INITIAL DECISION RELEASE NO. 742
ADMINISTRATIVE PROCEEDING
FILE NO. 3-15544

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

In the Matter of CHINA RUITAI INTERNATIONAL HOLDINGS CO., LTD., DIAN MIN MA, GANG MA, and JIN TIAN	INITIAL DECISION OF DEFAULT AS TO DIAN MIN MA, GANG MA, AND JIN TIAN February 5, 2015

APPEARANCE: Daniel J. Wadley for the Division of Enforcement, Securities and Exchange Commission

BEFORE: Cameron Elliot, Administrative Law Judge

Summary

This Initial Decision: grants the Division of Enforcement's (Division) Motion for Sanctions (Motion); finds that Respondent Dian Min Ma (Min Ma) violated Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act) and Exchange Act Rules 10b-5, 13a-14, 13b2-1, and 13b2-2(a), and caused China Ruitai International Holdings Co., Ltd.'s (China Ruitai) violations of Exchange Act Sections 13(a) and 13(b)(2)(A) and Exchange Act Rules 12b-20, 13a-1, 13a-11, and 13a-13; finds that Respondent Gang Ma (Gang Ma) willfully violated Exchange Act Section 10(b) and Exchange Act Rules 10b-5, 13a-14, 13b2-1, and 13b2-2(a), and willfully aided and abetted and caused China Ruitai's violations of Exchange Act Sections 13(a) and 13(b)(2)(A) and Exchange Act Rules 12b-20, 13a-1, 13a-11, and 13a-13; and finds that Respondent Jin Tian (Tian) willfully violated Exchange Act Section 10(b) and Exchange Act Rules 10b-5(a) and (c), 13b2-1, and 13b2-2(a), and willfully aided and abetted and caused China Ruitai's violations of Exchange Act Sections 10(b), 13(a), and 13(b)(2)(A) and Exchange Act Rules 10b-5(b), 12b-20, 13a-1, 13a-11, and 13a-13. It orders Min Ma, Gang Ma, and Tian (collectively, the Individual Respondents) to cease and desist from committing or causing violations of the above-listed provisions, and imposes civil penalties of $400,000 against each Individual Respondent.[1]

[1] This Initial Decision does not apply to China Ruitai. *See China Ruitai Int'l Holdings Co.*, Initial Decision Release No. 651, 2014 SEC LEXIS 2817 (Aug. 5, 2014), *finality order*, Exchange Act Release No. 73292, 2014 SEC LEXIS 3726 (Oct. 2, 2014).

Procedural Background

On September 30, 2013, the Securities and Exchange Commission (Commission) issued an Order Instituting Administrative and Cease-and-Desist Proceedings (OIP) against China Ruitai and the Individual Respondents (collectively, Respondents), pursuant to Exchange Act Sections 4C and 21C and Rule 102(e) of the Commission's Rules of Practice.

At an October 29, 2013, prehearing conference, the Division confirmed that it was in the process of effecting service on the Individual Respondents in China pursuant to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. Tr. 3-4.[2] Service was completed on May 19, 2014. *China Ruitai Int'l Holdings Co.*, Admin. Proc. Rulings Release No. 1587, 2014 SEC LEXIS 2397 (July 7, 2014). On July 7, 2014, I ordered the Individual Respondents to show cause on or before July 17, 2014, why this proceeding should not be determined against them due to their failure to file answers or otherwise defend this proceeding. *Id.*

The Individual Respondents failed to answer the OIP or to show cause. I found the Individual Respondents in default and directed the Division to file a motion for sanctions, supported by sufficient evidence in accordance with *Rapoport v. SEC*, 682 F.3d 98 (D.C. Cir. 2012).[3] *See China Ruitai Int'l Holdings Co.*, Admin. Proc. Rulings Release No. 1626, 2014 SEC LEXIS 2575, at *2-3 (July 18, 2014). On July 30, 2014, the Division filed its Motion, with supporting exhibits (Div. Exs. A-N).[4]

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[2] Citations to the transcript of the prehearing conference are noted as "Tr. __."

[3] I also provided the Individual Respondents with notice that they may move to set aside the default pursuant to Rule 155(b) of the Commission's Rules of Practice, 17 C.F.R. § 201.155(b). *See China Ruitai Int'l Holdings Co.*, Admin. Proc. Rulings Release No. 1626, 2014 SEC LEXIS 2575, at *2 n.2 (July 18, 2014).

[4] These exhibits are: (1) the OIP; (2) China Ruitai's Form 10-Q for the period ended March 31, 2011, filed on May 16, 2011 (Div. Ex. B); its Form 10-Q for the period ended June 30, 2011, filed on August 15, 2011 (Div. Ex. C); and its Form 10-Q for the period ended September 30, 2011, filed on November 14, 2011 (Div. Ex. D) (collectively, 2011 Quarterly Reports); (3) China Ruitai's Form 10-Q/A for the period ended June 30, 2011, filed on August 29, 2011 (Div. Ex. E); (4) Marcum Bernstein & Pinchuk LLP's February 29, 2012, Audit Findings and Issues Memo (Div. Ex. F); (5) three representation letters from China Ruitai to Marcum, dated May 16, 2011, August 15, 2011, and November 14, 2011, respectively, each signed by Min Ma, Gang Ma, and Tian (Div. Ex. G); (6) the Global Law Office's April 12, 2012, legal opinion to Tai'an Ruitai Cellulose Co. Ltd (Div. Ex. H); (7) DLA Piper's April 24, 2012, legal opinion to Marcum (Div. Ex. I); (8) Marcum's May 21, 2012, letter to China Ruitai (Div. Ex. J); (9) Marcum's July 25, 2012, letter to China Ruitai (Div. Ex. K); (10) Marcum's July 27, 2012, letter to China Ruitai (Div. Ex. L); (11) Attestation of Barbara J. Volpe, Management and Program Analyst at the Commission (Div. Ex. M); and (12) China Ruitai's Form NT 10-K for the period ended December 31, 2011, filed on March 30, 2012 (Div. Ex. N).

The Individual Respondents are in default for failing to answer the OIP or otherwise defend this proceeding. *See* 17 C.F.R. §§ 201.155(a)(2), .220(f). Accordingly, except as otherwise noted, I deem the allegations in the OIP true, as authorized by Rule of Practice 155(a).

Findings of Fact

A. Respondents

China Ruitai, incorporated in Delaware and located in the People's Republic of China (PRC or China), is a manufacturer of deeply processed chemicals used primarily in the production of PVC, cosmetics, foods, and paints. OIP at 2. At all relevant times, China Ruitai's common stock was registered with the Commission pursuant to Exchange Act Section 12(g) and quoted on OTC Link, operated by OTC Markets Group Inc. (formerly known as the "Pink Sheets") (OTC Link), under the ticker symbol "CRUI." *Id.*

Min Ma, age forty-six, resides in the PRC and has been a Director and Chief Executive Officer (CEO) of China Ruitai since 2007. *Id.* Min Ma, along with the President of China Ruitai, owns 100% of the capital stock of Shandong Ruitai Chemical Co., Ltd. (Shandong Ruitai), a related party to China Ruitai. *Id.* Min Ma also serves as the Finance Manager for Taian Ruitai Cellulose Co., Ltd. (Taian Ruitai), a majority-owned (ninety-nine percent) subsidiary of China Ruitai.[5] *Id.*

Gang Ma, age forty, resides in the PRC and has been Chief Financial Officer (CFO) of China Ruitai since 2007. *Id.* Gang Ma is also the Director of the Financial Department for Taian Ruitai. *Id.*

Tian, age thirty-eight, resides in the PRC and has been a Director and Chief Accounting Officer (CAO) of China Ruitai since 2007. *Id.* Tian is also an accountant for Taian Ruitai. *Id.*

B. Related Entities

Taian Ruitai is located in the PRC and is the operational subsidiary of China Ruitai. OIP at 2.

The Motion also refers to a second "Exhibit A" purportedly containing a summary of trading activity in China Ruitai's stock between September 30, 2010, and December 31, 2012, derived from Yahoo Finance. Motion at 31. This exhibit was previously submitted as an attachment to the Division's Supplemental Motion for Sanctions against China Ruitai filed on April 17, 2014. I refer to this exhibit as Supplemental Exhibit A.

[5] According to China Ruitai's 2011 Quarterly Reports, China Ruitai is a holding company, whose business (along with another entity) is to hold an equity interest in Taian Ruitai. Div. Ex. B at 5; Div. Ex. C at 5; Div. Ex. D at 7.

