

1 TERRY R. MILLER (CO. Bar No. 39007)
2 Email: millerte@sec.gov
3 Denver Regional Office
4 1961 Stout Street, Suite 1700
5 Denver, Colorado 80294
6 Telephone: (303) 844-1000

7 MICHAEL J. ROESSNER (D.C. Bar No. 501875)
8 Email: RoessnerM@sec.gov
9 United States Securities and Exchange Commission
10 100 F Street, NE
11 Mail Stop 5631
12 Washington, DC 20549-0022
13 Telephone: (202) 551-4347

14 Attorneys for Plaintiff
15 Securities and Exchange Commission

16 **UNITED STATES DISTRICT COURT**
17 **SOUTHERN DISTRICT OF CALIFORNIA**

18 SECURITIES AND EXCHANGE
19 COMMISSION,

20 Plaintiff,

21 vs.

22 CASH CAPITAL, LLC, AMERICA'S
23 STRATEGIC ORE PROPERTIES,
24 LLC, and ROBERT W. WILSON,

25 Defendants.

Case No. 17-cv-1536-L-AGS

**PLAINTIFF SECURITIES AND
EXCHANGE COMMISSION'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF ITS
MOTION FOR AN ORDER TO
SHOW CAUSE WHY DEFENDANT
ROBERT WILSON SHOULD NOT BE
HELD IN CIVIL CONTEMPT**

**Pursuant to Local Rules, No
Appearances Allowed Unless Requested
by the Court**

Date: June 22, 2020
Time: 10:30am
Place: Courtroom 5B
Judge: Hon. M. James Lorenz

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

INTRODUCTION5

PROCEDURAL HISTORY.....7

FACTUAL BACKGROUND9

 A. Wilson appears to have lulled his victims after consenting to the Final Judgment9

 B. Wilson offers the "Golden Unicorn" security.....10

 C. Wilson has not made any payment due under the Final Judgment12

ARGUMENT12

I. WILSON SHOULD BE HELD IN CONTEMPT FOR VIOLATION OF THE SECURITIES INJUNCTION AND DISGORGEMENT ORDER.....12

 A. Wilson Should be Held in Contempt for Violation of the Securities Injunction.....13

 B. Wilson Should be Held in Contempt for Failure to Comply with the Disgorgement Order16

 1. *Prima Facie* Case of Failure to Comply.....16

 2. Wilson is able to comply with the Disgorgement Order17

II. WILSON'S CONTEMPT WARRANTS SANCTIONS.....18

CONCLUSION.....21

TABLE OF AUTHORITIES

Federal Cases

CFTC v. Skorupskas,
605 F. Supp. 923 (E.D. Mich. 1985) 13

FTC v. Affordable Media LLC,
179 F.3d 1228 (9th Cir.1999) 12-13

In re Dickinson,
763 F. 2d 84 (2d Cir. 1985) 18

In re Marc Rich & Co.,
736 F2d 864 (2d Cir. 1984) 16

International Union, UMWA v. Bagwell,
512 U.S. 821 (1994) 18

Productive Marketing, Inc.,
136 F. Supp. 2d (C.D. Ca. 2001) 18

Salameh v. Tarsadia Hotel,
726 F.3d 1124 (9th Cir. 2013) 14

SEC v. Allen, Case No. 3:11-cv-882-O,
2014 WL 99974 (N.D. Tex. Jan 10, 2014) 18-19

SEC v. AMX, Int’l, Inc.,
872 F. Supp. 1541 (N.D. Tex. 1994) 17

SEC v. Bilzerian,
112 F. Supp. 2d 12 (D.D.C. 2000) 17

SEC v. Cavanagh,
155 F.3d 129 (2nd Cir. 1996) 18

SEC v. Chen, No. 15-CV-07425-RGK-PLAX,
2016 WL 7469683 (C.D. Cal. Dec. 8, 2016) 14, 15

SEC v. Connectajet.com, Inc.,
2015 WL 6437697 (N.D. Tex. Oct. 16, 2015) 19

SEC v. Durante, Case No. 01-cv-9056-DAB-AJP,
2013 WL 6800226 (S.D.N.Y. Dec. 19, 2013) 19

1 *SEC v. Elmas Trading Corp.*,
 824 F.2d 732 (9th Cir. 1987) 13

2

3 *SEC v. Kapur*,
 2015 WL 4040558 (S.D.N.Y. July 1, 2015) 19-20

4 *SEC v. Meta 1 Coin, No. 1:20-CV-273-RP*,
 2020 WL 1931852 (W.D. Tex. Apr. 21, 2020) 13, 19

