UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	LA CV13-07553 JAK (SSx)	Date	October 31, 2016
Title	Securities and Exchange Commission v. Yin Nan Michael Wang, et al.		

Present: The Honorable	JOHN A. KRONSTADT, UNITED STATES DISTRICT JUDGE

Andrea Keifer	Not Reported
Deputy Clerk	Court Reporter / Recorder
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: **(IN CHAMBERS) ORDER RE PLAINTIFF'S MOTION FOR MONETARY RELIEF AND ENTRY OF FINAL JUDGMENT AGAINST YIN NAN "MICHAEL" WANG AND WENDY KO (DKT. 249)**

I. Introduction

The Securities and Exchange Commission ("SEC" or "Plaintiff") brought this action against the following defendants: Yin Nan "Michael" Wang ("Wang"); his former wife, Wendy Ko ("Ko"); Velocity Investment Group, Inc. ("Velocity"); Rockwell Realty Management, Inc. ("Rockwell") and Bio Profit Series ("BPS") I, II, III, IV and V (collectively with Velocity and Rockwell, the "Entity Defendants"). David Stapleton, the Court-appointed Receiver ("Receiver"), concluded that Wang and Ko operated the Entity Defendants as a Ponzi-like investment scheme in violation of federal securities laws. *See* Dkt. 246 at 11.

A judgment to which Ko consented (Dkt. 107) was entered against her on June 12, 2014. Dkt. 109. Under its terms, she is to disgorge funds and pay prejudgment interest and civil penalties all in amounts to be determined by the Court following a motion brought by the SEC. Dkt. 109.

On August 18, 2015, the motion for summary judgment brought by the SEC against Wang was granted. Dkt. 246. That Order concluded that there was no genuine issue of fact as to the claim that he had engaged in a scheme to defraud investors. *Id.* The SEC requested an order directing Wang to disgorge all of the monies that he obtained improperly, and to pay prejudgment interest and civil penalties. *Id.* at 24-25. Because the SEC had provided no evidence as to the calculation of those amounts, its requests were denied. *Id.* at 25. However, the denial was without prejudice to the renewal of the request through a separate motion that included supporting evidence and legal authority as to the amounts sought. *Id.*

Subsequently, the SEC brought the present motion ("Motion" (Dkt. 249-1)) through which it seeks an order that determines the amounts due from Wang and Ko respectively. The SEC contends that Wang's improper gains total $82.53 million. It seeks the disgorgement of that amount as well as prejudgment interest of approximately $49.452 million. *Id.* at 5-6. The SEC contends that Ko's improper gains total $1.491 million. It seeks the disgorgement of that amount as well as prejudgment interest of $893,409.31.

Id. The SEC also seeks an order that imposes civil penalties of $1.5 million against Wang and $150,000 against Ko. *Id.* at 6. Wang filed an opposition to the Motion (Dkt. 252), and the SEC filed a reply. Dkt. 256. Ko did not oppose the Motion.

A hearing on these matters was held on March 14, 2016, and the Motion was taken under submission. For the reasons stated in this Order, the Motion is **GRANTED**.[1]

II. Factual Background

A. The Prior Determination that Wang Engaged in Securities Fraud

The factual background of this matter, which is detailed in the prior Order granting summary judgment, is incorporated here by this reference. The prior Order concluded that Wang acted with scienter in committing many manipulative and deceptive acts in violation of 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), as well as Rule 10b-5(a-c), 17 C.F.R. § 240.10b-5. Dkt. 246. The prior Order concluded that Wang acted with scienter because the evidence, "when considered in light of Wang's roles as the sole owner and business operator of the subject entities, provided a sufficient basis to show that Wang acted with what was at least, 'deliberate' or 'conscious' recklessness as to misleading investors." *Id.* at 22.

The prior Order also determined that Wang controlled the bank accounts of all of the Entity Defendants, including those of Velocity and the BPS Funds, and that Wang "was the person in charge of business operations and investment decisions for each of the BPS Funds." *Id.* at 17. It also concluded that Wang used the funds of new investors to pay "returns" to earlier ones, and that these payments resulted in the concealment of the fraudulent scheme so that it could continue. *Id.* Thus, "[e]arlier investors had no basis to conclude that a fraudulent scheme was in place, and new ones were misled by the claimed past returns." *Id.*

B. Ko Cannot Dispute that She Committed Securities Fraud

As noted, Ko consented to the entry of judgment. Dkt. 107, 109. She also agreed that the judgment barred her from contesting either the underlying factual allegations or the resulting, alleged violation of the federal securities laws:

> In connection with the Commission's motion for disgorgement and/or civil penalties, and at any hearing held on such motion: (a) Defendant will be precluded from arguing that she did not violate