Shandong Ruitai, located in the PRC, is a related party to China Ruitai and holds one percent of the capital stock of Taian Ruitai. *Id.* Shandong Ruitai is one-hundred percent owned by Min Ma and China Ruitai's President. *Id.* Shandong Ruitai is a dealer of hot steam, which it sells to Taian Ruitai. *Id.*

C. China Ruitai's Misconduct and Auditor's Resignation

From approximately January to December 2011, Respondents orchestrated a scheme to fraudulently obtain up to $40 million in bank financing using falsified documents. OIP at 3. China Ruitai, through its subsidiary, Taian Ruitai, falsified purchase orders to purchase steam from Shandong Ruitai. *Id.* Aided by the cooperation of Shandong Ruitai, Taian Ruitai obtained invoices from Shandong Ruitai for the fake purchase orders. *Id.*; *see* Div. Ex. J at 1. Taian Ruitai then presented the fake invoices and purchase orders to various banks to obtain bank acceptance notes. OIP at 3. Per the terms of the acceptance notes, China Ruitai deposited between thirty and one hundred percent of the invoice amount with the bank, and the bank paid the stated invoice amount to Shandong Ruitai. *Id.* The amounts that China Ruitai placed on deposit with the banks were held in reserve until China Ruitai repaid the bank acceptance notes. *Id.*

After Shandong Ruitai received funds from the banks, Shandong Ruitai typically provided the funds to Taian Ruitai to be used as operating capital. *Id.* At other times, Shandong Ruitai retained a portion of the funds for its own operational needs. *Id.* In both scenarios, the scheme was effectuated by the efforts of China Ruitai as the originator of the purchase orders. *Id.*; *see* Div. Ex. J. at 1.

During the time period of the scheme, China Ruitai filed Forms 10-Q for the periods ended March 31, 2011, June 30, 2011, and September 30, 2011, and a Form 10-Q/A for the period ended June 30, 2011 (Amendment). OIP at 3; Div. Exs. B-E. In its 2011 Quarterly Reports and Amendment, China Ruitai did not disclose its obligations to the banks, the scheme it was utilizing to provide working capital, and the risks associated with the ongoing scheme. OIP at 3; *see* Div. Exs. B-E; *cf.* Div. Ex. F at 1-3; Div. Ex. J at 1. As a result of the scheme, China Ruitai's related-party obligations to Shandong Ruitai increased over $40 million, or in excess of 1,300 percent, from December 31, 2010, to December 31, 2011.[6] Div. Ex. F at 1; Div. Ex. J at 1. China Ruitai's first Form 10-Q of 2011 reported a balance of nearly $8 million payable to Shandong Ruitai. Div. Ex. B at 2, 13. Its second Form 10-Q of 2011 reported a balance payable to Shandong Ruitai of over $24 million. Div. Ex. C at 2, 14. And its third Form 10-Q of 2011 reported a balance payable to Shandong Ruitai of over $34.5 million. Div. Ex. D at 4, 16.

As of September 30, 2011, China Ruitai's related-party obligations to Shandong Ruitai represented over thirty-six percent of its total liabilities and over thirty-seven percent of its current liabilities. Div. Ex. D at 4; *see* OIP at 3; *cf. China Ruitai Int'l Holdings Co.*, 2014 SEC LEXIS 2817, at *10 ("over thirty-seven percent of its total liabilities"). The failure to disclose

[6] Although the OIP alleges that the increase in related-party obligations was 1,600 percent, that percentage is not supported by the evidence. OIP at 3; Div. Ex. F at 1; Div. Ex. J at 1.

the obligations to the banks and the nature of the activity to obtain bank financing misrepresented the actual operations, obligations, solvency, and liquidity of China Ruitai.[7] OIP at 3. In footnotes to the financial statements contained in its 2011 Quarterly Reports, China Ruitai described the resulting obligations as related-party notes payable that were "non-interest bearing for the purpose of financing the Company's operations due to a lack of working capital, and have no fixed terms of repayment." *Id.*; Div. Ex. B at 13; Div. Ex. C at 14; Div. Ex. D at 16. These statements were false and misleading because they failed to disclose the nature and terms of the obligations to the banks. OIP at 3. Furthermore, the loans themselves constituted an undisclosed risk to the company, in view of their illegality. *Id.*; *see* Div. Exs. H-L.

Min Ma and Gang Ma each signed China Ruitai's Quarterly Reports, as well as certifications for those filings. OIP at 3; Div. Ex. B at 24 and Cert. Exs. 31.1-32.2; Div. Ex. C at 26 and Cert. Exs. 31.1-32.2; Div. Ex. D at 29 and Cert. Exs. 31.1-32.2. The Quarterly Reports incorrectly stated that they did not "contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report." OIP at 3-4; Div. Ex. B at Cert. Exs. 31.1-31.2; Div. Ex. C at Cert. Exs. 31.1-31.2; Div. Ex. D at Cert. Exs. 31.1-31.2. In fact, the statements and representations in China Ruitai's filings were materially misleading. OIP at 4.

Min Ma, Gang Ma, and Tian facilitated China Ruitai's violations by perpetuating the illegal scheme and directly and indirectly filing or causing to be filed with the Commission the materially misleading 2011 Quarterly Reports and Amendment. *Id.* In particular, Min Ma and Gang Ma signed certifications for those reports and attested to their accuracy. *Id.*; Div. Exs. B-D. These were misrepresentations because Min Ma, Gang Ma, and Tian knew or were reckless in not knowing that the bank financing transactions were illegal and that China Ruitai failed to disclose its obligations to the banks. *Id.* China Ruitai could not have continued its scheme without the substantial assistance of the Individual Respondents, and their fraudulent conduct is imputable to China Ruitai. *Id.*

During fiscal year 2011, China Ruitai retained the independent registered public accounting firm of Marcum Bernstein & Pinchuk LLP (Marcum), a New York CPA firm with offices in the PRC. *Id.* Marcum performed the review procedures for each of the first three quarters of 2011. *Id.* In each of these quarters, China Ruitai provided to Marcum management representation letters signed by Min Ma, Gang Ma, and Tian. *Id.* The representation letters

[7] The OIP alleges, without further explanation, that "[t]he misstatements made it appear that China Ruitai was meeting its working capital requirements with cash flows generated from business activities, rather than financing from banks." OIP at 3. It is not clear from the OIP or an independent review of the 2011 Quarterly Reports how misstatements about China Ruitai's debt financing would have misled investors into believing that the company was meeting its working capital requirements with cash flows generated from business activities. The 2011 Quarterly Reports make apparent that China Ruitai had negative working capital and a significant decrease in cash flows from operating activities compared to 2010, and an increase in cash flow generated from financing through related-party notes. Div. Ex. B at 4, 21; Div. Ex. C at 4, 23-24; Div. Ex. D at 6, 26.

included misleading statements that: (1) management had no knowledge of any fraud; (2) all related-party transactions had been properly disclosed; and (3) there had been no violations of laws. *Id.*; *see* Div. Ex. G. These statements were misleading because China Ruitai's scheme was a violation of PRC laws, and the description of the related-party obligations misrepresented the true nature of the activity. OIP at 4; *see* Div. Exs. H-L. Because of their management positions as CEO, CFO, and CAO respectively, Min Ma, Gang Ma, and Tian knew or were reckless in not knowing the true nature of the transactions and that the financing was obtained fraudulently and illegally. OIP at 4. They also knew or were reckless in not knowing that the misrepresentations would be incorporated into China Ruitai's public filings and that the public filings misrepresented the true nature of the transactions. *Id.*

Marcum also performed audit procedures in preparation for the filing of China Ruitai's Form 10-K. *Id.* As part of these audit procedures, Marcum performed substantive and analytical procedures on the related-party balances between Taian Ruitai and Shandong Ruitai. *Id.* Marcum made repeated inquiries regarding the related-party balances to employees of China Ruitai, but the employees were uncooperative. *Id.* Despite the lack of cooperation, Marcum identified at least $66.7 million in potentially fake purchase orders. *Id.* When confronted with this information, Gang Ma admitted that the purchase orders and corresponding invoices between Shandong Ruitai and Taian Ruitai were fictitious and that "no real deal occurred between the two entities." Div. Ex. F at 2; *see* OIP at 4. In a February 2012 audit findings and issues memo, Marcum concluded that if these facts were true, China Ruitai's behavior violated Article 10 of the PRC's Negotiable Instruments Law, which provides that: "The draft, acquisition and transfer of a negotiable instrument shall follow the principle of authenticity and credibility and be treated as a real act of trading or debt payment." Div. Ex. F at 3. Marcum expressed concern about exposure under the PRC's Criminal Law and doubt about the integrity of China Ruitai's management. *Id.*

