

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

v.

CMKM DIAMONDS, INC.; URBAN
CASAVANT; JOHN EDWARDS; GINGER
GUTIERREZ; JAMES KINNEY; ANTHONY
TOMASSO; KATHLEEN TOMASSO; 1ST
GLOBAL STOCK TRANSFER, LLC;
HELEN BAGLEY; NEVWEST SECURITIES
CORPORATION; DARYL ANDERSON;
SERGEY RUMYANTSEV; ANTHONY
SANTOS; and BRIAN DVORAK,

Defendants.

2:08-CV-00437-LRH-RJJ

ORDER

Before the court is Defendant Security and Exchange Commission’s (“Commission”) Application for Entry of Default Judgment Against Defendants Ginger Gutierrez and James Kinney (#132¹). Defendants have not responded to this suit in any manner.

I. Facts and Procedural History²

This case arises out of the fraudulent sale of unregistered stock of CMKM Diamonds. Inc.

¹ Refers to the court’s docket entry number.

²The court accepts the following facts, taken from the complaint, as true.

25
26

1 (“CMKM”), a diamond and gold mining company. In November of 2002, five private Canadian
2 companies owned by Defendant Urban Casavant entered into a reverse merger with CMKM, a
3 corporation owned by Defendant John Edwards. As a result of the merger, in exchange for
4 \$2,000,000 and 2.8 billion shares of common stock, CMKM acquired mineral claims in Canada
5 from the Canadian companies. Casavant became the sole director, as well as the president and
6 CEO, of CMKM.

7 From January of 2003, through May of 2005, CMKM issued hundreds of billions of shares
8 of unrestricted stock to Edwards and Casavant and their nominees. However, this stock was
9 unregistered. Further, CMKM had no legitimate operations, and its only activities were illegally
10 issuing and falsely promoting its own stock.

11 As a result of various promotional activities, approximately 40,000 people purchased
12 CMKM stock. While CMKM’s stock price varied between \$0.0001 and \$0.001, CMKM sold
13 billions of shares into the public markets, and the 40,000 investors lost approximately \$64.2
14 million.

15 Throughout the course of the scheme, Gutierrez acted as Casavant’s secretary and personal
16 assistant. In particular, Gutierrez contributed to the fraud in the following ways: (1) in 2003, by
17 acting as CMKM’s investor relations contact; (2) by regularly delivering documents including
18 stock certificates, opinion letters, and shareholder lists to and from Defendant Helen Bagley; (3) by
19 delivering documents to Edwards; (4) by drafting CMKM’s press releases for Casavant’s review;
20 (5) by maintaining the limited records CMKM kept; (6) by compiling the list of shareholders to
21 receive additional shares of unrestricted stock as “dividends” in September of 2004; (7) by having
22 signatory authority on many of Casavant’s and CMKM’s bank accounts, writing checks, and wiring
23 money on Casavant’s behalf; and (8) by overseeing some of CMKM’s promotional activities.

24 From 2003 through 2005, Gutierrez sold approximately 18 billion shares of unrestricted
25 CMKM stock in her own name, generating approximately \$3.1 million. Of that amount, Gutierrez
26

1 gave approximately \$1.1 million to Casavant.

2 Kinney acted as Casavant's intermediary, running errands and arranging promotional
3 opportunities. In 2003, along with Gutierrez, Kinney also served as CMKM's investor relations
4 contact. From 2003 through 2005, Kinney sold approximately 61.4 billion shares of purportedly
5 unrestricted CMKM stock. Kinney made more than \$6.7 million from the sale of these shares and
6 transferred approximately \$3.4 million of those funds to Casavant.

7 Gutierrez and Kinney also sold CMKM stock through a private corporate shell, Part-Time
8 Management, Inc. In 2004, Part-Time Management sold approximately 9 billion shares of
9 unrestricted stock for more than \$1.9 million. Of that amount, Gutierrez and Kinney returned
10 approximately \$1.2 million to Casavant.

