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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

v.

MARCUS A. LUNA; NATHAN
MONTGOMERY; ADAM DASKIVICH;
DAVID MURTHA; ST. PAUL VENTURE
FUND, LLC; MINNESOTA VENTURE
CAPITAL, INC.; REAL ESTATE OF
MINNESOTA, INC.; and MATRIX
VENTURE CAPITAL, INC.,

Defendants.

2:10-CV-2166-PMP-CWH

ORDER AND
PERMANENT INJUNCTION

Presently before the Court is the Opening Brief in Support of Plaintiff Securities and Exchange Commission's Request for Remedies (Doc. #109), filed on March 14, 2014. Defendants Nathan Montgomery and Minnesota Venture Capital, Inc. filed an Opposition Brief (Doc. #112) on April 17, 2014. Defendants Marcus Luna and St. Paul Venture Fund filed an Opposition Brief (Doc. #113) on April 17, 2014. Defendants Adam Daskivich; Real Estate of Minnesota, Inc.; David Murtha; and Matrix Venture Capital, Inc. filed an Opposition Brief (Doc. #114) on April 18, 2014. Plaintiff Securities and Exchange Commission filed a Reply Brief (Doc. #115) on May 2, 2014.

1 **I. BACKGROUND**

2 This is a civil enforcement action brought by the Securities and Exchange
3 Commission (“SEC”) against four individuals, Defendants Marcus Luna (“Luna”), Nathan
4 Montgomery (“Montgomery”), Adam Daskivich (“Daskivich”), and David Murtha
5 (“Murtha”), and their respective entities, Defendants St. Paul Venture Fund, LLC;
6 Minnesota Venture Capital, Inc.; Real Estate Minnesota, Inc.; and Matrix Venture Capital,
7 Inc. The Court set out the factual background of this case in a prior Order, and the Court
8 will not repeat the facts here except where necessary. (Order (Doc. #108).) The Court
9 previously granted the SEC’s Motion for Summary Judgment, finding no genuine issues of
10 material fact remained that Defendants each violated Section 5 of the Securities Act, and
11 that Defendant Luna violated Sections 17(a)(1), (2), and (3) of the Securities Act, Section
12 10(b) of the Exchange Act, and Rule 10b-5. The Court then ordered the parties to further
13 brief the issue of what remedies were appropriate given Defendants’ violations. (Id.)

14 SEC now seeks as remedies a permanent injunction enjoining Defendants from
15 violating the federal securities laws, disgorgement of Defendants’ profits plus prejudgment
16 interest, civil penalties, a bar on Defendants participating in an offering of penny stocks in
17 the future, and a bar on Luna providing professional legal services in connection with an
18 offer or sale of securities purportedly exempt from the registration requirements.

19 Defendants oppose the requested remedies.

20 **II. DISCUSSION**

21 **A. Permanent Injunction**

22 SEC contends a permanent injunction enjoining Defendants from violating
23 Sections 5(a) and (c) of the Securities Act, and enjoining Defendant Luna from violating
24 Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, and Rule 10b-5 is
25 appropriate. SEC asserts an injunction is appropriate because Defendants are likely to
26 engage in future violations of the securities laws. SEC contends Defendants acted at least

1 recklessly, their conduct was not isolated, Defendants have not recognized the wrongful
2 nature of their conduct, Defendants' occupations suggest they will remain involved in the
3 securities markets, and Defendants have not offered assurances they will not engage in
4 future violations.

5 To obtain a permanent injunction, the SEC bears the burden of showing there is
6 "a reasonable likelihood of future violations of the securities laws." S.E.C. v. M & A West,
7 Inc., 538 F.3d 1043, 1055 (9th Cir. 2008) (quoting S.E.C. v. Murphy, 626 F.2d 633, 655
8 (9th Cir. 1980)). The Court evaluates the likelihood of future violations based on (1) past
9 violations, (2) the degree of scienter involved, (3) whether the present violation was isolated
10 or recurrent, (4) whether the defendant recognizes the wrongful nature of his conduct, (5)
11 "the likelihood, because of defendant's professional occupation, that future violations might
12 occur," and (6) "the sincerity of his assurances against future violations." Murphy, 626
13 F.2d at 655. The inquiry is based on "the totality of the circumstances surrounding the
14 defendant and his violations." Id.

15 1. The Luna Defendants

16 Defendants Luna and St. Paul Venture Fund LLC (the "Luna Defendants") do not
17 oppose a permanent injunction from future securities law violations. (Defendants' Marcus
18 Luna & St. Paul Venture Fund Opp'n to Pl.'s Request for Remedies (Doc. #113) ["Luna
19 Opp'n"] at 8.) The likelihood that Luna will commit future violations supports the
20 imposition of a permanent injunction. Luna acted with a high degree of scienter, as set
21 forth in the Court's prior Order (Doc. #108). Luna does not recognize the wrongful nature
22 of his conduct, as demonstrated by his Opposition Brief which continues to assert that Luna
23 properly opined on the nature of the transactions at issue in this case. (Luna Opp'n at 2-4.)
24 Due to Luna's occupation as an attorney, and his argument that a legal services bar is
25 inappropriate because it will negatively impact his ability to earn a livelihood, future
26 violations are likely to occur. (Id. at 8-9.) Finally, Luna offers no assurances against future

1 violations.

2 Nevertheless, the Court concludes the more targeted injunctions discussed below
3 barring the Luna Defendants from participating in future penny-stock offerings and barring
4 Luna from certain legal work are more appropriate than the general injunction against any
5 Section 5, Section 17, Section 10, or Rule 10b-5 violation that the SEC requests. To the
6 extent Luna violates these provisions unrelated to the penny-stock and legal services bars,
7 he may face prosecution or enforcement actions for any future violations regardless of
8 whether the Court imposes a permanent injunction barring him from further securities law
9 violations. The Court therefore will decline to impose a permanent injunction from future
10 Section 5, Section 17, Section 10, or Rule 10b-5 violations as to the Luna Defendants.

