

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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SECURITIES AND EXCHANGE  
COMMISSION,

Case No. 2:12-CV-887 JCM (NJK)

ORDER

Plaintiff(s),

v.

JAMES B. CATLEDGE, et al.,

Defendant(s).

Presently before the court is plaintiff Securities and Exchange Commission's ("SEC") motion for entry of final judgment against defendant James B. Catledge. (ECF No. 58). Catledge filed a response (ECF No. 61), but the SEC has not filed a reply, and the time for doing so has passed.

Per the court's September 18, 2019 and October 22, 2019 orders (ECF Nos. 63, 72), the SEC has also submitted two supplemental briefs. (ECF Nos. 69, 75).

**I. Background**

On May 24, 2012, the SEC filed a complaint against Catledge, Derek F.C. Elliott, EMI Resorts (S.V.G.) Inc., EMI Sun Village, and Sun Village Juan Dolio, Inc., alleging the defendants solicited investments in a fraudulent scheme involving the offer and sale of over \$163 million of investment contracts in unregistered transactions to approximately 1,200 investors. (ECF No. 1). The complaint includes five causes of action: (1) violation of Section 17(a)(1) of the Securities Act of 1933, 15 U.S.C. § 77q(a)(1), against all defendants; (2) violation of Section 17(a)(2) and (3) of the Securities Act, 15 U.S.C. § 77q(a)(2) and (3), against all defendants<sup>1</sup>; (4)

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<sup>1</sup> The complaint omits a third cause of action. (ECF No. 1).

1 violation of Sections 5(a) and (c) of the Securities Act, 15 U.S.C. § 77e(a) and (c), against  
 2 Catledge, Elliott, EMI Sun Village, and Sun Village Juan Dolio; (5) violation of Section 15(a) of  
 3 the Exchange Act, 15 U.S.C. § 780(a), against Catledge and Elliott; and (6) unjust enrichment of  
 4 relief defendant D.R.C.I. trust. *Id.*

5 On December 20, 2012, SEC and Catledge filed a joint stipulation to stay this case  
 6 pending resolution of the criminal charges against Catledge in *United States v. James Catledge,*  
 7 *et al.*, case no. 3:12-cr-00678 (N.D. Cal.) (“criminal action”). (ECF No. 20). The court granted  
 8 the motion to stay on December 21, 2012. (ECF No. 23).

9 On May 2, 2018, Catledge pleaded guilty to one count of mail fraud. *Catledge*, case no.  
 10 3:12-cr-00678, ECF Nos. 241, 242. On December 12, 2018, he was sentenced to a term of sixty  
 11 (60) months imprisonment to be followed by three (3) years of supervised release. *Id.* at ECF  
 12 No. 303. Restitution in the amount of \$32,737,143.65 was imposed on May 15, 2019. *Id.* at  
 13 ECF No. 339.

14 On May 3, 2018, the court approved a consent judgment between the SEC and Catledge.  
 15 (ECF No. 44). The Catledge consent judgment fully incorporates the stipulated consent, which  
 16 provides, in relevant part, that:

17 [T]he Court shall determine whether it is appropriate to order disgorgement of ill-  
 18 gotten gains and/or a civil penalty pursuant to Section 20(d) of the Securities Act  
 19 [15 U.S.C. § 77t(d)] and Section 21(d)(3) of the Exchange Act [15 U.S.C. §  
 20 78u(d)(3)] and, if so, the amount(s) of the disgorgement and/or civil penalty. The  
 21 Defendant further understands that, if disgorgement is ordered, Defendant shall  
 22 pay prejudgment interest thereon, calculated from October, 2004, based on the  
 23 rate of interest used by the Internal Revenue Service for the underpayment of  
 24 federal income tax as set forth in 26 U.S.C. § 6621(a)(2).