11 The Commission initiated this action on April 7, 2008. The same day, the court issued
12 summonses against all fourteen defendants, including Gutierrez and Kinney. The Commission then
13 made numerous unsuccessful attempts to personally serve Gutierrez and Kinney.

14 On July 10, 2008, the Commission filed a motion seeking authorization to serve Gutierrez
15 and Kinney by publication (#62). On August 14, 2008, the court granted the motion (#86).
16 Pursuant to the court's order, beginning on August 22, 2008, the Commission published notice in
17 five editions of the Las Vegas Sun and the Las Vegas Review Journal. The Commission was also
18 eventually able to effectuate personal service on both Defendants.

19 On November 6, 2008, in light of their failure to respond to the Complaint, the Clerk of the
20 Court entered default against Gutierrez and Kinney (#98). The Commission now seeks the
21 following relief: (1) a permanent injunction preventing Gutierrez and Kinney from future violations
22 of the registration provision of the federal securities laws; (2) disgorgement by Gutierrez
23 individually in the amount of \$2,000,000 and payment of prejudgment interest and a third tier civil
24 penalty; (3) disgorgement by Kinney individually in the amount of \$3,300,000 and payment of
25 prejudgment interest and a third tier civil penalty; (4) disgorgement by Gutierrez and Kinney jointly
26

1 and severally in the amount of \$700,000 and payment of prejudgment interest; and (5) “permanent
2 penny stock bars against Gutierrez and Kinney.” (Def.’s Mot. Default (#132) at 1.)

3 **II. Discussion**

4 Obtaining a default judgment is a two-step process governed by Federal Rule of Civil
5 Procedure 55. *Eitel v. McCool*, 782 F.2d 1470, 1471 (9th Cir. 1986). First, Rule 55(a) provides,
6 “When a party against whom a judgment for affirmative relief is sought has failed to plead or
7 otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the
8 party’s default.” Second, after the clerk enters default, a party must seek entry of default judgment
9 under Rule 55(b).

10 Upon entry of default, the court takes the factual allegations in the non-defaulting party’s
11 complaint as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987)
12 (citation omitted). Nonetheless, while entry of default by the clerk is a prerequisite to an entry of
13 default judgment, “a plaintiff who obtains an entry of default is not entitled to default judgment as a
14 matter of right.” *Warner Bros. Entm’t Inc. v. Caridi*, 346 F. Supp. 2d 1068, 1071 (C.D. Cal. 2004)
15 (citation omitted). Instead, whether a court will grant a default judgment is in the court’s
16 discretion. *Id.* (citations omitted).

17 The Ninth Circuit has identified the following factors as relevant to the exercise of the
18 court’s discretion in determining whether to grant default judgment: (1) the possibility of prejudice
19 to the plaintiff; (2) the merits of the plaintiff’s substantive claims; (3) the sufficiency of the
20 complaint; (4) the sum of money at stake in the action; (5) the possibility of a dispute concerning
21 material facts; (6) whether the default was due to the excusable neglect; and (7) the strong policy
22 underlying the Federal Rules of Civil Procedure favoring decisions on the merits. *Eitel*, 782 F.2d at
23 1471-72. The court will consider these factors below.

24 ///

25 ///

26

1 **A. Merits of the Commission’s Substantive Claims**

2 The Commission alleges Gutierrez and Kinney engaged in the unregistered offer and sale of
3 securities in violation of Sections 5(a) and (c) of the Securities Act of 1933, 15 U.S.C. §§ 77e(a)
4 and 77e(c). “Section 12(1) of the Securities Act of 1933 imposes liability on any person who
5 ‘offers or sells a security’ in violation of Section 5 of the 1933 Act.” *Anderson v. Autotek*, 774 F.2d
6 927, 929 (9th Cir. 1985) (*citing* 15 U.S.C. § 77e). Sections 5(a) and 5(c) prohibit the offer and sale
7 of securities through the mail or interstate commerce unless a registration statement has been filed
8 and is in effect. *Id.* (*citing SEC v. Murphy*, 626 F.2d 633, 640 (9th Cir. 1980)). To state a prima
9 facie case for a violation of Section 5, the Commission must demonstrate the following: (1) the
10 defendants, directly or indirectly, sold or offered to sell securities; (2) the offer or sale was made
11 through the mail or interstate commerce; and (3) for those securities, no registration statement was
12 in effect or had been filed with the Commission. Once the Commission establishes a prima facie
13 violation, the burden shifts to the defendants to prove that one of the Act’s exceptions to liability
14 applies. *See SEC v. Ralston Purina Co.*, 346 U.S. 119, 126 (1953); 15 U.S.C. § 77d.

