

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

In the Matter of

IREECO, LLC, AND
IREECO LIMITED

INITIAL DECISION
March 24, 2016

APPEARANCES: Andrew O. Schiff for the Division of Enforcement,
Securities and Exchange Commission

Joseph A. Sacher, Gordon & Rees LLP, for Respondents

BEFORE: Jason S. Patil, Administrative Law Judge

Summary

In this initial decision, I order Respondent Ireeco, LLC (Ireeco LLC), to pay disgorgement of \$1,700,000 plus prejudgment interest and Respondent Ireeco Limited to pay disgorgement of \$1,479,633.85 plus prejudgment interest. I do not order a civil penalty against either Respondent.

Procedural History

On June 23, 2015, the Securities and Exchange Commission issued an order instituting proceedings (OIP) pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934, in which it accepted Respondents' offers of settlement and made findings. Specifically, the Commission found that Respondents willfully violated Exchange Act Section 15(a)(1); ordered them to cease and desist from committing or causing such violations or future violations; censured them; and ordered additional proceedings to determine the appropriateness of "disgorgement of ill-gotten gains and/or civil penalties." OIP at 5.

Based on the parties' agreement to proceed by motion and documentary evidence rather than a live hearing, I set a schedule for the filing of motion papers, allowing Respondents to file a sur-reply, as well as provided for an oral argument, at the parties' option. *Ireeco, LLC*, Admin. Proc. Rulings Release No. 3004, 2015 SEC LEXIS 3148 (ALJ Aug. 3, 2015). The Division filed its motion on August 18, Respondents filed their opposition on September 28, the Division filed

its reply on October 9, and Respondents filed their sur-reply on October 19, 2015. I entered a protective order on September 30 to keep sensitive financial information concerning Respondents' alleged inability to pay from the public record. Portions of this initial decision covered by the protective order are redacted. *Ireeco, LLC*, Admin. Proc. Rulings Release No. 3176, 2015 SEC LEXIS 3992. The parties did not request an oral argument.

I determined the issues in this proceeding “on the basis of affidavits, declarations, excerpts of sworn deposition or investigative testimony, and documentary evidence.” OIP at 5. I have considered all evidence, and where I have found a fact supported by the preponderance of evidence, and relevant to any remaining remedies issues, I have noted both my finding and evidentiary support in my analysis. *See Steadman v. SEC*, 450 U.S. 91, 100-04 (1981).

Facts

For this proceeding, the Commission's findings in the OIP are “deemed true” and Respondents are “precluded from arguing they did not violate the federal securities laws described in [the OIP].” OIP § IV. While I do not recite all of the Commission's factual findings contained in the OIP, I include a brief summary below and incorporate the remainder by reference.

Ireeco LLC, a Florida limited liability company, was formed in May 2006 by Stephen Parnell and Andrew Bartlett and was based in Boca Raton, Florida. OIP ¶ 1. Ireeco LLC was never registered with the Commission in any capacity. *Id.* From at least January 2010 through May 2012, Ireeco LLC acted as an unregistered broker-dealer in connection with the sales of securities involving the EB-5 visa program, which provides immigrants to the United States with the opportunity to become lawful permanent residents by investing in the U.S. economy through EB-5 projects.¹ *Id.* ¶¶ 1, 5.

Ireeco Limited, a Hong Kong entity, was formed by Parnell and Bartlett in May 2012 for tax purposes. OIP ¶ 2. Ireeco Limited is the 100% owner of Ireeco LLC. *Id.* Ireeco Limited has never been registered with the Commission in any capacity. *Id.* From at least May 2012 through June 2015, Ireeco Limited acted as an unregistered broker-dealer in connection with the sales of securities involving the EB-5 visa program. *Id.* Parnell and Bartlett are the co-managing members of Ireeco LLC and principals and equal co-owners of Ireeco Limited. *Id.* ¶¶ 3-4.

Respondents offered to assist foreign investors in choosing the right EB-5 projects. OIP ¶ 11. More specifically, once Respondents understood a potential investor's EB-5 preferences and suitability, they would provide one or more EB-5 projects as possible choices, as well as background information on the projects. *Id.* ¶ 14. Respondents also performed due diligence on each of the projects it selected for their customers. *Id.* After investors identified which project they were most interested in, Respondents “registered” the customers with the project by providing their names, contact information, and visa status. *Id.* ¶ 15. The investors then dealt

¹ EB-5 projects are investment projects based on proposals for promoting economic growth and are administered by EB-5 regional centers. OIP ¶ 6. A regional center is any economic entity, public or private, which is involved with the promotion of economic growth, improved regional productivity, job creation, and increased domestic capital investment. *Id.*

directly with the project, with Respondents being consulted by investors on occasion, such as when investors had questions about the investment or offering materials. *Id.* As part of the investment process, many projects required each applicant investor to pay an administrative fee, which varied from project to project, and was typically used to offset legal fees, travel, and other project expenses. *Id.* ¶ 7.