5

6 *SEC v. Musella*,
 818 F. Supp. 600 (S.D.N.Y. 1993) 17, 20

7

8 *SEC v. R.G. Reynolds Enter., Inc.*,
 952 F.2d 1125 (9th Cir. 1991) 15

9

10 *SEC v. SG Ltd.*,
 265 F.3d 42 (1st Cir. 2001) 15

11

12 *SEC v. Showalter*,
 227 F. Supp. 2d 110 (D.D.C. 2002) 17

13

14 *SEC v. Solow*,
 682 F. Supp. 2d 1312 (S.D. Fl. 2010) 19

15

16 *SEC v. W.J. Howey*,
 328 U.S. 293 (1946) 14

17

18 *SEC v. Wencke*,
 622 F.2d 1363 (9th Cir. 1980) 18

19

20 *Shillitani v. United States*,
 384 U.S. 364 (1966) 12

21

22 *Stone v. City and County of San Francisco*,
 968 F.2d 850 (9th Cir.1992) 13

23

24 *United States v. Lay*,
 779 F.2d 319 (6th Cir. 1985) 17

25

26 *United States v. Rylander*,
 460 U.S. 752 (1983) 13

27

28 *United States v. United Mine Workers*,
 330 U.S. 258 (1947) 19

United States v. Winter,
 70 F.3d 655 (1st Cir. 1995) 13

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

EEOC v. Local 28
247 F.3d 333 18, 20

State Statutes

Sections 25110 and 25401 of the California Corporations Code 5, 6

Other

Securities Act of 1933 6, 7, 14

Securities Exchange Act of 1934 7, 14

1 The Securities and Exchange Commission (“SEC”) submits this Memorandum
2 of Points and Authorities in Support of its Motion for an Order to Show Cause Why
3 Defendant Robert Wilson Should Not Be Held in Civil Contempt (the “Motion”). The
4 Declarations of Terry R. Miller (“Miller Decl.”), Michael J. Roessner (“Roessner
5 Decl.”), and Connie Page (“Page Decl.”), and exhibits attached thereto are also being
6 submitted in support of the Motion.
7

8 INTRODUCTION

9 The SEC files this Motion for a finding of contempt and appropriate sanctions
10 to compel compliance with the Court’s orders because Robert Wilson, a securities
11 fraud recidivist, has now violated orders of this Court.

12 The SEC alleged in this case that Defendant Robert Wilson defrauded
13 unsophisticated investors through an unregistered offer and sale of securities in a
14 purported mining property in Arizona referred to as the Yuma King project and then
15 misappropriated their money for his personal use. Based on Wilson’s consent, the
16 Court previously entered a final judgment resolving the claims of fraud and the
17 unregistered offer and sale of securities. Doc. # 51 (“Final Judgment”). Wilson has
18 now failed to comply with two of the most critical provisions of the Final Judgment:
19 (1) an injunction that prohibits him from offering and selling securities (Final
20 Judgment § IV (the “Securities Injunction”)); and (2) an order to disgorge
21 \$1,540,000, plus prejudgment interest in the amount of \$205,376.25 (Final Judgment
22 § V (the “Disgorgement Order”).

23 The SEC insisted upon the inclusion of the Securities Injunction in the Final
24 Judgment because Wilson is a securities fraud recidivist and his misconduct showed a
25 likelihood that he would continue to harm investors.¹ Just six months after entry of

26 ¹ In addition to the wrongdoing underlying the claims in this action, Wilson is subject
27 to a desist-and-refrain order issued by the California Corporations Commission on
28 May 3, 2011. The California order found that Wilson had violated sections 25110 and

1 the Final Judgment, Wilson violated the Securities Injunction by offering securities in
2 connection with the same failed mining property that was part of the “Yuma King”
3 project described in the Complaint. *See* Doc. # 1 at ¶ 15. In blatant disregard of the
4 Court’s Final Judgment, Wilson has offered securities to both prior victims and new
5 investors through newsletters sent at his direction and a website that invites the
6 general public to invest. In an offer Wilson calls a “Golden Unicorn,” he seeks
7 investments as low as \$5,000 and promises two types of promised returns: investors
8 can choose a 50% return in 12 months or a 100% return in 24 months. In other words,
9 despite settling the SEC’s claims and consenting to the Court’s Final Judgment
10 against him, Wilson has carried on with the same illegal conduct. Wilson’s conduct
11 re-victimizes prior investors, threatens to enlarge the harm already caused by
12 soliciting new investors and, without appropriate sanctions, undermines the deterrent
13 effect of the Final Judgment and the federal securities laws and damages the power
14 and dignity of the Court.

15 With respect to the Disgorgement Order, which required Wilson to disgorge ill-
16 gotten gains that will be provided to his victims, Wilson bargained for and obtained a
17 six-month period to disgorge the money he took from investors. The payment was
18 due in October 2019, but Wilson has not paid a dollar. He has not provided a reason
19 for his failure to disgorge and certainly has not shown an inability to comply with
20 even a portion of the Disgorgement Order.

21 Wilson has simply ignored the Court’s Final Judgment. For the reasons below,
22 the SEC requests an order: (1) setting a briefing schedule and hearing date requiring
23 Wilson to show cause why he should not be held in contempt; (2) requiring Wilson to

24 _____
25 25401 of the California Corporations Code, California’s analogs to Sections 5 and
26 17(a)(2) of the Securities Act — that is, that Wilson sold non-exempt securities
27 without “qualification” (which is akin to registration) and that Wilson offered and
28 sold securities by means of written or oral communications that included untrue
statements or omissions of material facts.

1 provide an accounting disclosing all financial transactions since the date of the Final
2 Judgment; and (3) permitting limited and expedited discovery into (a) the full scope
3 of Wilson’s offer and sale of securities since the date of the Final Judgment, and
4 (b) Wilson’s ability to pay amounts owed under the Disgorgement Order.

