

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

AXCAN SCANDIPHARM, INC.,	:	OCTOBER TERM, 2000
	:	
Plaintiff,	:	NO. 03827
	:	
v.	:	COMMERCE PROGRAM
	:	
REED SMITH, LLP,	:	Control Nos. 091988, 111836
:	:	
Defendant.	:	

ORDER

AND NOW, this 26th day of March, 2007, upon consideration of defendant's Motion to Dismiss, plaintiff's Motion for Leave to File Amended Complaint, the responses thereto, the briefs in support and opposition, and all other matters of record, and in accord with the court's Opinion issued contemporaneously, it is hereby **ORDERED** as follows:

1. Defendant's Motion to Dismiss is **GRANTED** in part, and plaintiff's claims for damages are limited as set forth in the court's accompanying Opinion. The remainder of the Motion to Dismiss is **DENIED**.
2. Plaintiff's Motion to Amend is **GRANTED**, and plaintiff may file an Amended Complaint under seal substantially in the form proffered by it in its Motion to Amend, but modified to comport with the court's accompanying Opinion regarding recoverable damages.

It is further **ORDERED** that the Case Management Order in this case is hereby amended as follows:

1. The parties shall have until June 2, 2007, to complete fact discovery limited to the issues of damages and the circumstances and effect of Judge Gafni's ruling disqualifying defendant as counsel in the indemnification arbitration.
2. On or before July 7, 2007, plaintiff shall identify and submit to all other parties curriculum vitae and expert reports for any damages expert witnesses plaintiff intends to have testify at trial.
3. On or before August 4, 2007, defendant shall identify and submit to all other parties curriculum vitae and expert reports for any damages expert witnesses defendant intends to have testify at trial.
4. All pre-trial motions (other than motions in limine) shall be filed not later than August 18, 2007.

A new Case Management Order setting forth these and other deadlines will be issued simultaneously with this Order.

BY THE COURT,

HOWLAND W. ABRAMSON, J.

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OPINION

In this action, Axcan Scandipharm, Inc. (“Axcan”) alleges that Reed Smith, LLP (“Reed Smith”) represented Axcan in certain federal court litigation brought against Axcan by McNeilab, Inc. (the “Patent Litigation”). Apparently, pursuant to an indemnification agreement American Home Products Corporation (“AHP”), and/or Eurand International, S.p.A. (“Eurand”) provided and paid for Reed Smith’s defense of Axcan in the Patent Litigation. Subsequently, Reed Smith undertook the representation of AHP/Eurand in a separate action in which AHP/Eurand sought indemnification from Axcan (the “Indemnification Action”) for damages AHP/Eurand incurred in connection with certain underlying product liability suits brought against them and Axcan.¹

Due to Reed Smith’s prior representation of Axcan in the Patent Litigation, Axcan alleged in both this action and in the Indemnification Action that Reed Smith had an impermissible conflict of interest and should be barred from representing AHP/Eurand adverse to Axcan in the Indemnification Action. The arbitrator in the Indemnification Action ultimately precluded Reed Smith from further representing AHP/Eurand in that action.

¹ By agreement of the parties to the Indemnification Action, the claims in that action were arbitrated before former Judge Gafni.

In this action, Axcan seeks damages flowing from Reed Smith's alleged conflicting representations of Axcan and AHP/Eurand and from Reed Smith's alleged disclosure of Axcan's confidences to AHP/Eurand in connection with the Indemnification Action.² Reed Smith moved to dismiss Axcan's claims on the basis that none of its alleged damages are recoverable. Axcan moved to Amend its Complaint to plead its breach of fiduciary duty and professional negligence claims and damages with more specificity. In order to decide both parties' motions in accordance with the applicable legal standards, the court will view Axcan's proposed Amended Complaint in the light of Reed Smith's Motion to Dismiss, rather than simply looking at the claims pled in Axcan's existing Complaint.³

"Amendments to pleadings will be liberally allowed to secure a determination of cases on their merits."⁴ "Leave to amend lies within the sound discretion of the trial court and the right to amend should be liberally granted at any stage of the proceedings unless there is an error of law or resulting prejudice to an adverse party."⁵ "The right to amend will be withheld if there does not appear to be a reasonable possibility that amendment will be successful."⁶ "A court is not required to allow amendment of a pleading if a party will be unable to state a claim on which

² In addition to its claims for damages, Axcan also sought a declaratory judgment that Reed Smith must turn over Axcan's file from the Patent Litigation and that Reed Smith is precluded from representing AHP/Eurand adverse to Axcan in the Indemnification Action. Since the Patent Litigation file was turned over and Judge Gafni disqualified Reed Smith in the Indemnification Action, the declaratory judgment claim is effectively moot.