Respondents entered into referral partner agreements with the EB-5 projects they recommended to their customers. OIP ¶ 16. Respondents were compensated by the EB-5 projects for each registered investor who invested funds in an EB-5 offering. *Id.* The fee was a commission based on a fixed portion of an administrative fee paid by each investor upon investing in a project, averaging around \$35,000 per investor. *Id.* Respondents only earned the fee once an investor's conditional green card was approved. *Id.* From January 2010 through June 2015, Respondents were paid fees for actively soliciting over 158 foreign investors for selected EB-5 projects. *Id.* ¶ 17. Together, these investors invested a combined total of \$79 million. *Id.* Respondents referred most of the investors to the same handful of EB-5 projects. *Id.*

The referral fees received by Respondents during the period alleged in the OIP were as follows: \$2,146,116.15 by Ireco LLC and \$1,479,633.85 by Ireco Limited. *See* Motion, Ex. A & Exs. 1-3.² Respondents do not dispute these fees were paid to them by the EB-5 projects after their referred investors received conditional green cards, and, although certain documents call these fees "consultancy fees," such fees were essentially commissions. *See* OIP ¶¶ 16-17; Motion, Ex. A. These fees were unlawful because Respondents were not registered or associated with a registered broker-dealer. OIP ¶ 18.

From 2010 to 2012, Ireco LLC distributed \$1.7 million to its sole officers, Parnell and Bartlett. Motion, Ex. A at Ex. 3. [REDACTED] Reply, Ex. 1 at 27, 42.

Remedial Actions

Inability to Pay

Respondents maintain that they are unable to pay disgorgement or civil penalties. *See* Opp. at 6-9. In accordance with Rule 630, in support of their inability to pay defense, Respondents submitted the declaration of Parnell, along with supporting financial statements and disclosures for both Respondents (Opp. Ex. A Parts 1 and 2) and the declaration of CPA Gary

² Exhibits 1-2 of Exhibit A, which is the declaration of Division Counsel Brian T. James, represent the fees paid to Ireco LLC and Ireco Limited from January 2010 through February 2014, totaling \$3,625,750. Motion, Ex. A ¶ 4-5. Exhibit 3 contains the profit and loss figures for Ireco LLC, for the years 2010 through 2013, which shows a total income of \$2,146,116.15. *Id.* ¶ 5. The difference between the total fees received and the total income of Ireco LLC represents fees of \$1,479,633.85 paid to Ireco Limited. *Id.*

³ The citation is to the bates numbers added to this exhibit by the Division, omitting "Ireco Limited" and the preceding string of zeros. *See* Reply at 5 n.8.

The Commission may consider a respondent's ability to pay in determining civil penalties under the Exchange Act. *See* 15 U.S.C. § 78u-2(d). Commission Rule of Practice 630, 17 C.F.R. § 201.630, permits a respondent to present evidence of an inability to pay disgorgement, interest, or a penalty. I give the inability to pay less weight in determining disgorgement than civil penalties because violations should be made unprofitable to the wrongdoer. *See SEC v. First Jersey Secs., Inc.*, 101 F.3d 1450, 1474 (2d Cir. 1996) (“The effective enforcement of the federal securities laws requires that the SEC be able to make violations unprofitable. The deterrent effect of an SEC enforcement action would be greatly undermined if securities law violators were not required to disgorge illicit profits.” (citations omitted)). Giving ability to pay significant weight in the disgorgement context would create a perverse incentive for securities law violators to spend ill-gotten gains quickly and without restraint, or to transfer them elsewhere. In the same vein, entities should not be able to escape an order of disgorgement by dissolving their assets. *See SEC v. Pentagon Capital Mgmt. PLC*, No. 08-cv-3324, 2012 WL 1036087, at *6 (S.D.N.Y. Mar. 28, 2012) (“[T]o the degree that Defendants’ [inability-to-pay] argument relies on Defendants’ decision to wind down PCM [an entity defendant], PCM’s status is self-inflicted, and Defendants have long been aware of this action, their late trading, and their potential liability.”), *aff’d in part, vacated, and remanded on other grounds*, 725 F.3d 279 (2d Cir. 2013). Ability to pay is only one factor that informs the determination of whether a respondent should be required to pay disgorgement, interest, or civil penalties. *Gregory O. Trautman*, Securities Act of 1933 Release No. 9088, 2009 SEC LEXIS 4173, at *93 (Dec. 15, 2009). Even when a respondent demonstrates an inability to pay, the Commission has discretion not to waive the monetary sanction. *Robert L. Burns*, Investment Advisers Act of 1940 Release No. 3260, 2011 SEC LEXIS 2722, at *39 (Aug. 5, 2011).