As a result of its discovery, Marcum demanded that China Ruitai obtain a legal opinion regarding the legality of the above-described conduct in relation to PRC law. OIP at 4; *see* Div. Ex. J at 2. China Ruitai, through its subsidiary Taian Ruitai, obtained a legal opinion from counsel in the PRC, the Global Law Office, which concluded that the conduct violated Article 10 of the PRC's Negotiable Instruments Law. OIP at 4-5; Div. Ex. H. The Global Law Office, however, stated that PRC laws "do not provide specific penalties for this behavior, so there's no material responsibility under the Negotiable Instruments Law." Div. Ex. H. at 1. For risks under Article 175 of the PRC's Criminal Law, the Global Law Office stated:

> [Taian] Ruitai had signed series Acceptance Agreements with cooperating banks before transferring bank acceptances to Shandong Ruitai . . . , which shows [Taian] Ruitai had no fraud intention as the banks knew [Taian] Ruitai's purpose and process of using the acceptances. What's more, the Basic Credit Report shows, up to March 26, 2012, [Taian] Ruitai had no outstanding non-performing loans, so no serious loss is caused to the banks, and no serious consequence had been resulted.

Id. at 1-2.

Marcum obtained a separate legal opinion from Chinese counsel associated with the international law firm DLA Piper, which also concluded that China Ruitai violated Article 10 of the PRC's Negotiable Instruments Law. OIP at 5; Div. Ex. I. Although DLA Piper agreed that the Negotiable Instruments Law provides no specific penalties for China Ruitai's violation, it opined that China Ruitai could be civilly liable if it failed to repay the bank acceptance notes. Div. Ex. I at 1-2. DLA Piper reasoned that if a lawsuit were filed against China Ruitai, the chance of China Ruitai's success in such a case was "unlikely to be high." *Id.* at 2. DLA Piper further opined that, under Article 175(I) of the PRC's Criminal Law, if China Ruitai continued to perform its obligations to the banks, with no loss to the banks, then its potential criminal liability under Article 175(I) should be relatively low. *Id.* DLA Piper also opined that China Ruitai's conduct may constitute a violation of Article 52 of the PRC's Contract Law, under which a contract is invalid in circumstances where the parties intend to conceal an illegal purpose under the guise of a legitimate transaction. *Id.* at 3. DLA Piper recommended disclosure of the details of the underlying transactions in China Ruitai's financial statements. *Id.* It also recommended that the total amount of the notes, less the deposit paid by China Ruitai, should be booked as a payable. *Id.*

Marcum reported its concerns to China Ruitai's board of directors in a May 21, 2012, letter, pursuant to Exchange Act Section 10A(b)(1), which requires the auditor to inform management that it has information indicating an illegal act has or may have occurred. OIP at 5; Div. Ex. J. Among other issues, Marcum reiterated its understanding that the purchase orders underlying the bank loans (and, ultimately, the related-party notes payable to Shandong Ruitai) were fake, and stated that it was unable to satisfactorily corroborate the fact asserted by the Global Law Office that the banks actually knew that there were no real transactions behind the notes. Div. Ex. J at 1-2. Min Ma, Gang Ma, and Tian all received the letter. OIP at 5; Div. Ex. J. China Ruitai failed to take any remedial action in response to the letter. OIP at 5.

On July 25, 2012, Marcum issued a notice to China Ruitai, pursuant to Exchange Act Section 10A(b)(2), indicating an illegal act had occurred and that failure of the company to take remedial action would warrant resignation of Marcum as the independent registered public accountant of China Ruitai. OIP at 5; Div. Ex. K. The notice informed China Ruitai that China Ruitai was required to notify the Commission no later than one business day after it received Marcum's report, pursuant to Exchange Act Section 10A(b)(3). OIP at 5; Div. Ex. K. Min Ma, Gang Ma, and Tian all received the letter. Div. Ex. K. Once again, China Ruitai failed to report the matter to the Commission. OIP at 5.

On July 27, 2012, Marcum sent a letter, pursuant to Exchange Act Section 10A(b)(3), to the Individual Respondents at China Ruitai, and sent a copy of it to the Commission. *Id.* at 5; Div. Ex. L. That letter provided notice to the Individual Respondents that Marcum was resigning from the audit engagement, effective immediately. OIP at 5; Div. Ex. L at 1. The letter also informed China Ruitai that Marcum no longer wished to be associated with the Quarterly Reports. OIP at 5; Div. Ex. L. The letter further requested that China Ruitai file a Form 8-K disclosing to the Commission and to the public that Marcum should no longer be associated with the Quarterly Reports, and that such financial statements were "not reviewed" in accordance with Statement of Auditing Standards No. 100, as required by Rule 10-01(d) of Regulation S-X under the Exchange Act. OIP at 5; Div. Ex. L.

As of the date of the OIP, China Ruitai had not complied with its obligation to report the matter to the Commission pursuant to Exchange Act Section 10A(b)(3). OIP at 5. China Ruitai failed to respond to Marcum's requests and cut off contact with Marcum. *Id.* In addition, China Ruitai did not file a Form 8-K to announce the resignation of its auditor. *Id.*; *see* Div. Ex. M.

Since Marcum resigned as China Ruitai's auditor, China Ruitai has failed to file its required periodic reports. OIP at 5. China Ruitai's last filing was a Form NT 10-K for the period ended December 31, 2011, filed on March 30, 2012, notifying the Commission that it was unable to file its Form 10-K on time. OIP at 5; *see* Div. Ex. N. China Ruitai's last periodic report filed with the Commission was its Form 10-Q for the period ended September 30, 2011, filed on November 14, 2011. OIP at 5; *see* Div. Ex. D.

D. Exchange Act 12(j) Proceeding

On September 30, 2013, the Commission issued an Order Instituting Administrative Proceedings against China Ruitai, pursuant to Exchange Act Section 12(j), alleging that China Ruitai had a class of securities registered with the Commission pursuant to Section 12(g) of the Exchange Act and was delinquent in its current and periodic filings, in violation of Section 13(a) of the Exchange Act and Exchange Act Rules 13a-1, 13a-11, and 13a-13. *China Ruitai Int'l Holdings Co.*, Exchange Act Release No. 70580, 2013 SEC LEXIS 3090 (Sept. 30, 2013).

China Ruitai defaulted due to its failure to file an Answer, appear at the prehearing conference, respond to an order to show cause, or otherwise defend the proceeding. *China Ruitai Int'l Holdings Co.*, Initial Decision Release No. 530, 2013 SEC LEXIS 3694, at *2-3 (Nov. 22, 2013). Accordingly, pursuant to Commission Rule of Practice 155(a), I deemed the allegations in the OIP true and issued an initial decision of default revoking the registration of China Ruitai's registered securities based on its failure to timely file required current and periodic reports with the Commission, in violation of Exchange Act Section 13(a) and Rules 13a-1, 13a-11, and 13a-13. *Id.* at *1-3, *6-7, *10-11. On January 16, 2014, the Commission issued a notice that the initial decision had become final. *China Ruitai Int'l Holdings Co.*, Exchange Act Release No. 71323, 2014 SEC LEXIS 162.

Conclusions of Law

A. Secondary Liability

A finding of aiding and abetting requires proof of: (1) a primary violation of the securities laws; (2) knowledge of the primary violation by the aider and abettor; and (3) substantial assistance by the aider and abettor in the commission of the primary violation. *SEC v. DiBella*, 587 F.3d 553, 566 (2d Cir. 2009). The knowledge requirement can be satisfied by recklessness when the alleged aider and abettor is a fiduciary or an active participant. *See Geman v. SEC*, 334 F.3d 1183, 1195-96 (10th Cir. 2003); *Ross v. Bolton*, 904 F.2d 819, 824 (2d Cir. 1990). Negligence is sufficient to establish liability for causing a primary violation that does not require scienter. *KPMG Peat Marwick LLP*, 54 S.E.C. 1135, 1175 (2001), *recons. denied*, Exchange Act Release No. 44050, 2001 SEC LEXIS 422 (Mar. 5, 2001), *pet. denied*, 289 F.3d

109 (D.C. Cir. 2002). A respondent who aids and abets a violation also is a cause of the violation. *See Sharon M. Graham*, 53 S.E.C. 1072, 1085 n.35 (1998), *aff'd*, 222 F.3d 994 (D.C. Cir. 2000).