[1] On September 18, 2015, Wang filed a motion seeking leave to depose the Receiver. Dkt. 253. The request was limited to testimony with respect to matters presented in paragraph 5 of the Receiver's declaration that was filed in support of the present Motion. *Id.* These matters were discussed during the March 14, 2016 hearing on the Motion. At that time, Wang's counsel renewed the request for the deposition, and the SEC opposed it. The Court later granted the request in part. Dkt. 296. The Receiver was ordered to appear for a deposition not to exceed two hours, and the parties were ordered to file supplemental briefing stating their respective positions as to the significance of the Receiver's testimony. *Id.* at 2. Each party timely filed a supplemental brief. The positions advanced are summarized and considered below. Dkt. 303, 305.

> the federal securities laws as alleged in the Complaint; (b) Defendant may not challenge the validity of the Consent or this Judgment; (c) solely for the purposes of such motion, the allegations of the Complaint shall be accepted as and deemed true by the Court . . . .

Id. at 2.

The Complaint presented specific, detailed allegations that, if established, were sufficient to support a finding that she violated federal securities laws. For example, it alleges that Ko assisted Wang in the operation of the BPS Funds and had the power to direct transfers to and from their bank accounts. Dkt. 3 ¶ 17. The Complaint also alleges that Ko played a critical role in the fraudulent scheme orchestrated by Wang and that she had actual knowledge of the fraud, or recklessly disregarded it. *Id.* ¶ 46.

C. Evidence of Improper Gains

The Receiver "undertook an extensive document recovery, review, and analysis effort in order to: (a) understand the business and financial activities of the Receivership Entities; (b) identify and account for the funds raised by the Receivership Entities and their principals and their disposition; and (c) prepare a detailed forensic accounting for presentation to this Court regarding [his] findings." Stapleton Decl., Dkt. 249-6 ¶ 2. The Receiver testified that, in the course of this document review, he recovered "hundreds of thousands of pages of documents relating to the business and financial activities of the Receivership Entities, including bank and other financial statements, real property documents, including title histories, security instruments, conveyances, and other materials, and the Entities' internal records, including their general ledgers and investor files." *Id.* ¶ 3. He also testified that he had performed a detailed review and analysis of these materials, which support the conclusions presented in his initial report, first interim report, second interim report, initial forensic report and second forensic report. *Id.* ¶ 3.

The Receiver testified that, based on the review and investigation, he reached the following conclusions:

> (i) The Entity Defendants collected over $155 million from investors and paid out distributions to investors in the amount of $78.3 million. Accordingly, the Entity Defendants took in substantially more than they paid out, resulting in a loss to investors of approximately $76 million.
>
> (ii) Over $44.7 million in funds collected from investors were diverted for investments that appear to have benefitted Wang and entities controlled by him or in which he had a substantial interest. An additional $37.8 million in investor funds were diverted or transferred to Wang and Ko, entities they controlled, and Wang's former spouse. Accordingly, a total of at least $82.5 million in investor funds were used for the benefit of or diverted to Wang, Ko and other Entity Defendants, rather than for the benefit of the Entity Defendants' investors.
>
> (iii) Ko received a cash disbursement in the amount of $391,000, as well as title to the real property located at 600 South Orange Grove Avenue in Pasadena, California. The grant deed reflecting the transfer of this property to Ko refers to the transfer as a bona fide gift. The Receiver values the property at $1.1 million. This valuation reflects the average of three independent

brokers' opinions. Accordingly, the total value of transfers to Ko from the Entity Defendants is approximately $1.5 million.

Id. ¶¶ 4-6.

III. Analysis

A. Legal Standard

A "district court has broad equity powers to order the disgorgement of 'ill-gotten gains' obtained through the violation of the securities laws." *S.E.C. v. First Pac. Bancorp*, 142 F.3d 1186, 1191 (9th Cir. 1998). "Disgorgement is designed to deprive a wrongdoer of unjust enrichment, and to deter others from violating securities laws by making violations unprofitable." *Id.* "The district court also has broad discretion in calculating the amount to be disgorged." *S.E.C. v. JT Wallenbrock & Assocs.*, 440 F.3d 1109, 1113 (9th Cir. 2006). "A disgorgement calculation requires only a 'reasonable approximation of profits causally connected to the violation,' and the amount of disgorgement should include 'all gains flowing from the illegal activities.'" *Id.* (quoting *First Pac. Bancorp*, 142 F.3d at 1192) (citations omitted); *see also S.E.C. v. Platforms Wireless Int'l Corp*., 617 F.3d 1072, 1096 (9th Cir. 2010) ("Disgorgement need be only a reasonable approximation of profits causally connected to the violation.") (internal quotation marks omitted).