5 PROCEDURAL HISTORY

6 In its Complaint, the SEC asserted claims against Wilson and two entities
7 controlled by Wilson for violations of the antifraud provisions of the Securities Act of
8 1933 (“Securities Act”) and the Securities Exchange Act of 1934 (“Exchange Act”) and
9 also for violation of the Securities Act’s prohibition against the offer and sale of
10 unregistered securities. Doc. # 1 at ¶¶ 135-157. Wilson sold investments to
11 unsophisticated investors that promised up to a 20% return in 18 months and,
12 according to Wilson, were backed by mining property assets worth at least \$18
13 billion. *Id.* ¶ 3. He knew or was reckless in not knowing that the valuation of the
14 mining property was nothing near what he represented to potential investors, and he
15 also misappropriated at least \$800,000 of investor money for his own personal use.
16 *Id.* at ¶¶ 4-7.

17 The crux of Wilson’s defense was the legal argument that the investments he
18 sold were not securities. The SEC moved for partial summary judgment seeking an
19 order that the investments were, as a matter of law, securities, but Wilson did not
20 respond. Doc. # 37. Instead, Wilson sought and obtained a continuance of the
21 summary judgment motion hearing so that he and the other defendants could explore
22 settlement at a court-ordered settlement conference. Doc. # 38. The parties reached a
23 tentative settlement during the conference on December 12, 2018. Doc. # 42.
24 Consistent with that agreement, Wilson executed a consent in which he agreed to
25 entry of the Final Judgment that contained, among other things, the Securities
26 Injunction and Disgorgement Order. Doc. # 47-3 (“Consent”).

27 Based on the Consent, on April 25, 2019, this Court entered the Final
28 Judgment. The Securities Injunction in the Final Judgment prohibited the offer and

1 sale of securities with the following:

2 Defendant is permanently restrained and enjoined from
3 directly or indirectly, including, but not limited to, through
4 any entity owned or controlled by Defendant, participating
5 in the issuance, purchase, offer, or sale of any security,
6 provided, however, that such injunction shall not prevent
7 Defendant from purchasing or selling securities listed on a
8 national securities exchange for his[] own personal account.

9 Final Judgment § IV. The purpose of this conduct-based injunction, and the other
10 injunctions found in the Final Judgment, was to prevent future harm to investors and
11 was necessary because of Wilson’s recidivist history.

12 The Disgorgement Order in the Final Judgment required Wilson to disgorge his
13 ill-gotten gains, together with prejudgment interest:

14 Defendant is liable jointly and severally with Defendants
15 Cash Capital, LLC and America’s Strategic Ore Properties,
16 LLC for disgorgement of \$1,540,000, representing profits
17 gained as a result of the conduct alleged in the Complaint,
18 together with prejudgment interest thereon in the amount of
19 \$205,376.25.

20 Final Judgment § V.² The Disgorgement Order was necessary to return wrongfully
21 obtained funds to Wilson’s victims. At the time of the Final Judgment, most
22 settlements with the SEC required defendants to pay a judgment in 14 days (it is now
23 30), but here, the Final Judgment provided Wilson six months to pay the amounts he
24 consented to pay. The deadline to pay passed in October 2019, Wilson has not paid a
25 dollar, and he has sought no modification of the Final Judgment. Roessner Decl. ¶ 3.

26 Finally, Wilson also consented to the provision in the Final Judgment which
27 states that this Court shall retain jurisdiction of this matter for purposes of enforcing

28 ² The Final Judgment also imposed a civil penalty in the amount of \$184,767. Wilson has not paid a dollar of this amount, either. However, this Motion does not seek a contempt finding for Wilson’s failure to comply with the order to pay a civil penalty.

1 the terms of the Final Judgment. Final Judgment § VIII. This Motion seeks
2 enforcement of the Final Judgment pursuant to that provision.

3 **FACTUAL BACKGROUND**

4 Since entry of the Final Judgment in April 2019, Wilson has remained in
5 contact with prior investors and continues to make offers of securities and what are
6 likely lulling statements intended to induce these prior investors from taking action to
7 demand return of their investments. In addition, Wilson has offered securities to new
8 investors through in-person meetings and a website accessible to the general public
9 related to his new limited liability company, G3, LLC. He also has made no effort to
10 pay any of the amounts due in the Final Judgment despite hundreds of thousands of
11 dollars flowing through his bank account since entry of the Final Judgment

12 **A. Wilson appears to have lulled his victims after consenting to the** 13 **Final Judgment.**

14 Even after consenting to the Final Judgment, Wilson caused his company,
15 Defendant America's Strategic Ore Properties ("ASOP"), to send updates to prior
16 ASOP investors that appear to have been, in effect, statements intended to lull
17 investor-victims into falsely believing that their investments were safe and intended
18 to induce them to refrain from asserting their rights.³ For example, less than two
19 months after the Final Judgment, on June 14, 2019, the "ASOP Team" sent an email
20 newsletter to prior investors that purported to detail Wilson's efforts to sell or finance
21 the Yuma King property, which would, presumably, lead to repayment of investor
22 funds. *See, e.g.*, Exhibit 1 to Miller Decl. (Wilson "has met with several other
23 interested groups/parties/companies with the most recent meeting being with a former
24 manager of a Wall Street hedge fund."). These appear to be the same type of
25 fraudulent lulling statements that supported the SEC's claims that were resolved in
26 the Final Judgment. *See* Doc. # 37-11 (Jan. 29, 2018 email from "ASOP Team")

27 _____
28 ³ Wilson testified that he asserts complete control of ASOP and takes full
responsibility for ASOP's representations and conduct. Doc. # 37.2 at ¶¶ 2-3.