B. Exchange Act Section 10(b) and Exchange Act Rule 10b-5

Exchange Act Section 10(b) and Rule 10b-5 (collectively, Section 10(b)) make it unlawful for any person in connection with the purchase or sale of any security to (a) employ any device, scheme, or artifice to defraud; (b) make material misstatements or omissions; or (c) engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person. 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5. Scienter is required to establish violations of Exchange Act Section 10(b) and Rule 10b-5. *Aaron v. SEC*, 446 U.S. 680, 695 (1980). As explained more fully below, I find that (1) Min Ma violated Section 10(b) and Rule 10b-5, (2) Gang Ma willfully violated Section 10(b) and Rule 10b-5, and (3) Tian willfully violated Section 10(b) and Rule 10b-5(a) and (c) and aided and abetted and caused China Ruitai's violations of Section 10(b) and Rule 10b-5(b).[8]

1. Fraudulent Scheme

Generally, Exchange Act Section 10(b) and Rule 10b-5(a) and (c) prohibit schemes to defraud. Rule 10b-5(a) and (c) make it unlawful for any person in connection with the purchase or sale of securities to "employ any device, scheme, or artifice to defraud" or to "engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person." 17 C.F.R. § 240.10b-5(a) and (c); *see* 15 U.S.C. § 78j(b). "Conduct itself can be deceptive," and there is no requirement that "there must be a specific oral or written statement before there could be liability under § 10(b) or Rule 10b-5." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 158 (2008).

Primary liability under Rule 10b-5(a) and (c) extends to one who employs any manipulative or deceptive device or engages in any manipulative or deceptive act, with scienter and in connection with the purchase or sale of securities. *See John P. Flannery*, Securities Act Release No. 9689, 2014 WL 7145625, at *12 (Dec. 15, 2014). That standard "certainly would encompass the falsification of financial records to misstate a company's performance" and "the orchestration of sham transactions designed to give the false appearance of business operations." *Id.* It also encompasses the "making" of a fraudulent misstatement to investors, and the drafting or devising of such a misstatement. *Id.*

That is, "scheme liability does not preclude, outright, claims based upon a scheme to misrepresent or omit material facts." *SEC v. Goldstone*, 952 F. Supp. 2d 1060, 1206 (D.N.M. 2013); *see In re Alstom SA Sec. Litig.*, 406 F. Supp. 2d 433, 475 (S.D.N.Y. 2005) (stating "it is possible for liability to arise under both subsection (b) and subsections (a) and (c) of Rule 10b-5

[8] The OIP alleges that Min Ma violated Section 10(b) and Rule 10b-5, but not willfully. OIP at 5-6. "Willful" means intentionally committing the act that constitutes the violation; there is no requirement that the actor must also be aware that she is violating any statutes or regulations. *See Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000).

out of the same set of facts, where the plaintiffs allege both that the defendants made misrepresentations in violations of Rule 10b-5(b), as well as that the defendants undertook a deceptive scheme or course of conduct that went beyond the misrepresentations"). Deceptive conduct "irreducibly entails some act that gives . . . a false impression." *U.S. v. Finnerty*, 533 F.3d 143, 148 (2d Cir. 2008); *see Burnett v. Rowzee*, 561 F. Supp. 2d 1120, 1125 (C.D. Cal. 2008) (stating that a deceptive act is one that has "the principle purpose and effect of creating a false appearance of fact in furtherance of the scheme") (internal quotations and citations omitted).

The Individual Respondents' violations included deceptive conduct beyond mere misrepresentations in China Ruitai's 2011 Quarterly Reports and Amendment. The Individual Respondents orchestrated a scheme to fraudulently obtain up to $40 million in bank financing using falsified documents. This conduct was found to have violated Article 10 of the PRC's Negotiable Instruments Law, and possibly Article 175(I) of the PRC's Criminal Law and Article 52 of the PRC's Contract Law, by two separate law firms. The Individual Respondents sought to conceal this scheme from both China Ruitai's auditor and its investors. For instance, during Marcum's review procedures for the first three quarters of 2011, the Individual Respondents signed management representation letters that stated that (1) management had no knowledge of any fraud, (2) all related-party transactions had been properly disclosed, and (3) there had been no violations of laws. These and other statements were then incorporated into China Ruitai's 2011 Quarterly Reports.

2. Misrepresentations and Omissions

Exchange Act Section 10(b) and Rule 10b-5(b) make it unlawful for any person in connection with the purchase or sale of securities to "make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading." 17 C.F.R. § 240.10b-5(b); *see* 15 U.S.C. § 78j(b); *VanCook v. SEC*, 653 F.3d 130, 138 (2d Cir. 2011). Among other requirements, Section 10(b) generally prohibits an issuer from making public statements that are false or that fail to include material facts necessary to make the statements made, in light of the circumstances under which they are made, not misleading. *See* 17 C.F.R. § 240.10b-5(b). "[C]orporations have a duty to disclose all facts necessary to ensure the completeness and accuracy of their public statements." *In re Marsh & McLennan Co. Sec. Litig.*, 501 F. Supp. 2d 452, 469 (S.D.N.Y. 2006).

In its 2011 Quarterly Reports, China Ruitai misrepresented and omitted facts regarding its related-party obligations to Shandong Ruitai, and in its Amendment, China Ruitai omitted facts regarding such obligations. OIP at 3-4; *see* Div. Exs. B-E. As a result of its scheme to obtain bank financing, China Ruitai's related-party obligations to Shandong Ruitai increased over $40 million from December 2010 to December 2011. Div. Ex. F at 1; Div. Ex. J at 1; *see* OIP at 3. In its 2011 Quarterly Reports, China Ruitai disclosed its related-party obligations to Shandong Ruitai, reporting that by September 30, 2011, those obligations totaled over $34 million, or over thirty-six percent of China Ruitai's liabilities. OIP at 3; Div. Ex. B at 2, 13; Div. Ex. C at 2, 14; Div. Ex. D at 4, 16. However, China Ruitai: (1) inaccurately described the resulting obligations as only related-party notes payable that were "non-interest bearing for the

purpose of financing the Company's operations due to a lack of working capital and have no fixed terms of repayment"; (2) failed to disclose its obligations to the banks and the nature of the illegal activity to obtain bank financing, namely that it obtained such financing based on fake purchase contracts; and (3) failed to disclose that such bank loans could result in risk to the company if their illegal nature was exposed or challenged. OIP at 3; Div. Ex. F at 1-3; Div. Ex. J; *cf.* Div. Ex. I.

In order for primary liability under Section 10(b) to attach, the alleged violator must be the "maker" of the misleading statements. *See SEC v. Wolfson*, 539 F.3d 1249, 1257 (10th Cir. 2008). The "maker" of a statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it. *Janus Capital Grp., Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2302 (2011). China Ruitai is thus a "maker" as "the entity with ultimate authority over the statement." *Id.* Min Ma and Gang Ma are also "makers" because as CEO and CFO, respectively, they signed the Quarterly Reports and Amendment and certifications that attested to their accuracy.

Although Tian is not a "maker" and thus does not have primary liability, he substantially assisted China Ruitai's Section 10(b) violation. Tian signed inaccurate management representation letters that were provided to Marcum during its review of China Ruitai for the first three quarters of 2011, which China Ruitai needed to conceal the scheme from its auditor. The management representation letters stated that (1) management had no knowledge of any fraud, (2) all related-party transactions had been properly disclosed, and (3) there had been no violations of law. These statements were misleading because China Ruitai's scheme violated PRC laws, and the description of the related-party obligations misrepresented the true nature of the activity.

3. Materiality

These misrepresentations and omissions were material because "there is 'a substantial likelihood that the disclosure of the [misstated or] omitted fact[s] would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available.'" *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1318 (2011) (quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988)). Staff Accounting Bulletin (SAB) 99, issued by the Staff of the Commission, provides guidance regarding materiality determinations. *See* SEC SAB No. 99, 64 Fed. Reg. 45150 (Aug. 19, 1999) (codified at 17 C.F.R. pt. 211). Certain qualitative factors considered include the concealment of an unlawful transaction and the significance of the misstatement in relation to the company's operations. *See ECA & Local 134 IBEW Joint Pension Trust v. JP Morgan Chase Co.*, 553 F.3d 187, 197-98 (2d Cir. 2009); SAB No. 99 at 45152 (1999).