"The SEC bears the ultimate burden of persuasion that its disgorgement figure reasonably approximates the amount of unjust enrichment." *Platforms Wireless*, 617 F.3d at 1096 (internal quotation marks omitted). However, once the SEC establishes a reasonable approximation of the actual profits of one or more defendants, "the burden shifts to the defendants to demonstrate that the disgorgement figure was not a reasonable approximation." *Id.* (internal quotation marks omitted). This burden is placed on the defendants "because information is not obtainable at negligible cost"; the defendants are "more likely than the SEC to have access to evidence establishing what they paid for the securities, if anything, to whom the proceeds from the sales were distributed, and for what purposes the proceeds were used." *Id.* (internal quotation marks omitted). "Although '[p]lacing the burden on the defendants of rebutting the SEC's showing of actual profits . . . may result . . . in actual profits becoming the typical disgorgement measure,'" the "'risk of uncertainty should fall on the wrongdoer whose illegal conduct created that uncertainty.'" *Id.* (quoting *SEC v. First City Fin. Corp*., 890 F.2d 1215, 1232 (D.C. Cir. 1989)).

B. Application

1. Wang

The SEC has presented evidence demonstrating that Wang caused $37,802,000 in investor funds to be transferred to himself or persons or entities related to him, and diverted an additional $44,728,000 into investments that benefited him, rather than Velocity investors. It also alleged that these two amounts, which total $82,530,000, are ill-gotten gains. Stapleton Decl., Dkt. 249-6 ¶ 5. Further, the SEC has calculated prejudgment interest on this amount for the period from June 5, 2005 to August 18, 2015. Dean Decl., Dkt. 249-2 ¶¶ 5-6. That figure is $49,452,093.81. *Id.*

Finally, the SEC seeks the imposition of $1.5 million in civil penalties against Wang. Wang is liable for penalties under Section 21(d)(3) of the Exchange Act and Section 20(d)(1) of the Securities Act. *See* 15 U.S.C. § 78u(d)(3); 15 U.S.C. § 77t(d)(1). The $1.5 million figure was calculated by multiplying the third-tier statutory amount of $150,000 for each of the 10 statutory violations charged, *i.e.*, separate violations of Section 10(b) and Section 17(a)) as to each of the five fraudulent offerings by the BPS funds.

Wang opposes this demand.

a) Disgorgement

(1) Disgorgement Amount

(a) The $37.8 Million Amount

Wang objects to the amount of the claimed transfer of $37.8 million to him or persons or entities related to him. He argues:

> This total may actually involve some double counting by the Receiver. The chart supporting this number appears at page 22 of the Initial Report. However that chart includes $13,484,000 as paid from Velocity (owned by Wang) as cash received by Wang and Related Parties [i.e. Velocity Investment Group, Inc. ("Velocity"), Bio Profit Asset Management, Rockwell and Wang's former wife], but the same chart shows that $4,111,000 of the funds paid to Wang personally came from Velocity. If the latter figure is backed out, the total cash payments to Wang and Related Parties is $33,691,000.

Dkt. 252 at 2 n.1.

Wang contends that the $33,691,000 should be reduced "by the $1.4 million which the Receiver states he recovered from Receivership Entity Bank accounts shortly after the Receiver's appointment since the case [sic] paid to these entities is included the [sic] amount which the Commission asserts was paid to Wang and the Related Parties." *Id.* at 6 (citing Initial Report, Dkt. 126).[2]

Wang has not met his burden of demonstrating that the Receiver "may" have "double counted" the $4.1 million paid to Wang personally. Dkt. 252 at 2 n.1. During his February 2015 deposition, Neil Gluckman, the Receiver's Accountant, was asked to confirm whether this amount was double counted. He then reviewed the relevant reports and concluded that the figures were accurate and did not reflect any double counting. Dean Decl., Dkt. 305-1 (Ex. 2 at 5). Wang has not offered any contrary evidence.

[2] Wang's memorandum cites page 14 of the Initial Report. This citation appears to be an error. Thus, pages 4-5 of that Report state: "From the time of his appointment through the date of this Report, the Receiver has: (1) recovered approximately $1,461,560.00 in cash for the benefit of the receivership, largely from bank accounts held by the entities, but also in the form of rents payable to the Entities in connection with real properties owned by the Entities and loan payments due to the Entities . . . ."

Consequently, the SEC has met its burden to show that the disgorgement figure is a reasonable approximation. *See Platforms Wireless*, 617 F.3d at 1096 ("Once the SEC establishes a reasonable approximation of defendants' actual profits . . . the burden shifts to the defendants to demonstrate that the disgorgement figure was not a reasonable approximation.") (internal quotation marks omitted).

