UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

Administrative Proceeding
File No. 3-16989

In the Matter of

VINAY KUMAR NEVATIA,

Respondent.

DIVISION OF ENFORCEMENT'S MOTION FOR REMEDIAL RELIEF AGAINST RESPONDENT VINAY KUMAR NEVATIA

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I. Introduction

Pursuant to Rules 155(a) and 220(f) of the Commission's Rules of Practice, and the Law Judge's Order to Show Cause, Postponing Hearing, and Directing Motion for Sanctions ("Order to Show Cause") dated January 4, 2016, the Division of Enforcement ("Division") moves for an industry bar against Respondent Vinay Kumar Nevatia pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act"). We set forth the grounds for this relief below.

II. Procedural History

Following a default judgment against Nevatia in the Commission's federal district court action, *SEC v. Nevatia,* No. 14-cv-05273 (N.D. Cal.), which permanently enjoined Nevatia from further securities fraud violations, the Commission issued an Order Instituting Administrative Proceedings ("OIP") against Nevtia pursuant to Exchange Act Section 15(b) on December 8, 2015. In summary, the OIP alleges that Nevatia secretly re-sold approximately $900,000 worth of shares in a privately-held company, which he had previously procured for eight other investors who remained the rightful owners at the time of his fraudulent re-sale.

The Division served the OIP on Nevatia on December 11, 2015 by attaching the OIP to an e-mail sent to the e-mail address that Nevatia instructed the Commission staff to use in the underling investigation. Order to Show Cause at 2 (finding that the Division served Nevatia by e-mail on December 11, 2015).

Nevatia has not appeared in this proceeding and, accordingly, failed to file an Answer, which was due on December 31, 2015. 17 C.F.R §201.220(b); Order to Show Cause at 2. The Law Judge ordered Nevatia to show cause by January 15, 2016 to justify his failure to file an Answer or otherwise defend this proceeding. Order to Show Cause

at 2. The Division served the Order to Show Cause by e-mailing a copy to Nevatia on January 4, 2016, sent to the same e-mail address used to deliver the OIP. Respondent had until January 15, 2016 to respond and show cause for why the Law Judge should not determine the proceeding against him. He failed to do so. Nevatia is therefore in default and, pursuant to the Order to Show Cause, the Division brings this motion for remedial relief. *Id.*

III. Legal Argument

A. Summary of Allegations of the OIP

Pursuant to Rule 155(a), the Law Judge may deem the allegations of the OIP as true for purposes of determining remedial relief against Respondent. *See In the Matter of Peak Wealth Opportunities, LLC and David W. Dube*, AP File No. 3-14979, 2013 WL 812635 at *1 (March 5, 2013).

The relevant allegations are:

- From approximately 2007 through 2013, Nevatia solicited investments through certain entities owned or controlled by him, including KBR Capital Markets, LLC, a California limited liability company. OIP at ¶ II.A.1. KBR Capital Markets, LLC was registered with the Commission as a broker-dealer from March 2004 through August 2014, and, from at least September 2012 through the present, Nevatia owned KBR Capital Markets, LLC. *Id.*
- From November 2011 through September 2012, Nevatia purported to sell approximately $900,000 worth of shares in CSS Corp. Technologies (Mauritius) Limited ("CSS"), a privately held technology company. OIP at ¶ II.B.3.
- The shares of CSS that Nevatia purported to sell were actually owned by eight other investors who had purchased the stock through Respondent in 2008. *Id.*
- Three years after the original investors bought the CSS shares through Nevatia, he began re-selling the shares without telling the original investors. *Id.*
- Nevatia went to great effort to conceal his double-dealing, lying at each stage of his fraudulent re-sales of CSS stock. He deceived the subsequent buyers into believing he was the legitimate and sole owner of the shares, and had them wire the money to him, rather than the original investors. *Id.* He lied to CSS's transfer agent, claiming that new stock certificates needed to be issued to the

new buyers because the original stock certificates had been lost. *Id.* Even after the fraudulent re-sales were complete, Respondent continued to deceive the original investors into thinking they still held the shares. *Id.*

- Nevatia absconded with the proceeds from the re-sales and did not share them with the original investors. *Id.*
- The same facts alleged in the OIP previously gave rise to the Commission's district court action, which was initiated on December 2, 2014. *Id.* at II.B.4. Respondent defaulted, and, on November 9, 2015, the district court entered a judgment against Respondent permanently enjoining him from future violations of Section 17(a) of the Securities Act of 1933 ("Securities Act"), and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. The judgment also ordered Respondent to disgorge $701,013.94 of ill-gotten profit (including prejudgment interest of $71,213.94) and to pay a civil penalty of $629,800. *Id.*

The OIP thus describes how Nevatia violated Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and that the district court in the civil case enjoined him from future violations of these statutes and rule.