China Ruitai's related-party notes totaled millions of dollars, represented a significant portion of its total liabilities, and were the result of an undisclosed and deceptive transaction. As of March 31, 2011, China Ruitai's related-party notes payable balance was almost $8 million, which was about 9.7 percent of its total liabilities. Div. Ex. B at 2. As of June 30, 2011, China Ruitai's related-party notes payable balance was around $24.3 million, which was about twenty-five percent of its total liabilities. Div. Ex. C at 2. As of September 30, 2011, China Ruitai's

related-party notes payable balance was around $34.7 million, which was about 36 percent of its total liabilities. Div. Ex. D at 4. Both the Global Law Office and DLA Piper found that China Ruitai's conduct likely violated Article 10 of the PRC's Negotiable Instruments Law, and DLA Piper additionally found that China Ruitai could be held liable under Article 175(I) of the PRC's Criminal Law, and its conduct may also have constituted a violation of Article 52 of the PRC's Contract Law. OIP at 4-5; Div. Exs. H, I. A reasonable investor would have viewed China Ruitai's deceptive conduct in obtaining bank financing – in any amount, and particularly as an increasingly larger percentage of China Ruitai's total liabilities – as significantly altering the total mix of information made available.

Further, Item 404 of Regulation S-K requires registrants to "[d]escribe any transaction, since the beginning of the registrant's last fiscal year . . . in which the registrant was or is to be a participant and the amount involved exceeds $120,000, and in which any related person had or will have a direct or indirect material interest" in Forms 10-K. 17 C.F.R. § 229.404(a). Similarly, Statement of Financial Accounting Standards Number 57 provides that a public company's "[f]inancial statements shall include disclosures of material related-party transactions." Related Party Disclosures, Statement of Fin. Accounting Standards No. 57 (Fin. Accounting Standards Bd. Mar. 1982). "[D]isclosure is the overriding principle" governing related-party transactions because, although "related party transactions are not inherently bad, they have proven to be an easy and effective way for perpetrators of fraud and money laundering schemes to misstate the economic substance and reality of financial transactions." *In re Am. Preferred Prescription, Inc.*, Bankr. No. 893-84170-478, 1997 WL 158401, at *3 n.11 (Bankr. E.D.N.Y. Mar. 21, 1997) (discussing such transactions in bankruptcy context); *accord Zagami v. Natural Health Trends Corp.*, 540 F. Supp. 2d 705, 711 (N.D. Tex. 2008) (discussing such transactions in the securities fraud context).

Full disclosure of the true nature of the related-party notes was necessary to give investors an accurate assessment of the company's financial condition, especially given that doubts about the company's ability to continue as a going concern due to lack of working capital were represented as being dependent on, among other things, obtaining debt financing. Div. Ex. B at 5; Div. Ex. C at 5-6; Div. Ex. D at 7-8. By representing in its 2011 Quarterly Reports that the company's financing activities significantly increased through use of related-party notes, China Ruitai misleadingly made it appear that it obtained legitimate debt financing to make up for its otherwise negative operating cash flows. Div. Ex. B at 4, 13, 21; Div. Ex. C at 4, 14, 23-24; Div. Ex. D at 6, 16, 26. It did not disclose that such notes were based on underlying bank loans that had been obtained through fictitious purchase orders, which could result in risks to the company if exposed or challenged by the banks or others, especially if China Ruitai failed to repay the bank loans. OIP at 3; *see* Div. Ex. I; Div. Ex. J. Even if China Ruitai's liability for such illegally obtained bank financing under PRC law was low, as stated in the legal opinions by the Global Law Office and DLA Piper,[9] a reasonable investor would still find it significant that the company's debt financing was largely the product of fraud and risky bank financing.

In sum, by inaccurately describing and failing to disclose facts in its public filings regarding the true nature and activity underlying millions of dollars in related-party obligations,

[9] *See* Div. Exs. H and I.

China Ruitai, Min Ma, and Gang Ma misrepresented and omitted material facts regarding China Ruitai's actual operations, debt obligations, solvency, liquidity, and financial risks. OIP at 3. A reasonable investor would view such information as material in deciding whether to invest in the company. *See SEC v. Murphy*, 626 F.2d 633, 653 (9th Cir. 1980) ("[T]he materiality of information relating to financial condition, solvency and profitability is not subject to serious challenge."); *see also SEC v. Monterosso*, 756 F.3d 1326, 1338 (11th Cir. 2014) ("revenue overstatements would have been important to any reasonable shareholder").

4. Scienter

The Individual Respondents acted with scienter, a "mental state embracing intent to deceive, manipulate, or defraud." *Aaron v. SEC*, 446 U.S. 680, 686 n.5 (1980) (internal quotation marks omitted). A finding of "extreme recklessness" satisfies the scienter requirement. *See Flannery*, 2014 WL 71415625, at *10 n.24; *David Disner*, 52 S.E.C. 1217, 1222 & n.20 (1997). In the context of securities fraud, extreme recklessness is "highly unreasonable" conduct, "which represents an extreme departure from the standards of ordinary care . . . to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it." *Flannery*, at *10 n.24; *Novak v. Kasaks*, 216 F.3d 300, 308 (2d Cir. 2000) (quoting *Rolf v. Blyth, Eastman Dillon & Co.*, 570 F.2d 38, 47 (2d Cir. 1978)) (omission in original). Proof of scienter may be inferred from circumstantial evidence. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390-91 n.30 (1983).

Here, the Individual Respondents knew, or were reckless in not knowing, that the bank financing was obtained fraudulently. OIP at 3-4. Both Min Ma and Gang Ma signed China Ruitai's Quarterly Reports, as well as certifications for those filings. *Id.* at 3. In response to Marcum's inquiries regarding the purchase contracts underlying China Ruitai's bank loans, Gang Ma was unable to provide evidence confirming the existence of real purchases or sales between China Ruitai and Shandong Ruitai; additionally, he admitted that such purchase orders were fictitious. Div. Ex. F at 2-3; Div. Ex. J at 1; OIP at 4. Further, Min Ma is a co-owner of Shandong Ruitai and thus would have had access to information concerning the true nature of the purchase orders. *See* OIP at 2. Marcum was unable to satisfactorily corroborate the fact, asserted by the Global Law Office apparently based on information supplied by China Ruitai, that the banks actually knew that there were no real transactions behind the notes. Div. Ex. J at 2. Tian signed management representation letters directed to Marcus which falsely stated that China Ruitai had no knowledge of any fraud. Div. Ex. G. As CAO, Tian knew or was reckless in not knowing the true nature of the transactions and that the financing was obtained fraudulently and illegal. OIP at 4. He also knew or was reckless in not knowing that the misrepresentations would be incorporated into China Ruitai's public filings and that the public filings materially misrepresented the true nature of the transactions. *Id.*

A reasonable inference is that China Ruitai provided false information not only to the banks, but also to its attorneys and auditor. Thus, the Individual Respondents were at least extremely reckless in misrepresenting facts to China Ruitai's attorneys and auditor, and in publishing financial statements in China Ruitai's 2011 Quarterly Reports and Amendment, when they knew or should have known that those statements misrepresentations were inaccurate, false, and misleading. *See SEC v. Pirate Investor LLC*, 580 F.3d 233, 243 (4th Cir. 2009) (citing

Aldridge v. A.T. Cross Corp., 284 F.3d 72, 83 (1st Cir. 2002); *Fla. State Bd. of Admin. v. Green Tree Fin. Corp.*, 270 F.3d 645, 665 (8th Cir. 2001)); *Novak*, 216 F.3d at 308-09.