11 2. The Montgomery Defendants¹

12 Defendants Montgomery and Minnesota Venture Capital, Inc. (the “Montgomery
13 Defendants”) respond that a permanent injunction is inappropriate as to them because there
14 was no finding at summary judgment that Montgomery acted with scienter, and he did not
15 act with scienter because he relied on Luna’s advice. The Montgomery Defendants further
16 argue the violation was isolated because there is no evidence Montgomery previously acted
17 as a statutory underwriter in a public offering, and there is no basis to conclude he will do
18 so in the future. The Montgomery Defendants assert Montgomery no longer works in the
19 securities field, has no desire to again risk criminal and civil proceedings, and Montgomery
20 has provided a certification attesting that he will not violate the securities laws again.

21 The violation at issue in this case is not isolated as to Montgomery. He has been
22 convicted of one count of conspiracy to commit securities fraud and wire fraud in a separate
23 criminal proceeding. (Defs. Nathan Montgomery & Minnesota Venture Capital, Inc.’s Br.

24
25 ¹ The Montgomery Defendants request the Court stay ruling on this matter until the appeal in
26 Montgomery’s related conviction is resolved. The Court declines to indefinitely delay resolution of
this case.

1 in Opp'n (Doc. #112) ["Montgomery Opp'n"], Certification of Nathan Montgomery
2 ("Montgomery Certification") at 3); see also United States v. Curshen, No. 1:11-CR-20131-
3 RWG, S.D. Fla., Jury Verdict (Doc. #262). This factor weighs in favor of granting a
4 permanent injunction.

5 As to the degree of scienter, a Section 5 violation does not require any scienter.
6 S.E.C. v. CMKM Diamonds, Inc., 729 F.3d 1248, 1256 (9th Cir. 2013). Because the SEC
7 brought only a Section 5 claim against the Montgomery Defendants, the SEC did not
8 request, and the Court did not rule as a matter of law at summary judgment, that the
9 Montgomery Defendants acted with scienter. The evidence presented at the summary
10 judgment stage would support a finding that Montgomery acted at least recklessly. As
11 detailed in the Court's prior Order, the Montgomery Defendants engaged in lockstep
12 coordinated activity in multiple steps within a short time frame with the other Defendants to
13 distribute their unregistered Axis Technologies Group, Inc. stock to the uninformed public.
14 (Order (Doc. #108) at 2-9, 18-22.) Additionally, the Court concluded the SEC was entitled
15 to an adverse inference against the Montgomery Defendants regarding whether they
16 acquired the Axis Technologies Group, Inc. shares with a view to distribute those shares.
17 (Id. at 18-20.)

18 Montgomery states in his Certification that he did not understand he was acting
19 as a statutory underwriter in relation to the Axis Technologies Group, Inc. stock, that he
20 trusted Luna's opinion on the matter, and that he "did not intend to violate the law."
21 (Montgomery Certification at 2.) Montgomery's Certification comes after Montgomery
22 declined on Fifth Amendment grounds to answer questions at his deposition regarding
23 whether he relied on Luna's advice. (See, e.g., Pl.'s Mot. Summ. J., Ex. 9 at 162.)
24 Nevertheless, the SEC did not seek summary judgment on the issue of scienter as to these
25 Defendants, and these Defendants now have presented contrary evidence under oath on the
26 issue. The Court therefore will deem this factor as neutral or weighing slightly against a

1 permanent injunction.

2 Whether the Montgomery Defendants recognize the wrongful nature of their
3 conduct is ambiguous. Although Montgomery states in his Certification that he understands
4 the Court's finding that he violated the law, he does not accept responsibility for his
5 participation, instead blaming Luna. (Id.) Elsewhere in their Opposition Brief, the
6 Montgomery Defendants suggest they caused no harm to the investing public.
7 (Montgomery Opp'n at 10.) This factor is neutral or weighs slightly in favor of granting a
8 permanent injunction.

9 Montgomery no longer works in the securities field, and now works for an
10 architectural and interior design company. (Montgomery Certification at 2-3.)
11 Montgomery also assures the Court he has matured and learned from his past mistakes.
12 (Id.) Montgomery expresses a desire to not be involved in the securities arena in the future,
13 and assures the Court that he does not want to risk his future with his wife. (Id. at 3-4.)
14 These factors weigh against imposing a permanent injunction.

15 Viewing the totality of the circumstances, the Court concludes the likelihood of
16 future violations, while not unsubstantial, is not sufficient to support the broad permanent
17 injunction that the SEC seeks against any future violations of Section 5 of the Securities
18 Act. Montgomery has suffered considerable ramifications, both civilly and criminally, for
19 his prior securities-related activities. Montgomery no longer will be working in the
20 securities arena, and assures the Court he has learned his lesson from the mistakes he made
21 as a young man. To the extent Montgomery's assurances are insincere, he may face
22 prosecution or enforcement actions for any future violations regardless of whether the Court
23 imposes a permanent injunction barring him from further securities law violations under
24 Section 5. As discussed below, the Court concludes a more targeted injunction barring the
25 Montgomery Defendants from future penny-stock offerings is more appropriate than the
26 general injunction against any Section 5 violation that the SEC requests. The Court

1 therefore will decline to impose a permanent injunction from future Section 5 violations as
2 to the Montgomery Defendants.

3 3. The Daskivich and Murtha Defendants

4 Defendants Daskivich; Real Estate of Minnesota, Inc.; Murtha; and Matrix
5 Venture Capital (the “Daskivich and Murtha Defendants”) respond that a permanent
6 injunction is inappropriate as to them because they did not act with scienter, rather they
7 relied on Luna’s advice. The Daskivich and Murtha Defendants further argue there is no
8 evidence of past violations as to them, and there is no basis to conclude these Defendants
9 would be statutory underwriters in the future. The Daskivich and Murtha Defendants also
10 argue the likelihood of future violations is low because Daskivich no longer works in the
11 securities field, and both Defendants have submitted certifications to the Court assuring
12 they will not violate the securities laws in the future.

