

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS  
TOPEKA DIVISION**

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SECURITIES AND EXCHANGE COMMISSION,	:	
	:	
Plaintiff,	:	
	:	
vs.	:	
	:	
DAVID TANNER, Individually, and d/b/a	:	
CAPITAL ENHANCEMENT CLUB,	:	
ROCKY D. SPENCER,	:	Civil Action No.
MARROC CORP., and	:	05-4057-RDR
RICHARD P. KRINGEN,	:	
	:	
Defendants,	:	
	:	
and	:	
	:	
MARGARET F. SPENCER,	:	
OMNIBUS LLC,	:	
VECTRA RESOURCES, LLC, and	:	
DYNAMIC ENVIRONMENTAL SOLUTIONS, INC.,	:	
	:	
Relief Defendants.	:	

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**MEMORANDUM OF LAW IN SUPPORT OF JOINT MOTION  
TO MODIFY PERMANENT INJUNCTION AND ORDER  
OF DISGORGEMENT AGAINST DAVID TANNER**

*s/ J. Kevin Edmundson*

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Plaintiff Securities and Exchange Commission and Receiver Larry E. Cook jointly move to modify the Agreed Order of Permanent Injunction and Order of Disgorgement Against David Tanner entered on September 13, 2005 (Doc. # 113) (“Agreed Order”). The relief sought is appropriate because the Commission and the Receiver have determined that David Tanner is an alias for Scott F. Klion, a recidivist securities law violator. Modifying the Agreed Order to reflect Klion’s true identity would promote justice, serve the best interests of the investing public and improve the Receiver’s ability to collect and preserve receivership assets. The Commission and the Receiver also request that the Court modify the Agreed Order, to state more accurately the amount of disgorgement that Klion should be ordered to pay, and to set appropriate amounts of prejudgment interest and a civil penalty. The *Declaration of Receiver Larry E. Cook in Support of Joint Motion to Modify Judgment and Order of Disgorgement Against Defendant David Tanner* (the “Cook Declaration”) is attached to this Memorandum of Law as **Exh. A**

## **I. BACKGROUND**

On May 4, 2005, the Commission filed a Complaint alleging that David Tanner masterminded a scheme to defraud investors of at least \$15 million through the fraudulent offer and sale of securities referred to as a “private joint venture investment.” Operating under the name Capital Enhancement Club (“CEC”), the Commission alleged that Tanner and others falsely claimed that CEC would pay monthly interest of approximately 7% to 11% (120% to 260% annually) from “trading in international markets.” In reality, CEC’s trading program was nonexistent and investor funds were misappropriated by the Defendants or transferred to several offshore institutions for the benefit of the Defendants.

In support of the emergency relief initially sought, the Commission demonstrated, among other things, that David Tanner (or someone using that name) (a) was identified in CEC

promotional materials as CEC's managing partner and webmaster, (b) registered and posted the CEC website, (c) established electronic currency ("E-Gold") accounts, some of which, accepted CEC investor deposits, and (d) published periodic newsletters promoting CEC and instructing investors where to send their money.<sup>1</sup>

In response to discovery requests served with the Complaint, Tanner's former counsel produced a sworn declaration indicating "Tanner's" intention to assert his Fifth Amendment right against self-incrimination. The declaration purported to carry Tanner's original signature. Notwithstanding Tanner's Fifth Amendment Declaration, the Commission and the Receiver soon started to suspect that Tanner was an alias for someone else. For example, on May 17, 2005, the Commission and the Receiver deposed Phillip Risby, the president of Relief Defendant Dynamic Environmental Solutions ("DES"). Mr. Risby testified that funds traced from CEC investors to DES were the result of an investment in DES by "James Tucker," not Tanner.<sup>2</sup>

Following the filing of Tanner's answer, in which he essentially denied all of the allegations against him, the Commission requested dates for Tanner's deposition. Tanner's counsel opposed the deposition and filed a motion for a protective order.<sup>3</sup> On August 30, 2005, the Court denied Tanner's motion and ruled that he was to appear for a deposition on September 30, 2005.<sup>4</sup>

Faced with the prospect of a compelled in-person deposition, Tanner's counsel approached the Commission with a settlement offer. On September 6, 2005, Tanner's counsel

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<sup>1</sup> Docket 5, *Memorandum of Law in Support of Plaintiff's Application for an Ex Parte Temporary Restraining Order, Order Freezing Assets and Other Emergency Relief*, at pages 2-3.