25 (ECF Nos. 43 at 2, 44 at 4). The consent judgment also provides that “solely for the purposes of  
 26 such motion [for disgorgement], the allegations of the Complaint shall be accepted as and  
 27 deemed true by the Court.” (ECF No. 44). No provision is made for the imposition of a civil  
 28 penalty. *Id.* In addition, the Catledge consent judgment provides for the issuance of a permanent  
 injunction, enjoining future violation of the federal Securities Act and Exchange Act. *Id.*

On June 28, 2019, the SEC filed a motion to lift the stay (ECF No. 56) following the  
 resolution of the criminal action against Catledge, which this court granted on July 3, 2019 (ECF  
 No. 57).

1 In their initial motion for final judgment as to Catledge, the SEC asked this court to  
 2 “order Catledge to pay \$32,737,143.65 in disgorgement but deem it satisfied based upon the  
 3 entry of the restitution order in that amount, and not impose any prejudgment interest.” (ECF  
 4 No. 58 at 4). The SEC also asked this court to issue a permanent injunction against Catledge,  
 5 enjoining him from future violation of the federal Securities Act and Exchange Act. *Id.*

6 On September 18, 2019, the court ordered the SEC to submit supplemental briefing to  
 7 explain how the approximately \$163 million taken from investors was used. (ECF No. 63). In  
 8 that same order, the court declined to issue a civil penalty against Catledge. *Id.* The SEC  
 9 submitted its response on October 2, 2019. (ECF No. 69). The SEC again requested  
 10 disgorgement in the amount \$32,737,143.65. *Id.*

11 In light of the Supreme Court’s decision in *Kokesh v. S.E.C.*, 137 S. Ct. 1635 (2017),<sup>2</sup> the  
 12 court ordered additional supplemental briefing. (ECF No. 72). The SEC was directed to explain  
 13 what amount of the approximately \$163 million at issue was appropriated by the defendants prior  
 14 to May 24, 2007. *Id.* The SEC submitted its response on November 26, 2019. (ECF No. 75).  
 15 The SEC now seeks disgorgement in the amount of \$6,375,927.58. *Id.*

16 Having now received the SEC’s supplemental briefing, the court will address Catledge’s  
 17 liability for disgorgement and the entry of a permanent injunction.

## 18 **II. Legal Standard**

19 The district court has broad powers in equity to order the disgorgement of “ill-gotten  
 20 gains” obtained through the violation of federal securities laws. *SEC v. First Pac. Bancorp.*, 142  
 21 F.3d 1186, 1191 (9th Cir. 1998); *see also SEC v. Colello*, 139 F.3d 674, 679 (9th Cir. 1998) (“To  
 22 order disgorgement, the district court ... need find only that [the defendant] has no right to retain  
 23 the funds illegally taken from the victims.”). “Disgorgement is designed to deprive a wrongdoer  
 24 of unjust enrichment, and to deter others from violating securities laws by making violations  
 25 unprofitable.” *SEC v. Platforms Wireless Int’l Corp.*, 617 F.3d 1072, 1096 (9th Cir. 2010)  
 26 (quoting *First Pac. Bancorp.*, 142 F.3d at 1191) (internal quotation marks omitted).

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 28 <sup>2</sup> In *Kokesh*, the Supreme Court held that “[d]isgorgement in the securities enforcement context” is a “penalty” subject to a five-year limitations period. 137 S. Ct. at 1639 (2017).

1 The district court has broad discretion in calculating the amount to be disgorged. *SEC v.*  
 2 *JT Wallenbrock & Assocs.*, 440 F.3d 1109, 1113 (9th Cir. 2006). The amount of disgorgement  
 3 should include “all gains flowing from the illegal activities,” *id.* at 1114, though the actual  
 4 assessment need only be a “reasonable approximation of profits causally connected to the  
 5 violation,” *First Pac. Bancorp.*, 142 F.3d at 1192 n. 6 (internal citation omitted). The SEC “bears  
 6 the ultimate burden of persuasion that its disgorgement figure reasonably approximates the  
 7 amount of unjust enrichment.” *Platforms Wireless*, 617 F.3d at 1096.