13 The SEC has not presented admissible evidence establishing the Daskivich and
14 Murtha Defendants engaged in a separate violation beyond the one alleged in this case, the
15 SEC has presented evidence the Daskivich and Murtha Defendants have associated with
16 other individuals who have engaged in separate penny-stock schemes, including
17 Montgomery who was convicted for participating in a pump and dump scheme with these
18 same individuals. See S.E.C. v. Curshen, 888 F. Supp. 2d 1299, 1301-08 (S.D. Fla. 2012);
19 see also United States v. Curshen, No. 1:11-CR-20131-RWG, S.D. Fla., Plea Agreement for
20 Robert Weidenbaum (Doc. #184), Plea Agreement for Ryan Reynolds (Doc. #219), Plea
21 Agreement for Timothy Barham (Doc. #220), Factual Proffer (Doc. #222), Factual Proffer
22 (Doc. #223). When asked about their association with these individuals, Defendants
23 Daskivich and Murtha invoked their Fifth Amendment rights. (Pl.’s Mot. Summ. J., Ex. 6
24 at 71-72, 76-77; Ex. 10 at 58-59.) While not conclusive evidence of a prior violation,
25 Defendants’ association with others engaged in penny-stock pump and dump schemes
26 weighs in favor of imposing a permanent injunction.

1 For the same reasons as discussed above with respect to the Montgomery
2 Defendants, the question of the degree of scienter is neutral or weighs slightly against
3 granting a permanent injunction. The evidence at summary judgment could support a
4 finding of recklessness. However, Murtha and Daskivich state in their Certifications that
5 they did not understand they were acting as statutory underwriters in relation to the Axis
6 Technologies Group, Inc. stock, and that they trusted Luna's opinion on the matter. (Defs.
7 Adam Daskivich, Real Estate Minnesota, Inc., David Murtha & Matrix Venture Capital,
8 Inc.'s Opp'n to Pl.'s Request for Remedies (Doc. #114) ["Daskivich & Murtha Opp'n"],
9 Certification of David Murtha ("Murtha Certification") at 2, Certification of Adam
10 Daskivich ("Daskivich Certification") at 2.) Defendants declined to answer questions on
11 these topics at their depositions, invoking their Fifth Amendment rights. (See, e.g., Pl.'s
12 Mot. Summ. J., Exs. 6, 10.) Nevertheless, the SEC did not seek summary judgment on the
13 issue of scienter as to these Defendants, and these Defendants now have presented contrary
14 evidence under oath on the issue. The Court therefore will deem this factor as neutral or
15 weighing slightly against a permanent injunction.

16 Whether the Daskivich and Murtha Defendants recognize the wrongful nature of
17 their conduct is ambiguous. Although these Defendants state in their Certifications that
18 they understand the Court found they violated the law, they do not accept responsibility for
19 their participation, instead blaming Luna. (Murtha Decl. at 2, Daskivich Decl. at 2.)
20 Elsewhere in their Opposition Brief, the Daskivich and Murtha Defendants suggest they
21 caused no harm to the investing public. (Daskivich & Murtha Opp'n at 5.) This factor is
22 neutral or weighs slightly in favor of granting a permanent injunction.

23 Daskivich no longer works in the securities field, and now works in a custom
24 tailoring business making men's clothing. (Daskivich Certification at 2.) Daskivich also
25 assures the Court he has matured and is interested in pursuing his career outside the
26 securities markets. (Id.) Daskivich states he will not engage in any future questionable or

1 illegal conduct in relation to the securities markets. (Id. at 2-3.)

2 Murtha, on the other hand, does not attest that he has a career separate from the
3 securities arena. However, he asserts he has matured, and he assures the Court he will not
4 engage in any questionable or illegal conduct. (Murtha Certification at 2.) These factors
5 weigh against granting a permanent injunction.

6 Viewing the totality of the circumstances, the Court concludes the likelihood of
7 future violations, though not unsubstantial, is not sufficient to support the broad permanent
8 injunction that the SEC seeks against any future violations of Section 5 of the Securities
9 Act. Daskivich no longer will be working in the securities arena, and Daskivich and
10 Murtha assure the Court they have learned from the mistakes they made as young men. As
11 with Montgomery, to the extent these assurances are insincere, they may face prosecution or
12 enforcement actions for any future violations regardless of whether the Court imposes a
13 permanent injunction barring them from further securities law violations under Section 5.
14 As discussed below, the Court concludes a more targeted injunction barring the Daskivich
15 and Murtha Defendants from future penny-stock offerings is more appropriate than the
16 general injunction against any Section 5 violation that the SEC requests. The Court
17 therefore will decline to impose a permanent injunction from future Section 5 violations as
18 to the Daskivich and Murtha Defendants.

19 **B. Disgorgement**

20 SEC requests each Defendant disgorge ill-gotten gains from their violations,
21 which SEC calculates as the amount of profits from each Defendant's stock sales. SEC
22 contends the individual Defendants should be jointly and severally liable for the profits
23 from his respective company. SEC also contends Luna should be jointly and severally
24 liable on the amounts that Real Estate Minnesota, Inc. and Matrix Venture Capital, Inc.
25 diverted to Luna. Finally, SEC seeks prejudgment interest at the rate provided in 26 U.S.C.
26 § 6621 for tax underpayments from the date of Defendants' last trade of Axis Technologies

1 Group, Inc. stock through March 14, 2014, the date the SEC filed its Opening Brief.

2 The Court has “broad equity powers to order the disgorgement of ill-gotten gains
3 obtained through the violation of the securities laws.” S.E.C. v. First Pac. Bancorp, 142
4 F.3d 1186, 1191 (9th Cir. 1998) (quotation omitted). “Disgorgement is designed to deprive
5 a wrongdoer of unjust enrichment, and to deter others from violating securities laws by
6 making violations unprofitable.” Id. Where “individuals or entities collaborate or have a
7 close relationship in engaging in the violations of the securities laws,” the Court may hold
8 them jointly and severally liable for the disgorgement of illegally obtained proceeds. Id.
9 For example, an individual who played the principal role in the fraudulent activities, and
10 who was the chairman of the board, chief executive officer, and majority shareholder of a
11 corporation, enjoyed a close relationship with his corporate co-defendant sufficient to
12 support joint and several liability. Id. at 1192.