15 Here, the complaint alleges (1) no registration statement was in effect for the CMKM
16 securities and (2) Gutierrez and Kinney, personally and through a shell corporation, sold
17 approximately 88 billion shares of unregistered CMKM stock through means of interstate
18 commerce. On its face, the complaint states a claim for a Section 5 violation. As a result, taking
19 the allegations in the complaint as true, the court finds that the Commission has demonstrated that
20 the merits of its substantive claim support awarding default judgment.

21 **B. Remaining Default Judgment Factors**

22 The remaining default judgment factors also favor the entry of default judgment. Given
23 Defendants’ failure to appear in this action and the likelihood that Defendants will continue to
24 withhold the amounts the Commission seeks, the possibility of prejudice in the absence of a default
25 judgment is great. Likewise, Defendants’ failure to respond indicates their default was not due to
26

1 excusable neglect, and, based on the information before the court, the likelihood of a dispute
2 concerning material facts appears limited. Thus, despite the strong policy underlying the Federal
3 Rules of Civil Procedure favoring decisions on the merits, the court finds that an entry of default
4 judgment is appropriate.

5 **C. Defendants' Liability**

6 Having concluded that default judgment is warranted, the court must now consider the
7 extent of Defendants' liability. As noted, the Commission seeks a permanent injunction,
8 disgorgement and prejudgment interest, third tier civil penalties, and a penny stock offerings bar.
9 The court will address each form of relief below.

10 **1. Permanent Injunction**

11 To obtain a permanent injunction, the Commission must show that there is a reasonable
12 likelihood of future violations of the securities laws. *Murphy*, 626 F.2d at 655 (citations omitted).
13 In considering the likelihood of future violations, the court evaluates the totality of the
14 circumstances. *Id.* (citations omitted). The Ninth Circuit has identified the following factors as
15 helpful in the court's analysis: (1) the degree of scienter involved; (2) the isolated or recurrent
16 nature of the infraction; (3) the defendant's recognition of the wrongful nature of his conduct; (4)
17 the likelihood that future violations might occur; and (5) the sincerity of the defendant's assurances
18 against future violations. *Id.*

19 These factors support an injunction here. Gutierrez and Kinney sold billions of shares of
20 unrestricted stock in violation of the securities laws. They engaged in these fraudulent sales for
21 more than two years and received millions of dollars in gains as a result. Further, neither Gutierrez
22 nor Kinney have acknowledged their wrongdoing. Although it is not clear whether Defendants
23 continue to operate in positions providing opportunities for additional misconduct, this factor alone
24 is not sufficient to tip the balance of factors against an injunction. Accordingly, the court will enter
25 an injunction prohibiting Defendants from engaging in future violations of the registration
26

1 provisions.

2 **2. Disgorgement and Prejudgment Interest**

3 The court's authority to order disgorgement of ill-gotten gains and prejudgment interest is
4 well-established. *See SEC v. First Pac. Bancorp*, 142 F.3d 1186, 1191 (9th Cir. 1998). The
5 purpose of disgorgement is to deprive wrongdoers of unjust enrichment while deterring future
6 violations of the securities laws. *Id.* To determine the appropriate disgorgement amount, the SEC
7 need only show "a reasonable approximation of profits causally connected to the violation." *Id.* at
8 1192 n.6 (citation omitted). If this approximation appears unreasonable, defendants bear the
9 burden of proving a more reasonable figure. *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1232
10 (D.C. Cir. 1989).