<sup>2</sup> Docket 222, *Declaration of Larry E. Cook in Support of Unopposed Motion to Modify Scheduling Order to Reopen Discovery for the Limited Purpose of Determining the True Identity of David Tanner* at ¶ 9, Ex. A.

<sup>3</sup> Docket 81.

<sup>4</sup> Docket 105.

and the Commission submitted a *Joint Motion to Enter Agreed Order of Permanent Injunction and Order of Disgorgement Against David Tanner*<sup>5</sup> On September 13, 2005, the Court entered the *Agreed Order of Permanent Injunction and Order of Disgorgement Against David Tanner*<sup>6</sup> submitted by Tanner's counsel and the Commission. The Joint Motion and Agreed Order: (a) enjoined Tanner from further violations of the federal securities laws as alleged in the Complaint, (b) ordered Tanner to disgorge \$15 million, (c) authorized the Receiver to petition the Court for additional disgorgement if subsequent discovery demonstrated that CEC had actually raised an amount greater than \$15 million, and (d) allowed that the additional remedies of a civil penalty and pre-judgment interest were to remain unresolved until completion of discovery.<sup>7</sup>

## II. "TANNER'S" TRUE IDENTITY

Following additional discovery, it became clear why Tanner was eager to settle and avoid appearing for his deposition. The Commission and the Receiver have now determined that Tanner was one of two aliases used by Scott F. Klion, a recidivist securities law violator, to perpetrate the CEC fraud scheme.<sup>8</sup> The evidence demonstrating Klion's use of various aliases, including the names "David Tanner" and "James Tucker," is as follows:

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<sup>5</sup> Docket 110.

<sup>6</sup> Docket 113.

<sup>7</sup> Docket 110.

<sup>8</sup> Klion has been involved in at least three cases initiated by the Commission. Klion was named as the primary defendant in *SEC v. Scott L. Klion, d/b/a Cen-Tex Alchemy Guild, et al.* No. 6:98-CV-186, USDC, WD TX (Waco Division). His middle initial was incorrectly identified in the *Cen-Tex* case. After commencement of the *Cen-Tex* case, Klion fled to St. Maarten. Despite being enjoined from further securities laws violations in the *Cen-Tex* case, Klion, under the alias David Tanner, formed Capital Enhancement Club, the ponzi scheme which is the subject of this action. Klion is also a primary defendant in the related case *SEC v. Seaforth Meridian, et al.*, Case No. 06-4107 pending before this Court.

- As described in the Receiver’s declaration previously filed in this case, Tanner appeared to be a name used by James Tucker, who lived in St. Maarten, Netherlands Antilles.<sup>9</sup>
- When certain E-Gold accounts were established for the benefit of CEC and Tanner in December 2000, an account for James Tucker was established the following day using *the same unique Internet Protocol (“IP”) address*;<sup>10</sup>
- Several hundred E-Gold transactions in both the CEC and Tucker accounts came from the same IP address;<sup>11</sup>
- Approximately \$900,000 of CEC investor funds were sent to Relief Defendant DES at the direction of Tucker;<sup>12</sup>
- Approximately \$1.8 million in CEC funds were used to purchase jewelry in the United States that was shipped to a retail store called Ballerina Jewelry in St Maarten. The owner of Ballerina Jewelry told the Receiver that the jewelry was order by Tucker who arranged to pay the suppliers directly;<sup>13</sup>
- Tucker is a “founder” and “Managing Member” of Seaforth Meridian Ltd. (“Seaforth”), a United States hedge fund that, at Tucker’s direction, received \$9 million of CEC investor funds;<sup>14</sup>
- Tucker directed the payment of \$5 million of CEC funds to Server-To-Go, a company that claims to have been engaged by Tucker to develop a software program for the transfer of money over the Internet;<sup>15</sup>
- Twenty four payments totaling \$675,000 of CEC investor funds were wired from a Latvian bank directly to Tucker in St. Maarten or to a second Latvian bank to pay “Tucker’s” credit card bill;<sup>16</sup>
- Information recently produced by Tanner’s counsel indicates that at least \$227,000 of the \$500,000 in legal fees paid to Tanner’s attorneys were wired from an Antilles

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<sup>9</sup> Doc. 222, Declaration of Larry Cook ¶ 6.

<sup>10</sup> *Id.* at ¶ 7.