The $1.4 million that Wang contends was already recovered by the Receiver was discussed during the hearing on this Motion. At that time, SEC counsel confirmed that this amount had been recovered by the Receiver, and that Wang would be given credit for it once a disgorgement plan is adopted. Therefore, the Judgment as to Wang shall reflect a credit of $1.4 million as an amount previously received from Wang.

(b) The $44.7 Million Amount

The Receiver concluded, based upon his "review and analysis of the documents, books, and records collected, as reflected in [his] Second Forensic Report," that $44.7 million "in funds collected from investors were diverted for investments that appear to have benefitted Defendants Yin Nan "Michael" Wang and entities controlled by him or in which he had a substantial interest." Stapleton Decl., Dkt. 249-6 ¶ 5.[3] The Receiver identified eight transactions that he claimed provided benefits to Wang or entities he controlled. They are identified in the Second Forensic Report. Dkt. 302-2 (Ex. C at 8). A description of each then follows. *Id.* at 8-13. The Second Forensic Report contains the following chart, with each amount stated in thousands[4]:

Investments with Direct or Indirect Benefit to Defendant Wang

3M	$6,157
Jellick Rowland	$8,959
MGM	$1,445
Vienna Capital	$7,151
Burwood	$4,500
Broadway	$6,185
Pasadena Car Wash	$4,029
Jackson Glen	$6,302
Total Benefit to Defendant Wang:	**$44,728**

As noted, after the hearing on this Motion, Wang was granted leave to depose the Receiver about this calculation, including the method and data that he used. Dkt. 296. The deposition occurred in March 2016. Gartenberg Decl., Dkt. 302-1 ¶ 5. In the subsequent, supplemental briefing, Wang again advanced the claim that the Receiver's explanation for this calculation is insufficient.

[3] The rulings on Wang's evidentiary objections to these statements (Dkt. 252-1) are set forth in a separate Order. *See* Dkt.334.

[4] For example, $6,157 means $6,157,000.

Wang presents two key arguments. *First*, he contests the Receiver's conclusion that the Entity Defendants did not benefit in any way from these investments noting that: (i) the Burwood investment received a return of $491,000; and (ii) the Jackson Glen investment received a return of $875,000. Dkt. 303 at 2-3.[5] Wang concedes that the eight investments constituting the $44.7 million resulted in net losses, but contends that the returns of $491,000 and $875,000 respectively rebut the claim by the Receiver that the investments did not benefit the various investors. *See id.* at 4 ("Instead of concluding that Wang wrongfully received $44.7 million, it would be more accurate to conclude that $44.7 million was invested in these eight investments and at least two yielded almost $1.3 million in returns. While this was certainly not a return which would have been hoped for, it was the result of investments that did not fully perform."). "At the least," Wang argues that the $44.7 million amount "should be reduced by the amount of the returns." Dkt. 303 at 4.

As to the $491,000 "return," the SEC contends that "Wang has not submitted any evidence supporting that the $491,000 was a legitimate return on the transaction." Dkt. 305 at 6. Regarding the $875,000 return, the SEC points out that the money came from an entity called "Jackson & Burwood," not "Jackson Glen LLC," and, in any event, "neither of these flimsy contentions can stand in light of the receiver's conclusion, well-documented in his reports, declaration, and deposition, that these transactions benefitted Wang or entities he controlled." *Id.*

Second, Wang contests the Receiver's conclusion that, because Wang controlled the entities to which the funds were transferred, he necessarily benefitted from the transfers. Specifically, Wang argues that support for the claims as to four of the investments -- Burwood, MGM, Broadway and Jackson Glen -- are "speculative and inadequate." *Id.* at 5-6.

The SEC responds that Wang "mischaracterizes the record" because the Receiver's conclusions are supported with sufficient facts to support an inference that Wang had control over the identified entities. Dkt. 305 at 5. Regarding the Burwood investment, the SEC notes that the Receiver's conclusion is supported with facts, including that Wang signed a grant deed on behalf of Burwood, the entity receiving the funds. *See* Dkt. 302-2 (Ex. C at 12). As to the MGM investment, the SEC notes that the entity's managing member had been "involved in other investment ventures with Defendant Wang." *Id.* at 10. It then claims that the other investments also involved transfers of large sums to entities controlled by Wang or his known business associates, "all of which lacked evidence that the receivership entities acquired a financial interest in exchange for these transfers." Dkt. 305 at 5.