In addition, for the procedural background leading to the district court's injunction against Nevatia, the following materials from the underlying district court proceeding are attached to this motion:

- Exhibit 1--Complaint, dated December 2, 2014;
- Exhibit 2--Declaration of Jason H. Lee., dated June 12, 2015;
- Exhibit 3—Declaration of William T. Salzmann, dated July 17, 2015;
- Exhibit 4—Report and Recommendation Regarding SEC's Application for Default Judgment, dated October 19, 2015;
- Exhibit 5--Order Adopting Report and Recommendation, dated November 9, 2015; and
- Exhibit 6--Judgment, dated November 9, 2015.

B. The Requested Bar Is Appropriate.

Respondent has been in default in this proceeding since January 15 when he failed to show cause as required under the Order to Show Cause, and the only question left is what remedial relief is appropriate under Exchange Act Section 15(b).

Exchange Act Section 15(b)(6)(A)(iii) authorizes the Commission to bar a person from further association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization ("NRSRO"), where, at the time of the misconduct, he was associated with or seeking to become associated with a broker or dealer, if the person was enjoined in connection with the purchase or sale of a security, and the bar is in the public interest. 15 U.S.C. §78(o)(b)(6)(A)(iii); *In the Matter of Christopher A. Seeley*, AP File No. 3-15240, 2013 WL 5561106 at *13 (Oct. 9, 2013). Furthermore, the Commission is authorized to issue collateral bars pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) ("Dodd-Frank"), which added collateral bars as remedies under Exchange Act Section 15(b)(6). All of the misconduct at issue here occurred after the enactment of Dodd-Frank.

The following three elements are thus important in this case to establish the need for an industry bar: (1) Nevatia was associated with a broker or dealer at the time of his misconduct; (2) the OIP and district court record demonstrate that Nevatia was enjoined against securities fraud; and (3) it is in the public interest to bar him.

1. Nevatia Was "Associated With a Broker or Dealer" Under the Exchange Act.

Under Section 15(b)(6) of the Exchange Act, the Commission may bar a person who is, or was at the time of the misconduct, "associated" with a broker or dealer. 15 U.S.C. §78(o)(b)(6)(A). Section 3(a)(18) of the Exchange Act defines a "person

associated with a broker or dealer" to include "any partner, officer, director...of such broker or dealer (or any person occupying a similar status or performing similar functions)" as well as "any person directly or indirectly controlling...such broker or dealer." 15 U.S.C. §78c(a)(18). As alleged in the OIP, during his fraud Nevatia owned KBR Capital Markets LLC, a registered broker dealer entity, and, from at least 2007 through 2013, Nevatia solicited securities investments through the entity. OIP at ¶ II.A.1.

2. Respondent Was Permanently Enjoined for His Violations of Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, and Rule 10b-5 Thereunder.

As noted above, Section 15(b)(6)(iii) of the Exchange Act authorizes the Law Judge to bar Respondent from the securities industry if he was enjoined from activities relating to the purchase or sale of a security. 15 U.S.C. §78(o)(b)(6)(A)(iii); 15 U.S.C. §78(o)(b)(4)(C) (allowing for an injunction from engaging in "any conduct or practice ...in connection with the purchase or sale of any security" to give rise to a bar).

Here, as alleged in the OIP and reflected in the district court record, the district court permanently enjoined Nevatia from further violations of Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, and Rule 10b-5 thereunder. OIP at ¶ II.B.4; Exhibit 4 at 15, Exhibit 5, Exhibit 6. The district court based both injunctions on findings that Nevatia committed the fraud in connection with the sale of CSS securities. *See* Exhibit 4, at 9 and 11 (finding, respectively, that Nevatia's Exchange Act violations were "in connection with the purchase or sale" of a security, and his Securities Act violations were "in the sale of a security"). This record is sufficient to meet the prerequisite under Section 15(b)(6)(iii) of the Exchange Act. *See Christopher Seeley*, 2013 WL 5561106 at *13 (a district court injunction against violations of Section 10(b), among other statutes, gave rise to an industry bar).

3. An Industry Bar Is in the Public Interest.

In determining whether a bar is in the public interest, the Commission considers the factors outlined in *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979): (1) the egregiousness of a respondent's actions; (2) the isolated or recurrent nature of the violations; (3) the degree of scienter involved; (4) the respondent's assurances against future violations; (5) the respondent's recognition of the wrongful nature of his conduct; and (6) the likelihood the respondent's occupation will present opportunities for future violations. *See also In the Matter of KPMG Peat Marwick, LLP,* AP File No. 3-9500, 2001 WL 47245 at *23-26 (Jan. 19, 2001), *aff'd sub nom KPMG v. SEC*, 289 F.3d 109 (D.C. Cir. 2002); *Peak Wealth Opportunities,* 2013 WL 812635 at *9-10; *Christopher Seeley*, 2013 WL 5561106 at *14. No one factor controls. *See SEC v. Fehn*, 97 F.3d 1276, 1295-96 (9th Cir. 1996).