Based on the foregoing evidence, I find that Respondents lack the ability to pay the monetary remedies requested by the Division. However, the analysis does not end here, because Respondents are solely owned and controlled by two individuals, Parnell and Bartlett. The reason why Respondents are insolvent is because throughout the unlawful referral scheme, Parnell and Bartlett used the money to pay themselves, as “consultants” and “managers” of their entities. As a practical matter, because only the insolvent respondent-entities were charged, and not their officers, any disgorgement may be difficult to collect.⁴ However, it would make a

⁴ Indeed, Respondents persuasively make that precise point:

mockery of the remedy of disgorgement against an entity if the unjustly enriched entity were to be excused simply because it transferred the unlawful profits, through pay or other means, to the only two people who controlled the entity throughout the course of its misconduct. To excuse disgorgement in this case based on inability to pay would encourage the redirecting of illegal profits from an entity into the pockets of its officers. Thus, as a matter of discretion, I decline to entirely excuse disgorgement based on an inability to pay; instead, I will consider inability to pay only as to the amount of unjust enrichment exceeding what the principals paid themselves.

Disgorgement

Exchange Act Sections 21B(e) and 21C(e) authorize me to order disgorgement in this proceeding, including reasonable interest. 15 U.S.C. §§ 78u-2(e), 78u-3(e); *see* OIP at 5-6. Commissions received from unlawful sales may provide the required reasonable approximation of a respondent's ill-gotten gains. *Ralph Calabro*, Securities Act Release No. 9798, 2015 WL 3439152, at *44-45 (May 29, 2015). As the Commission explained,

Disgorgement is intended primarily to prevent unjust enrichment. Although the amount of disgorgement should include all gains flowing from the illegal activities, calculating that amount requires only a reasonable approximation of profits causally connected to the violation. Once the Division shows that its disgorgement figure reasonably approximates the ill-gotten gains, the burden shifts to the respondent to demonstrate that the Division's estimate is not a reasonable approximation. Thus, exactitude is not a requirement; so long as the measure of disgorgement is reasonable, any risk of uncertainty should fall on the wrongdoer whose illegal conduct created that uncertainty.

Id. at *44 (footnotes, quotations, and alterations omitted). Although *Calabro* involved fraud, which is not present here as Respondents point out, *Opp.* at 10-11 & n.3, commissions are also an appropriate measure of disgorgement with respect to a violation not requiring scienter. *See Ronald S. Bloomfield*, Securities Act Release No. 9553, 2014 WL 768828, at *20-21 (Feb. 27, 2014) (ordering disgorgement of commissions for sale of unregistered securities), *partially vacated on other grounds, Robert Gorgia*, Securities Act Release No. 9743, 2015 WL 1546302 (Apr. 8, 2015); *cf. SEC v. Rockwell Energy of Tex., LLC*, No. H-09-4080, 2012 WL 360191, at *6

Despite this knowledge [that Respondents are insolvent], the Commission knowingly entered into a negotiated, partial-settlement with the Respondent entities, only, with the understanding that their principals would not be named in this action, as Respondents or even Relief Defendants. Thus, the Division cannot claim that it is surprised by the Financial Disclosures. Respondents' financial condition was fully disclosed to the Staff, as well as Respondents' intent to seek protection under Rule 630, prior to the execution of the Respondents' Offers of Settlement, and prior to the Commission's acceptance of the Offers and issuance of the OIP.

Sur-reply at 6. Despite the persuasiveness of this point, it does not follow that I should excuse Respondents from disgorgement because they were always quick to move money to their two principals.

(S.D. Tex. Feb. 1, 2012) (“Disgorgement is appropriate not only in cases of fraud . . . but also where a defendant violates the securities registration provisions of the federal securities laws.”). Although Respondents strive energetically to distinguish cases on disgorgement, they are distinctions without a difference, because as a rule, unlawful referral fees should be disgorged.