8 The manner in which a defendant chooses to spend the illegally obtained funds has no  
 9 relevance to the disgorgement calculation. *JT Wallenbrock*, 440 F.3d at 1116. A court may  
 10 order disgorgement even if the violator “is no longer in possession of such funds due to  
 11 subsequent, unsuccessful investments or other forms of discretionary spending.” *Id.* at 1115–16  
 12 (quoting *SEC v. Thomas James Assocs.*, 738 F.Supp. 88, 95 (W.D.N.Y. 1990)) (internal  
 13 quotation marks omitted).

14 A five-year statute of limitations applies to any “action, suit or proceeding for the  
 15 enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise.” 28 U.S.C. § 2462.  
 16 “Disgorgement in the securities enforcement context” is a “penalty” subject to the five-year  
 17 limitations period set forth in § 2462. *Kokesh*, 137 S. Ct. at 1639 (2017).

### 18 **III. Discussion**

#### 19 *a. Disgorgement*

20 The SEC now requests that this court order Catledge to disgorge \$6,375,927.58, to be  
 21 deemed satisfied by the amended judgment entered on May 15, 2019, in *Catledge*, case no. 3:12-  
 22 cr-00678, ECF No. 339, which orders \$32,737,143.65 in restitution. (ECF No. 75).

23 In the Catledge consent judgment, the parties agreed that, upon subsequent motion by the  
 24 SEC, the court would determine whether it is appropriate to order disgorgement of Catledge’s ill-  
 25 gotten gains, and if so, the amount of disgorgement. (ECF Nos. 43, 44). Catledge further agreed  
 26 to pay prejudgment interest on any disgorgement ordered, to be calculated from October 2004.  
 27 (ECF Nos. 43, 44).

1 Based on undisputed allegations in the complaint, Catledge and Elliott raised money  
 2 from investors through the fraudulent sale of investment contracts in unregistered transactions.  
 3 (ECF No. 1). These funds were to be used for the renovation and construction of the Cofresi and  
 4 Juan Dolio properties, and the defendants guaranteed a return on investment. *Id.* Instead, the  
 5 defendants used these funds, which were pooled in a common account, to pay investors “returns”  
 6 to maintain the illusion that they were investing the money as promised, as well as to cover their  
 7 operating expenses and exorbitant personal commissions, and to invest in other speculative  
 8 ventures. *Id.*

9 All told, the complaint alleges that the defendants raised over \$163 million from  
 10 investors, a figure substantially greater than the \$6,375,927.58 the SEC now requests. To  
 11 determine how much of the approximately \$163 million should be ordered in disgorgement, the  
 12 court directed the SEC to submit supplemental briefing on how the ill-gotten gains were used.  
 13 (ECF No. 63). The SEC was directed to explain what amount of the funds, if any, was: (1)  
 14 returned to investors to maintain the scheme; (2) properly invested in the Cofresi and Juan Dolio  
 15 properties in accordance with the investment contracts; and (3) allocated to commissions,  
 16 separate ventures, and otherwise. *Id.*

17 The SEC submitted the following figures in its supplemental brief:

Investment Funds Raised from Investors:	<u>\$163.8 million</u>
Funds Returned to Investors:	<u>\$6.8 million</u>
Funds Properly Invested in Cofresi and Juan Dolio:	\$8 million
Commissions:	\$58.9 million
Funds Diverted to Separate Ventures, Operating Expenses, or Otherwise:	\$90.1 million

18 (ECF No. 69). The SEC contends that it is unable to further segregate these figures as a result of  
 19 defendants’ commingling of investor funds, defendants’ failure to maintain adequate books and  
 20 records, Catledge’s invocation of his Fifth Amendment privilege against self-incrimination, and  
 21 the stay of this case pending resolution of the criminal action (preventing the SEC from engaging  
 22 in discovery). *Id.*

23 In light of the Supreme Court’s decision in *Kokesh*, the SEC was then directed to submit  
 24 additional supplemental briefing explaining what amount of the approximately \$163 million at  
 25 issue was appropriated by the defendants prior to May 24, 2007. (ECF No. 72). The SEC  
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1 contends that “prior disgorgement law and practice, the limitations of the Commission’s pre-suit  
 2 investigation, and the subsequent seven-year stay of the case which prohibited the Commission  
 3 from engaging in discovery” have limited its ability to approximate “the profits causally  
 4 connected to Catledge’s violations.” (ECF No. 75).