Here, all six factors weigh in favor of a securities industry bar. The first three *Steadman* factors applied to Nevatia's conduct suggest a repeated pattern of fraudulent behavior, carried out with scienter. As alleged in the OIP, Nevatia carried out his fraud over a period that spanned nearly two years from November 2011 to August 2013. OIP at ¶ II.B.3. During this period, Nevatia made multiple misrepresentations to the other affected parties, including the original purchasers, the subsequent buyers, and the transfer agent who stood as a gatekeeper between him and the completion of his fraud. *Id.* Among these lies were after-the-fact misrepresentations to the original purchasers intended to hide the fraud from them. *Id.* Given the period over which the fraud took place, as well as Nevatia's efforts to hide his misconduct, the first three *Steadman* factors are readily satisfied. *See SEC v. Smart*, 678 F.3d 850, 857 (10th Cir. 2012) (holding that where a defendant did not use investors' funds in the manner that he said he would, used

funds for his own personal expenses, "ignored investors" inquiries about the status of their funds[,] and provided false accountings," the "circumstances go beyond mere recklessness and indicate a deliberate intent to defraud investors").

The fourth and fifth *Steadman* factors—which consider whether the respondent has come to terms with his prior violations and done anything to mitigate them—also weigh strongly in favor of a bar against Nevatia. He chose to continue to lie to the original purchasers after he had already absconded with the money obtained from the fraudulent re-sales. OIP at ¶ II.B.3. Likewise, Nevatia failed to cooperate in the Division's underlying investigation, failing to appear for his testimony, and then ceasing all communications with the Division staff. Exhibit 3 at ¶4. Moreover, the fact that Nevatia received, and then failed to appear for, an unrelated prison sentence in the United Arab Emirates provides a further basis to infer that he is likely to commit future violations. Exhibit 2 at ¶ 5.

The last *Steadman* factor—respondent's line of work—reinforces the need for an industry bar against Respondent. Nevatia has long been in the business of raising capital for various real estate and securities investments. OIP at ¶ II.A.1. Given his lack of contrition regarding his fraudulent activities, there is a high likelihood that he may commit further violations.

It is in the public interest to collaterally bar Nevatia from all association with the securities industry. Pursuant to Dodd-Frank, the Commission is authorized to collaterally bar Nevatia from associating with any investment adviser, municipal securities dealer, municipal advisor, transfer agent or NRSRO, in addition to barring him from associating with any broker or dealer. All of Nevatia's misconduct occurred after the enactment of Dodd-Frank and it is in the public interest to collaterally bar him from all association

with the securities industry.

IV. Conclusion

For all the reasons discussed above, the Division asks the Law Judge to issue a securities industry bar against Nevatia and bar him from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent or NRSRO.

Dated: January 29, 2016

Respectfully submitted,

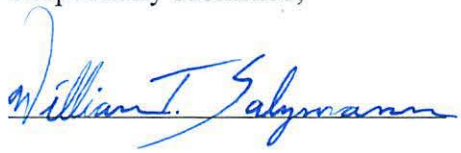

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EXHIBIT 1

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, vs. VINAY KUMAR NEVATIA a/k/a VINAY KUMAR, VINAY NEVATIA, VINAY NIVATIA, VINAY K. KUMAR, KUMAR K., VINAY KUMAR SRINIVASAN, VINAY SRINIVASAN and KUMAR MANGALAM KUMAR, Defendant.	Case No. _____ COMPLAINT

Plaintiff Securities and Exchange Commission (the "Commission") alleges:

SUMMARY OF THE ACTION

1. From November 2011 to September 2012, Vinay Kumar Nevatia ("Kumar"), a former Palo Alto executive search consultant and owner of several now-defunct investment entities, purported to sell $900,000 worth of shares in a privately-held technology company that were actually owned by eight other investors who had purchased the stock through Kumar in 2008.

2. Kumar went to great effort to conceal his double-dealing. He raised money from investors to purchase shares of CSS Corp. Technologies (Mauritius) Limited ("CSS"), a privately-held technology company. Three years later he began reselling the CSS shares, which belonged to the original investors without telling them. Kumar deceived subsequent buyers into believing that he was the legitimate and sole owner of the shares, and had them wire the money to purchase the shares to him. He lied to CSS's transfer agent, saying that new stock certificates should be issued to the new buyers and that the original stock certificates had been lost. Even after fraudulently selling their shares, Kumar deceived the original CSS investors into thinking that they still held them. He then absconded with the proceeds belonging to the original eight investors.