13 The Court has broad discretion in determining the disgorgement amount. S.E.C.
14 v. JT Wallenbrock & Assocs., 440 F.3d 1109, 1113 (9th Cir. 2006). The disgorgement
15 amount need reflect only a “reasonable approximation of profits causally connected to the
16 violation,” and “should include all gains flowing from the illegal activities.” Id. at 1113-14
17 (quotations omitted). “The SEC bears the ultimate burden of persuasion that its
18 disgorgement figure reasonably approximates the amount of unjust enrichment.” S.E.C. v.
19 Platforms Wireless Int’l Corp., 617 F.3d 1072, 1096 (9th Cir. 2010) (quotation omitted).
20 The SEC may meet this burden by establishing the total proceeds from the violations to
21 establish a reasonable approximation of the ill-gotten gains. Id. at 1096-97.

22 If the SEC establishes a reasonable approximation of actual profits, “the burden
23 shifts to the defendants to demonstrate that the disgorgement figure was not a reasonable
24 approximation.” Id. at 1096 (quotation omitted). The defendants bear this burden because
25 they are “more likely than the SEC to have access to evidence establishing what they paid
26 for the securities, if anything, to whom the proceeds from the sales were distributed, and for

1 what purposes the proceeds were used.” Id. (stating “the risk of uncertainty should fall on
2 the wrongdoer whose illegal conduct created that uncertainty” (quotation omitted)).

3 Further, a “person who controls the distribution of illegally obtained funds is liable for the
4 funds he or she dissipated as well as the funds he or she retained.” Id. at 1098.

5 Finally, the Court has discretion to order prejudgment interest on the
6 disgorgement amount. Id. at 1099. The Court may set the rate pursuant to the rate provided
7 in 26 U.S.C. § 6621 for tax underpayments. Id. Additionally, the Court has discretion to
8 calculate prejudgment interest from the date of the sales of the securities. Id. at 1099-1100.

9 1. The Luna Defendants

10 The Luna Defendants argue the SEC’s disgorgement request is excessive because
11 it does not offset legitimate business expenses Defendants incurred. The Luna Defendants
12 also contend any prejudgment interest award must be recalculated based on any reduction in
13 the disgorgement amount.

14 The Luna Defendants do not dispute that disgorgement is a proper remedy in this
15 case, and the Court concludes disgorgement is appropriate as to the Luna Defendants. In
16 the Court’s prior Order (Doc. #108), the Court found no genuine issue of fact remained that
17 Luna acted at least recklessly. Ordering the Luna Defendants to disgorge their ill-gotten
18 gains is warranted both to deprive the Luna Defendants of unjust enrichment, and to deter
19 others from violating securities laws. Additionally, it is appropriate to hold Luna jointly
20 and severally liable with his wholly owned company through which he engaged in the
21 illegal activity. Moreover, the Court, in its discretion, finds that Luna also should be jointly
22 and severally liable for the disgorgement of amounts transferred to him by Defendants Real
23 Estate Minnesota, Inc. and Matrix Venture Capital, Inc. As discussed in more detail in the
24 Court’s prior Order (Doc. #108), Luna collaborated with the other Defendants and Luna
25 benefitted from the transfer of funds from fellow participants in the scheme. Failing to
26 award disgorgement of these amounts would unjustly enrich Luna and would not fully

1 account for all gains flowing to Luna from his illegal activities.

2 As to the amount of disgorgement, the SEC has met its burden of establishing a
3 reasonable approximation of profits by presenting evidence of Defendants' total proceeds.
4 (Pl.'s Opening Br., Ex. 1.) The burden thus shifts to the Luna Defendants to establish the
5 SEC's disgorgement calculation is not a reasonable approximation of the Luna Defendants'
6 profits. Although the Luna Defendants contend the disgorgement amount should be offset
7 by reasonable business expenses, the Luna Defendants present no evidence of any such
8 expenses. The Luna Defendants therefore have not met their burden of establishing the
9 SEC's calculation is not a reasonable approximation of their ill-gotten gains. The Luna
10 Defendants also have not disputed the SEC's calculation of prejudgment interest, and the
11 Court finds that amount reasonable.

12 The Court therefore will order the Luna Defendants to disgorge \$3,904,089,
13 reflecting proceeds from Defendant St. Paul Venture Fund's sales in the amount of
14 \$2,030,540, plus \$1,750,728 and \$122,821 transferred to Luna from Defendants Real Estate
15 Minnesota, Inc. and Matrix Venture Capital, Inc. The Court also will award prejudgment
16 interest in the amount of \$1,076,717.91, for a total disgorgement award of \$4,980,806.91,
17 for which Defendant Luna and Defendant St. Paul Venture Fund are jointly and severally
18 liable. Additionally, Defendant Luna is jointly and severally liable with the Daskivich
19 Defendants for \$2,233,565.38 of the total disgorgement amount, reflecting the payments
20 these Defendants made to Defendant Luna plus prejudgment interest. Defendant Luna also
21 is jointly and severally liable with the Murtha Defendants for \$156,694.12 of the total
22 disgorgement amount, reflecting the payments these Defendants made to Defendant Luna
23 plus prejudgment interest.