Respondents assert, based on a fragment of Parnell’s investigative testimony, that Respondents provided a variety of other services to clients over the long-term that were wholly unrelated to the investment scheme, and hence, should not be disgorged. Opp. at 11-12, Ex. C at 29-30. This assertion is unpersuasive given the lack of any corroborating evidence for it. Furthermore, Respondents expressly disclaim any attempt to value such services, pronouncing that “[i]t would be wholly improper for Respondents to now attempt to document prior events that were not contemporaneously documented.” Sur-Reply at 10. Yet, for me to diminish a reasonable approximation of disgorgement, I need more than unsupported assertions accompanied only by refusals to quantify how much, if any, the amount should be decreased. See *SEC v. Bilzerian*, 814 F. Supp. 116, 121 (D.D.C. 1993) (finding that because it is difficult to separate legal from illegal profit, “it is proper to assume that all profits gained while defendants were in violation of the law constituted ill-gotten gains”), *aff’d*, 29 F.3d 689 (D.C. Cir. 1994). I do not find sufficient evidence, based on other purported services, to adjust downward the Division’s approximations of the unlawful referral fees.

I find that the unlawful referral fees paid to Ireeco LLC of \$2,146,116.15 and to Ireeco Limited of \$1,479,633.85 are thus reasonable approximations of those entities’ unjust enrichment. However, in light of the fact that Ireeco LLC has no ability to pay, I will limit the order of disgorgement concerning that entity to \$1.7 million, which is the full amount it paid to its principals for their consulting and management. For Ireeco Limited, though it is also insolvent, given that it paid the two principals more than the full amount sought, I order that it disgorge the full amount it was unjustly enriched of nearly \$1.5 million.

The issue of prejudgment interest was already decided by the OIP, which provided that: “*If disgorgement is ordered, Respondents shall pay prejudgment interest thereon, calculated from January 1, 2010, 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)(2).*” OIP at 5 (emphasis added). As a result, I do not consider Respondents’ arguments that there should be no prejudgment interest.

Civil Penalties

The Division seeks one first-tier penalty of \$75,000 against each Respondent for their misconduct after June 23, 2010.⁵ Motion at 10; Reply at 4. Civil penalties “are intended to punish, and label defendants wrongdoers.” *Gabelli v. SEC*, 133 S. Ct. 1216, 1223 (2013). Penalties also serve to deter both the violator and “others in similar positions from future violations.” *John P. Flannery*, Securities Act Release No. 3981, 2014 WL 7145625, at *41 (Dec. 15, 2014), *vacated*

⁵ The Division’s request for a civil penalty relates to conduct that the OIP makes clear occurred within the five-year period of limitation. Therefore, Respondents’ insistence that they *also* committed misconduct before the five-year period is irrelevant for my penalty analysis. Opp. at 15 n.7, 17 n.9, 18; Sur-reply at 13-14 & n.12.

on other grounds, 810 F.3d 1 (1st Cir. 2015). Exchange Act Section 21B(a)(2) authorizes civil penalties in any proceeding instituted under Exchange Act Section 21C if a respondent is violating, has violated, or is or was a cause of the violation of any provision of the Exchange Act or rule thereunder. 15 U.S.C. § 78u-2(a)(2). Exchange Act Section 21B(a)(1) provides for civil penalties in any proceeding instituted pursuant to certain sections of the Exchange Act, including Section 15(b)(4) and (6). 15 U.S.C. § 78u-2(a)(1). This subsection requires a public interest determination as well as a finding of willfulness. *Id.* The public interest factors enumerated in Exchange Act Section 21B(c) are as follows: (1) whether the violation involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; (2) whether the violation resulted in harm to others; (3) the extent to which there was unjust enrichment; (4) whether the respondent has committed previous violations; (5) the need to deter the respondent and others; and (6) such other matters as justice may require. 15 U.S.C. § 78u-2(c).

Exchange Act Section 21B(b) establishes a three-tier system of penalties. 15 U.S.C. § 78u-2(b). Under the first tier, the maximum penalty for an entity is \$75,000 per violation occurring after March 3, 2009, and until March 5, 2013; after March 5, 2013, an entity can be penalized up to \$80,000 per violation. 15 U.S.C. § 78u-2(b)(1); 17 C.F.R. §§ 201.1004-1005, Subpt. E, Tbls. IV-V. The second and third tiers require “fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement,” none of which applies here. 15 U.S.C. § 78u-2(b)(2), (3); *see* Reply at 4.

It is not in the public interest to impose a penalty as none of the foregoing factors weigh strongly enough in favor of a penalty.