JURISDICTION AND VENUE

3. The Commission brings this action pursuant to Sections 20(b) and 20(d) of the Securities Act of 1933 ("Securities Act") [15 U.S.C. §§ 77t(b) and 77t(d)] and Sections 21(d) and 21(e) of the Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. §§ 78u(d) and 78u(e)].

4. This Court has jurisdiction over this action pursuant to Sections 20(b), 20(d), 22(a), and 22(c) of the Securities Act [15 U.S.C. §§ 77t(b), 77t(d), 77v(a), and 77v(c)] and Sections 21(d), 21(e), and 27 of the Exchange Act [15 U.S.C. §§ 78u(d), 78u(e), and 78aa].

5. Kumar, directly or indirectly, made use of the means or instrumentalities of interstate commerce, or of the mails, in connection with the transactions, acts, practices, and courses of business alleged herein. In addition, significant steps of Kumar's fraud occurred within the United States, and the fraud had a foreseeable substantial effect within the United States.

6. This Court is a proper venue for this action pursuant to Section 22 of the Securities Act [15 U.S.C. § 77v] and Section 27 of the Exchange Act [15 U.S.C. § 77aa] because acts, transactions, practices, and courses of business constituting the violations alleged in this Complaint occurred within this District.

INTRADISTRICT ASSIGNMENT

7. Intradistrict assignment to the San Francisco Division is proper pursuant to Civil Local Rule 3-2(d) because acts or omissions giving rise to the Commission's claims occurred, among other places, in San Mateo County, California.

DEFENDANT

8. Kumar, age [redacted], resided in Palo Alto, California at least from 2004 through 2013. During this period, Kumar used several aliases, including Vinay Kumar, Vinay Nevatia, Vinay Nivatia, Vinay K. Kumar, Kumar K., Vinay Kumar Srinivasan, Vinay Srinivasan, and Kumar Mangalam Kumar. From approximately 2007 through 2013, Kumar solicited real estate and securities investments through numerous entities owned or controlled by him, including KBR Capital Markets, LLC; KBR Capital Partners, Inc.; KBR Capital Partners, LLC; and KBR Fund, LP, which he operated out of offices in San Mateo County and his personal residence. Prior to this period, Kumar was employed in the San Francisco Bay Area as an executive search consultant. Kumar is not individually registered with the Securities and Exchange Commission and he has never been licensed to trade securities.

RELEVANT ENTITIES

9. VRSBS Investment, LLC ("VRSBS") is a Delaware limited liability company operating in California. VRSBS has nine members including Kumar.

10. CSS Corp. Technologies (Mauritius) Limited (f/k/a Cybernet Technologies (Mauritius) Ltd and SlashSupport Mauritius Ltd) is a private Mauritius company. It provides remote information technology infrastructure and support services.

FACTUAL ALLEGATIONS

11. From approximately May 2008 through August 2008, Kumar raised money from eight United States-based investors to purchase shares of CSS stock. Kumar recruited these investors by touting CSS, which was a privately-held information technology company, as an exclusive pre-IPO opportunity. Kumar knew one of CSS's co-founders through prior unrelated business dealings, and he told the investors that CSS shares were only available to persons, like himself, with personal connections to the company.

12. On or about August 8, 2008, Kumar and the other eight investors purchased 179,900 ordinary shares of CSS stock through VRSBS, an entity formed by Kumar for the limited purpose of buying the shares. Kumar told the investors that it was necessary for the shares to be purchased through a single entity to simplify the transaction for the seller. The investors became the entity's

sole members, and they contributed $899,500 for VRSBS to purchase CSS shares. Of this amount, $25,000, less than 3% of the total, was contributed by Kumar, and the remaining $874,500 was contributed by the other eight investors. Kumar used all of these funds for the purchase of CSS shares on behalf of the VRSBS members.

13. Although the CSS shares were held under the name of VRSBS, the investors and Kumar agreed that the ownership rights to the shares would be directly proportional to the amount of money that each member contributed to the shares' purchase. Accordingly, Kumar owned less than 3% of the CSS shares, while more than 97% of the shares were owned by the other investors.

14. Kumar and the other VRSBS members adopted an "Operating Agreement of VRSBS Investment, LLC," dated August 8, 2008, whereby VRSBS's "sole purpose" was to buy and hold CSS shares "for the benefit of [the VRSBS members] in the percentage interest" as set forth in a schedule to the agreement. Further, in the event of a potential sale of the CSS shares, Kumar, in his capacity as VRSBS's managing member, was required to provide the other members with a description of the material terms of the sale and was prohibited from commingling the proceeds with his personal accounts.

