEC filed its Complaint against Abacus and its sole owner and employee, Agustin, on May 11, 1999, alleging that Agustin, acting by and through Abacus and its website, had since July 1998 fraudulently offered and sold non-existent securities in violation of the securities registration and antifraud provisions of the Securities Act of 1933 ("Securities Act"), and the antifraud and broker-dealer registration provisions of the Securities Exchange Act of 1934 ("Exchange Act"). The complaint alleges that Agustin

1 promised extravagant, risk-free investments with guaranteed returns of 80% per month and  
2 higher, and that at least one investor was induced to invest approximately \$170,000 in  
3 Abacus' securities, \$60,000 of which Agustin purportedly misappropriated for personal use.  
4 The SEC also claims that Agustin used materials and statements from other Internet websites  
5 to deceitfully describe Abacus as an international company with access to a wide variety of  
6 investment opportunities, when, in fact, it was nothing more than a website that Agustin  
7 operated out of his home in Alameda, California. Agustin, through the Abacus website,  
8 allegedly made numerous material misrepresentations and omissions regarding the  
9 investments. Most importantly, the investments that Abacus offered did not exist, and the  
10 statements about them were purely fraudulent.

11 On May 20, 1999, the SEC served the Complaint on Defendants Abacus and Agustin  
12 personally. After no response from Defendants, the SEC filed a Request for Entry of  
13 Default, which the Clerk of the Court granted on September 15, 1999. The SEC filed a  
14 Motion for Judgment by Default on February 21, 2001, seeking to permanently enjoin  
15 Defendants from future violations of section 5(c) and 17(a) of the Securities Act, and  
16 sections 10(b) and 15(a) of the Exchange Act and Rule 10b-5 thereunder. SEC also seeks  
17 civil remedies, including disgorgement of \$170,000 and prejudgment interest.

18 The SEC served Agustin with its Motion for Default Judgment by mail on February  
19 27, 2001, at Jamestown prison, California, where Agustin was incarcerated for an unrelated  
20 drug offense. On March 8, 2001, Agustin, who had previously not appeared in this action,  
21 sent the Court a letter informing it that he had been incarcerated since February 2000, and  
22 requesting additional time to respond to the SEC's Motion. The Court gave Agustin an  
23 additional 21 days to oppose the SEC's motion. The Court's order, however, was returned by  
24 the Post Office because Defendant had been transferred to another prison.

25 On June 13, 2001, the SEC filed a Motion for the Imposition of Third-Tier Civil  
26 Penalties against Agustin, pursuant to section 20(d) of the Securities Act and section 21(d)(3)  
27 of the Exchange Act. That motion was scheduled to be heard by this Court together with the  
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1 Motion for Default Judgement on July 30, 2001. However, since defendant Agustin alleged  
2 in his March letter that he had never received the complaint, and in the interest of resolution  
3 of cases on the merits, this Court vacated that hearing and ordered the parties to submit  
4 declarations elaborating on the circumstances upon which Defendant Agustin was  
5 “personally” served.

6 Plaintiff's attorney declared that SEC's complaint was personally delivered to Agustin  
7 at his place of business in Alameda, California, on May 20, 1999. He further explained that  
8 Agustin was present at the address where service took place and that he received the papers  
9 from the process server. Defendant responded by submitting a letter to the Court denying  
10 that he was served with SEC's papers. He stated, in a suspiciously vague manner, that he was  
11 evicted from that address --without providing any particular date for the alleged eviction--  
12 and that he has not signed any documents. Considering the vagueness and lack of formality  
13 of Agustin's response --it is unsigned and not in declaration form--, and the specificity of  
14 the SEC's declaration, the Court is persuaded that service of process was indeed effectuated  
15 on Agustin on May 20, 1999. The Court is therefore ready to consider Plaintiff's Motion for  
16 Default Judgment and for Imposition of Civil Penalties.

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18 **LEGAL STANDARD**

19 Pursuant to Federal Rule of Civil Procedure 55(a), default must be entered when “a  
20 party against whom a judgment for affirmative relief is sought has failed to plead or  
21 otherwise defend . . . and that fact is made to appear by affidavit or otherwise. . . ”.  
22 Judgment by default “may be entered” when “the party entitled to a judgment by default”  
23 applies to the Court for such judgment. Fed. R. Civ. Pro. 55(b). Entry of default is  
24 discretionary. The general rule is that default judgments are ordinarily disfavored, and cases  
25 should be decided upon their merits whenever reasonably possible. *Pena v. Seguros La*  
26 *Comercial, S.A.*, 770 F.2d 811, 814 (9th Cir.1985).