<sup>11</sup> *Id.* at ¶ 8.

<sup>12</sup> *Id.* at ¶ 9.

<sup>13</sup> *Id.* at ¶ 10.

<sup>14</sup> *Id.* at ¶ 13.

<sup>15</sup> *Id.* at ¶ 11.

<sup>16</sup> *Id.* at ¶ 12.

bank.<sup>17</sup> Tucker is the only person known to be associated with CEC who resides in the Antilles;

- While the Receiver can demonstrate that Tucker received or directed payment of approximately \$18 million of CEC investor funds, the Receiver has yet to uncover even one financial account indicating that anyone named “David Tanner” obtained or controlled significant CEC funds; and<sup>18</sup>
- An individual who personally met the person going by the name James Tucker identified him as Scott Klion.<sup>19</sup>

On June 20, 2006, the Court allowed the Commission an additional 90 days to conduct discovery to determine the true identity of Defendant Tanner and his presumed alias James Tucker.<sup>20</sup> The Commission issued subpoenas and pursued investigative leads. As a result of that investigation, the Commission and Receiver have determined that Tanner and Tucker are actually aliases of securities fraud recidivist Scott Fraiser Klion, formerly of Copperas Cove, Texas.<sup>21</sup> Information which supports the conclusion that Klion (using the aliases Tanner and Tucker) is the real CEC mastermind includes:

- The photo of Tucker matches the expired Texas driver’s license photo of Klion;<sup>22</sup>
- Multiple witnesses who met with Tucker in the Antilles reported meeting a female companion named Liz or Elizabeth who has a daughter named Patricia Alaniz. A woman named Elizabeth Alaniz was identified as Klion’s co-defendant girlfriend in the *Cen-Tex* case;<sup>23</sup>

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<sup>17</sup> *Id.* at ¶ 15.

<sup>18</sup> *Id.* at ¶¶ 4, 6.

<sup>19</sup> Cook Decl., ¶ 4.

<sup>20</sup> Docket 223.

<sup>21</sup> Klion’s middle initial was incorrectly identified in the *Cen-Tex* case. Cook Decl., ¶ 2. Klion fled to St. Maarten in 1998 after he was named as the primary defendant in *SEC v. Scott L. Klion, d/b/a Cen-Tex Alchemy Guild, et al.* No. 6:98-CV-186, USDC, WD TX (Waco Division). Cook Decl., ¶ 3. Like CEC, the *Cen-Tex* ponzi scheme involved the sale of fictitious high-yield securities. Docket 262 at Ex. A.

<sup>22</sup> Docket 262, Exs. B and C, respectively.

<sup>23</sup> Cook Decl., ¶ 2.

- When the *Cen-Tex* receiver took possession of Klion's house in 1998, he found information on obtaining "economic citizenship" from the Lesser Antilles Island of Domenica. Tucker purportedly holds a passport from the Island of Domenica; and<sup>24</sup>
- Multiple witnesses who met Tucker described that he wore a distinctive Virginia Military Institute ("VMI") ring and discussed being a VMI graduate. Klion is a VMI graduate and the *Cen-Tex* receiver identified the VMI ring from the Tucker photograph.

After discovering Tanner/Tucker's true identity, the Commission informed counsel for Tanner, and new prospective counsel for Tucker, of its belief that Klion is actually the real identity of both Tanner and Tucker. No one has disputed the claim and Tanner's three prior attorneys, for unspecified reasons, have all withdrawn from the case.<sup>25</sup>

### III. ARGUMENT AND AUTHORITIES

#### A. The Agreed Order Should Be Modified to Reflect Tanner's True Identity.

Rule 60(b)(6) of the Federal Rules of Civil Procedure provides:

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons . . . (6) any other reason justifying relief from the operation of the judgment.

Modifying the Agreed Order to add Klion as a specifically named defendant, and Tucker as an additional alias used by Klion, should be allowed here as there is no bad faith or dilatory conduct on the part of the movant. Modification is sought now because Klion deceived this Court, the Commission, the Receiver, and thousands of defrauded investors concerning his true identity. And because Klion knew the "Tanner" and "Tucker" identities were aliases for Klion, there is no prejudice because he was properly served with the Complaint and participated in this litigation by filing an answer, objecting to the taking of sworn testimony, and entering into the

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<sup>24</sup> Docket 262, Ex. D. The application identifies Tucker's Dominican Passport.