5. "In Connection" with the Purchase or Sale of Securities

The fraudulent scheme and the misrepresentations and omissions in China Ruitai's 2011 Quarterly Reports and Amendment were "in connection with" the purchase or sale of domestic securities. *See* 15 U.S.C. § 78j(b); *Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869, 2884 (2010) ("[T]he focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States.");[10] *cf. China Ruitai Int'l Holdings Co.*, 2013 SEC LEXIS 3694, at *3 (China Ruitai's common stock quoted on OTC Link); *SEC v. Ficeto*, 839 F. Supp. 2d 1101, 1112 (C.D. Cal. 2011) (Section 10(b) applies with equal force to market manipulation on national exchanges and the domestic over-the-counter market). The Supreme Court has broadly construed the phrase "in connection with" under Section 10(b); the requisite showing does not require deception of an identifiable purchaser or seller, but rather that the fraud coincides with a securities transaction. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 85 (2006) (citing *United States v. O'Hagan*, 521 U.S. 642, 651, 658 (1997), and *SEC v. Zandford*, 535 U.S. 813, 819-20, 822 (2002)). Where the fraud alleged involves the public dissemination of information in public filings with the Commission, the "in connection with" element is generally met by proof of the means of its dissemination and the materiality of the misrepresentation or omission. *See SEC v. Wolfson*, 539 F.3d 1249, 1262 (10th Cir. 2008); *Semerenko v. Cendant Corp.*, 223 F.3d 165, 176 (3d Cir. 2000); *SEC v. Rana Research, Inc.*, 8 F.3d 1358, 1362 (9th Cir. 1993); *SEC v. Savoy Indus., Inc.*, 587 F.2d 1149, 1171 (D.C. Cir. 1978); *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 860-62 (2d Cir. 1968) (en banc).

The fraudulent scheme operated as a fraud on investors because in an effort to conceal the scheme, the Individual Respondents made misrepresentations to Marcum, and these misrepresentations were incorporated into China Ruitai's 2011 Quarterly Reports. China Ruitai's public filings, were designed to reach investors and are documents upon which a reasonable investor would rely in deciding whether to purchase its securities. *See Wolfson*, 539 F.3d at 1262-63; *SEC v. Benson*, 657 F. Supp. 1122, 1131 (S.D.N.Y. 1987); *Rita J. McConville*, 58 S.E.C. 596, 618-19 (2005), *pet. denied*, 465 F.3d 780 (7th Cir. 2006).

C. Exchange Act Section 13(a) and Rules 12b-20, 13a-1, 13a-11, and 13a-13

Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 thereunder require issuers with securities registered under Exchange Act Section 12 to file annual and quarterly reports with the

[10] The Dodd-Frank Wall Street Reform and Consumer Protection Act may have overturned *Morrison* in the context of Commission enforcement actions. Exchange Act Section 27(b) provides the Commission with jurisdiction to bring an action alleging a violation of the antifraud provisions involving "(1) conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or (2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States." 15 U.S.C. § 78aa(b).

Commission. 15 U.S.C. § 78m(a); 17 C.F.R. §§ 240.13a-1, .13a-13. An issuer violates these provisions if it files reports that contain materially false or misleading information. *SEC v. Kalvex, Inc.*, 425 F. Supp. 310, 315-16 (S.D.N.Y. 1975); *Russell Ponce*, 54 S.E.C. 804, 812 n.23 (2000), *pet. denied*, 345 F.3d 722 (9th Cir. 2003). Exchange Act Rule 12b-20 requires that periodic reports filed with the Commission contain further material information "as may be necessary to make the required statements, in the light of the circumstances under which they are made[,] not misleading." 17 C.F.R. § 240.12b-20; *SEC v. Falstaff Brewing Corp.*, 629 F.2d 62, 72 (D.C. Cir. 1980). In addition, under Exchange Act Rule 13a-11, an issuer must file current reports on Form 8-K, which requires disclosure of an auditor's resignation within four business days of such resignation. 17 C.F.R. § 240.13a-11; Form 8-K (SEC Form 873), General Instructions B.1, Item 4.01. No showing of scienter is necessary to establish a violation of these provisions. *See McNulty*, 137 F.3d at 740-741; *SEC v. Wills*, 472 F. Supp. 1250, 1268 (D.D.C. 1978); *Gregory M. Dearlove, CPA*, Exchange Act Release No. 57244, 2008 SEC LEXIS 223, at *112 (Jan. 31, 2008), *pet. denied*, 573 F.3d 801 (D.C. Cir. 2009) (en banc).

I find that Min Ma caused, and Gang Ma and Tian willfully aided and abetted and caused, China Ruitai's violations of Exchange Act Section 13(a) and Rules 12b-20, 13a-1, 13a-11, and 13a-13.[11] As previously discussed, China Ruitai's 2011 Quarterly Reports and Amendment contained materially false and/or misleading statements. Thus, its misconduct violated Exchange Act Section 13(a) and Rules 12b-20, 13a-1, and 13a-13. Moreover, China Ruitai violated Exchange Act Rule 13a-11 by its failure to timely report Marcum's resignation in a Form 8-K. *See China Ruitai Int'l Holdings Co.*, 2013 SEC LEXIS 3694, at *3-5 (describing China Ruitai's failure to file any periodic reports since it filed its Form 10-Q for the period ended September 30, 2011).

It is clear that the Individual Respondents caused, and Gang Ma and Tian knowingly and substantially assisted, China Ruitai's failure to comply with periodic reporting requirements. As China Ruitai's CEO and CFO, respectively, Min Ma and Gang Ma were responsible for China Ruitai's filings with the Commission. Min Ma and Gang Ma signed the 2011 Quarterly Reports and Amendment and accompanying certifications attesting to their accuracy. Under Min Ma and Gang Ma's management, China Ruitai failed to timely report Marcum's resignation in a Form 8-K and ceased complying with the federal securities laws' periodic reporting requirements. As CAO, Tian played a significant role in communicating with China Ruitai's auditor during the 2011 quarterly and annual reviews. Tian signed three inaccurate management representation letters that were provided to Marcum. As public company officers, the Individual Respondents knew or should have known that their acts or omissions would contribute to China Ruitai's false and misleading filings and its later failure to file required reports.

D. Exchange Act Section 13(b)(2)(A) and Rules 13b2-1 and 13b2-2(a)

Exchange Act Section 13(b)(2)(A) requires China Ruitai, an issuer registered with the Commission pursuant to Exchange Act Section 12(g), to "make and keep books, records, and

[11] The OIP alleges that Min Ma caused China Ruitai's violations of Exchange Act Section 13(a) and Rules 12b-20, 13a-1, 13a-11, and 13a-13, but not that he aided and abetted them. OIP at 6; *cf.* Motion at 18.

accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer." 15 U.S.C. § 78m(b)(2)(A). Just as the false and misleading financial statements contained in China Ruitai's 2011 Quarterly Reports and Amendment violated Exchange Act Section 10(b), they also violated Section 13(b)(2)(A). *See Ponce*, 345 F.3d at 736-37 (Exchange Act 13(b)(2) liability predicated on Exchange Act Section 10(b) violation for financial misstatements in annual and quarterly reports); *SEC v. Black*, No. 04-cv-7377, 2008 WL 4394891, at *15 (N.D. Ill. Sept. 24, 2008) (financial misstatements contained in Forms 10-K established Section 13(b)(2)(A) violation). Scienter need not be shown to establish liability under Section 13(b)(2). *Rita J. McConville*, 58 S.E.C. at 622. The Individual Respondents caused, and Gang Ma and Tian willfully aided and abetted and caused China Ruitai's violation of Exchange Act Section 13(b)(2)(A).[12] The Individual Respondents knowingly provided substantial assistance to China Ruitai in its books and records violations, because as discussed above, they knowingly made or caused China Ruitai to make the false and misleading statements contained in China Ruitai's 2011 Quarterly Reports and Amendment.

Exchange Act Rule 13b2-1 states that "[n]o person shall[,] directly or indirectly, falsify or cause to be falsified, any book, record or account" subject to Exchange Act Section 13(b)(2)(A). 17 C.F.R. § 240.13b2-1. Scienter is not required for a finding of violation of Rule 13b2-1. *Rita J. McConville*, 58 S.E.C. at 620. I find that Min Ma violated, and Gang Ma and Tian willfully violated Rule 13b2-1 because they falsified China Ruitai's books, records, and accounts that were presented to Marcum and incorporated into the 2011 Quarterly Reports and Amendment.

Exchange Act Rule 13b2-2(a) makes it unlawful for a director or officer of an issuer to make or cause to be made a materially false or misleading statement to an accountant or omit or cause to omit any material information necessary to make the statements made not misleading in connection with an audit of financial statements or reports filed with the Commission. 17 C.F.R. § 240.13b2-2(a). Scienter is not required for a finding of violation of Rule 13b2-2. *SEC v. World-Wide Coin Inv.*, 567 F. Supp. 724, 749 (N.D. Ga. 1983). The term "officer" includes "president, vice president, secretary, treasurer or principal financial officer, comptroller or principal accounting officer, and any person routinely performing corresponding functions with respect to any organization." 17 C.F.R. § 240.3b-2. Thus, Min Ma, Gang Ma, and Tian are considered officers with respect to Rule 13b2-2(a). As discussed above, the Individual Respondents signed management representation letters addressed to Marcum that contained false and misleading statements that (1) management had no knowledge of any fraud, (2) all related-party transactions had been properly disclosed, and (3) there had been no violations of laws. I find that Min Ma violated, and Gang Ma and Tian willfully violated Exchange Act Rule 13b2-2(a).