³ Given the present procedural posture of this case, the court must accept all factual allegations in Axcan's Complaint and proposed Amended Complaint as true. *See Emerich v. Phila. Center for Human Development, Inc.*, 554 Pa. 209, 213, 720 A.2d 1032, 1035, n.1 (1998). In doing so, the court does not hold that Reed Smith has, in fact, breached any fiduciary duty to Axcan. That determination must await the parties' proofs at trial or, at least, at summary judgment.

⁴ *Capobianchi v. BIC Corp.*, 446 Pa. Super. 130, 134, 666 A.2d 344, 346 (1995).

⁵ *Werner v. Zazyczny*, 545 Pa. 570, 584, 681 A.2d 1331, 1338 (1996).

⁶ *Spain v. Vicente*, 315 Pa. Super. 135, 142, 461 A.2d 833, 837 (1983).

relief could be granted.”⁷ In other words, Axcan’s proposed Amended Complaint must satisfy the preliminary objection standards for demurrer.

In its Motion to Dismiss and its opposition to Axcan’s Motion to Amend, Reed Smith contends that Axcan has failed to allege that it suffered any legally cognizable damages. In order to prevail on its Motion to Amend and to defeat Reed Smith’s Motion to Dismiss, Axcan must show that the relief it demands in its proposed Amended Complaint constitutes recoverable damages; otherwise its proposed amendments would be futile and will be disallowed.

In its proposed Amended Complaint, Axcan claims that Reed Smith breached its fiduciary duty and was professionally negligent as counsel to Axcan. In making such a claim, Axcan “has the burden of proving: (1) that a past attorney/client relationship existed which was adverse to a subsequent representation by the law firm of the other client; (2) that the subject matter of the relationship was substantially related; (3) that the member of the law firm . . . acquired knowledge of confidential information from or concerning the former client, actually or by operation of law.”⁸ In support of its claim, Axcan has pled that: Reed Smith represented Axcan in the Patent Litigation; Reed Smith acquired confidential information concerning Axcan during the course of that litigation; Reed Smith subsequently represented AHP/Eurand adverse to Axcan in the Indemnification Action; and Reed Smith divulged Axcan’s confidential information to AHP/Eurand. In other words, Axcan accuses Reed Smith of engaging in a impermissible conflict of interest. Such allegations make out a claim for breach of fiduciary duty/professional negligence against Reed Smith.

⁷ Werner, 545 Pa. at 584, 681 A.2d at 1338.

⁸ In re Estate of Pew, 440 Pa. Super. 195, 244, 655 A.2d 521, 545-6 (1994).

In order to recover damages for Reed Smith's alleged breach of fiduciary duty, Axcan must show that it suffered "economic damages that could be measured with certainty and, if awarded, would compensate [Axcan] for all financial losses [it] suffered as a result of [Reed Smith's] conduct, including the value of property taken."⁹ Axcan claims several different types of damages due to Reed Smith's alleged breach. Axcan claims that it is entitled to compensatory damages, which it argues includes the fees it paid other counsel to have Reed Smith disqualified in the Indemnification Action and to obtain the Patent Litigation client file from Reed Smith. Axcan also claims that Reed Smith must disgorge to Axcan the fees that Reed Smith earned representing Axcan in the Patent Litigation. Axcan further claims that Reed Smith must disgorge to Axcan the fees that Reed Smith earned representing AHP/Eurand in the Indemnification Action. Finally, Axcan claims that it is entitled to punitive damages due to the egregiousness of Reed Smith's breach of fiduciary duty. Some, but not all, of such damages may be sought by Axcan in this action.