1 stating that “Robert works daily with several groups who are very interested in
2 becoming part of ASOP via large dollar funding.”).

3 As another example, on September 23, 2019, Wilson caused the “ASOP Team”
4 to send a newsletter that claimed Wilson continued “to work with various lending
5 groups, organizations, and companies from around the world” to sell or finance the
6 Yuma King property. Exhibit 2 to Miller Decl. at p. 3. Again, the implication of this
7 statement is that the sale or financing of the property would lead to repayment of
8 investor funds. *Id.* (“At this point, along with meeting with new groups to continue
9 cultivating relationships, I am speaking with Heads of State about this venture.”).

10 **B. Wilson offers the “Golden Unicorn” security.**

11 At least as early as October 2019, Wilson used these newsletters to prior
12 investors to promote a new investment opportunity he called the “Golden Unicorn.”
13 In a newsletter email dated October 25, 2019, with a subject heading of “Robert
14 Update – Golden Unicorn,” the ASOP Team continued to represent to prior investors
15 that a transaction to sell or finance the Yuma King property was imminent. Exhibit 3
16 to Miller Decl. (“While Robert is certain one of these lenders will fund, he cannot
17 predict when that will be.”). The email also introduced terms and details of the
18 Golden Unicorn, claiming that “Robert immediately recognized that the cash that
19 could be generated from the ‘new unicorn’ can and will be used to payout [sic]
20 everyone involved in the AZ venture.” *Id.* at 2.

21 The Golden Unicorn offer promises high returns in a “gold milling venture.”
22 *Id.* at 4. For investments as low as \$5,000, investors can choose a 50% return in 12
23 months or a 100% return in 24 months. *Id.* at 3. To earn the profit, Wilson explains
24 that he will process abandoned stockpiles of “Gold-rich Material” to which he claims
25 he “has secured purchase rights.” *Id.* at 2. Although these stockpiles are abandoned
26 and “are in general considered a community blight,” Wilson claims to have the
27 knowledge and skill necessary to earn large profits through the venture. Wilson
28

1 invites recipients of the offer to share the offer with others, and promises a 6%
2 referral fee. *Id.* at 5.

3 Wilson also promotes this offer on a website hosted by his new business entity
4 called G3, LLC (www.g34az.com). The website provides information about the
5 Yuma King property generally that continues to make the same representations about
6 graphene that were the subject of the fraud claims in the Complaint. *See* Exhibit 4 to
7 Miller Decl. (“What do we have? A calculated multi-billion dollar discovery.”). The
8 website also promotes the same investment that Wilson described as a “Golden
9 Unicorn,” which includes the same promised returns and invites the general public to
10 contact Wilson for additional information. Exhibits 5-7 to Miller Decl.

11 Wilson has also approached at least one new investor personally through
12 conversations on the telephone, an in-person meeting, and follow-up emails. Page
13 Decl. ¶¶ 2-5. Like the general public solicited through Wilson’s G3 website, this
14 potential investors has no specialized training, skill, experience, or education in the
15 mining business and was not expected to participate in the gold milling venture in any
16 way except to write a check to Wilson. *See id.* at ¶¶ 6-8.

17 When promoting the Golden Unicorn offer, Wilson also provides a misleading
18 written explanation of this action and the Final Judgment, in which he denies
19 allegations in the Complaint and argues that the Complaint lacks a factual basis. He
20 also includes a vague letter from his counsel that has the effect of endorsing his
21 written description of the Complaint and Final Judgment in this case. Exhibit A to
22 Page Decl. at pp. 27-29. Nothing in the written explanation of the Final Judgment
23 provided by Wilson to potential investors mentions the Securities Injunction, the
24 Disgorgement Order, or Wilson’s agreement to refrain from publicly denying the
25 allegations set forth in the Complaint.⁴ Wilson does not provide potential investors

26 ⁴ Wilson’s denial of the factual basis for the Complaint is another breach of a material
27 provision of the Consent, which expressly prohibits Wilson taking any action or
28 permitting to be made “any public statement denying any allegation in the complaint

1 with copies of, or links to, the Complaint, the Consent, or the Final Judgment. *Id.*

2 **C. Wilson has not made any payment due under the Final Judgment.**

3 Also since entry of the Final Judgment, Wilson has not disgorged any of the
4 amount ordered. The deadline to pay the full amount owed under the Final Judgment
5 was October 22, 2019. On November 25, 2019, the SEC sent Wilson’s counsel of
6 record a letter notifying Wilson that the disgorgement amount (with prejudgment
7 interest) was past due and attached another copy of the Court’s Final Judgment.
8 Exhibit 1 to Roessner Decl. Wilson did not respond to this letter, Roessner Decl. ¶ 2,
9 and at no time has Wilson contacted counsel of record in this matter or counsel for
10 the SEC that sent the demand letter to explain an inability to pay any amounts owed.
11 The SEC has begun to investigate Wilson’s ability to pay and discovered Wilson
12 spent over \$450,000 from his Bank of America account since January 1, 2019. *See*
13 Roessner Decl. ¶ 4 and Exhibit 2 attached thereto.