5 The SEC further argues that \$6,375,927.58 is a reasonable approximation of Catledge’s  
 6 ill-gotten gains obtained since May 24, 2007. *Id.* The SEC arrived at this figure by: (1)  
 7 determining that Catledge received \$30,285,656 in commissions; (2) dividing \$30,285,656 by  
 8 nineteen (the number of fiscal quarters within the time period the scheme was conducted),  
 9 resulting in a quarterly average of \$1,593,981.89<sup>3</sup>; (3) multiplying \$1,593,981.89 by eight (the  
 10 number of fiscal quarters within the five-year limitations period), resulting in a disgorgement  
 11 amount of \$12,751,855.16; and (4) reducing \$12,751,855.16 by half based on Catledge’s  
 12 argument in the criminal action that his misconduct ceased in or around July 2008, thus limiting  
 13 the disgorgement figure to four fiscal quarters, for a total disgorgement amount of  
 14 \$6,375,927.58. *Id.*; *Catledge*, case no. 3:12-cr-00678, ECF No. 278.

15 *1. Disgorgement calculation*

16 The court holds that Catledge is liable for disgorgement in the amount of \$56,920,276.24.  
 17 To arrive at this figure, the court adopted the SEC’s proposed methodology as a reasonable  
 18 means to approximate Catledge’s ill-gotten gains, with one modification. The court declines to  
 19 credit Catledge’s argument in the criminal action that his misconduct ceased in or around July  
 20 2008, and accordingly finds that all eight fiscal quarters within the five-year limitations period  
 21 should be included in the disgorgement calculation. The court’s computation follows below.

22 To begin, this figure contemplates the \$30,285,656 in commissions Catledge received,  
 23 along with the \$90,100,000 in funds that were diverted to separate ventures, operating expenses,  
 24 and otherwise. This figure also contemplates the \$6,800,000 in funds returned to investors and  
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26 <sup>3</sup> The SEC assumes that the funds at issue were appropriated in equal amounts each  
 27 quarter throughout the time period the scheme was conducted. (ECF No. 75). However, even if  
 28 the appropriated funds were not taken in equal amounts from quarter to quarter (which is a  
 reasonable assumption), “[t]he most elementary conceptions of justice and public policy require  
 that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.”  
*Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265 (1946).

1 the \$8,000,000 in funds invested in the Cofresi and Juan Dolio properties, for a total of  
2 \$135,185,656.00 in ill-gotten gains.

3 The court finds that the commissions Catledge received must be included in the  
4 disgorgement calculation as profit flowing from the illegal activity. *See JT Wallenbrock*, 440  
5 F.3d at 1114.

6 The court also finds that the funds diverted to separate ventures, operating expenses, and  
7 otherwise must be included in the disgorgement calculation. The deterrent purpose of  
8 disgorgement would be left unfulfilled if Catledge were permitted to escape disgorgement here,  
9 as all of these funds were employed to prop up and further the very business he used to defraud  
10 investors. These funds facilitated the enterprise's continued, fraudulent activities to the benefit  
11 and unjust enrichment of Catledge. He cannot therefore be permitted to escape disgorgement of  
12 these funds. *See Platforms Wireless*, 617 F.3d at 1098 ("A person who controls the distribution  
13 of illegally obtained funds is liable for the funds he or she dissipated as well as the funds he or  
14 she retained."); *JT Wallenbrock*, 440 F.3d at 1114 (holding that where "the defendants benefitted  
15 from the use of investors' money to spend at the defendants' discretion—whether to cover  
16 operating expenses, invest in start-up companies, pay personal expenses or to pay fake returns to  
17 investors to perpetuate the fraud[—]" all such uses of investor money represented "an ill-gotten  
18 gain that unjustly enriched the defendants").