Reed Smith's primary argument in support of its Motion to Dismiss is that Axcan is barred by the "American Rule" from recovering any damages comprised of attorneys fees. "The American Rule states that a litigant cannot recover counsel fees from an adverse party unless there is express statutory authorization, a clear agreement of the parties or some other established exception."¹⁰ However, in this case, Axcan is not trying to recover its attorneys fees from its adversary. It is not claiming that it is entitled to the fees it has incurred in this action, where

⁹ Paves v. Corson, 569 Pa. 171, 177, 801 A.2d 546, 550 (2002) (citing lower court's jury instructions with approval). See also Maritrans GP, Inc. v. Pepper, Hamilton & Scheetz, 529 Pa. 241, 258, 602 A.2d 1277, 1285 (1992) ("Courts have also allowed civil actions for damages for an attorney's breach of his fiduciary duties by engaging in conflicts of interest.")

¹⁰ Mosaica Academy Charter School v. Commonwealth Dept. of Education, 572 Pa.191, 206-7, 813 A.2d 813, 822 (2002) ("In Pennsylvania, the American Rule is embodied in 42 Pa.C.S. § 1726(a)(1), which provides that attorneys' fees are not an item of taxable costs except as permitted by 42 Pa.C.S. § 2503 (relating to right of participants to receive counsel fees)").

Reed Smith is Axcan's adversary.¹¹ Instead, it is trying to recover at least a portion of the fees it incurred in the separate Indemnification Action. Furthermore, Axcan is not trying to recover those fees from AHP/Eurand, which was its adversary in the Indemnification Action, but rather Axcan is trying to recover them from its former agent and fiduciary, Reed Smith, who allegedly breached its pre-existing fiduciary duties to Axcan during the course of representing AHP/Eurand in the Indemnification Action.

The duty Reed Smith allegedly breached was the duty of loyalty, *i.e.*, the duty not to undertake a conflicting representation or otherwise to violate client confidences. Reed Smith allegedly refused to withdraw from representing AHP/Eurand adverse to Axcan, so in order to protect its confidences, Axcan had to petition to have Reed Smith enjoined or disqualified from representing AHP/Eurand in the Indemnification Action.¹² The arbitrator apparently believed that Reed Smith's representation of AHP/Eurand did constitute such a breach of fiduciary duty because he ultimately disqualified Reed Smith. Therefore, the attorneys' fees Axcan was compelled to incur in successfully moving to disqualify Reed Smith are compensable damages which Axcan may claim in this malpractice action against Reed Smith.¹³ Such damages may be

¹¹ In New Jersey, under a special judicially-created exception to the "American Rule," a client who successfully sues its attorney for legal malpractice may recover as compensatory damages from its attorney-adversary the fees that the client incurred in prosecuting the malpractice action against the attorney. *See Packard-Bamberger & Co., Inc. v. Collier*, 167 N.J. 427, 771 A.2d 1194 (2001); *Saffer v. Willoughby*, 143 N.J. 256, 670 A.2d 527 (1996). This common law exception to the "American Rule" has not been adopted in Pennsylvania, and this court declines to do so here.

Pennsylvania does provide by statute and rule of court for the recovery of attorneys fees from an adversary in some cases. *See* 42 Pa. C.S. § 2503 (6), (7), (9) (attorneys fees may be awarded for certain improper litigation conduct); Pa. R. Civ. P. 1023.1, 1023.4 (attorneys fees may be awarded for improper litigation conduct); Pa. R. Civ. P. 4019(g) (attorneys fees may be awarded for improper discovery conduct). The court does not decide at this juncture whether any such award of fees may be appropriate in this case.

¹² *See Maritrans*, 529 Pa. at 262, 602 A.2d at 1287 ("[A] fiduciary who breaches his duty of loyalty to his principal is liable to his principle, and an injunction is a proper remedy for the breach.").