In sum, Wang contests the Receiver's evidence without offering any of his own. Wang concedes as much. Dkt. 252 at 6. n.4 ("While, ideally, Wang might be able to provide a more detailed response, having been virtually compelled to assert the Fifth Amendment in light of the allegations, his response is directed to the lack of supporting evidence for the Commission's position.").

[5] The SEC points out that the Second Forensic Report, to which Wang cites in support of these figures, actually states that the return on investment amount was $785,000 rather than $875,000. *See* Dkt. 303 at 3 n.11 (citing First Interim Report, Dkt. 302-1 (Ex. B at 44)).

On balance, Wang's arguments fall short of meeting his burden to show that the SEC's disgorgement figure is not a reasonable approximation -- a burden placed on him for the express reason that he is "more likely than the SEC to have access to evidence establishing what [he] paid for the securities, if anything, to whom the proceeds from the sales were distributed, and for what purposes the proceeds were used." *Platforms Wireless*, 617 F.3d at 1096 (internal quotation marks omitted). Any risk of uncertainty falls on the wrongdoer. *Id.* Thus, Wang has not shown that the claimed returns of $491,000 and $875,000 benefitted investors or someone other than himself or his close business associates. Consequently, the SEC's calculation in which this amounts are not credited, remains a "reasonable approximation."

(2) Statute of Limitations

Wang next argues that a five-year statute of limitations may apply here, and if so, the SEC's disgorgement claim must be recalculated. Wang argues that the law is "not settled as to whether or not disgorgement in a Commission action is subject to a statute of limitations." Dkt. 252 at 7.

28 U.S.C. § 2462 provides: "Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued."

In *SEC v. Rind*, 991 F.2d 1486, 1492 (9th Cir. 1993), the Ninth Circuit concluded that there is no statute of limitations governing SEC enforcement actions. However, as other District Courts have noted, *Rind* did not expressly address the applicability of Section 2462. *See S.E.C. v. Mercury Interactive, LLC*, 2008 WL 4544443, at *5 (N.D. Cal. Sept. 30, 2008) ("The Ninth Circuit has held expressly that no statute of limitations applies to SEC civil enforcement actions. *SEC v. Rind*, 991 F.2d 1486, 1492 (9th Cir. 1993). As *Rind* remains good law, a citation to that holding ordinarily would dispose of the statute of limitations argument. However, Defendants point out that despite its broad language, *Rind* did not address the precise question of whether Section 2462 applies to SEC enforcement actions."); *S.E.C. v. Berry*, 580 F. Supp. 2d 911, 919 (N.D. Cal. 2008) ("[T]he Ninth Circuit's opinion in Rind is devoid of any consideration of section 2462").

Most of the courts that have expressly addressed this issue have held that Section 2462 applies to penalties and other forms of relief, which seek to punish wrongdoing, but not to equitable relief, which seeks to remedy a past wrong. *See, e.g.*, *S.E.C. v. Kokesh*, ___ F.3d ___, No. 15-2087, 2016 WL 4437585, at *6 (10th Cir. Aug. 23, 2016) ("The nonpunitive remedy of disgorgement does not fit in [Section 2462]"); *Johnson v. SEC*, 87 F.3d 484, 487-88 (D.C. Cir. 1996) (relief that is not considered punitive is not subject to the limitations period of Section 2462); *Mercury*, 2008 WL 4544443, at *5 (disgorgement relief not limited by Section 2462); *Berry*, 580 F. Supp. 2d at 919 (same); *S.E.C. v. Shanahan*, 624 F. Supp. 2d 1072, 1079 (E.D. Mo. 2008) ("It is clear that equitable claims which do not constitute a 'civil fine, penalty, or forfeiture' are not subject to the statute of limitations contained in Section 2462.") (internal quotation marks omitted); *S.E.C. v. Jones*, 476 F. Supp. 2d 374, 381 (S.D.N.Y. 2007) ("[T]he Court holds that the limitations period in § 2462 applies to civil penalties and equitable relief that seeks to punish, but does not apply to equitable relief which seeks to remedy a past wrong or protect the public from future harm."); *S.E.C. v. Saltsman*, No. 07-CV-4370, 2016 WL 4136829, at *28-29 (E.D.N.Y. Aug. 2, 2016) (disgorgement, as an equitable remedy, "is not a forfeiture for the purposes of Section 2462").

The analysis by these courts is consistent with the text of Section 2462, which limits its application to any "civil fine, penalty, or forfeiture." Although disgorgement of ill-gotten gains could be regarded as similar to civil forfeiture, case law makes clear that civil forfeiture is not a form of equitable relief. *See Rind*, 991 F.2d 1486 ("[T]he Supreme Court has observed that actions for disgorgement of improper profits are equitable in nature.") (citing *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 570 (1990); *see also* 27A Am. Jur. 2d Equity § 52 ("Equity does not look with favor on forfeitures and penalties. In fact, it is said that equity abhors penalties or forfeitures.")).