24 2. The Montgomery Defendants

25 The Montgomery Defendants respond that the Court should exercise discretion
26 and not order disgorgement because the Montgomery Defendants violated a strict liability

1 provision of the securities laws, the Montgomery Defendants acted on Luna's advice, and
2 the Montgomery Defendants' conduct did "not caus[e] any harm to the investing public."
3 (Montgomery Opp'n at 13.) The Montgomery Defendants also argue that due to
4 Montgomery's criminal conviction, Montgomery already owes over \$8 million to the
5 United States and he will be financially unable to satisfy further judgments. The
6 Montgomery Defendants also contend Montgomery paid \$300,000 to acquire the Axis
7 Technologies Group, Inc. shares and paid taxes on the sales, and these amounts should be
8 deducted from the requested disgorgement amount.

9 Ordering the Montgomery Defendants to disgorge their ill-gotten gains is
10 warranted both to deprive the Montgomery Defendants of unjust enrichment, and to deter
11 others from violating securities laws. Additionally, it is appropriate to hold Montgomery
12 jointly and severally liable with his wholly owned company through which he engaged in
13 the illegal activity. The fact that the Montgomery Defendants were found to have violated a
14 strict liability provision of the securities laws, as opposed to a provision that requires
15 scienter, does not negate the propriety of disgorgement as a remedy. The Montgomery
16 Defendants' purported reliance on Luna's advice also does not persuade the Court that
17 disgorgement is inappropriate. Even accepting Montgomery's statement in his Certification
18 as true despite Montgomery's assertion of his Fifth Amendment rights in response to SEC
19 questioning on this topic during discovery, the fact remains Montgomery received ill-gotten
20 gains through a violation of the securities laws. Allowing him to retain those proceeds
21 would not foster the goals of preventing unjust enrichment and deterring similar violations
22 by others.

23 The Montgomery Defendants' position that they did not cause any harm to the
24 investing public is unpersuasive. The registration provisions are designed to protect the
25 public, and Defendants evaded those protections to sell thousands of shares of an
26 unregistered security to the investing public during a period in which the Axis Technologies

1 Group, Inc. stock price rose dramatically, resulting in nearly \$2 million in proceeds for the
2 Montgomery Defendants. The suggestion that the Montgomery Defendants' violation of
3 the registration provisions was merely technical with no real world consequences is
4 unconvincing.

5 As to Montgomery's financial status, Montgomery already owes over \$8 million
6 to the United States, and thus may lack means to satisfy further judgments. However, the
7 Montgomery Defendants present no evidence of their financial condition. In any event, the
8 fact that a defendant has dissipated the ill-gotten gains should not relieve him of a
9 disgorgement order, particularly because Montgomery is only thirty-three years old and he
10 may become able to satisfy a judgment in the future.

11 Finally, the Court will not deduct \$300,000 for the funds used to acquire the Axis
12 Technologies Group, Inc. shares or any amount for taxes paid on the sales. As discussed
13 above, the SEC has met its initial burden of establishing a reasonable approximation of
14 profits, and the burden shifted to Defendants to show that amount was unreasonable. The
15 Montgomery Defendants present no evidence that they were the source of the \$300,000.
16 The Montgomery Defendants also present no evidence of taxes paid.

17 The Court therefore will order the Montgomery Defendants to disgorge
18 \$1,970,956 in proceeds from Defendant Minnesota Venture Capital, Inc.'s sales. The
19 Montgomery Defendants have not disputed the SEC's calculation of prejudgment interest,
20 and the Court finds that amount reasonable. The Court therefore will award prejudgment
21 interest in the amount of \$543,574.58, for a total disgorgement award of \$2,514,530.58, for
22 which Defendant Montgomery and Defendant Minnesota Venture Capital, Inc. are jointly
23 and severally liable.

24 3. The Daskivich and Murtha Defendants

25 The Daskivich and Murtha Defendants argue disgorgement is an inappropriate
26 remedy because they violated a strict liability provision, and thus disgorgement would not

1 serve a deterrent purpose. These Defendants also argue the evidence shows Luna received
2 the actual benefit of most of the funds the SEC attributes to Daskivich and Murtha, and thus
3 they should not be ordered to disgorge the amounts transferred to Luna. Additionally,
4 Murtha contends he did not receive the benefit of \$1,019,000 which was paid to an investor
5 relation firm. The Daskivich and Murtha Defendants assert they do not have the financial
6 ability to pay the requested amounts. Finally, they contend the SEC has failed to establish
7 the Daskivich and Murtha Defendants victimized anyone.

8 As with the Montgomery Defendants, ordering the Daskivich and Murtha
9 Defendants to disgorge their ill-gotten gains is warranted both to deprive the Daskivich and
10 Murtha Defendants of unjust enrichment, and to deter others from violating securities laws.
11 Although these Defendants contend disgorgement offers no deterrence for violating a strict
12 liability statute, ordering disgorgement in this case will encourage individuals to be more
13 careful in complying with the registration requirements. Additionally, it is appropriate to
14 hold Daskivich and Murtha jointly and severally liable with their wholly owned companies
15 through which they engaged in the illegal activity.

16 Similarly, these Defendants' purported reliance on Luna's advice does not
17 persuade the Court that disgorgement is inappropriate. Even accepting Daskivich and
18 Murtha's statements in their Certifications as true despite their assertion of their Fifth
19 Amendment rights in response to SEC questioning on this topic during discovery, the fact
20 remains Daskivich and Murtha received ill-gotten gains through a violation of the securities
21 laws. Allowing them to retain those proceeds would not foster the goals of preventing
22 unjust enrichment and deterring similar violations by others. Additionally, the Court will
23 not exclude the amounts these Defendants transferred to Luna. The Daskivich and Murtha
24 Defendants exercised control over the dissipation of the funds, and there is no evidence that
25 they were required to transfer those funds to Luna.

26 ///

1 Defendants' position that the SEC did not prove they caused harm to any
2 particular investor is unpersuasive. The registration provisions are designed to protect the
3 public, and Defendants evaded those protections to sell thousands of shares of an
4 unregistered security to the investing public during a period in which the Axis Technologies
5 Group, Inc. stock price rose dramatically, resulting in over \$4 million in proceeds for these
6 Defendants. The suggestion that Defendants' violations of the registration provisions were
7 merely technical with no real world consequences is unconvincing.