<sup>25</sup> Docket Nos. 244, 261, and 350. In addition, former counsel for "Tanner" advised the Court in a June 20, 2006 correspondence that he did not know the true identity of his client. A copy of the correspondence is attached as **Exh. B**.

Agreed Order. Thus, and as discussed further below, modifying the Agreed Order in the form attached as **Exh. C** is a proper and necessary exercise of this Court's discretion, and would promote justice and benefit the defrauded investors.

**B. Modification of the Agreed Order Is Necessary.**

1. The Final Judgment Must Reflect Tanner's True Identity

The Agreed Order against "Tanner" should be modified to include "Klion" as a specifically named defendant. The scope of the Agreed Order, particularly the language enjoining Tanner and "his agents, servants, employees, attorneys, and all other persons in active concert or participation with him," clearly contemplates that the agreed relief was to include the individual responsible for the CEC fraud, regardless of the alias used. Modifying the order to include Klion is merely an administrative detail. More significantly, to allow the disgorgement provisions to be restricted to the bogus "Tanner" identity would possibly complicate further collection actions of the Receiver and the Commission. Thus, a final judgment including Klion should be issued in this case.

2. Disgorgement and Pre-Judgment Interest

The Agreed Order should be modified to increase the amount of disgorgement against "Tanner/Klion," and to set an appropriate amount for prejudgment interest. The Agreed Order provides that "the *Joint Motion to Enter Agreed Order of Permanent Injunction against David Tanner* ("*Tanner Joint Motion*") is incorporated herein with the same force and effect as if fully set forth herein, and that Defendant Tanner shall comply with all of the undertakings and agreements set forth therein."<sup>26</sup> The *Tanner Joint Motion*, in relevant part, states:

- Tanner understands, and the parties agree that, although \$15 million represents the full amount of disgorgement currently sought in the Commission's Complaint,

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<sup>26</sup> Doc. 113 at p. 4

the court-appointed Receiver may later seek to modify and increase the amount of disgorgement from Tanner pending the completion of his investigation of Tanner's and the Capital Enhancement Club's financial activities. The Receiver may make this application to the Court at any time prior to his completion and ultimate discharge from this matter.<sup>27</sup>

- Tanner's offer to agree to the foregoing relief leaves two claims sought by the Commission unresolved. Specifically, the Commission has a claim against Tanner for prejudgment interest on the amount disgorged and a claim for a civil monetary penalty. The Commission may, at its discretion and at any time prior to the completion of this matter against all parties, petition the court to set appropriate amounts of prejudgment interest and a civil money penalty.<sup>28</sup>

The Receiver and the Commission now ask the Court to modify the Agreed Order.

The amount to be disgorged "need only be a reasonable approximation of profits causally connected to the violation," and "the risk of uncertainty" in computing disgorgement "should fall on the wrongdoer whose illegal conduct created that uncertainty."<sup>29</sup> Moreover, the gross amount of pecuniary gain obtained by a defendant through violations of the federal securities laws is a proper measure of disgorgement.<sup>30</sup> In cases similar to this matter, when wrongdoer's profits resulted from the proceeds raised in the fraudulent offering of securities, courts have held that the defendants must disgorge all proceeds that were received in connection with the offering.<sup>31</sup>

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<sup>27</sup> Doc. 110 at p. 2

<sup>28</sup> *Id.* at p. 3

<sup>29</sup> *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1231 (D.C. Cir. 1989); *see also SEC v. MacDonald*, 699 F.2d 47, 55 (1st Cir. 1983); *Elkind v. Liggett & Myers, Inc.*, 635 F.2d 156, 172 (2d Cir. 1980).

<sup>30</sup> *SEC v. Continental Wireless Cable Television, Inc.*, 110 F.3d 69 (9th Cir. 1997); *see also SEC v. Interlink Data Network of Los Angeles, Inc.*, Fed. Sec. L. Rep. ¶ 98,049 (C.D. Cal. 1993); *SEC v. United Monetary Servs., Inc.*, Fed. Sec. L. Rep. ¶ 95,284 (S.D. Fla. 1990).

<sup>31</sup> *See SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d at 1104; *SEC v. R. J. Allen & Assocs.*, 386 F. Supp. 866, 880 (S.D. Fla. 1974).