The Eleventh Circuit reached a different conclusion on this issue. *Sec. & Exch. Comm'n v. Graham*, 823 F.3d 1357, 1363 (11th Cir. 2016). It concluded that the similarity between the dictionary definitions of disgorgement and forfeiture demonstrates that disgorgement can be considered a subset of forfeiture. 823 F.3d at 1364 ("We find no meaningful difference in the definitions of disgorgement and forfeiture."); *see also* Black's Law Dictionary 568, 765 (10th ed. 2014) (defining disgorgement as "[t]he act of giving up something (such as profits illegally obtained) on demand or by legal compulsion," and forfeiture as "[t]he loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty").

The Tenth Circuit adopted a different position in *Kokesh*. It concluded that the text of Section 2462 suggests that the term "forfeiture" specifically encompasses civil forfeiture, which is defined by *Black's Law Dictionary* as "[a]n in rem proceeding brought by the government against property that either facilitated a crime or was acquired as a result of criminal activity." *Kokesh*, ___ F.3d ___, 2016 WL 4437585, at*5 (quoting Black's Law Dictionary 765 (10th ed. 2014)). *Kokesh* noted that, at the time Section 2462 was enacted, forfeiture consisted of the seizure of property, not proceeds, irrespective of any wrongdoing by the owner. *Id.* at *6. This is distinct from disgorgement, an equitable remedy seeking to remedy a past wrong through the confiscation of profits and proceeds. *Kokesh* held that the modern expansion of forfeiture statutes to include disgorgement-type remedies does not expand the definition of forfeiture that was contemplated by Congress when Section 2462 was enacted in 1948. *Id.*

That disgorged funds are often distributed to defrauded investors also support this conclusion. The "Fair Funds" provision of the Sarbanes-Oxley Act expressly permits the SEC to distribute disgorged funds to victims. 15 U.S.C. § 7246(a). A recent comprehensive empirical assessment of the SEC's compensation efforts showed that the SEC distributes a substantial amount of money to harmed investors through "fair funds." Urska Velikonja, *Public Compensation for Private Harm: Evidence from the SEC's Fair Fund Distributions*, 67 Stan. L. Rev. 331, 332 (2015) ("Over the last twelve years, the SEC has quietly become an important source of compensation for defrauded investors. Since 2002, the SEC has deposited $14.46 billion for defrauded investors into distribution funds, usually called "fair funds" after the statute that authorizes them. To put this figure into context, the aggregate amount distributed through fair funds over the past decade is substantially larger than the SEC's budget over the same period.").

For these reasons, the reasoning of *Kokesh* and the other cases cited above is persuasive. Therefore, the disgorgement claim is not limited by statute of limitations contained in Section 2462.

b) Prejudgment Interest

Whether to grant prejudgment interest is within the discretion of the trial court. *Vance v. Am. Hawaii Cruises, Inc*., 789 F.2d 790, 794 (9th Cir. 1986) (citing *U.S. Dominator, Inc. v. Factory Ship Robert E. Resoff*, 768 F.2d 1099, 1106 (9th Cir. 1985)). This determination is based on equitable considerations including "[t]he goal of compensating the injured party fairly for the loss caused by the defendant's breach of the statutory obligation." *Frank Music Corp. v. Metro-Goldwyn-Mayer Inc*., 886 F.2d 1545, 1545 (9th Cir. 1989). "Prejudgment interest compensates the injured party for the loss of the use of money he would otherwise have had." *Id.*

Wang argues that prejudgment interest should not be charged at all. Alternatively, he contends that, if it is granted, it should be in amount less than the amount sought by the SEC. In support of this position, he claims that the disgorgement sought is a substantial amount, and that there is no evidence an investor has complained. He also suggests that if pre-judgment interest is awarded, it should be calculated on an investor-by-investor basis. Thus, the calculation should take into account when each of the 2000 persons invested and, the amount of their respective investments. Dkt. 252 at 9.

It is well-settled that when disgorgement is ordered, prejudgment interest should be imposed to ensure that a wrongdoer does not profit from the associated misconduct. *See Platforms* Wireless, 617 F.3d at 1099; *SEC v. Manor Nursing Centers, Inc*., 458 F.2d 1082, 1105 (2d Cir. 1972); *SEC. v. Cross Fin. Servs., Inc*., 908 F. Supp. 718, 734 (C.D. Cal. 1995) ("The ill-gotten gains include prejudgment interest to ensure that the wrongdoer does not profit from the illegal activity."). There is no requirement that an injured investor present a request for such relief. Nor is there one that the amount of money whose disgorgement is ordered should affect the analysis.