¹³ In reaching this conclusion, the court recognizes that it disagrees with at least one New York state court, which held that "the request for [attorneys fees incurred in litigating an attorney's disqualification], if recoverable, should have been raised in the proceeding in which the disqualification occurred." *Steinberg v. Harmon*, 259

awarded “to address the concrete loss that [Axcan] has suffered by reason of [Reed Smith’s] wrongful conduct” in representing AHP/Eurand in the Indemnification Action.¹⁴

While it appears that Axcan incurred fees in seeking to have Reed Smith disqualified, it is not as clear whether Axcan incurred any fees in compelling Reed Smith to turn over Axcan’s file from the Patent Action. If Axcan did incur such fees, and if such failure to turn over the file rises to the level of attorney malpractice, then Axcan may also be able to collect those fees and costs as compensatory damages. Likewise, Axcan may be able to recover any other fees that Axcan incurred in the Indemnification Action that resulted solely from Reed Smith’s breach of its fiduciary duties to Axcan.

Axcan is not entitled to recover all of its other attorneys’ fees incurred in defending the Indemnification Action, unless it pleads and proves a “Dragonetti” claim against Reed Smith.¹⁵ If AHP/Eurand had a good faith claim against Axcan for indemnification, then presumably some other counsel would have chosen to represent AHP/Eurand in bringing such a claim, even if Reed Smith had not chosen to do so. Therefore, Axcan would have incurred those defense costs anyway, without any breach of fiduciary duty by Reed Smith.

A.D.2d. 318, 686 N.Y.S.2d 423 (1999). Under that reasoning, Judge Gafni should have been the one to award such fees, or not.

Under Pennsylvania law, a client is entitled to receive, in a separate legal action, compensatory damages flowing from its attorney’s breach of fiduciary duty. See Maritrans, 529 Pa. at 258, 602 A.2d at 1285. See also Paves, 569 Pa. at 177, 801 A.2d at 550. Compensatory damages are those which will make the client “whole.” See Feingold v. SEPTA, 512 Pa. 567, 579, 517 A.2d 1270, 1276 (1986). Axcan will never be made whole without payment of those attorneys fees it was forced to incur to disqualify Reed Smith in the Indemnification Action. In this respect, Pennsylvania law is more akin to the law of New Jersey, discussed, *supra*, footnote 11, than it is to that of New York.

¹⁴ State Farm Mut. Automobile Ins. Co. v. Campbell, 538 U.S. 408, 416, 123 S.Ct. 1513, 1519 (2003) (defining compensatory damages).

¹⁵ See 42 Pa.C.S. §§ 8351, 8352 (under the “Dragonetti” Act, an attorney of record may be liable for wrongful use of civil proceedings if the initiation or continuation of a civil cause is intended merely to harass or maliciously injure the opposite party).

In addition to its claims for compensatory damages, Axcan also asks for disgorgement. “Courts throughout the country have ordered the disgorgement of fees paid or the forfeiture of fees owed to attorneys who have breached their fiduciary duties to their clients by engaging in impermissible conflicts of interests.”¹⁶ However, in most cases where courts have ordered such disgorgement, the attorneys fees that were being disgorged were paid by the client, so the disgorgement was in essence a refund and qualifies as compensatory damages.¹⁷ In this case, Axcan did not pay Reed Smith anything for Reed Smith’s representation of Axcan in the Patent Litigation. Instead, AHP/Eurand apparently paid Reed Smith’s fees incurred on Axcan’s behalf. If the court were to order Reed Smith to disgorge those fees to Axcan, Axcan would not be made whole; it would receive a windfall.

Axcan also claims that Reed Smith should disgorge, and Axcan should receive, the fees paid to Reed Smith by AHP/Eurand in the Indemnification Action. This is partially true.

Where [a fiduciary] acquires information in confidence and adopts or uses it for his own private benefit and personal profit to the exclusion and detriment of the [client], he may be enjoined at the instance of the [client] and he may be required to account to the [client] for any profits derived therefrom as well as be subject to liability for damages sustained as a result of such breach of his fiduciary duties.¹⁸

¹⁶ Maritrans, 529 Pa. at 258, 602 A.2d at 1285.