E. Exchange Act Rule 13a-14

[12] The OIP alleges that Min Ma caused China Ruitai's violations of Exchange Act Section 13(b)(2)(A), but not that he aided and abetted them. OIP at 6; *cf.* Motion at 19-20. Also, it alleges that Min Ma violated Rules 13b2-1 and 13b2-2(a), but not willfully. OIP at 6.

Under Exchange Act Rule 13a-14, the principal executive and principal financial officers of an issuer with securities registered under Exchange Act Section 12 are required to sign a certification that, based on their knowledge, the annual and quarterly reports filed with the Commission do not contain any untrue statement of material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading. 17 C.F.R. §§ 240.13a-14, 229.601(b)(31). I find that Min Ma violated[13] and Gang Ma willfully violated Rule 13a-14. As CEO and CFO, respectively, Min Ma and Gang Ma signed the certifications for the 2011 Quarterly Reports. As discussed above, Min Ma and Gang Ma knew that the 2011 Quarterly Reports contained material misstatements and omissions.

Sanctions

The Division requests cease-and-desist orders and third-tier civil penalties against the Individual Respondents. Motion at 1, 21-33. The Division does not request officer and director bars against the Individual Respondents or that Gang Ma and Tian be denied the privilege of appearing or practicing before the Commission as accountants. *See* OIP at 8; Motion at 21-33. I therefore do not impose those sanctions.

A. Cease-and-Desist Order

Under Exchange Act Section 21C, the Commission may order a person found to be violating or to have violated a provision of the Exchange Act or any rule thereunder to cease and desist from such violations. 15 U.S.C. § 78u-3(a). Although there must be some likelihood of future violations whenever the Commission issues a cease-and-desist order, the required showing is "significantly less than that required for an injunction." *KPMG Peat Marwick LLP*, 54 S.E.C. at 1185, 1191. Indeed, absent evidence to the contrary, a single past violation ordinarily suffices to establish a risk of future violations. *Id.* at 1185, 1191.

In evaluating whether to issue a cease-and-desist order, the Commission considers "the seriousness of the violation, the isolated or recurrent nature of the violation, the respondent's state of mind, the sincerity of the respondent's assurances against future violations, the respondent's recognition of the wrongful nature of his or her conduct, and the respondent's opportunity to commit future violations." *Id.* at 1192. In addition, the Commission considers "whether the violation is recent, the degree of harm to investors or the marketplace resulting from the violation, and the remedial function to be served by the cease-and-desist order in the context of any other sanctions being sought in the same proceedings." *Id.* The Commission weighs these factors in light of the entire record, and no one factor is dispositive. *Id.*

The Individual Respondents' violations were serious because they conducted multiple fraudulent transactions and misrepresented these transactions to China Ruitai's auditor and investors, and in filings with the Commission. The Commission has "repeatedly held that conduct that violates the antifraud provisions of the securities laws is especially serious and subject to the severest of sanctions under the securities laws." *Peter Siris*, Exchange Act Release

[13] The OIP alleges that Min Ma violated Rule 13a-14, but not willfully. OIP at 6.

No. 71068, 2013 SEC LEXIS 3924, at *23 (Dec. 12, 2013) (internal quotation marks omitted), *pet. denied*, 773 F.3d 89 (D.C. Cir. 2014). Additionally, the Individual Respondents made blatant misrepresentations to Marcum regarding China Ruitai's filings. The Individual Respondents, as officers of China Ruitai, signed representation letters certifying that management had no knowledge of any fraud, all related-party transactions had been properly disclosed, and there had been no violations of laws. Because of these misrepresentations, Marcum had no reason to believe fraudulent activity was occurring and, therefore, false information was reported in the 2011 Quarterly Reports and Amendment. Furthermore, even when Marcum identified the misrepresentations and illegal conduct, the Individual Respondents blatantly disregarded Marcum's Exchange Act Section 10A(b) notices and refused either to correct the misrepresentations or file the necessary Form 8-K with the Commission. Indeed, Gang Ma confirmed that the transactions were fictitious. Additionally, China Ruitai's failure to comply with the reporting provisions is serious because these provisions are central to the Exchange Act. The purpose of periodic reporting is to supply investors with current and accurate financial information about an issuer so that they may make sound investment decisions. *Gateway Int'l Holdings, Inc.*, Exchange Act Release No. 53907, 2006 SEC LEXIS 1288, at *26 (May 31, 2006). The seriousness of the violations is further underscored by the fact that it failed to report Marcum's resignation on Form 8-K, despite being notified that Marcum had resigned following an alleged illegal act that the company failed to remedy.

The Individual Respondents' violations were recurrent in that they repeatedly caused China Ruitai to file materially false and misleading quarterly reports throughout 2011; failed to correct China Ruitai's misleading statements, even after the resignation of its auditor; and caused China Ruitai to repeatedly fail to timely file required current and periodic reports. Additionally, in each of the first three quarters of 2011, the Individual Respondents provided materially misleading management representation letters to China Ruitai's auditor.

The Individual Respondents acted with scienter in violating the antifraud provisions, though a finding of scienter is not required for Exchange Act Sections 13(a) and 13(b)(2)(A) and Rules 12b-20, 13a-1, 13a-11, 13a-13, and 13a-14. The Individual Respondents have provided no assurances against future violations, nor generally recognized the wrongful nature of their conduct.[14] Their opportunities to commit future violations are high, as they are experienced business persons, each in their late thirties to mid-forties, and have many working years ahead of them.

The antifraud violations occurred in 2011, while the reporting requirement violations occurred as recently as 2013. While the degree of harm to investors is difficult to quantify, as discussed in more detail below, I find that investors suffered substantial loss or risk of substantial loss. The degree of harm to the marketplace is thus high, as an efficient and honest market requires accurate information to be distributed to investors. *See Basic Inc. v. Levinson*, 485 U.S. 224, 230 (1988). As noted below, I am also imposing substantial civil penalties.

[14] Gang Ma did admit to Marcum that the underlying transactions were fictitious, but it is not clear that he recognized that his conduct overall was wrongful.

Applying these factors to the present case, each of the violations independently calls for cease-and-desist relief. All of the factors, especially the seriousness of the violations, the Individual Respondents' failure to appreciate that seriousness, and particularly, the forward-looking effect to be served by cease-and-desist orders, weigh in favor of imposition of cease-and-desist orders.

Accordingly, cease-and-desist orders are appropriate.

B. Civil Penalties

Under Exchange Act Section 21B, the Commission is authorized to impose a civil penalty in a cease-and-desist proceeding where, as here, the respondent has violated the Exchange Act or rules thereunder. *See* 15 U.S.C § 78u-2(a)(2). A three-tier system establishes the maximum civil money penalty that may be imposed for each violation found: a first-tier penalty may be imposed for each statutory violation; a second-tier penalty is permissible where the respondent's violation involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; and a third-tier penalty may be imposed where, in addition to the first-tier and second-tier requirements, the violation directly or indirectly (1) resulted in substantial losses, (2) created a significant risk of substantial losses to other persons, or (3) resulted in substantial pecuniary gain to the person who committed the misconduct (loss prong). 15 U.S.C § 78u-2(b). The Commission must determine how many violations occurred to impose civil penalties under the statute. *See Rapoport*, 682 F.3d at 108. For the relevant period, for an individual the maximum third-tier penalty was $150,000. 17 C.F.R. § 201.1004 and Table IV to Subpart E.

The Division seeks third-tier penalties for "not less than four" violations. Motion at 30. There were four instances where the Individual Respondents caused China Ruitai to file materially misleading Commission filings (the 2011 Quarterly Reports and Amendment), in violation of Section 10(b) and Rule 10b-5. The Individual Respondents' four violations all involved scienter, which is sufficient to establish fraud, deceit, and reckless disregard of a regulatory requirement. *See Ambassador Capital Mgmt., LLC*, Initial Decision Release No. 672, 2014 WL 4656408, at *78 (Sept. 19, 2014), *finality notice*, Advisers Act Release No. 3979, 2014 WL 6985132 (Dec. 11, 2014). Thus, at least four second-tier penalties are warranted as to each Individual Respondent.