11 Disgorgement orders include all gains flowing from the illegal activity and include
12 prejudgment interest. *SEC v. Cross Fin. Servs., Inc.*, 908 F. Supp. 718, 734 (C.D. Cal. 1995)
13 (*citing SEC v. Lund*, 570 F. Supp. 1397, 1404 (C.D. Cal. 1983)). The purpose of ordering payment
14 of prejudgment interest is to deny defendants any possible profit resulting from illegal activity. *Id.*
15 (*citing Lund*, 570 F. Supp. at 1404). Generally, prejudgment interest is calculated at the post-
16 judgment rate specified in 28 U.S.C. § 1961. *W. Pac. Fisheries, Inc. v. S.S. President Grant*, 730
17 F.2d 1280, 1289 (9th Cir. 1984). This removes any economic incentive to delay and ensures that
18 "judicially-awarded interest rates are not less than the contemporary cost of money." *Id.*

19 The Commission asks the court to order the following: (1) Gutierrez individually to
20 disgorge \$2 million, representing \$3.1 million in sales proceeds minus \$1.1 million given to
21 Casavant; (2) Kinney individually to disgorge \$3.3 million, representing \$6.7 million in sales
22 proceeds minus \$3.4 million given to Casavant; and (3) Gutierrez and Kinney jointly and severally
23 to disgorge \$700,000, representing \$1.9 million in Part-Time Management's sales proceeds minus
24 \$1.2 million given to Casavant. The court finds that these are reasonable approximations of
25 Gutierrez's and Kinney's profits from their violations.

1 The court will also order Gutierrez and Kinney to pay prejudgment interest as follows: (1)
2 Gutierrez shall pay \$176,312.35; (2) Kinney shall pay \$290,915.38; and (3) Gutierrez and Kinney
3 shall pay \$61,709.32 individually and severally. Because these figures only represents interest
4 accrued from March of 2003, through November, 13, 2003, the court will order that (1) Gutierrez
5 pay an additional \$525.44 per week from November 14, 2009, until the date of this order; (2)
6 Kinney pay an additional \$866.98 per week from November 14, 2009, until the date of this order;
7 and (3) Gutierrez and Kinney, jointly and severally, pay an additional \$183.90 per week from
8 November 14, 2009, until the date of this order. Therefore, Gutierrez shall pay an additional
9 \$1,576.32 in prejudgment interest, for a total of \$2,177,888.67, Kinney shall pay an additional
10 \$2,600.94 in prejudgment interest, for a total of \$3,593,516.32, and Gutierrez and Kinney, jointly
11 and severally, shall pay an additional \$551.70 in prejudgment interest, for a total of \$762,261.02.

12 3. Civil Penalties

13 Under the Securities Act, civil penalties are “determined by the court in light of the facts
14 and circumstances.” 15 U.S.C. § 77t(d)(2)(A). Unlike disgorgement, civil penalties are not only
15 designed to deter future violations of securities laws but are imposed to punish the individual
16 violator. *SEC v. Moran*, 944 F. Supp. 286, 296 (S.D.N.Y. 1996) (quoting H.R.Rep. No. 101-616,
17 101st Cong., at 1384-1386 (1990)).

18 The Securities Act assesses civil penalties according to a three-tier system.
19 15 U.S.C. § 77t(d). First-tier penalties are imposed for any violation of the Securities Act.
20 15 U.S.C. § 77t(d)(2)(A). Second-tier penalties are imposed for violations involving “fraud, deceit,
21 manipulation or deliberate or reckless disregard of a regulatory requirement.”
22 15 U.S.C. § 77t(d)(2)(B). Third-tier penalties are imposed for violations that (1) involve “fraud,
23 deceit, manipulation, or reckless disregard for a regulatory requirement” and (2) “directly or
24 indirectly resulted in substantial losses or created a significant risk of substantial losses to other
25 persons.” 15 U.S.C. § 77t(d)(2)(C).