¹⁷ The court in Maritrans cited to a number of disgorgement cases from other jurisdictions. 529 Pa. at 258, 602 A.2d at 1285. None of those cases are factually similar to the present case, in that most involve the disgorgement of fees paid by the client, not a third party on behalf of the client. See Perl v. St. Paul Fire and Marine Ins. Co., 345 N.W.2d 209 (Minn. 1984) (“the forfeiture of an insured attorney’s fees for breach of a fiduciary duty owed the client is ‘money damages’ within the meaning of [malpractice] policy”); Rice v. Perl, 320 N.W.2d 407 (Minn. 1982) (attorney was ordered to refund contingency fee paid by client where the attorney simultaneously employed a party adverse to client); Financial Gen. Bankshares v. Metzger, 523 F. Supp. 744, 773 (D.D.C. 1981) vacated on jurisdictional grounds, 680 F.2d 768 (D.C. Cir. 1982) (attorney could not recover fees from, and had to forfeit fees paid by, first client where its representation of second client was a breach of its duties to its first client); White v. Roundtree Transport, Inc., 386 So.2d 1287 (Fla. 3d. Dist 1980) (attorney who simultaneously represented two clients with conflicting interest was not entitled to receive fee for representation of second client); Goldstein v. Lees, 46 Cal. App. 3d 614, 120 Cal. Rptr. 253 (2d Dist. 1975) (attorney could not recover fee from second client where its representation of second client was a breach of its duties to its first client.) The remaining case cited by the court in Maritrans is addressed, *infra*, note 18.

¹⁸ Boyd v. Cooper, 269 Pa. Super. 594, 597, 410 A.2d 860, 862 (1979). See also Sack v. Feinman, 489 Pa. 152, 163, 413 A.2d 1059, 1065 (1980) (“ If the fiduciary makes profits, or gets interest on the money he wrongly

However, the court does not read the case law as permitting Axcan to recover the entire fee earned by Reed Smith in the Indemnification Action, but only Reed Smith's net profit resulting from its alleged breach of fiduciary duty.

In addition to compensatory and disgorgement damages, Axcan also claims it is entitled to recover punitive damages for Reed Smith's breach of fiduciary duty.

Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant.¹⁹

Unlike compensatory damages which "are intended to redress the concrete loss that the plaintiff has suffered . . . [P]unitive damages serve a broader function; they are aimed at deterrence and retribution."²⁰ Punitive damages may be awarded for a breach of fiduciary duty by an attorney.²¹

In fact, the reasons for imposing punitive damages on an errant attorney are even more compelling than those where a non-attorney breaches a fiduciary or other tort duty to a plaintiff.

takes from the beneficiary, he must be held liable not only for the profits or interest he makes on such funds, but also for interest on those profits or the interest itself."); Restatement (Second) Agency, § 396(c) (1958) ("Unless otherwise agreed, after the termination of the agency, the agent . . . has a duty to account for profits made by the sale or use of trade secrets and other confidential information, whether or not in competition with the principal"); Zeiden v. Oliphant, 54 N.Y.S.2d 27 (N.Y. Co. 1945) ("No doubt damages may be recovered resulting from misconduct of an attorney in revealing confidential matter obtained in such capacity; and, indeed, the attorney may well be declared a trustee *ex maleficio* for any advantage or profit thus obtained at the expense of the client.") (case cited with approval in Maritrans).

¹⁹ Kirkbride v. Lisbon Contractors, Inc., 521 Pa. 97, 102, 555 A.2d 800, 803 (1989), citing, Restatement (Second) Torts § 908(2) (1979).

²⁰ State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416, 123 S.Ct. 1513, 1519 (2003).

²¹ See Rizzo v. Haines, 520 Pa. 484, 507-8, 555 A.2d 58, 69 (1989) ("Haines used his confidential position to persuade his injured client and good friend that he should transfer to him the \$50,000 that Judge Marshall had awarded him due to Haines' misconduct. Haines secured this transfer after intentionally withholding Judge Marshall's findings of misconduct, in order to evade her ruling. He also secured this transfer by telling his client that he needed the money to pursue a claim against the doctor and the hospital. That claim, however, proved meritless. In addition, he overreached on costs and expenses. These breaches of fiduciary duty, intentional withholding of critical information and fraudulent misrepresentation, were more than sufficient to justify the punitive damage award.")