The loss prong for assessing a third-tier penalty requires a more complex analysis. In its Motion, the Division argues that a defendant's conduct can create both a substantial loss to other persons and the risk of substantial loss to other persons where victims of fraud purchased the company's stock, and were then stuck with it until the company's financial demise. Motion at 29 (citing *SEC v. Huff*, 758 F. Supp. 2d 1288, 1364 (S.D. Fla. 2010), *aff'd*, 455 F. App'x 882 (11th Cir. 2012)). The Division notes that during the relevant six-month period during which its misinformation was "on the market, China Ruitai's stock price remained "comparably stable at prices between $.15 and $.30," with over 395,000 shares trading hands in twenty-one transactions. *Id.* at 31. After December 2011, however, trading in China Ruitai's stock effectively ceased, with only thirteen transactions in 2012 and a significant drop in price, down to $.03 by the end of 2012. *Id.*

I find that with respect to the four 2011 Quarterly Reports and Amendment violations, the loss prong is met and third-tier civil penalties should be imposed.

> [I]n an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business. . . . Misleading statements will therefore defraud purchasers of stock even if the purchasers do not directly rely on the misstatements. . . . The causal connection between the defendants' fraud and the [purchasers'] purchase of stock in such a case is no less significant than in a case of direct reliance on misrepresentations.

Basic Inc., 485 U.S. at 241-42 (quoting *Paul v. Speiser*, 806 F.2d 1154, 1160-61 (3d Cir. 1986)) (omissions in original). China Ruitai's misinformation spoiled the market from May 16, 2011 – when China Ruitai filed its first quarter results for 2011 – through March 30, 2012 – when China Ruitai filed a Form NT 10-K, announcing that its annual report would be delayed. Although the misinformation was not revealed on March 30, 2012, after this date China Ruitai did not make any additional filings, including its Form 8-K to announce the resignation of its auditor. *See* Div. Ex. M. During this period, China Ruitai's stock prices were at an artificially high level. Investors who purchased stock during that period suffered substantial losses or risked substantial losses once China Ruitai was unable to continue disseminating materially false and misleading information. *See Vladlen "Larry" Vindman*, Securities Act Release No. 8679, 2006 SEC LEXIS 862, at *19, *35 (Apr. 14, 2006) (significant risk of substantial losses to those who traded in stock that ranged from $.025 to $.36 per share). Stock prices ranged from a low of $.10 to a high of $.51 during this period. Supplemental Ex. A. Trading was relatively robust from May 16, 2011, through the end of November 2011 (the period when China Ruitai was actively disseminating materially false and misleading information), with around 400,000 shares trading hands. *Id.* From December 2011 through March 30, 2012, a time when China Ruitai was no longer actively disseminating materially false and misleading information but the information remained in the market, trading dropped precipitously, with only 21,500 shares trading hands. *Id.* After March 30, 2012, trading continued to be sparse, with only 73,500 shares trading hands over twelve separate days through the end of 2012, and the price dropped from $.13 to $.03. *Id.*

Although the tier determines the maximum penalty, "each case has its own particular facts and circumstances which determine the appropriate penalty to be imposed" within the tier. *SEC v. Opulentica, LLC*, 479 F. Supp. 2d 319, 331 (S.D.N.Y. 2007) (internal quotation marks omitted); *see Ronald S. Bloomfield*, Exchange Act Release No. 71632, 2014 WL 768828, at *23 (Feb. 27, 2014). Within any particular tier, the Commission has the discretion to set the amount of the penalty. *See Brendan E. Murray*, Advisers Act Release No. 2809, 2008 SEC LEXIS 2924, at *42 (Nov. 21, 2008).

Several considerations bear on the amount of a penalty. In considering whether a penalty is in the public interest, the Commission considers six factors: (1) fraud; (2) harm to others; (3) unjust enrichment; (4) previous violations; (5) deterrence; and (6) such other matters as justice may require. 15 U.S.C. § 78u-2(c). "Not all factors may be relevant in a given case, and the

factors need not all carry equal weight." *Robert G. Weeks*, Initial Decision Release No. 199, 2002 WL 169185, at *58 (Feb. 4, 2002). In addition to these statutory factors, courts consider:

> (1) the egregiousness of the violations at issue, (2) defendants' scienter, (3) the repeated nature of the violations, (4) defendants' failure to admit to their wrongdoing; (5) whether defendants' conduct created substantial losses or the risk of substantial losses to other persons; (6) defendants' lack of cooperation and honesty with authorities, if any; and (7) whether the penalty that would otherwise be appropriate should be reduced due to defendants' demonstrated current and future financial condition.

SEC v. Lybrand, 281 F. Supp. 2d 726, 730 (S.D.N.Y. 2003), *aff'd*, 425 F.3d 143 (2d Cir. 2005).

Regarding the six statutory factors, factors one, two, and five weigh in favor of a large penalty: the Individual Respondents' violations involved fraud and harm to investors, and substantial penalties will deter others. There is no evidence pertaining to the other three statutory factors. Regarding the seven *Lybrand* factors, factors one through five weigh in favor of a heavy sanction. No evidence regarding factors six and seven has been presented.

There is no clear evidence that any particular Individual Respondent is more culpable than another, or that the various factors should be weighed differently for the different Individual Respondents. On balance, I find four third-tier penalties of $100,000 each, or $400,000 total, to be warranted for each Individual Respondent.

Order

IT IS ORDERED that, pursuant to Section 21C of the Securities Exchange Act of 1934, Dian Min Ma shall CEASE AND DESIST from committing or causing any violations or future violations of Sections 10(b), 13(a), and 13(b)(2)(A) of the Securities Exchange Act of 1934 and Rules 10b-5, 12b-20, 13a-1, 13a-11, 13a-13, 13a-14, 13b2-1, and 13b2-2(a) thereunder.

IT IS FURTHER ORDERED that, pursuant to Section 21C of the Securities Exchange Act of 1934, Gang Ma shall CEASE AND DESIST from committing, causing, or aiding and abetting any violations or future violations of Sections 10(b), 13(a), and 13(b)(2)(A) of the Securities Exchange Act of 1934 and Rules 10b-5, 12b-20, 13a-1, 13a-11, 13a-13, 13a-14, 13b2-1, and 13b2-2(a) thereunder.

IT IS FURTHER ORDERED that, pursuant to Section 21C of the Securities Exchange Act of 1934, Jin Tian shall CEASE AND DESIST from committing, causing, or aiding and abetting any violations of Sections 10(b), 13(a), and 13(b)(2)(A) of the Securities Exchange Act of 1934 and Rules 10b-5, 12b-20, 13a-1, 13a-11, 13a-13, 13b2-1, and 13b2-2(a) thereunder.

IT IS FURTHER ORDERED that, pursuant to Section 21B of the Securities Exchange Act of 1934, Dian Min Ma shall PAY A CIVIL MONEY PENALTY in the amount of $400,000; Gang Ma shall PAY A CIVIL MONEY PENALTY in the amount of $400,000; and Jin Tian shall PAY A CIVIL MONEY PENALTY in the amount of $400,000.

Payment of penalties shall be made no later than twenty-one days following the day this Initial Decision becomes final, unless the Commission directs otherwise. Payment shall be made in one of the following ways: (1) transmitted electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request; (2) direct payments from a bank account via Pay.gov through the website at http://www.sec.gov/about/offices/ofm.htm; or (3) by certified check, United States postal money order, bank cashier's check, wire transfer, or bank money order, payable to the Securities and Exchange Commission. Any payment by certified check, United States postal money order, bank cashier's check, wire transfer, or bank money order shall include a cover letter identifying the Respondent(s) and Administrative Proceeding No. 3-15544, and shall be delivered to: Enterprises Services Center, Accounts Receivable Branch, HQ Bldg., Room 181, AMZ-341, 6500 South MacArthur Blvd., Oklahoma City, Oklahoma 73169. A copy of the cover letter and instrument of payment shall be sent to the Commission's Division of Enforcement, directed to the attention of counsel of record.

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

Respondents are notified that they may move to set aside the default in this case. Rule 155(b) permits the Commission, at any time, to set aside a default for good cause, in order to prevent injustice and on such conditions as may be appropriate. 17 C.F.R. § 201.155(b). A motion to set aside a default shall be made within a reasonable time, state the reasons for the failure to appear or defend, and specify the nature of the proposed defense in the proceeding. *Id.*

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Cameron Elliot
Administrative Law Judge