1 Here, the Commission seeks third-tier civil penalties. As discussed above, Gutierrez and
2 Kinney appear to have sold the shares of CMKM stock knowing that the CMKM stock was
3 unregistered and knowing that CMKM had no legitimate operations. In doing so, they defrauded
4 40,000 investors out of over \$11 million. Because Gutierrez and Kinney engaged in fraudulent
5 conduct resulting in substantial losses, the court finds that third-tier civil penalties are warranted.

6 Courts have calculated third-tier penalties in two ways. First, a court may multiply a
7 defendant's violations by a dollar amount. *See SEC v. Coates*, 137 F. Supp. 2d 413, 430 (S.D.N.Y.
8 2001); *see also* 15 U.S.C. § 77t(d)(2). Second, a court may impose a flat penalty equal to a
9 defendant's gross pecuniary gain. *See SEC v. Solow*, 554 F. Supp. 2d 1356, 1368 (S.D. Fla. 2008);
10 *SEC v. Haligiannis*, 470 F. Supp. 2d 373, 386 (S.D.N.Y. 2007). Courts routinely consider five
11 factors, established in *SEC v. Murphy*, 626 F.2d 633 (9th Cir. 1980), when calculating civil
12 penalties: (1) the degree of scienter involved; (2) the isolated or recurrent nature of the infraction;
13 (3) the defendant's recognition of the wrongful nature of his conduct; (4) the likelihood, because of
14 the defendant's professional occupation, that future violations might occur; and (5) the sincerity of
15 the defendant's assurances against future violations. *See, e.g., SEC v. Alpha Telecom, Inc.*, 187 F.
16 Supp. 2d 1250, 1263 (D. Or. 2002) (applying the factors to assess a civil penalty).

17 The court will employ the second method for calculating third-tier civil penalties and
18 impose a single fine on each defendant. When faced with a similar array of violations, courts often
19 order penalties based on a defendant's gross pecuniary gain. *See Haligiannis*, 470 F. Supp. 2d at
20 386 (ordering a \$15,000,000 penalty equal to the disgorgement amount "due to difficulty
21 calculating total number of violations"); *SEC v. Interlink Data Network, Inc., et. al.*, No. 93-3073
22 R, 1993 WL 603274, *13 (C.D. Cal. Nov. 15, 1993) (ordering a \$12,285,035 penalty equal to the
23 disgorgement amount for 565, 439, and 527 violations because "there are many ways to compute
24 the amount of a civil penalty under the federal securities law"); *SEC v. Invest Better 2001*, No.
25 11427, 2005 WL 2385452, *5 (S.D.N.Y. May 4, 2005) (ordering civil penalty equal to
26

1 disgorgement amount because “the exact number of violations . . . is impossible to determine”);
2 *SEC v. Yuen*, 272 Fed. App’x 615, 618 (9th Cir. 2008) (affirming a district court’s penalty equal to
3 the disgorgement amount as “well within [the district court’s] discretion”).

4 Given the gravity of their actions, the extent of their fraud, and the magnitude of their unjust
5 enrichment, penalties equal to each defendant’s gross pecuniary gain are warranted. The *Murphy*
6 factors confirm the propriety of this calculation. As noted repeatedly, Gutierrez and Kinney
7 knowingly defrauded approximately 40,000 investors out of over \$11 million. Although it is not
8 clear whether Defendants are likely to engage in future violations in the future, by failing to appear
9 in this dispute, they have refused to acknowledge their wrongdoing. As a result, in addition to
10 ordering disgorgement of ill-gotten gains and prejudgment interest, the court will impose third-tier
11 penalties equal to Defendants’ respective disgorgement amounts.