The SEC has calculated prejudgment interest from June 5, 2005 forward based on the rate used by the Internal Revenue Service for the underpayment of federal income tax. 26 U.S.C. § 6621(a)(2). The proposed amount is $49,452,093.81. *See* Dean Decl. ¶¶ 5-6. The only evidence the SEC provides in support of this calculation is a declaration of its counsel, Lynn M. Dean. Dean Decl. Dean declares that she entered the relevant data into the SEC's prejudgment interest calculator, and the calculator produced the $49,452,093.81 figure. Dean Decl. ¶¶ 5-6. Wang objects to this portion of the declaration as hearsay. Dkt. 252-1. The SEC has not produced a printout or any other documentation from the prejudgment interest calculator. Thus, this statement in the declaration is hearsay because it is an out-of-court statement, offered for the truth of the matter asserted. Fed. R. Evid. 801, 802. No exception to the hearsay rule has been cited by the SEC. Furthermore, in determining this amount, the SEC calculated prejudgment interest for the entire amount of its disgorgement claim as of June 5, 2005. Dean Decl. ¶¶ 5-6. Although the underlying scheme began on this date, Wang acquired the funds whose disgorgement is sought over a period of time when he operated the scheme. Thus, not all of the funds had been received as of June 5, 2005. The dates from which prejudgment interest accrues as to the remaining disgorgement amount should be based on a reasonable estimate of when Wang acquired the various amounts of funds whose disgorgement is ordered.

Because the funds were received from investors who were victims, it is appropriate to apply prejudgment interest in this action. This will deny Wang the benefit of the use of the funds, and will increase the amount available for distribution to his victims. It will also serve to deter others from engaging in similar misconduct. *See Platforms Wireless*, 617 F.3d at 1099. Therefore, within 10 days of the issuance of this Order, the SEC shall present a proposed calculation of prejudgment interest based on a reasonable estimate when the various funds were received by Wang. Both the basis for such estimates and the calculation itself shall be supported by admissible evidence. Wang shall file any objection to any such submission within 10 days of its service.

c) Penalties

As noted, the SEC seeks civil penalties against Wang in the amount of $1,500,000. Wang does not dispute that he is liable for civil penalties under Section 21(d)(3) of the Exchange Act and Section 20(d)(1) of the Securities Act. *See* 15 U.S.C. § 78u(d)(3); 15 U.S.C. § 77t(d)(1). Instead, he argues that the Court should reduce the civil penalty amount to $150,000 -- a single third-tier penalty -- based on the Receiver's finding that Wang fraudulently operated Velocity and the BPS Funds as a "unitary enterprise" by commingling their assets. Dkt. 252 at 9-10.

A finding that the Entity Defendants were fraudulently operated as a unitary enterprise does not alone justify treating the five offerings as one. Wang committed two separate statutory violations in each of the five offerings. Civil penalties are meant to penalize wrongdoers and to deter them and others from future violations of the securities laws. Here, each of the factors set forth in *SEC v. Murphy*, 626 F.2d 633 (9th Cir. 1980), weighs heavily in favor of imposing multiple third-tier penalties. Thus, Wang acted with scienter, ran a fraudulent scheme for many years, and caused millions of dollars of losses to thousands of victims. He has left the United States. There is no evidence that he has acknowledged, accepted or apologized for his wrongful conduct. Nor is there any assurance that he will not engage in future, similar violations. Under these circumstances, a civil penalty of $1,500,000 is appropriate.

2. Ko

The SEC has presented evidence demonstrating that Ko received $391,000 in cash transfers from the entity Defendants, along with title to a home located in Pasadena, California valued at $1.1 million. Stapleton Decl., Dkt. 249-6 ¶¶ 6-7. This evidence reasonably calculates the value of the improper gains that Ko received as a result of her involvement in the fraudulent scheme. That total is $1,491,000.

The judgment against Ko states that prejudgment interest "shall be calculated from June 5, 2005 based on the rate of interest used by the Internal Revenue Service for the underpayment of federal income tax as set forth in 26 U.S.C. § 6621(a)(1)." Dkt. 109 at 2. In support of its calculation of prejudgment interest as to the judgment against Ko, the SEC has provided the same declaration that it submitted as to the requested judgment against Wang. As to Ko, the SEC seeks prejudgment interest on $1,491,000 for the period from June 5, 2005 to August 18, 2015. The requested interest totals $893,409.31. Dean Decl., Dkt. 249-2 ¶¶ 5, 7. Ko has not objected. However, no admissible evidence has been submitted to support the amount sought. Therefore, within 10 days of the issuance of this Order, the SEC shall present a proposed

calculation of prejudgment interest based on a reasonable estimate when the various funds were received by Ko. Both the basis for such estimates and the calculation itself shall be supported by admissible evidence. Ko shall file any objection to any such submission within 10 days of its service.