The disgorgement calculation as to Tanner/Klion is based on the total amount of CEC investor funds he received, less any amounts returned to investors. The disgorgement amount is not reduced for expenses connected with his participation in the fraudulent CEC scheme. This disgorgement calculation comports with the “overwhelming weight of authority holding that securities laws violators may not offset their disgorgement liability with business expenses.”<sup>32</sup>

In his declaration, the Receiver sets forth his conclusions based on an analysis of fifty foreign and domestic bank accounts, thousands of transactions related to the fraudulent CEC program, six electronic currency providers who facilitated payments between CEC and its investors, and 1146 completed and verified investor claim forms.<sup>33</sup>

As set forth in the Cook Declaration, Tanner/Klion enticed at least 1146 investors into the CEC scheme<sup>34</sup> and received net investor funds totaling \$19,800,974. Accordingly, Klion’s net unjust enrichment totals \$19,800,974.

The Cook Declaration also sets forth a reasonable calculation of prejudgment interest using rates established for interest on tax underpayments under Section 6621 of the Internal Revenue Code. Applying these rates, the Receiver determined that Tanner/Klion should be obligated to pay prejudgment interest in the amount of \$2,221,136. Accordingly, the Court should modify the Final Judgment requiring Tanner/Klion to pay disgorgement in the amount of \$19,800,974 plus prejudgment interest of \$2,221,136.

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<sup>32</sup> *SEC v. Hughes Capital Corp.*, 917 F. Supp. 1080, 1086 (D.N.J. 1996). *See also SEC v. Great Lakes Equities Co.*, 775 F. Supp. 211, 214-215 (E.D. Mich. 1991) (rejecting deductions from the disgorgement amount for overhead, commissions, and other expenses); *SEC v. Benson*, 657 F. Supp. 1122, 1134 (S.D.N.Y. 1987) (stating that the “manner in which [defendant] chose to spend his misappropriations is irrelevant as to his objection to disgorge”); *SEC v. Kenton Capital, Ltd.*, 69 F. Supp.2d 1, 15-16 (D.D.C. 1998).

<sup>33</sup> The Receiver counts a claim as “completed and verified” if ordered to pay the claim pursuant to order of the Court following the November 20, 2006 claims hearing.

<sup>34</sup> Cook Dec. at ¶ 6.

3. Civil Penalty

The proposed Final Judgment submitted by the Commission seeks a third-tier penalty in the amount of \$130,000 against Klion. Section 20(d) of the Securities Act of 1933 and Section 21(d)(3) of the Securities Exchange Act of 1934 authorize the Commission to seek, and the Court to impose, a third-tier penalty if a defendant's violation (1) "involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement" and (2) "directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons." These provisions authorize a third-tier civil penalty of \$130,000 per violation for a natural person.

A third-tier penalty against Klion is appropriate under the facts of this case. Based on the allegations in the Commission's Amended Complaint, there is no question that Klion enticed multiple victims into the scheme and committed multiple violations of the federal securities laws involving fraud and deceit and that his violations resulted in substantial losses to investors. CEC was a Ponzi scheme, centered around the offer and sale of fraudulent "units of beneficial interest," which collected more than \$19 million from thousands of investors. Klion's misrepresentations and omissions, primarily in the form of "newsletters," were saturated with outrageous misrepresentations concerning expected returns for investors, the use of investor funds, and the safety of the investment. Finally, while the recovery effort of the Receiver continue, the CEC investor victims are still likely to lose a significant portion of their investment principal. Accordingly, it is appropriate to assess a civil penalty of \$130,000 against the CEC mastermind.

#### IV. CONCLUSION

Based on Klion's identification, the Commission now seeks to modify the Agreed Order to reflect (i) the correct amount of funds that Klion should be ordered to disgorge, and (ii) set appropriate amounts of prejudgment interest and civil penalty.

Respectfully submitted,

*s/ J. Kevin Edmundson*

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Attorneys for Larry E. Cook, Receiver

**CERTIFICATE OF SERVICE**

I hereby certify that on this 10th day of May, 2007 I electronically filed the foregoing, with the Clerk of the Court for the District of Kansas, Topeka Division, by using the CM/ECF system which will send a notice of electronic filing to all CM/ECF participants.

In addition, I certify that on the same day, I caused a copy of the foregoing to be sent via e-mail to Scott Klion aka James Tucker aka David Tanner at:

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/s/ Brian M. Holland  
An attorney for Larry E, Cook,  
Receiver