15. The investors requested that Kumar ask CSS and its transfer agent to issue separate stock certificates, each listing only the number of shares owned by an individual investor. They further requested that Kumar deliver each of these stock certificates to the corresponding investor. This procedure was to prevent all the shares from being represented on a single stock certificate, to allow each investor to have a physical document further representing his or her ownership interest, and to ensure that each individual investor would have control over the future sale of his or her shares. In response to these requests, Kumar arranged for CSS's transfer agent to divide the stock certificates amongst the investors. From approximately August 2008 through December 2008, Kumar delivered the stock certificates to each investor or his representative.

16. Three years later, in November 2011, Kumar purported to resell approximately half of the CSS shares held by the original investors to three directors of a venture capital firm based in San Mateo County, California. On or about November 23, 2011, Kumar and the three directors came to an agreement that the directors would pay VRSBS $359,800 in exchange for 89,950 shares of CSS.

In negotiating this sale, Kumar concealed the ownership interests of the original investors and falsely told the directors that the shares were "his shares."

17. Purportedly on behalf of VRSBS, Kumar signed a written agreement prepared by the venture capital firm, titled "Stock Purchase Agreement," and dated November 23, 2011. Kumar made the following representations in this agreement: (1) that the seller was not a party to "any agreement, written or oral," creating rights to the CSS shares in any other person, (2) that the shares were "free and clear" of any encumbrances, and (3) that there were no restrictions of any nature relating to the stock. Kumar knew, or was reckless in not knowing, that these representations were materially false or misleading because Kumar was conducting this resale as part of a fraudulent scheme to steal the proceeds from eight other individuals, whose existence he had hidden from the venture capital directors. Moreover, in contrast to his misrepresentations, Kumar knew, or was reckless in not knowing, that the CSS shares were, in fact, encumbered by oral and written agreements giving ownership interests and other rights to the original investors.

18. On or about November 23, 2011, Kumar instructed the three purchasers to wire their payments for the CSS shares to a personal trust bank account held in Kumar's name, rather than to the VRSBS bank account. On or about the same day, Kumar received wire transfers for $359,800, the full amount owed, but never transferred any of the sale proceeds to VRSBS's bank account or shared any portion of the funds with the other VRSBS investors. Kumar also never informed any of the original investors about the resale despite the requirement in VRSBS's Operating Agreement that he do so.

19. Shortly thereafter, when the venture capital firm directors requested the stock certificates underlying the shares they bought, Kumar falsely claimed that new certificates needed to be issued because all his CSS shares were held on a single certificate, which covered a greater number of shares than the amount the directors had purchased. As Kumar knew or was reckless in not knowing, the shares were actually reflected in several separate certificates that were being held for safekeeping by the other VRSBS members.

20. In a continuation of his fraudulent scheme, Kumar entered into an agreement on or about February 16, 2012 to resell another 25,000 CSS shares to two of the venture capital firm

directors for $100,000. In another "Stock Purchase Agreement," this one dated February 16, 2012, Kumar made the same material misrepresentations as in the November 23, 2011 Stock Purchase Agreement alleged above. Similarly, on or about February 22, 2012, Kumar purported to resell another 60,000 CSS shares for $195,000 to a Cayman Islands private equity fund managed out of Hong Kong. Once again, Kumar concealed both February 2012 resale transactions from the original investors despite his obligation under the VRSBS Operating Agreement to notify them.

21. Kumar misappropriated the proceeds from the fraudulent resales of CSS shares in February 2012. On or about February 17, 2012, Kumar instructed the two venture capital firm directors by email to wire their payment to a bank account under Kumar's sole control, and received a $100,000 wire transfer that same day. Kumar never subsequently transferred any portion of this payment to VRSBS's bank account or shared any of it with the other VRSBS members. On February 24, 2012, the private equity fund purchaser wired its payment of $195,000, this time to VRSBS's bank account. However, within approximately a week Kumar transferred all but $500 of the $195,000 from VRSBS's bank account to the same United States-based bank account that he had instructed the venture capital firm directors to wire funds one week earlier. Kumar never distributed any of these funds to the other VRSBS members.

22. Kumar engaged in further deceit to finalize the documentation for the resales, and he ultimately induced the fraudulent transfers of virtually all of the CSS shares owned by the VRSBS members. Following the February 2012 resales, the venture capital firm directors repeatedly contacted Kumar to obtain stock certificates underlying both their November 2011 and February 2012 stock purchases. However, from approximately July through August 2012, CSS's transfer agent informed Kumar that he needed to return the original CSS stock certificates for cancellation before new certificates could be issued. Kumar knew or was reckless in not knowing that he could not provide the original stock certificates because he had previously delivered all but one of the certificates to the other VRSBS members. Instead, he falsely told the transfer agent during a phone call that all of the original stock certificates issued to VRSBS had been lost. On or about September 10, 2012, Kumar repeated this misstatement in a document, titled "Indemnity for Lost Share Certificates," that he signed and sent to both the transfer agent and the venture capital firm's CFO.