19 Additionally, the court finds that the funds returned to investors and the funds invested in  
20 the Cofresi and Juan Dolio properties must also be included in the disgorgement calculation.  
21 This scheme was able to continue because Catledge used these funds to issue fake returns and  
22 create the illusion that the funds were being properly invested in the properties. For much the  
23 same reasons as are discussed above, the illicit use of these funds benefitted and unjustly  
24 enriched Catledge, and so he is liable for disgorgement of these funds as well.

25 The court, in applying the SEC's proposed methodology to reasonably approximate  
26 Catledge's ill-gotten gains during the five-year limitations period, finds: (1) \$135,185,656.00  
27 was wrongfully appropriated by Catledge during the time period the scheme was conducted; (2)  
28 on average, \$7,115,034.53 was appropriated per quarter over the nineteen fiscal quarters within



1 that period; and (3) an average of \$7,115,034.53 appropriated per quarter for the eight fiscal  
 2 quarters within the limitations period results in a total disgorgement amount of \$56,920,276.24.

3 2. *Disgorgement in the amount of \$56,920,276.24 reasonably approximates Catledge's*  
 4 *ill-gotten gains*

5 In total, the court holds that Catledge is liable for disgorgement in the amount of  
 6 \$56,920,276.24, to be deemed satisfied in part by the \$32,737,143.65 ordered as restitution in the  
 7 criminal action. *See Catledge*, case no. 3:12-cr-00678, ECF No. 339; *see also First Pac.*  
 8 *Bancorp*, 142 F.3d at 1192 n. 6. Per the Catledge consent order, the court also holds that  
 9 Catledge is liable for prejudgment interest on this amount. (*See* ECF No. 44); *see also S.E.C. v.*  
 10 *Vassallo*, 22 F. Supp. 3d 1063, 1067 (E.D. Cal. 2014) (“[T]he purpose of pre-judgment interest  
 11 in a securities fraud case is to make the defrauded investors whole.”). Prejudgment interest shall  
 12 be calculated from October 2004, based on the rate of interest used by the Internal Revenue  
 13 Service for the underpayment of federal income tax as set forth in 26 U.S.C. § 6621(a)(2).

14 b. *Permanent injunctive relief as to Catledge*

15 In the Catledge consent judgment, Catledge submitted to the issuance of a permanent  
 16 injunction barring future violation of: (1) Sections 17(a)(1), (2), and (3) of the Securities Act, 15  
 17 U.S.C. § 77q(a)(1), (2), and (3); (2) Sections 5(a) and 5(c) of the Securities Act, 15 U.S.C.  
 18 § 77e(a) and (c); and (3) Section 15(a) of the Exchange Act, 15 U.S.C. § 78o(a). (*See* ECF No.  
 19 44).

20 Therefore, the court will issue a permanent injunction against Catledge, enjoining him  
 21 from future violation of the aforementioned sections of the federal Securities Act and Exchange  
 22 Act.

23 **IV. Conclusion**

24 Accordingly,

25 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that the SEC's motion for  
 26 entry of final judgment as to Catledge (ECF No. 58) be, and the same hereby is, GRANTED.

27 IT IS FURTHER ORDERED that Catledge is liable for disgorgement in the amount of  
 28 \$56,920,276.24. This amount shall be deemed satisfied in part by the criminal sentencing order



1 entered on May 15, 2019, in *United States v. James Catledge, et al.*, case no. 3:12-cr-00678  
2 (N.D. Cal.), which orders Catledge to pay restitution in the amount of \$32,737,143.65.

3 IT IS FURTHER ORDERED that Catledge is liable for prejudgment interest on the full  
4 disgorgement amount of \$56,920,276.24. Prejudgment interest shall be calculated from October  
5 2004, based on the rate of interest used by the Internal Revenue Service for the underpayment of  
6 federal income tax as set forth in 26 U.S.C. § 6621(a)(2).