Finally, the SEC moves for $150,000 in civil penalties against Ko. Based on the consent judgment, Ko is liable for penalties under Section 21(d)(3) of the Exchange Act and Section 20(d)(1) of the Securities Act. *See* 15 U.S.C. § 78u(d)(3); 15 U.S.C. § 77t(d)(1). These statutes provide three tiers of penalties that may be imposed based on the degree of culpability. The most serious violations are punishable by third-tier penalties. For conduct occurring after March 3, 2009, the third tier provides for a maximum amount that may be imposed for each violation. That amount is the greater of: (i) $150,000 for a natural person or $725,000 for any other person, or (ii) the gross amount of pecuniary gain to the defendant as a result of the violation. *See* 17 C.F.R. § 201.100. Third-tier penalties apply to violations that: (i) involve "fraud, deceit, manipulation, or reckless disregard for a regulatory requirement" and (ii) "directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons." Section 20(d)(1) of the Securities Act, 15 U.S.C. § 77t(d)(1); Section 21(d)(3)(A) of the Exchange Act, 15 U.S.C. § 78u(d)(3)(A).

The requested civil penalty of $150,000 represents a one-time statutory third-tier penalty for fraud causing substantial loss to investors. *See* 15 U.S.C. §§ 77t(d); 78u(d)(3). The SEC contends that third-tier penalty is appropriate because, as alleged in the SEC's Complaint -- which Ko cannot dispute -- she played a critical role in the fraudulent scheme orchestrated by Wang, in managing the Entity Defendants' bank accounts and running their day-to-day operations. The Complaint further alleges that she knowingly or recklessly facilitated this fraud. The proposed civil penalty imposed represents a small fraction of the nearly $76 million lost by investors.

Ko does not oppose the Motion. *See Platforms Wireless*, 617 F.3d at 1096 ("Once the SEC establishes a reasonable approximation of defendants' actual profits . . . the burden shifts to the defendants to demonstrate that the disgorgement figure was not a reasonable approximation.") (internal quotation marks omitted).

For the foregoing reasons, the Motion is **GRANTED** with respect to Ko as follows: disgorgement of $1,491,000; prejudgment interest, if any, on this principal in an amount to be determined as stated above; and in civil penalties of $150,000.

IV. Conclusion

For the foregoing reasons, the Motion is **GRANTED**.

Ko is liable for disgorgement in the amount $1,491,000, with prejudgment interest, if any, on this principal in an amount to be determined as stated above, and a civil penalty in the amount of $150,000 pursuant to Section 21(d)(3) of the Exchange Act and Section 209d)(1) of the Securities Act, 15 U.S.C. § 78(u)(d)(3); 15 U.S.C. § 77t(d)(1), for a total of $2,534,409.31.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	LA CV13-07553 JAK (SSx)	Date	October 31, 2016
Title	Securities and Exchange Commission v. Yin Nan Michael Wang, et al.		

Wang shall disgorge of $82,530,000, together with prejudgment interest, if any, on this principal in an amount to be determined as stated above, and a civil penalty of $1,500,000 pursuant to Section 21(d)(3) of the Exchange Act and Section 209d)(1) of the Securities Act, 15 U.S.C. § 78(u)(d)(3); 15 U.S.C. § 77t(d)(1). In making the final calculation of the amount due under the forthcoming judgment in this action, there will be a credit to Wang of $1.4 million for the amount the Receiver already recovered.

In the most recent status report, the parties explained that the Entity Defendants are currently in Receivership, and that the SEC anticipated resolving its claims against the Entity Defendants through settlement. Dkt. 271. However, the SEC deferred entering into settlement negotiations until after the issuance of the present Order. Accordingly, within 21 days of the issuance of this Order, counsel for the SEC and the Entity Defendants shall file a Joint Report with respect to the procedural status of their settlement efforts. At that time, the SEC shall also submit a proposed judgment. That submission shall follow a meet and confer process with Wang's counsel to determine if those parties can agree to the form of a proposed judgment. A proposed judgment shall be lodged at that time. Any objections to the proposed judgment shall be timely filed in accordance with the Local Rules. Upon receiving the submissions required by this Order, the Court will determine whether to proceed with the entry of a Judgment.

IT IS SO ORDERED.

_____ : _____

Initials of Preparer ak