12 **4. Penny Stock Bar**

13 Finally, the Commission asks the court to permanently bar Gutierrez and Kinney from
14 offering penny stocks. In relevant part, 15 U.S.C. § 77t(g) provides, “In any proceeding [brought
15 pursuant to the Securities Act] against any person participating in . . . an offering of penny stock,
16 the court may prohibit that person from participating in an offering of penny stock, conditionally or
17 unconditionally, and permanently or for such period of time as the court shall determine.” 15
18 U.S.C. § 77t(g)(1)).

19 In deciding whether a penny stock bar is appropriate, courts have looked to the standard
20 used for determining whether an individual may be prohibited from acting as an officer or director
21 of a public company. See *SEC v. Indigenous Global Dev. Corp.*, No. 06-5600, 2008 U.S. Dist.
22 LEXIS 50434, *54-55 (N.D. Cal. June 30, 2008) (citing *SEC v. Wolfson*, No. 02-1086, 2006 U.S.
23 Dist. LEXIS 29543, *29 (D. Utah May 4, 2006)). The Ninth Circuit has identified the following
24 factors as helpful to the court’s analysis: (1) the egregiousness of the underlying securities
25 violation; (2) the defendant’s repeat offender status; (3) the defendant’s role or position when he
26

1 engaged in the fraud; (4) the defendant's degree of scienter; (5) the defendant's economic stake in
2 the violation; and (6) the likelihood that misconduct will recur. *SEC v. First Pac. Bancorp*, 142
3 F.3d 1186, 1193 (9th Cir. 1998).

4 The court has considered these factors and finds that a penny stock offering bar is
5 appropriate. Gutierrez and Kinney sold billions of shares of CMKM penny stock knowing that
6 CMKM did not have any legitimate operations. As a result of their fraud, they earned millions of
7 dollars in profit. As such, the court will order Gutierrez and Kinney be permanently barred from
8 participating in penny stock offerings.

9 IT IS THEREFORE ORDERED that the Commission's Application for Entry of Default
10 Judgment (#132) is GRANTED.

11 I.

12 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Gutierrez, Kinney, and
13 their agents, servants, employees, attorneys, and all persons in active concert or participation with
14 them who receive actual notice of this Final Judgment by personal service or otherwise are
15 permanently restrained and enjoined from violating Section 5 of the Securities Act, 15 U.S.C. §
16 77e, by, directly or indirectly, in the absence of any applicable exemption:

17 (a) Unless a registration statement is in effect as to a security, making use of any means or
18 instruments of transportation or communication in interstate commerce or of the mails to
19 sell such security, through the use or medium of any prospectus or otherwise;

20 (b) Unless a registration statement is in effect as to a security, carrying or causing to be
21 carried through the mails or in interstate commerce, by any means or instruments of
22 transportation, any such security for the purpose of sale or for delivery after sale; or

23 (c) Making use of any means or instruments of transportation or communication in
24 interstate commerce or of the mails to offer to sell or offer to buy through the use or
25 medium of any prospectus or otherwise any security, unless a registration statement has
26

1 Investment System (“CRIS”) or any other type of interest bearing account that is utilized by the
2 Court. These funds, together with any interest and income earned thereon (collectively, the
3 “Fund”), shall be held in the interest bearing account until further order of the Court. In accordance
4 with 28 U.S.C. § 1914 and the guidelines set by the Director of the Administrative Office of the
5 United States Courts, the Clerk is directed, without further order of this Court, to deduct from the
6 income earned on the money in the Fund a fee equal to ten percent of the income earned on the
7 Fund. Such fee shall not exceed that authorized by the Judicial Conference of the United States.