27 The Court may consider the following factors in determining whether to award a  
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1 default judgment: (1) the merits of plaintiff's claims; (2) the sufficiency of the complaint; (3)  
2 the amount of money at stake; (4) the likelihood of prejudice to plaintiffs if judgment of  
3 default is denied; (5) the possibility of dispute as to any material facts in the case; (6)  
4 whether default resulted from excusable neglect; (7) the policy of the Federal Rules of Civil  
5 Procedure favoring decisions on the merits. *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th  
6 Cir. 1986).

7  
8 **DISCUSSION**

9 1. Application of *Eitel*

10 The first two *Eitel* factors require that plaintiff's allegation "state a claim on which  
11 (plaintiff) may recover." *Danning v. Levine*, 572 F.2d 1386, 1388 (9th Cir. 1978). The SEC  
12 alleges that Agustin has violated §§ 5(c) and 17(a) of the Securities Act, and §§ 10(b) and  
13 15(a) of the Exchange Act and Rule 10b-5 thereunder.

14 Section 5(c) of the Securities Act provides that "[i]t shall be unlawful for any person,  
15 directly or indirectly, to make use of any means or instruments of transportation or  
16 communication in interstate commerce or of the mails to offer to sell or offer to buy through  
17 the use or medium of any prospectus or otherwise any security, unless a registration  
18 statement has been filed as to such security." 15 U.S.C. §77e(c); *see also SEC v. Holschuh*,  
19 694 F.2d 130, 137 (7th Cir. 1982). The SEC has plead a prima facie case of a §5 violation.  
20 It contends (1) that the non-existent financial instruments and investments that Abacus  
21 offered are securities under § 3(a)(10) of the Exchange Act, which defines a "security" as  
22 "any note, . . . treasury, bond, debenture . . .". 15 U.S.C. §78c(a)(10); *see also SEC v.*  
23 *Bremont*, 954 F. Supp. 726, 732 (S.D.N.Y. 1997); *SEC v. Lauer*, 864 F. Supp. 784, 792  
24 (N.D. Ill. 1994), *aff'd*, 52 F.3d 667, 670 (7th Cir. 1995); (2) that since Agustin, through  
25 Abacus, offered and sold securities to the public through the Internet, interstate commerce,  
26 he was subject to the requirements of §5, and (3) that Agustin is liable under §5 because he  
27 sold securities to the public for his own financial gain without registering with the SEC. *See*  
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1 *Pinter v. Dahl*, 486 U.S. 622, 647 (1988).

2 Section 17(a) of the Securities Act, § 10(b) of the Exchange Act and Rule 10b-5  
3 prohibit acts, transactions, and practices or courses of businesses that operate with fraud or  
4 deceit, including misrepresentations and omissions of a material fact, in connection with the  
5 offer, purchase or sale of securities. *See* 15 U.S.C. §§ 77g, 78j(g); 17 C.F.R. § 240.10b-5.  
6 The SEC has alleged all the prima facie elements for a violation of these provisions. It  
7 claims (1) that Agustin, through Abacus, made numerous material misrepresentations and  
8 omissions regarding the investments offered; (2) that these representations were fraudulent  
9 on their face, and (3) that it is clear that Agustin and Abacus acted with the requisite degree  
10 of scienter. *See Aaron v. SEC*, 446 U.S. 680, 697 (1980); *Hollinger v. Titan Capital Corp.*,  
11 914 F.2d 1564, 1568-69 (9th Cir. 1990).

12 Finally, Plaintiff has also plead a prima facie violation of §15(a) of the Exchange Act,  
13 which provides that “It shall be unlawful for any broker or dealer . . . to make use of the  
14 mails or any means or instrumentality of interstate commerce to effect any transactions in, or  
15 induce or attempt to induce the purchase or sale of, any security . . . unless such broker or  
16 dealer is registered . . .”. 15 U.S.C. § 78o(a). SEC's complaint alleges (1) that both Abacus  
17 and Agustin meet the definition of “broker” under §3(a)(4) of the Exchange Act and (2) that  
18 neither of them ever filed a registration application.