Based on this false document, on or about September 11, 2012, the transfer agent issued new CSS stock certificates to three of the four purchasing directors at the venture capital firm. After an administrative delay, the transfer agent issued new CSS stock certificates to the fourth director on or about May 2, 2013.

23. In an attempt to maintain his ruse, Kumar engaged in increasingly desperate attempts to conceal his illicit stock sales from the original investors. From approximately March 2012 through July 2013, Kumar engaged in deceptive conduct and made material misstatements and omissions that include:

- Falsely indicating to the original investors that he would get new certificates issued in the individual investors' names when, in reality, he was in the final stages of the fraudulent resale of their shares;
- Falsely telling one investor that his investment was performing well and that CSS was planning to have a potentially lucrative initial public offering, while continuing to conceal and withhold the proceeds he already received from the fraudulent resales;
- Falsely telling two investors who wanted to cash out their shares that he would try to find interested buyers, while continuing to conceal the fact that he had already fraudulently sold the shares; and
- Asking investors to send him wiring information, ostensibly so they could receive a dividend announced by CSS, when he knew that the original investors would never get a dividend for shares that had been fraudulently resold by him.

24. In July 2013, some of the original investors reached out directly to CSS and learned that Kumar had fraudulently sold nearly all of their CSS shares without obtaining their approval, distributing the proceeds, or even providing notice of the sales. In August 2013, certain of these investors confronted Kumar with evidence obtained from CSS documenting his illicit stock sales. Even then, Kumar tried to keep his scheme going by falsely claiming that he had not actually sold the shares, but only temporarily "transferred" them to safeguard them from Kumar's creditors. Later that month, Kumar pretended to restore an original investor's shares through a purported stock transfer from two fictitious shareholders. As proof, Kumar sent the investor bogus forms purporting to record

the transfer of 100,000 shares, but, in reality, neither of the two purported transferors owned any CSS shares. After this point, Kumar stopped responding to all attempts by the VRSBS members to contact him.

FIRST CLAIM FOR RELIEF

Violations of Exchange Act Section 10(b) and Rule 10b-5 Thereunder

25. The Commission realleges and incorporates by reference paragraphs 1 through 24 above.

26. By engaging in the conduct described above, Kumar, directly or indirectly, in connection with the purchase or sale of securities, by the use of means or instrumentalities of interstate commerce, or the mails, with scienter:

a. Employed devices, schemes, or artifices to defraud;

b. Made untrue statements of material facts or omitted to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; and

c. Engaged in acts, practices, or courses of business which operated or would operate as a fraud or deceit upon other persons, including purchasers and sellers of securities.

27. By reason of the foregoing, Kumar has violated, and unless restrained and enjoined, will continue to violate Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rule 10b-5 [17 C.F.R. § 240.10b-5].

SECOND CLAIM FOR RELIEF

Violations of Securities Act Section 17(a)(1)

28. The Commission realleges and incorporates by reference Paragraphs 1 through 24 above.

29. By engaging in the conduct described above, Kumar, directly or indirectly, in the offer or sale of securities, by use of the means or instruments of transportation or communication in interstate commerce or by use of the mails with scienter employed devices, schemes or artifices to defraud.

30. By reason of the foregoing, Kumar violated, and unless restrained and enjoined, will continue to commit violations of, Section 17(a)(1) of the Securities Act [15 U.S.C. § 77q(a)].

THIRD CLAIM FOR RELIEF

Violations of Securities Act Sections 17(a)(2) and (3)

31. The Commission realleges and incorporates by reference Paragraphs 1 through 24 above.

32. By engaging in the conduct described above, Kumar, directly or indirectly, in the offer or sale of securities, by use of the means or instruments of transportation or communication in interstate commerce or by use of the mails:

a. Obtained money or property by means of untrue statements of material fact or by omitting 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; and

b. Engaged in transactions, practices, or courses of business which operated or would operate as a fraud or deceit upon the purchasers.

33. By reason of the foregoing, Kumar has violated, and unless restrained and enjoined, will continue to violate Sections 17(a)(2) and (3) of the Securities Act [15 U.S.C. §§ 77q(a)(2) and (3)].

PRAYER FOR RELIEF

WHEREFORE, the Commission respectfully requests that this Court:

I.

Permanently enjoin Kumar from directly or indirectly violating Section 17(a) of the Securities Act [15 U.S.C. § 77q(a)] as well as Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5];

II.

Order Kumar to disgorge ill-gotten gains from the conduct alleged herein, plus prejudgment interest;

III.

Order Kumar to pay civil penalties pursuant to Section 20(d) of the Securities Act [15 U.S.C. § 77t(d)] and Section 21(d)(3) of the Exchange Act [15 U.S.C. § 78u(d)(3)];

IV.