8 The Commission may by motion propose a plan to distribute the Fund subject to the Court’s
9 approval. Such a plan may provide that the Fund shall be distributed pursuant to the Fair Fund
10 provisions of Section 308(a) of the Sarbanes-Oxley Act of 2002. Regardless of whether any such
11 Fair Fund distribution is made, amounts ordered to be paid as civil penalties pursuant to this
12 Judgment shall be treated as penalties paid to the government for all purposes, including all tax
13 purposes. To preserve the deterrent effect of the civil penalty, Gutierrez shall not, after offset or
14 reduction of any award of compensatory damages in any Related Investor Action based on
15 Gutierrez’s payment of disgorgement in this action, argue that he is entitled to, nor shall he further
16 benefit by, offset or reduction of such compensatory damages award by the amount of any part of
17 Gutierrez’s payment of a civil penalty in this action (“Penalty Offset”). If the court in any Related
18 Investor Action grants such a Penalty Offset, Gutierrez shall, within 30 days after entry of a final
19 order granting the Penalty Offset, notify the Commission’s counsel in this action and pay the
20 amount of the Penalty Offset to the United States Treasury or to a Fair Fund, as the Commission
21 directs. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to
22 change the amount of the civil penalty imposed in this Judgment. For purposes of this paragraph, a
23 “Related Investor Action” means a private damages action brought against Gutierrez by or on
24 behalf of one or more investors based on substantially the same facts as alleged in the Complaint in
25 this action.

IV.

1
2 IT IS FURTHER ORDERED that Defendant Kinney is individually liable for disgorgement
3 of \$3,300,000, representing profits gained as a result of the conduct alleged in the Complaint,
4 together with prejudgment interest thereon in the amount of \$293,516.32, and a civil penalty in the
5 amount of \$3,300,000 pursuant to Section 20(d) of the Securities Act of 1933, 15 U.S.C. § 77t(d).
6 Kinney shall satisfy this obligation by paying \$6,893,516.32 within ten business days to the Clerk
7 of this Court, together with a cover letter identifying Kinney as a defendant in this action; setting
8 forth the title and civil action number of this action and the name of this Court; and specifying that
9 payment is made pursuant to this Final Judgment. Kinney shall simultaneously transmit
10 photocopies of such payment and letter to the Commission's counsel in this action. By making this
11 payment, Kinney relinquishes all legal and equitable right, title, and interest in such funds, and no
12 part of the funds shall be returned to Kinney. Kinney shall pay post-judgment interest on any
13 delinquent amounts pursuant to 28 U.S.C. § 1961.

14 The Clerk shall deposit the funds into an interest bearing account with the Court Registry
15 Investment System ("CRIS") or any other type of interest bearing account that is utilized by the
16 Court. These funds, together with any interest and income earned thereon (collectively, the
17 "Fund"), shall be held in the interest bearing account until further order of the Court. In accordance
18 with 28 U.S.C. § 1914 and the guidelines set by the Director of the Administrative Office of the
19 United States Courts, the Clerk is directed, without further order of this Court, to deduct from the
20 income earned on the money in the Fund a fee equal to ten percent of the income earned on the
21 Fund. Such fee shall not exceed that authorized by the Judicial Conference of the United States.

22 The Commission may by motion propose a plan to distribute the Fund subject to the Court's
23 approval. Such a plan may provide that the Fund shall be distributed pursuant to the Fair Fund
24 provisions of Section 308(a) of the Sarbanes-Oxley Act of 2002. Regardless of whether any such
25 Fair Fund distribution is made, amounts ordered to be paid as civil penalties pursuant to this
26

1 Judgment shall be treated as penalties paid to the government for all purposes, including all tax
2 purposes. To preserve the deterrent effect of the civil penalty, Kinney shall not, after offset or
3 reduction of any award of compensatory damages in any Related Investor Action based on
4 Kinney's payment of disgorgement in this action, argue that he is entitled to, nor shall he further
5 benefit by, offset or reduction of such compensatory damages award by the amount of any part of
6 Kinney's payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related
7 Investor Action grants such a Penalty Offset, Kinney shall, within 30 days after entry of a final
8 order granting the Penalty Offset, notify the Commission's counsel in this action and pay the
9 amount of the Penalty Offset to the United States Treasury or to a Fair Fund, as the Commission
10 directs. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to
11 change the amount of the civil penalty imposed in this Judgment. For purposes of this paragraph, a
12 "Related Investor Action" means a private damages action brought against Kinney by or on behalf
13 of one or more investors based on substantially the same facts as alleged in the Complaint in this
14 action.