An attorney at law has been said to be a public officer. He is an officer of the court sworn to aid in the administration of justice and to act with all good fidelity both to his clients and to the court. The public have a deep and vital interest in his integrity. It is a matter of profound importance from every point of view that members of the bar be men of probity and rectitude, zealous to maintain relations of utmost honesty with their clients and solicitous to protect them against legal wrong. Unflinching fidelity to their genuine interests is the duty of every attorney to his clients. Public policy can hardly touch matters of more general concern than the maintenance of an untarnished standard of conduct by the attorney at law toward his client. The attorney and client do not deal with each other at arms' length. The client often is in many respects powerless to resist the influence of his attorney. If that influence be vicious, untoward, criminal, the relation of trust is abused and becomes a source of wrong.²²

Therefore, Axcan may assert a claim for punitive damages against Reed Smith in this instance.

However, any punitive damages award must comport with the requirements of due process.²³ In particular, such punitive damages must bear a reasonable relationship, and must be proportionate, to the compensatory damages, if any, awarded against Reed Smith for its misconduct.²⁴ Furthermore, any such punitive damages must not duplicate the other damages

²² Feld & Sons, Inc. v. Pechner, Dorfman, Wolfee, Rounick & Cabot, 312 Pa. Super. 125, 140-141, 458 A.2d 545, 553 (1983) citing with approval from Berman v. Coakley, 243 Mass. 348, 137 N.E. 667 (1923).

²³ An award of punitive damages must make sense in view of “(1) the degree of reprehensibility of the defendant’s misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.” State Farm, 538 U.S. at 418, 123 S.Ct. at 1520.

²⁴ *Id.*, 538 U.S. at 426, 123 S.Ct. at 1524 (“courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered.”) “[F]ew awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. . . . [A] higher ratio might be necessary where the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine. The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant’s conduct and the harm to the plaintiff.” *Id.*, 538 U.S. at 425, 123 S.Ct. at 1524.

awarded, such as any profits that Reed Smith may be required to disgorge.²⁵

CONCLUSION

For all the foregoing reasons, Axcan may amend its Complaint, and its claims against Reed Smith will not be dismissed. However, Axcan is limited to recovering the attorneys fees it incurred, and any net profits Reed Smith may have earned, as a direct result of Reed Smith's alleged breach of fiduciary duty to Axcan, as well as reasonable punitive damages if Reed Smith's conduct is proven to have been sufficiently reprehensible.²⁶

BY THE COURT,

HOWLAND W. ABRAMSON, J.

²⁵ See *id.*, 538 U.S. at 426, 123 S.Ct. at 1524 -5 (punitive damages were disallowed where they duplicated compensatory damages for emotional distress).

²⁶ Further support for the court's holdings regarding damages may be found in the following article: Jay Weiser, *Measure of Damages for Violation of Property Rules: Breach of Confidentiality*, 9 U. Chi. L. Sch. Roundtable 75 (2002). Employing the inimitable language of the law-and-economics school, the author opined that: In classic fiduciary relationships such as doctor-patient and lawyer-client, the Gatherer owes, in Cardozo's gaseous phrase, 'the punctilio of an honor most sensitive.' In these relationships, a Source shares Data with a Gatherer in reliance on the Gatherer's expertise, and with the expectation that the Gatherer will act disinterestedly on the Source's behalf. The expectation of disinterestedness includes the obligation not to disclose Data. . . . A strong property rule should protect against a classic fiduciary's intentional Taking of Data. Intentional, in this context, should include any Taking with intent greater than lack of precaution, because the classic fiduciary should err on the side of protecting confidentiality. . . . Because there are fewer concerns about overdeterrence, the property rule would include damages for restitution and proximate cause, the Gatherer's monetary gain (less any overlap with restitution damages) and its illicit gain. The fencing cost factor should be high, given the especially destabilizing effect of a Taking by a classic fiduciary. The Source should also receive its enforcement costs and an appropriate correction factor.

Id. at 121-2.