8 The Daskivich and Murtha Defendants present no evidence of their financial
9 condition. In any event, the mere fact that a defendant has dissipated the ill-gotten gains
10 should not relieve him of a disgorgement order, particularly because these Defendants are in
11 their thirties and they may become able to satisfy a judgment in the future.

12 Finally, the Court will not deduct \$1,019,000 which Murtha contends was paid to
13 an investor relation firm. As discussed above, the SEC has met its initial burden of
14 establishing a reasonable approximation of profits, and the burden shifted to Defendants to
15 show that amount was unreasonable. Murtha presents no evidence showing the funds were
16 expended for a legitimate business purpose.

17 The Court therefore will order Defendants Daskivich and Real Estate of
18 Minnesota, Inc. to disgorge \$2,735,924 in proceeds from Defendant Real Estate of
19 Minnesota, Inc.'s sales. The Daskivich Defendants have not disputed the SEC's calculation
20 of prejudgment interest, and the Court finds that amount reasonable. The Court therefore
21 will award prejudgment interest in the amount of \$754,546.93, for a total disgorgement
22 award of \$3,490,470.93, for which Defendant Daskivich and Defendant Real Estate of
23 Minnesota, Inc. are jointly and severally liable.

24 The Court also will order Defendants Murtha and Matrix Venture Capital, Inc. to
25 disgorge \$1,378,785 in proceeds from Defendant Matrix Venture Capital, Inc.'s sales. The
26 Murtha Defendants have not disputed the SEC's calculation of prejudgment interest, and

1 the Court finds that amount reasonable. The Court therefore will award prejudgment
2 interest in the amount of \$350,167.03, for a total disgorgement award of \$1,728,952.03, for
3 which Defendant Murtha and Defendant Matrix Venture Capital, Inc. are jointly and
4 severally liable.

5 **C. Civil Penalties**

6 The SEC requests the Court impose third tier civil penalties on all Defendants.
7 The SEC contends Defendants engaged in a carefully planned scheme to reap substantial
8 profits at the expense of the uninformed public. The SEC also contends that because
9 Defendants failed to produce evidence of their financial conditions during discovery,
10 Defendants have not provided the Court with a basis to reduce the penalties.

11 Under the Securities Act or the Exchange Act, the Court may impose civil
12 penalties upon a proper showing by the SEC. 15 U.S.C. §§ 77t(d)(1), §78u(d)(3)(A). The
13 statutes provide tiered options for determining the appropriate penalty. See id. at
14 §§ 77t(d)(2); 78u(d)(3). First tier penalties are imposed for any violation of the securities
15 laws. Id. at §§ 77t(d)(2)(A); 78u(d)(3)(B)(i). Second tier penalties are imposed for
16 statutory violations which involve “fraud, deceit, manipulation, or deliberate or reckless
17 disregard of a regulatory requirement.” Id. at §§ 77t(d)(2)(B), 78u(d)(3)(B)(ii). Third tier
18 violations are imposed for second tier violations which also “directly or indirectly resulted
19 in substantial losses or created a significant risk of substantial losses to other persons.” Id.
20 at §§ 77t(d)(2)(C), 78u(d)(3)(B)(iii). At each tier level, the penalty imposed shall not be
21 greater than a specified amount for each tier, or the gross amount of pecuniary gain the
22 defendant obtained a result of the violation. Id. §§ 77t(d)(2), 78u(d)(3). The Court
23 determines the penalty amount “in light of the facts and circumstances.” Id. at
24 §§ 77t(d)(2)(A), 78u(d)(3)(B)(I).

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1 1. The Luna Defendants

2 The Luna Defendants argue a civil penalty is not mandatory, and given the other
3 remedies the SEC requests, a civil penalty would be excessive. The Luna Defendants
4 contend that having published judgments against them, combined with any bar orders the
5 Court enters, are sufficient measures to punish the Luna Defendants and deter others. The
6 Luna Defendants also argue imposing a penalty is excessive because Luna previously has
7 not had any misconduct in his twenty-year career as an attorney.

8 In light of the facts and circumstances of this case, the Court concludes second
9 tier penalties are appropriate for the Luna Defendants. The Court previously determined no
10 genuine issue of material fact remains that the Luna Defendants violated Section 5 of the
11 Securities Act, as well as Section 17(a)(1), (2), and (3) of the Securities Act, Section 10(b)
12 of the Exchange Act, and Rule 10b-5. In the Court's prior Order, the Court found no
13 genuine issue of material fact remains that Luna "knew or recklessly disregarded that the
14 entire process constituted an unregistered public offering not entitled to an exemption, yet
15 he misrepresented the nature of the transaction to Holladay to obtain unrestricted, free
16 trading shares to be sold to the general public." (Order (Doc. #108) at 27.) Imposing a civil
17 penalty under these circumstances is appropriate to punish the Luna Defendants and to deter
18 others from engaging in this conduct.

19 The Court need not decide whether third tier penalties are appropriate because,
20 regardless, the Court would impose the same penalty amount. Given the large number of
21 stock sales, the Court finds imposition of the statutory fine amount for each violation would
22 be excessive. Instead, the Court will impose the gross amount of pecuniary gain to the
23 Luna Defendants. The Luna Defendants have presented no evidence of their financial
24 condition to support reducing the penalty. The Court therefore will impose a second tier
25 penalty in the amount of \$2,030,540.

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1 2. The Montgomery, Daskivich, and Murtha Defendants

2 The Montgomery, Daskivich, and Murtha Defendants contend the SEC's request
3 for civil penalties is excessive because they did not act with scienter, they followed Luna's
4 advise, and they do not have the means to pay the requested penalties.