15 V.

16 IT IS FURTHER ORDERED that Defendants Gutierrez and Kinney are jointly and
17 severally liable for disgorgement of \$700,000, representing profits gained as a result of the conduct
18 alleged in the Complaint, together with prejudgment interest thereon in the amount of \$62,261.02.
19 Gutierrez and Kinney shall satisfy this obligation by paying \$762,261.02 within ten business days
20 to the Clerk of this Court, together with a cover letter identifying themselves as defendants in this
21 action; setting forth the title and civil action number of this action and the name of this Court; and
22 specifying that payment is made pursuant to this Final Judgment. Gutierrez and Kinney shall
23 simultaneously transmit photocopies of such payment and letter to the Commission's counsel in
24 this action. By making this payment, Gutierrez and Kinney relinquish all legal and equitable right,
25 title, and interest in such funds, and no part of the funds shall be returned to Gutierrez or Kinney.

1 Gutierrez and Kinney shall pay post-judgment interest on any delinquent amounts pursuant to 28
2 U.S.C. § 1961.

3 The Clerk shall deposit the funds into an interest bearing account with the Court Registry
4 Investment System (“CRIS”) or any other type of interest bearing account that is utilized by the
5 Court. These funds, together with any interest and income earned thereon (collectively, the
6 “Fund”), shall be held in the interest bearing account until further order of the Court. In accordance
7 with 28 U.S.C. § 1914 and the guidelines set by the Director of the Administrative Office of the
8 United States Courts, the Clerk is directed, without further order of this Court, to deduct from the
9 income earned on the money in the Fund a fee equal to ten percent of the income earned on the
10 Fund. Such fee shall not exceed that authorized by the Judicial Conference of the United States.

11 The Commission may by motion propose a plan to distribute the Fund subject to the Court’s
12 approval. Such a plan may provide that the Fund shall be distributed pursuant to the Fair Fund
13 provisions of Section 308(a) of the Sarbanes-Oxley Act of 2002. Regardless of whether any such
14 Fair Fund distribution is made, amounts ordered to be paid as civil penalties pursuant to this
15 Judgment shall be treated as penalties paid to the government for all purposes, including all tax
16 purposes. To preserve the deterrent effect of the civil penalty, Gutierrez and Kinney shall not, after
17 offset or reduction of any award of compensatory damages in any Related Investor Action based on
18 Gutierrez and Kinney’s payment of disgorgement in this action, argue that they are entitled to, nor
19 shall they further benefit by, offset or reduction of such compensatory damages award by the
20 amount of any part of Gutierrez and Kinney’s payment of a civil penalty in this action (“Penalty
21 Offset”). If the court in any Related Investor Action grants such a Penalty Offset, Gutierrez and
22 Kinney shall, within 30 days after entry of a final order granting the Penalty Offset, notify the
23 Commission’s counsel in this action and pay the amount of the Penalty Offset to the United States
24 Treasury or to a Fair Fund, as the Commission directs. Such a payment shall not be deemed an
25 additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed
26

1 in this Judgment. For purposes of this paragraph, a “Related Investor Action” means a private
2 damages action brought against Gutierrez and Kinney by or on behalf of one or more investors
3 based on substantially the same facts as alleged in the Complaint in this action.

4 VI.

5 IT IS FURTHER ORDERED that this Court shall retain jurisdiction of this matter for the
6 purposes of enforcing the terms of this Final Judgment.

7 VII.

8 There being no just reason for delay, pursuant to Rule 54(b) of the Federal Rules of Civil
9 Procedure, the Clerk is ordered to enter this Final Judgment forthwith and without further notice.

10 IT IS SO ORDERED.

11 DATED this 4th day of December, 2009.



12
13
14

LARRY R. HICKS
UNITED STATES DISTRICT JUDGE
15
16
17
18
19
20
21
22
23
24
25
26