19 Under *Eitel*, the Court must also examine the amount of money at stake in relation to  
20 the seriousness of defendant's conduct. *Board of Trustees of the Automotive Industries*  
21 *Welfare Fund v. Concord Car Inc.*, 1996 WL 382845 (N.D. Cal.). Here SEC seeks to  
22 recover a total of \$305,601: \$170,000 in disgorgement, \$25,601 in prejudgment interest, and  
23 \$110,000 in civil penalties. This amount is certainly proportionate to the seriousness of  
24 Agustin's conduct.

25 Another inquiry is whether there is a significant possibility of prejudice to Plaintiff  
26 should relief be denied. In this case, if relief is denied, Agustin's fraudulent conduct would  
27 remain unchecked, and he would be free to pursue similar activities in the future, directly  
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1 endangering the general public.

2       The fifth *Eitel* factor is the possibility of dispute as to any material facts in the case.  
3 The law is clear that upon entry of default all well-pleaded factual allegations set forth in the  
4 complaint will be taken as true, except those pertaining to damages. *Televideo Systems v.*  
5 *Heidenthal*, 826 F.2d 915, (9th Cir. 1987); *Benny v. Pipes*, 779 F.2d 489 (9th Cir. 1986).  
6 Since here the Clerk of Court entered default on September 15, 1999, no genuine possibility  
7 of dispute exists.

8       In addition, there is no cognizable possibility of excusable neglect. More than two  
9 years have passed since Plaintiff initiated this action, and almost two years since default was  
10 entered. Agustin received notice satisfying *Mullane v. Central Hanover Trust Co.*, 339 U.S.  
11 306, 314 (1950). He had a long time to respond, failed to do so and offered no excuses  
12 explaining this failure.

13       The final *Eitel* factor is the policy of the Federal Rules of Civil Procedure favoring  
14 decisions on the merits. The mere existence of Fed. R. Civ. P. 55(b) indicates that the rules'  
15 preference for resolution of cases on the merits, standing alone, is not dispositive. When a  
16 party fails to defend against an action and delays a decision on the merits with vagueness, as  
17 here, the rules' policy does not preclude the Court from granting default judgment.

18  
19 2. The SEC's remedies.

20       A district court has the discretion to fashion whatever equitable relief it deems  
21 necessary to deprive defendants of their wrongful gains. *See J.I. Case Co. v. Borak*, 377  
22 U.S. 426, 433 (1964). The SEC asks this Court to permanently enjoin Agustin from future  
23 violations of the securities laws, and it further seeks to impose disgorgement, prejudgment  
24 interest and civil penalties on Agustin. Each of these remedies is addressed below.

25 A. Injunctive Relief.

26       Injunctive relief is the primary statutory remedy for violations of the federal securities  
27 laws. 15 U.S.C. §§ 77t(b), 78u(d). Once a violation of the federal securities laws has been  
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1 established, a district court has broad discretion to grant a permanent injunction against  
2 future violations if “the defendant's past conduct indicates . . . that there is a reasonable  
3 likelihood of further violation(s) in the future.” *SEC v. Savoy Industries Inc.*, 587 F.2d 1149,  
4 1168 (D.C. Cir. 1978); *see also SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1100  
5 (2nd Cir. 1972). In determining the likelihood of future violations, a court should consider  
6 the totality of the circumstances, including: the degree of scienter involved; the isolated or  
7 recurrent nature of the violation; the defendant's recognition of the wrongfulness of the  
8 conduct; the likelihood, given the defendant's occupation, of future violations, and the  
9 sincerity of his assurances against future violations. *SEC v. Murphy*, 626 F.2d 633, 655 (9th  
10 Cir. 1980). Past violations may permit an inference that future violations will occur, and the  
11 fact that the defendant is presently not engaged in any violations does not preclude a court  
12 from issuing a permanent injunction. *Id*; *see also Manor Nursing Centers*, 458 F.2d at 1100;  
13 *SEC v. Management Dynamics, Inc.*, 515 F.2d 801, 807 (2nd Cir. 1975).

14 In this case the complaint details multiple violations which resulted from a  
15 premeditated scheme, carried out over a period of time, to misappropriate client funds.  
16 Agustin has failed to appear and recognize the wrongfulness of his conduct; nor has he  
17 offered assurances against future violations. In these circumstances, the Court finds that  
18 injunctive relief is appropriate.