5 In light of the facts and circumstances of this case, the Court concludes first tier
6 penalties are appropriate for the Montgomery, Daskivich, and Murtha Defendants. The
7 Court previously determined no genuine issue of material fact remains that the
8 Montgomery, Daskivich, and Murtha Defendants violated the registration provisions of
9 Section 5 of the Securities Act, and thus they qualify for first tier penalties. Defendants
10 participated in a highly coordinated scheme and reaped substantial profits as a result.
11 Imposing a civil penalty under these circumstances is appropriate to punish these
12 Defendants and to deter others from engaging in this conduct. A Section 5 violation has no
13 scienter requirement, however, and the SEC did not move for summary judgment on the
14 issue of whether these Defendants acted with any particular state of mind to support a
15 second or third tier penalty. These Defendants each have presented the Court with
16 Certifications denying they had the requisite intent to support second and third tier
17 penalties. The SEC failed to move for summary judgment on the scienter issue, and the
18 Court cannot make a credibility determination at this stage of the proceedings. See M & A
19 West, Inc., 538 F.3d at 1054-55. The Court therefore concludes that only first tier penalties
20 are appropriate for these Defendants.

21 As to the amount of penalties, given the number of stock sales at issue, imposing
22 a penalty for each violation would be excessive. Instead, the Court will impose the gross
23 amount of pecuniary gain to each Defendant as a result of the violation. These Defendants
24 have produced no evidence of their financial condition to support reduction of the penalty.
25 The Court therefore will impose a first tier penalty in the amount of \$1,970,956 against the
26 Montgomery Defendants, a first tier penalty in the amount of \$2,735,924 against the

1 Daskivich Defendants, and a first tier penalty in the amount of \$1,378,785 against the
2 Murtha Defendants.

3 **D. Penny-Stock and Legal Services Bar**

4 The SEC seeks a penny-stock bar against all Defendants prohibiting them from
5 participating in an offering of penny stock in the future. The SEC also requests an order
6 prohibiting Defendant Luna from providing professional legal services in connection with
7 an offer or sale of securities pursuant to, or claiming, an exemption under Regulation D.

8 The Court may enter an order prohibiting a party from participating in a
9 penny-stock offering against “any person participating in, or, at the time of the alleged
10 misconduct who was participating in, an offering of penny-stock.” 15 U.S.C. §§ 77t(g)(1),
11 78u(d)(6)(A). In addition to the statutory authority to enter a penny-stock bar, the Court
12 “has broad equitable powers to fashion appropriate relief for violations of the federal
13 securities laws.” First Pacific Bancorp, 142 F.3d at 1193. In determining whether to enter a
14 bar order, the Court considers (1) the egregiousness of the underlying violation, (2) whether
15 the defendant has previous violations, (3) the defendant’s role in the violation, (4) the
16 defendant’s “economic stake in the violation,” and (5) the likelihood the defendant will
17 engage in future misconduct. See id. (quotation omitted).

18 1. The Luna Defendants

19 The Luna Defendants do not oppose a penny-stock bar. (Luna Opp’n at 8.)
20 However, the Luna Defendants oppose a legal services bar, arguing that Luna’s past record
21 as an attorney, as well as his future ability to earn a living, weigh against imposing such a
22 bar.

23 The Court concludes a penny-stock bar is appropriate as to the Luna Defendants.
24 As discussed previously, Luna acted with intent and gained over \$2 million from his
25 violations. Additionally, Luna played the central role in the violation, as detailed more fully
26 in this Court’s prior Order. (Order (Doc. #108) at 26-27.) There is a high likelihood Luna

1 will engage in future misconduct. In his Opposition Brief, Luna continues to defend his
2 conduct in this case, and he requests the Court not impose a legal services bar so that he
3 may continue to earn a livelihood engaging in similar work. (Luna Opp'n at 2-4, 8-9.) The
4 Court therefore concludes that both a penny-stock bar and a legal services bar are
5 appropriate. Specifically, the Court will permanently enjoin the Luna Defendants from
6 participating in an offering of penny stock, and will permanently enjoin Luna from
7 providing legal services to any person in connection with an offer or sale of securities
8 pursuant to, or claiming, an exemption under Regulation D, including, without limitation,
9 participating in the preparation or issuance of any opinion letter related to such offerings.
10 This narrowly tailored legal services bar will not preclude Luna from earning a living as an
11 attorney, does not completely bar him from working in the field of securities law, and is
12 targeted at Luna's misconduct in this case.

13 2. The Montgomery Defendants

14 The Montgomery Defendants argue a penny-stock bar is not appropriate because
15 Montgomery relied on Luna's advice. The Montgomery Defendants also contend a penny-
16 stock bar is not appropriate because Montgomery is not participating in the securities field,
17 and he has acknowledged his mistakes in this case.

18 The evidence produced at summary judgment demonstrated that the Montgomery
19 Defendants were active participants in a highly coordinated scheme through which they
20 reaped nearly \$2 million. Additionally, Montgomery was involved in another stock scheme
21 resulting in a criminal conviction. Although Montgomery played a minor role when
22 compared to Luna, he was not an insignificant player in the scheme. Montgomery's
23 assertion that he is no longer participating in the securities field weighs against imposing a
24 bar, but there is a likelihood that Montgomery could engage in similar conduct in the future
25 given his previous violation, his willingness to associate with individuals engaged in such
26 schemes, the rapid realization of profits he enjoyed from his participation in these schemes,

1 and his willingness to blame Luna rather than acknowledge his own conduct. Although the
2 Court concludes, as discussed previously, that a general injunction prohibiting any Section 5
3 Securities Act violation is too broad, the Court finds a penny-stock bar to be appropriate as
4 a narrowly tailored remedy to address the likelihood that the Montgomery Defendants will
5 violate the Securities Act's registration provisions with respect to a penny-stock offering in
6 the future. The Court therefore will permanently enjoin the Montgomery Defendants from
7 participating in an offering of penny stock.

8 3. The Daskivich and Murtha Defendants

9 The Daskivich and Murtha Defendants argue a penny-stock bar is inappropriate
10 because they unknowingly violated a strict liability provision and relied on Luna's advice.
11 These Defendants thus contend there is little likelihood of a future violation, particularly for
12 Daskivich who no longer works in the securities field.