Retain jurisdiction of this action in accordance with the principles of equity and the Federal Rules of Civil Procedure in order to implement and carry out the terms of all orders and decrees that may be entered, or to entertain any suitable application or motion for additional relief within the jurisdiction of this Court; and

V.

Grant such other relief as this Court may deem just and appropriate.

Respectfully submitted,

Dated: December 2, 2014

/s/ William T. Salzmann
William T. Salzmann
Attorney for Plaintiff
SECURITIES AND EXCHANGE COMMISSION

EXHIBIT 2

JINA L. CHOI (New York Bar No. 154425)
JOHN S. YUN (Cal. Bar No. 112260)
yunj@sec.gov
WILLIAM T. SALZMANN (Cal. Bar No. 205808)
salzmannw@sec.gov
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leejh@sec.gov

Attorneys for Plaintiff
SECURITIES AND EXCHANGE COMMISSION
44 Montgomery Street, 28th Floor
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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. VINAY KUMAR NEVATIA a/k/a VINAY KUMAR, VINAY NEVATIA, VINAY NIVATIA, VINAY K. KUMAR, KUMAR K., VINAY KUMAR SRINIVASAN, VINAY SRINIVASAN and KUMAR MANGALAM KUMAR, Defendant.	Case No. 3:14-cv-05273 **DECLARATION OF JASON H. LEE** Date: June 19, 2015 Time: 2:00 p.m. Courtroom: G, 15th Floor Judge: Hon. Joseph C. Spero

I, Jason H. Lee, declare:

I am an attorney duly admitted to practice in the State of California. If called as a witness, I could and would competently testify as follows:

1. I am an attorney with Plaintiff Securities and Exchange Commission (the "Commission").

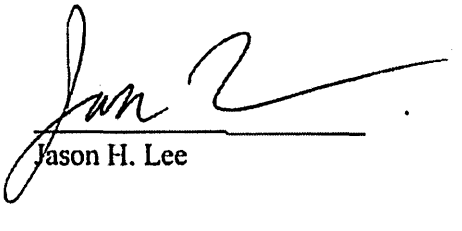
2. In January 2015, the Commission staff received information that Defendant Vinay Kumar Nevatia ("Kumar") was being held in custody in the United Arab Emirates ("UAE"), and the Commission took steps to serve Kumar while he was still in custody.

3. On February 9, 2015, I received an email from a representative of Nationwide Legal, LLC stating that Kumar had been served on that date at a customs holding facility in Dubai, UAE. Shortly thereafter, a representative from Nationwide Legal, LLC provided me with a Proof of Service of Kumar, which was filed with the Court on February 17, 2015 (Dkt. No. 16).

4. After the last case management conference on March 20, 2015, the Commission staff continued to seek information from UAE government authorities and other sources regarding whether Kumar had been released from custody.

5. On June 11, 2015, the Commission staff was informed by the U.S. Department of State that, on April 14, 2015, Kumar was sentenced to one month in jail in the UAE, and that Kumar is currently at large.

I declare under penalty of perjury that the foregoing is true and correct. Executed in San Francisco, California on June 12, 2015.



Jason H. Lee

EXHIBIT 3

JINA L. CHOI (New York Bar No. 154425)
JOHN S. YUN (Cal. Bar No. 112260)
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WILLIAM T. SALZMANN (Cal. Bar No. 205808)
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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. VINAY KUMAR NEVATIA a/k/a VINAY KUMAR, VINAY NEVATIA, VINAY NIVATIA, VINAY K. KUMAR, KUMAR K., VINAY KUMAR SRINIVASAN, VINAY SRINIVASAN and KUMAR MANGALAM KUMAR, Defendant.	Case No. 3:14-cv-05273 **DECLARATION OF WILLIAM T. SALZMANN IN SUPPORT OF PLAINTIFF'S REQUEST FOR ENTRY OF DEFAULT AND APPLICATION FOR DEFAULT JUDGMENT BY COURT** Date: September 11, 2015 Time: 9:30 a.m. Courtroom: G, 15th Floor Hon. Joseph C. Spero

I, William T. Salzmann, declare as follows:

I am an attorney representing plaintiff Securities and Exchange Commission (the "Commission") in this proceeding. I am admitted to practice before this Court, and I am making this declaration based on facts within my personal knowledge to which I am competent to testify if called upon to do so.

1. Prior to filing the complaint in this action, members of the Commission's staff including myself conducted an investigation of the facts underlying the complaint.

2. During this investigation, in August 2013, I spoke with Defendant Vinay Kumar Nevatia ("Mr. Kumar") on the telephone. In this conversation, Mr. Kumar told me that e-mail was the best way to send documents to him, and on or about August 30, 2013, Mr. Kumar and I exchanged e-mails confirming this fact.

3. From August 2013 through September 2013, I sent documents to Mr. Kumar via his business e-mail address, "vinay@kbrcp.com."