14 **ARGUMENT**

15 **I. WILSON SHOULD BE HELD IN CONTEMPT FOR VIOLATION OF**
16 **THE SECURITIES INJUNCTION AND DISGORGEMENT ORDER.**

17 The Court has “inherent power to enforce compliance with [its] lawful orders
18 through civil contempt.” *Shillitani v. United States*, 384 U.S. 364, 370 (1966). “The
19 standard for finding a party in civil contempt is well settled: The moving party has
20 the burden of showing by clear and convincing evidence that the contemnors violated
21 a specific and definite order of the court. The burden then shifts to the contemnors to
22 demonstrate why they were unable to comply.” *FTC v. Affordable Media LLC*, 179
23

24 _____
25 or creating the impression that the complaint is without factual basis” and also
26 prohibits Wilson from making or permitting to be made “any public statement to the
27 effect that Defendant does not admit the allegations of the complaint without also
28 stating that Wilson does not deny the allegations.” Consent ¶ 12(i)-(ii). Although the
SEC does not seek in this Motion a finding of contempt for failure to comply with
these provisions, which are incorporated into the Final Judgment, Wilson’s blatant
violation of these provisions further supports the SEC’s contention that Wilson will
not stop harming investors without further intervention from the Court.

1 F.3d 1228, 1239 (9th Cir.1999) (quoting *Stone v. City and County of San Francisco*,
2 968 F.2d 850, 856 n.9 (9th Cir.1992)). Only by presenting sufficient evidence of an
3 inability to comply with the court’s order can the defendant shift the burden back to
4 the plaintiff. *Id.* at 1239.

5 To meet this initial burden, the SEC need only present a *prima facie* case and it
6 is not necessary to show that the defendant’s disobedience was willful. *See United*
7 *States v. Rylander*, 460 U.S. 752, 755 (1983). “Generally, a court may impose civil
8 contempt sanctions pursuant to the minimal procedures of notice and opportunity to
9 be heard; the reason for this is that the civil contemnor may avoid the sanction by
10 obeying the court’s order.” *United States v. Winter*, 70 F.3d 655, 661 (1st Cir. 1995).
11 Among other things, courts have held defendants in civil contempt for continuing to
12 deceive investors after the entry of an injunctive order, *see, e.g., CFTC v. Skorupskas*,
13 605 F. Supp. 923, 945 (E.D. Mich. 1985), and for failure to account for funds and
14 produce records, *see, e.g., SEC v. Elmas Trading Corp.*, 824 F.2d 732, 732-33 (9th
15 Cir. 1987); *see also SEC v. Meta 1 Coin*, No. 1:20-CV-273-RP, 2020 WL 1931852, at
16 *1 (W.D. Tex. Apr. 21, 2020).

17 **A. Wilson Should be Held in Contempt for Violation of the Securities**
18 **Injunction.**

19 The Securities Injunction is a specific and definite order of the Court. This
20 provision clearly and unambiguously prohibited Wilson from “participating in the
21 issuance ... offer, or sale of any security” except those listed on a national securities
22 exchange for his own account. Final Judgment § IV. Wilson is aware of the Final
23 Judgment because, in addition to the fact that he signed the Consent and received
24 service of the Final Judgment on his counsel of record, Wilson’s promotion materials
25 include a self-serving (and misleading) explanation of the Final Judgment to potential
26 investors. *See Exhibit A to Page Decl.* at pp. 27-29.

27 This Motion presents clear and convincing evidence that Wilson violated the
28 Securities Injunction. The evidence is clear that Wilson offered the Golden Unicorn

1 investments. The essence of the Golden Unicorn investment is that investors, who are
2 unsophisticated and inexperienced in the mining industry, would pool their money
3 into a mining operation and expect profits from the work of Robert Wilson—there
4 will be no profit unless Wilson can effectively execute his apparent plan to extract
5 and sell gold from the abandoned stockpile. These investments are securities as a
6 matter of law under *SEC v. W.J. Howey*, 328 U.S. 293, 298-99 (1946).

7 Section 2(a)(1) of the Securities Act and Section 3(a)(10) of the Exchange Act
8 both define the term “security” to include an “investment contract,” and “in general,
9 any interest or instrument commonly known as a ‘security.’” Wilson’s offer of
10 interests in the Golden Unicorn project are investment contracts, and therefore
11 securities, under the test set forth in *Howey*: “an investment contract is (1) an
12 investment of money, (2) in a common enterprise, (3) with an expectation of profits
13 produced by the efforts of others.” *SEC v. Chen*, No. 15-CV-07425-RGK-PLAX,
14 2016 WL 7469683, at *4 (C.D. Cal. Dec. 8, 2016) (quoting *Salameh v. Tarsadia*
15 *Hotel*, 726 F.3d 1124, 1130 (9th Cir. 2013)).