13 As discussed with respect to the Montgomery Defendants, the evidence produced
14 at summary judgment demonstrated that the Daskivich and Murtha Defendants were active
15 participants in a highly coordinated scheme through which they reaped over \$4 million.
16 Although these Defendants played a minor role when compared to Luna, they were not
17 insignificant players in the scheme. Daskivich's assertion that he is no longer participating
18 in the securities field weighs against imposing a bar, but there is a likelihood that Daskivich
19 could engage in similar conduct in the future given his willingness to associate with
20 individuals conducting such schemes, the rapid realization of profits he enjoyed from his
21 participation in this scheme, and his willingness to blame Luna rather than acknowledge his
22 own conduct. These same concerns apply to Murtha, who does not indicate he no longer
23 works in the securities field, thus raising a heightened possibility that Murtha will engage in
24 future violations. Although the Court concludes, as discussed previously, that a general
25 injunction prohibiting any Section 5 Securities Act violation is too broad, the Court finds a
26 penny-stock bar to be appropriate as a narrowly tailored remedy to address the likelihood

1 that the Daskivich and Murtha Defendants will violate the Securities Act's registration
2 provisions with respect to a penny-stock offering in the future. The Court therefore will
3 permanently enjoin the Daskivich and Murtha Defendants from participating in an offering
4 of penny stock.

5 **III. CONCLUSION**

6 IT IS THEREFORE ORDERED that Plaintiff Securities and Exchange
7 Commission's Opening Brief in Support of Plaintiff Securities and Exchange Commission's
8 Request for Remedies (Doc. #109) is hereby GRANTED in part and DENIED in part.

9 IT IS FURTHER ORDERED that Defendants Marcus Luna and St. Paul Venture
10 Fund LLC are hereby permanently enjoined from participating in an offering of penny
11 stock.

12 IT IS FURTHER ORDERED that Defendant Marcus Luna is hereby permanently
13 enjoined from providing legal services to any person in connection with an offer or sale of
14 securities pursuant to, or claiming, an exemption under Regulation D, including, without
15 limitation, participating in the preparation or issuance of any opinion letter related to such
16 offerings.

17 IT IS FURTHER ORDERED that Judgment is hereby entered in favor of
18 Plaintiff Securities and Exchange Commission and against Defendant Marcus Luna and
19 Defendant St. Paul Venture Fund as follows:

20 • \$4,980,806.91 in disgorgement plus prejudgment interest, for which Defendant
21 Luna and Defendant St. Paul Venture Fund are jointly and severally liable.

22 Additionally, Defendant Luna is jointly and severally liable with the Daskivich
23 Defendants for \$2,233,565.38 of the total disgorgement amount, reflecting the
24 payments these Defendants made to Defendant Luna plus prejudgment interest.

25 Defendant Luna also is jointly and severally liable with the Murtha Defendants
26 for \$156,694.12 of the total disgorgement amount, reflecting the payments these

1 Defendants made to Defendant Luna plus prejudgment interest.

- 2 • \$2,030,540 in civil penalties, for which Defendant Luna and Defendant St. Paul
3 Venture Fund are jointly and severally liable.

4 IT IS FURTHER ORDERED that the Clerk of Court shall provide a copy of this
5 Order and a copy of the Court's prior Order (Doc. #108) to the State Bar of California for
6 such action, if any, it deems appropriate with respect to Defendant Marcus Luna who is a
7 licensed member of the Bar.

8 IT IS FURTHER ORDERED that Defendants Nathan Montgomery and
9 Minnesota Venture Capital, Inc. are hereby permanently enjoined from participating in an
10 offering of penny stock.

11 IT IS FURTHER ORDERED that Judgment is hereby entered in favor of
12 Plaintiff Securities and Exchange Commission and against Defendants Nathan Montgomery
13 and Minnesota Venture Capital, Inc. as follows:

- 14 • \$2,514,530.58 in disgorgement plus prejudgment interest, for which Defendant
15 Montgomery and Defendant Minnesota Venture Capital, Inc. are jointly and
16 severally liable.
17 • \$1,970,956 in civil penalties, for which Defendant Montgomery and Defendant
18 Minnesota Venture Capital, Inc. are jointly and severally liable.

19 IT IS FURTHER ORDERED that Defendants Adam Daskivich and Real Estate
20 of Minnesota, Inc. are hereby permanently enjoined from participating in an offering of
21 penny stock.

22 IT IS FURTHER ORDERED that Judgment is hereby entered in favor of
23 Plaintiff Securities and Exchange Commission and against Defendants Adam Daskivich and
24 Real Estate of Minnesota, Inc. as follows:

- 25 • \$3,490,470.93 in disgorgement plus prejudgment interest, for which Defendant
26 Daskivich and Defendant Real Estate of Minnesota, Inc. are jointly and severally

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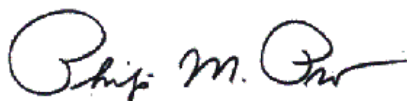
- \$2,735,924 in civil penalties, for which Defendant Daskivich and Defendant Real Estate of Minnesota, Inc. are jointly and severally liable.

IT IS FURTHER ORDERED that Defendants David Murtha and Matrix Venture Capital, Inc. are hereby permanently enjoined from participating in an offering of penny stock.

IT IS FURTHER ORDERED that Judgment is hereby entered in favor of Plaintiff Securities and Exchange Commission and against Defendants David Murtha and Matrix Venture Capital, Inc. as follows:

- \$1,728,952.03 in disgorgement plus prejudgment interest, for which Defendant Murtha and Defendant Matrix Venture Capital, Inc. are jointly and severally liable.
- \$1,378,785 in civil penalties, for which Defendant Murtha and Defendant Matrix Venture Capital, Inc. are jointly and severally liable.

DATED: June 27, 2014



PHILIP M. PRO
United States District Judge