19 B. Disgorgement and Prejudgment Interest.

20 To prevent unjust enrichment and to deter others from violating the securities laws,  
21 courts have broad equity powers to order defendants to disgorge illicit gains and impose  
22 prejudgment interest on those gains. *SEC v. Clark*, 915 F.2d 439, 453 (9th Cir. 1990);  
23 *Knapp v. Ernst & Whinney*, 90 F.3d 1431, 1441 (9th Cir. 1996). Disgorgement is a method  
24 of “forcing the defendant to give up the amount by which he was unjustly enriched.” *SEC v.*  
25 *Commonwealth Chemical Securities Inc.*, 574 F.2d 90, 102 (2nd Cir. 1978). The amount of  
26 disgorgement should be measured by the defendant's unjust enrichment or personal benefit,  
27 not by the damages inflicted upon purchasers and sellers of the relevant securities. *SEC v.*  
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1 *Penn Central Co.*, 450 F. Supp. 908, 916 (E.D. Pa. 1978). The SEC requests that Agustin be  
2 ordered to pay \$170,000 in disgorgement. The Court finds that disgorgement is appropriate,  
3 since Agustin has been unjustly enriched in the amount of \$170,000, which an investor sent  
4 to Abacus.

5 In assessing whether to order prejudgment interest, the Court may consider the degree  
6 of personal wrongdoing on the part of the defendant. *Osterneck v. Ernst & Whitney*, 489  
7 U.S. 169, 176 (1989). Granting prejudgment interest serves a compensatory function; it  
8 designed to make the injured party whole. *Frank Music Corp. v. Metro Goldwyn-Mayer,*  
9 *Inc.*, 886 F.2d 1545, 1550 (9th Cir. 1989). Prejudgment interest is calculated from the date  
10 of the violation to the approximate date of judgment, in accordance with the delinquent tax  
11 rate as established by the Internal Revenue Code, IRC § 6621(a)(2). SEC requests a total of  
12 \$25,601 in prejudgment interest, to deprive Agustin of the benefit of having access to  
13 investors' funds up to the date of the judgment. The Court finds that prejudgment interest is  
14 appropriate in this case, since Agustin has been unjustly enriched by retaining use of the  
15 \$170,000 he wrongfully obtained.

16 C. Civil Penalties.

17 Plaintiff has also requested that this Court impose “third tier” civil penalties against  
18 Agustin. Third tier penalties are available when the securities law violation “involved fraud,  
19 deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement [and]  
20 such violation directly or indirectly resulted in substantial losses or created a significant risk  
21 of substantial loss to other persons.” 15 U.S.C. §§ 77(d)(2)(C), 78(d)(3)(B)(ii). The law  
22 provides that the penalty is not to exceed the greater of: \$110,000 for a natural person, or the  
23 “gross amount of pecuniary gain” to the defendant as a result of the violation. 28 U.S.C.  
24 §2461(note); 17 C.F.R. §201.1001. Here SEC seeks the imposition of a \$110,000 penalty  
25 against Agustin.

26 Like a permanent injunction, civil penalties are imposed to deter the wrongdoer from  
27 similar violations in the future; therefore the factors listed in *SEC v. Murphy*, 626 F.2d 633,  
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1 655 (9th Cir. 1980) apply. Agustin's violations were numerous and ongoing. Further, his  
2 actions were clear departures from the securities laws and created a significant risk of  
3 substantial loss to investors who purchased fraudulent securities through his website. His  
4 fraudulent conduct and reckless disregard of regulatory requirements warrants the imposition  
5 of civil penalties.

6  
7 **CONCLUSION**

8 Accordingly, and given all of the above, the SEC's Motion for Judgment by Default is  
9 GRANTED. Arthur Agustin IS HEREBY PERMANENTLY ENJOINED from committing  
10 future violations of sections 5(c) and 17(a) of the Securities Act, and sections 10(b) and  
11 15(a) of the Exchange Act and Rule 10b-5 thereunder. Furthermore, SEC's Motions for  
12 disgorgement, prejudgment interest and civil penalties are GRANTED. Defendant Agustin  
13 SHALL PAY a total of \$170,000 in disgorgement, \$25,601 in prejudgment interest, and  
14 \$110,000 as a civil penalty.

15  
16 IT IS SO ORDERED.

17  
18 Dated: 8/15/01

  
\_\_\_\_\_  
THELTON E. HENDERSON  
United States District Judge