16 The first and third elements of *Howey* are satisfied because the Golden Unicorn
17 investment seeks an investment of money and, in exchange, offers the expectation of
18 profits derived from a venture to separate and process gold and silver from an
19 abandoned stockpile. According to the terms of the offer, this work will be done by or
20 at the direction of Wilson and not by the investors. The investment is being offered to
21 the same group who invested in the Yuma Project, which consists of unsophisticated
22 investors with no mining or mineral expertise, as well as new investors in the general
23 public. Any expectation of profits from the Golden Unicorn offering necessarily
24 includes the expectation that the profits will be derived from the efforts of others. *See*,
25 *e.g.*, Exhibit 6 to Miller Decl. (“**no** buyer participation or involvement is required.”
26 (emphasis in original))

27 The second element, the common enterprise element, is satisfied by showing
28 either horizontal commonality (a pooling of investor funds and interests) or vertical

1 commonality (the fortunes of the investor are linked with those of the promoter). *SEC*
2 *v. R.G. Reynolds Enter., Inc.*, 952 F.2d 1125, 1130 (9th Cir. 1991). Here, there is
3 horizontal commonality and likely also vertical commonality.

4 Horizontal commonality exists where “[t]he participants pool their assets; they
5 give up any claim to profits or losses attributable to their particular investments in
6 return for a pro rata share of the profits of the enterprise; and they make their
7 collective fortunes dependent on the success of a single common enterprise.”
8 *Reynolds Enter., Inc.*, 952 F.2d at 1130. The structure of the Golden Unicorn offering
9 would provide investors with an interest in a common venture to process fungible
10 rocks and, therefore, does not allow investors to maintain claims to profits or losses
11 attributable to their particular investments. There is horizontal commonality here
12 because the investors’ funds would be pooled into the milling venture and they would
13 profit or lose together in proportion to the size of their investment. In addition,
14 Wilson’s promise of a 6% referral fee to existing investors for inducing others to
15 invest is an independent basis to establish horizontal commonality. *Chen*, 2016 WL
16 7469683, at *5 (citing *SEC v. SG Ltd.*, 265 F.3d 42, 51 (1st Cir. 2001) (“[R]eferral
17 fees paid to existing participants for inducing others to patronize the business is an
18 alternative basis for finding horizontal commonality.”)).

19 Vertical commonality also likely exists because investors’ returns are linked to
20 Wilson’s fortunes. *Chen*, 2016 WL 7469683, at *4 (“Vertical commonality may be
21 established by showing that the fortunes of the investors are linked with those of the
22 promoters.”). Wilson promoted the Golden Unicorn as a means to “payout [sic]
23 everyone involved in the AZ venture;” namely he intends to use profits from the
24 venture to pay himself in addition to amounts he owes to prior investors in the “AZ
25 venture.” Exhibit 3 to Miller Decl. at 2. This claim links the fortunes of the Golden
26 Unicorn venture to those of Wilson. Moreover, although his compensation is not
27 specified in the promotion materials, Wilson, as he did previously, likely intends to
28 retain at least some of the profit for personal use. Thus, while it is not necessary to

1 establish vertical commonality, the SEC expects discovery to reveal that the fortunes
2 of the investors are linked with Wilson’s income in addition to his ability to repay
3 debts.

4 Because the Golden Unicorn investments meet the definition of an investment
5 contract under *Howey*, the investments are securities and Wilson has clearly violated
6 the Securities Injunction, a specific and definite order of this Court.

7 Finally, Wilson will not be able to demonstrate an inability to comply with the
8 Securities Injunction here because that provision prohibited conduct that could easily
9 be avoided. Wilson can present no credible argument that he was unable to refrain
10 from offering the Golden Unicorn investment. *See In re Marc Rich & Co.*, 736 F2d
11 864, 866 (2d Cir. 1984) (“[T]he burden of proving plainly and unmistakably that
12 compliance is impossible rests with the contemnor.” (emphasis added, internal quotes
13 omitted)).

14 Accordingly, the SEC has met its burden to establish that Wilson is in
15 contempt of the Securities Injunction.

16 **B. Wilson Should be Held in Contempt for Failure to Comply with the**
17 **Disgorgement Order.**

18 Wilson should also be held in contempt of the Disgorgement Order because he
19 has made no payments towards the Final Judgment and cannot demonstrate an
20 inability to comply.

21 **1. Prima Facie Case of Failure to Comply**

22 There can be no doubt that the Court’s Final Judgment was a valid order;
23 Wilson, as a party to this action, had knowledge of that order. *See* Exhibit 1 to
24 Roessner Decl. (November 25, 2019 Demand letter); *see also* Exhibit A to Page Decl.
25 at pp. 27-29. The Final Judgment required Wilson to pay the disgorgement amount
26 within 180 days of the entry of that order and Wilson has not made any payment of
27 the amount owed. Doc. # 51 at Section V; *see also* Roessner Decl. at ¶ 3.
28

1 Accordingly, the SEC has established a *prima facie* case that Wilson has failed to
2 comply with the Disgorgement Order.

3 **2. Wilson is able to comply with the Disgorgement Order.**

4 Once the SEC establishes Wilson's non-compliance with the Court's
5 disgorgement order, the burden then shifts to Wilson to provide evidence of his
6 inability to comply with the Court's order. *SEC v. Bilzerian*, 112 F. Supp. 2d 12, 16
7 (D.D.C. 2000). To meet his burden, Wilson must explain "categorically and in detail"
8 why he is unable to make any payments. *Id.* Even if Wilson was not able to pay the
9 Final Judgment in full, he must show that he paid as much as he could, and that he
10 made "in good faith all reasonable efforts to comply" with his payment obligations.
11 *Musella*, 818 F. Supp. at 602; *Bilzerian*, 112 F. Supp. 2d at 17.