7 IT IS FURTHER ORDERED that, solely for purposes of exceptions to discharge set forth  
8 in Section 523 of the Bankruptcy Code, 11 U.S.C. § 523, the allegations in the complaint are true  
9 and admitted by Catledge, and further, any debt for disgorgement, prejudgment interest, civil  
10 penalty or other amounts due by Catledge under this judgment or any other judgment, order,  
11 consent order, decree or settlement agreement entered in connection with this proceeding, is a  
12 debt for the violation of the federal securities laws or any regulation or order issued under such  
13 laws, as set forth in Section 523(a)(19) of the Bankruptcy Code, 11 U.S.C. § 523(a)(19).

14 IT IS FURTHER ORDERED that Catledge and Catledge's agents, servants, employees,  
15 attorneys, and all persons in active concert or participation with them who receive actual notice  
16 of this judgment by personal service or otherwise are permanently restrained and enjoined from  
17 violating Sections 17(a)(1), (2) and (3) of the Securities Act [15 U.S.C. § 77q(a)(1), (2) and (3)]  
18 in the offer or sale of any security by the use of any means or instruments of transportation or  
19 communication in interstate commerce or by use of the mails, directly or indirectly: (a) to  
20 employ any device, scheme, or artifice to defraud; (b) to obtain money or property by means of  
21 any untrue statement of a material fact or any omission of a material fact necessary in order to  
22 make the statements made, in light of the circumstances under which they were made, not  
23 misleading; or (c) to engage in any transaction, practice, or course of business which operates or  
24 would operate as a fraud or deceit upon the purchaser.

25 IT IS FURTHER ORDERED that Catledge and Catledge's agents, servants, employees,  
26 attorneys and all persons in active concert or participation with them who receive actual notice of  
27 this judgment by personal service or otherwise are permanently restrained and enjoined from  
28 violating Sections 5(a) and 5(c) of the Securities Act [15 U.S.C. § 77e(a) and (c)] by, directly or

1 indirectly, in the absence of any applicable exemption: (a) unless a registration statement is in  
2 effect as to a security, making use of the means or instruments of transportation or  
3 communication in interstate commerce or of the mails to sell such security through the use or  
4 medium of any prospectus or otherwise; (b) unless a registration statement is in effect as to a  
5 security, carrying or causing to be carried through the mails or in interstate commerce, by any  
6 means or instruments of transportation, any such security for the purpose of sale or for delivery  
7 after sale; or (c) making use of any means or instruments of transportation or communication in  
8 interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of  
9 any prospectus or otherwise any security, unless a registration statement has been filed with the  
10 SEC as to such security, or while the registration statement is the subject of a refusal order or  
11 stop order or (prior to the effective date of the registration statement) any public proceeding or  
12 examination under Section 8 of the Securities Act [15 U.S.C. § 77h].

13 IT IS FURTHER ORDERED that Catledge and Catledge's agents, servants, employees,  
14 attorneys, and all persons in active concert or participation with them who receive actual notice  
15 of this judgment by personal service or otherwise are permanently restrained and enjoined from  
16 violating, directly or indirectly, Section 15(a) of the Exchange Act [15 U.S.C. § 78o(a)] to use  
17 the mails or any means or instrumentality of interstate commerce, directly or indirectly, to effect  
18 any transactions in, or to induce or attempt to induce the purchase or sale of, any security unless  
19 Catledge is registered in accordance with Section 15(b) of the Exchange Act [15 U.S.C.  
20 § 78o(b)].

21 IT IS FURTHER ORDERED that this court shall retain jurisdiction of this matter for the  
22 purposes of enforcing the terms of this judgment.

23 The clerk shall enter final judgment against Catledge accordingly.

24 DATED December 16, 2019.

25   
26 UNITED STATES DISTRICT JUDGE  
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28