First, there was no “fraud,” no “deceit,” no “manipulation,” nor any “deliberate or reckless disregard of a regulatory requirement.” 15 U.S.C. § 78u-2(c)(1). The Division contends that Respondents knew that their conduct “placed them at risk of being found to have acted as a broker,” Reply at 1, but does not dispute that until this case, the Commission had not charged any similar entity or individual for such misconduct in connection with EB-5 projects. *See* Opp. at 1. In fact, the June 23, 2015, press release about this case announced that “[t]he charges are the first against brokers handling investments in the government’s EB-5 Immigrant Investor Program . . .” *Id.* at 4 (citing Press Release, SEC, SEC Charges Unregistered Brokers in EB-5 Immigrant Investor Program (June 23, 2015), <https://www.sec.gov/news/pressrelease/2015-127.html>). The Division also contends that Respondents “amplified that risk by continuing to engage in the conduct after becoming aware of the Division’s investigation.” Reply at 1. However, this does not negate the preceding point that, in the absence of ever having heard of any similarly situated business being charged, the mere fact of an investigation was not as significant as it would have otherwise been. In addition, Respondents put forth a plausible argument that the Commission’s investigation

included one period of extensive non-activity from approximately April of 2013 until late February of 2014, during which time Ireco was left with the distinct impression that the investigation had been concluded, that the Staff was satisfied, that no further action would be taken, and that Ireco could continue conducting business in the normal course.

Opp. at 2-3.

Second, there is no evidence that Respondents' violations caused harm or injury. Third, while the Respondents were unjustly enriched to the extent the fees they earned were unlawful because they were operating as unregistered broker-dealers, the foregoing order of disgorgement sufficiently addresses that issue. Fourth, prior to the instant action, neither Respondent had been found to have violated (or been enjoined from violating) securities laws or rules, or related laws. Fifth, deterrence does not require civil penalties here. The bringing of this case, which debilitated both Respondents, and the remedies otherwise imposed, will be more than sufficient to satisfy the interests of deterrence. Finally, I credit Respondents' willingness to enter into the consent order and cease all operations voluntarily. Considering all of the factors together, I find that a penalty against either Respondent would not serve the public interest.

ORDER

I ORDER that, pursuant to Sections 21B(e) and 21C(e) of the Securities Exchange Act of 1934:

Ireeco, LLC, shall PAY DISGORGEMENT in the amount of \$1,700,000, plus prejudgment interest; and

Ireeco Limited shall PAY DISGORGEMENT in the amount of \$1,479,633.85, plus prejudgment interest.

Prejudgment interest shall be calculated from January 1, 2010, to the last day of the month preceding the month in which payment of disgorgement is made, consistent with 17 C.F.R. § 201.600. Prejudgment interest shall be calculated at the underpayment rate of interest established under Section 6621(a)(2) of the Internal Revenue Code, 26 U.S.C. § 6621(a)(2), and shall be compounded quarterly. 17 C.F.R. § 201.600(b). Interest shall continue to accrue on all funds owed until they are paid.

Payment of disgorgement and prejudgment interest shall be made no later than twenty-one days following the day this initial decision becomes final, unless the Commission directs otherwise. Payment shall be made in one of the following ways: (1) transmitted electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request; (2) direct payments from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or (3) by certified check, bank cashier's check, United States postal money order, or bank money order made payable to the Securities and Exchange Commission and hand-delivered or mailed to the following address alongside a cover letter identifying Respondent and Administrative Proceeding No. 3-16647: Enterprises Services Center, Accounts Receivable Branch, HQ Bldg., Room 181, AMZ-341, 6500 South MacArthur Blvd., Oklahoma City, Oklahoma 73169. A copy of the cover letter and instrument of payment shall be sent to the Commission's Division of Enforcement, directed to the attention of counsel of record.

This initial decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice, 17 C.F.R. § 201.360. Pursuant to that rule, a party may file a petition for review of this initial decision within twenty-one days after service of the initial decision. A party may also file a motion to correct a manifest error of fact within ten days of the initial decision, pursuant to Rule 111 of the Commission's Rules of Practice, 17 C.F.R. § 201.111. If a motion to correct a manifest error of fact is filed by a party, then a party shall have twenty-one days to file a petition for review from the date of the undersigned's order resolving such motion to correct a manifest error of fact. The initial decision will not become final until the Commission enters an order of finality. The Commission will enter an order of finality unless a party files a petition for review or motion to correct a manifest error of fact or the Commission determines on its own initiative to review the initial decision as to a party. If any of these events occur, the initial decision shall not become final as to that party.

Jason S. Patil
Administrative Law Judge