12 In the context of disgorgement orders, "a securities violator may not avoid his
13 responsibility to turn over his ill-gotten gains by claiming that he is no longer in
14 possession of the funds due to subsequent unsuccessful investments or other types of
15 discretionary spending." *SEC v. AMX, Int'l, Inc.*, 872 F. Supp. 1541, 1544 (N.D. Tex.
16 1994) (citation omitted). Nor may a defendant justify the nonpayment of
17 disgorgement and prejudgment interest with the argument that to do so would
18 diminish his income or standard of living. *Id.* (citing *SEC v. Musella*, 818 F. Supp.
19 600, 602 (S.D.N.Y. 1993)). "Further, an inability to pay the full disgorgement amount
20 at one time does not absolve a defendant from responsibility to pay some portion of
21 the sum or payments over time." *Id.* In short, to the extent that an inability to pay is
22 self-induced, that inability to comply is not a defense to contempt. *SEC v. Showalter*,
23 227 F. Supp. 2d 110, 120 (D.D.C. 2002) (citing *United States v. Lay*, 779 F.2d 319,
24 320 (6th Cir. 1985) and *Bilzerian*, 112 F. Supp. 2d at 17)). The burden shifts back to
25 the SEC only upon a sufficient showing by Wilson that he is not able to comply with
26 the judgment. *Showalter*, 227 F. Supp. 2d at 120

27 Wilson can comply with the Court's Disgorgement Order, but instead he burns
28 funds at an exorbitant rate and ignores the disgorgement ordered by the Court. At a

1 minimum, he has spent over \$450,000 in 2019 as reflected in the summary of his
2 Bank of America account statements. Exhibit 2 to Roessner Decl. He also has never
3 accounted for the \$800,000 of investor funds he misappropriated to himself. It
4 appears that with just a slight reduction in his monthly expenditures, Wilson could
5 easily have made payments towards satisfying the Court's disgorgement order, but he
6 has simply chosen to not do so.

7 **II. WILSON'S CONTEMPT WARRANTS SANCTIONS.**

8 Courts have wide discretion in fashioning remedies for civil contempt. *See In*
9 *re Dickinson*, 763 F. 2d 84, 87 (2d Cir. 1985). "Sanctions in civil contempt are
10 permitted for two purposes: (1) to coerce defendant into compliance with the court's
11 order; and (2) to compensate the complainant for losses sustained as a result of the
12 contumacious behavior." *Productive Marketing, Inc.*, 136 F. Supp. 2d at 1112 (C.D.
13 Ca. 2001). Civil contempt sanctions, or those penalties designed to compel future
14 compliance with a court order, are considered to be coercive and avoidable through
15 obedience and thus may be imposed in an ordinary civil proceeding upon notice and
16 an opportunity to be heard. *International Union, UMWA v. Bagwell*, 512 U.S. 821,
17 826 (1994). Courts may also enter broad compensatory awards for all contempt
18 through civil proceedings. *Productive Marketing*, 136 F. Supp. 2d at 1112. Pursuant
19 to their general equity powers, courts may order ancillary relief to effectuate the
20 purposes of the federal securities laws and to ensure that wrongdoers do not profit
21 from their unlawful conduct. *See, e.g., SEC v. Cavanagh*, 155 F.3d 129, 136-37 (2nd
22 Cir. 1996); *SEC v. Wencke*, 622 F.2d 1363, 1369 (9th Cir. 1980).

23 Once contempt has been established, a district court has "broad discretion to
24 fashion an appropriate coercive remedy ... based on the nature of the harm and the
25 probable effect of alternative sanctions." *EEOC v. Local 28*, 247 F.3d 333, 336 (2d
26 Cir. 2001); *see also SEC v. Allen*, Case No. 3:11-cv-882-O, 2014 WL 99974, at *3
27 (N.D. Tex. Jan 10, 2014) (holding the defendant in contempt and ordering him to pay
28

1 \$500,000 to the clerk of the court within 30 days); *SEC v. Connectajet.com, Inc.*,
2 2015 WL 6437697 (N.D. Tex. Oct. 16, 2015) (holding the defendant in contempt and
3 ordering him to pay \$100,000 and not less than \$5,000 each month.). Such remedial
4 sanctions may include any type of coercive order that is designed to produce
5 compliance with the Court’s equitable orders. *See United States v. United Mine*
6 *Workers*, 330 U.S. 258, 304 (1947).

7 With respect to Wilson’s violation of the Securities Injection, a recent district
8 court case illustrates the type of available sanctions. Like Wilson here, the defendants
9 in *Meta 1 Coin* blatantly violated an injunction that barred the offer of securities.
10 2020 WL 1931852, at *1 (“The Court also barred the Meta 1 Defendants from
11 ‘directly or indirectly (through an entity they control or otherwise) participating in the
12 issuance, purchase, offer, or sale of any securities provided.’”). After a hearing held
13 by videoconference, *id.* at *1 n.1, the court considered fines to induce compliance
14 but, for a number of reasons including the fact that the defendants “show[ed] no signs
15 of ceasing their activities,” the court issued bench warrants for the defendants’ arrest
16 and ordered the defendants incarcerated until they purged their contempt. *Id.* at *5-6.

17 With respect to Wilson’s violation of the Disgorgement Order, district courts in
18 recent SEC enforcement actions have imposed incarceration to compel defendants to
19 comply with orders to pay disgorgement and/or surrender funds. *See, e.g., SEC v.*
20 *Solow*, 682 F. Supp. 2d 1312, 1334 (S.D. Fl. 2010) (where defendant refused to pay
21 disgorgement and prejudgment interest, district court ordered “that Mr. Solow shall
22 surrender to the custody of the U.S. Marshall’s Office”); *SEC v. Durante*, Case No.
23 01-cv-9056-DAB-AJP, 2013 WL 6800226 (S.D.N.Y. Dec. 19, 2013) (“Because
24 Durante has failed to comply, despite being given every opportunity to do so, he
25 should be ordered incarcerated until he makes meaningful payments towards the
26 disgorgement amount and provides a current and accurate accounting of his income
27 and assets.”); *SEC v. Kapur*, 2015 WL 4040558 (S.D.N.Y. July 1, 2015) (finding
28

1 Kapur had not proven his inability to comply, the court found him in contempt and
2 ordered him incarcerated until he purged the contempt).

3 The Court should therefore impose the necessary remedial sanctions to coerce
4 Wilson's compliance with the Court's Securities Injunction and Disgorgement Order.
5 Wilson's violation of the Securities Injunction and Disgorgement Order undermines
6 the Court's authority, continues to harm investors, and threatens the deterrent effect
7 of federal securities laws. Wilson seems to have lost sight of the fact that the Court's
8 Final Judgment requiring disgorgement is not to be "treated as a contribution to one's
9 favorite charity that one makes if and when one feels able to do so." *Musella*, 818 F.
10 Supp. at 612

11 In light of Wilson's willful contempt, the SEC requests that this Court:

- 12 1. Order Wilson to submit any memorandum in opposition within 30 days
13 of service of the order
- 14 2. Set a show cause hearing on a date at least 60 days from the date of the
15 order so that Wilson has an opportunity to show cause why he should not
16 be held in civil contempt and to address appropriate sanctions for
17 contempt, including but not limited to disgorgement of all funds
18 obtained in violation of the Securities Injunction;
- 19 3. To understand the full scope of Wilson's offer of securities and his
20 ability to disgorge any amounts ordered to be disgorged, order Wilson to
21 file, within 14 days of service of the order, a sworn accounting of:
 - 22 a. Each account, including safe deposit boxes, with any bank,
23 financial institution or brokerage firm, maintained in the names of
24 Robert Wilson or any entity he controls, or the names of any
25 subsidiary, affiliate, or agent, in which they have direct or indirect
26 control or beneficial interest, and the current value and makeup of
27 that account;
 - 28 b. All investments, securities, funds, real estate, and other assets held

1 in the names of Robert Wilson or any entity that he controls, or in
2 the names of any subsidiary, affiliate, or agent or under their direct
3 or indirect control, stating a description, a value, and location of
4 such assets; and

5 c. Every transaction in which the ownership, direction, or control of
6 any funds or other assets of any kind of have been transferred,
7 directly or indirectly, to or from Robert Wilson or any entity he
8 controls since April 25, 2019;

9 4. Order that the parties may engage in expedited discovery under Rules
10 30, 33, 34, 36, and 45 into Wilson's offer and sale of investments since
11 the date of the Final Judgment and his ability to pay amounts owed
12 under the Disgorgement Order;

13 5. Order other relief the Court deems appropriate.

14 **CONCLUSION**

15 For the reasons above, the SEC requests that the Court grant the SEC's Motion,
16 hold Wilson in civil contempt for violation of the Securities Injunction and the
17 Disgorgement Order, and order the relief requested above.

18
19 Dated: May 26, 2020

20 Respectfully submitted,

21 /s/ Terry R. Miller

22 Terry R. Miller
23 Michael J. Roessner
24 United States Securities and Exchange
25 Commission
26
27
28

**PROOF OF SERVICE VIA ELECTRONIC POSTING PURSUANT TO
SOUTHERN DISTRICT OF CALIFORNIA LR 5.4**

I, the undersigned, say:

I am a citizen of the United States. I am over the age of 18 and not a party to the within action. My business address is 1961 Stout Street, Suite 1700, Denver, CO 80294

On May 26, 2020, I caused to be served the following document:

**PLAINTIFF SECURITIES AND EXCHANGE COMMISSION’S
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS
MOTION FOR AN ORDER TO SHOW CAUSE WHY DEFENDANT
ROBERT WILSON SHOULD NOT BE HELD IN CIVIL CONTEMPT**

by posting the document to the ECF Website of the United States District Court for the Southern District of California, for receipt electronically by the parties as listed on the Court’s ECF Service List. The document was also served by mail and email on Defendants by the following:

THOMAS LAW GROUP P.C.
PAUL W. THOMAS, SBN 137840
2943 Jefferson Street
Carlsbad, CA 92008
Tel: (760) 720-9600
Fax: (760) 720-9690
Email: pwt@paulthomaslaw.com

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct

Executed on May 26, 2020, at Denver, Colorado

/s/ Terry R. Miller
Terry R. Miller
United States Securities and Exchange
Commission