4. In October 2013, Mr. Kumar identified his personal e-mail address "[redacted] as a more reliable e-mail address than "vinay@kbrcp.com." On or about October 10, 2013, Mr. Kumar sent an e-mail confirming that he wanted me to use the [redacted] address, and on that same date, I sent an administrative subpoena to Mr. Kumar, requiring him to appear for testimony on October 21, 2013. Following this e-mail communication, members of the Commission's staff including myself had several telephone conversations with Mr. Kumar regarding the scheduling of his testimony. Mr. Kumar stopped responding to the Commission's calls, e-mails, and other written correspondence on or about October 25, 2013. He never appeared for testimony.

5. On December 4, 2014, the Commission sent courtesy copies of the complaint, summons and other documents via e-mail to Mr. Kumar's [redacted] address. In response to this e-mail, the Commission did not receive a communication from Gmail indicating the account was inactive. (The Commission thereafter completed service of the complaint and summons as described in Docket Nos. 16 and 18.)

6. On June 22, 2015, I sent a courtesy-copy of the Court's Civil Minute Order (Docket No. 23) via e-mail to Mr. Kumar's [redacted] address. In that e-mail, I informed Mr. Kumar that the Commission intended to seek default judgment if he did not respond to the complaint. I did not receive a communication from Gmail indicating that Mr. Kumar's account was inactive. A true and correct copy of this e-mail is attached as Exhibit 1.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed in San Francisco, California on July 17, 2015.

William T. Salzmann

EXHIBIT 1

Salzmann, William

From: Salzmann, William
Sent: Monday, June 22, 2015 5:06 PM
To: [redacted]
Cc: Lee, Jason H; Corboy, Wendy
Subject: RE: Securities and Exchange Commission v. Vinay Kumar Nevatia, Case No. 3:14-cv-05273-JCS
Attachments: 6-22-15 Minute Entry.pdf

Mr. Nevatia,

Per the attached Minute Entry in the above-referenced case, the Commission intends to move for entry of default and file a motion for default judgment if you do not answer the complaint. The Minute Entry requires the Commission to take these steps no later than July 17, 2015.

Sincerely,

Bill Salzmann
Senior Counsel, Division of Enforcement
U.S. Securities and Exchange Commission
44 Montgomery Street, 28th Floor
San Francisco, CA 94104
Direct: (415) 705-8110
Main: (415) 705-2500
salzmannw@sec.gov

From: Corboy, Wendy
Sent: Thursday, December 04, 2014 4:06 PM
To: vinay@kbrcp.com; [redacted]
Cc: Salzmann, William; Lee, Jason H
Subject: Securities and Exchange Commission v. Vinay Kumar Nevatia, Case No. 3:14-cv-05273-JCS

Mr. Nevatia,

Please find attached documents that were filed with the United States District Court for the Northern District of California on December 2, 2014.

Sincerely,

Wendy Corboy
Paralegal Specialist
Securities and Exchange Commission
44 Montgomery Street, Suite 2800
San Francisco, CA 94104
Telephone: (415)705-8115

EXHIBIT 4

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

VINAY KUMAR NEVATIA,

Defendant.

Case No. 14-cv-05273-JCS

REPORT AND RECOMMENDATION REGARDING SEC'S APPLICATION FOR DEFAULT JUDGMENT

Re: Dkt. No. 25

I. INTRODUCTION

This is a civil enforcement action by the Securities and Exchange Commission (the "SEC") against Defendant Vinay Kumar Nevatia ("Kumar").[1] Kumar has not answered the SEC's Complaint otherwise appeared in this action, and the SEC moves for default judgment. According to the SEC's uncontested allegations and evidence, Kumar fraudulently sold approximately $650,000 worth of stock that he did not own, went to great lengths to conceal his misconduct, and left the country rather than cooperate with the SEC's administrative investigation. For the reasons stated below, the undersigned recommends that the SEC's Motion be GRANTED, and that the Court order disgorgement, a civil penalty, and injunctive relief. Although the SEC has consented to the jurisdiction of the undersigned magistrate judge, Kumar has not. Accordingly, this case will be reassigned to a United States district judge for all further proceedings, including action on the recommendations of this Report.

II. BACKGROUND

A. Factual Background

Kumar lived in Palo Alto, California "at least from 2004 through 2013," during which time

[1] A/k/a Vinay Kumar, Vinay Nevatia, Vinay Nivatia, Vinay K. Kumar, Kumar K., Vinay Kumar Srinivasan, Vinay Srinivasan, and Kumar Mangalam Kumar.

he solicited investments in real estate and securities. Compl. (dkt. 1) ¶ 8.[2] He "is not individually registered with the [SEC] and has never been licensed to trade securities." *Id.*

From approximately May through August of 2008, Kumar convinced eight investors (the "Investors") to purchase shares of CSS Corp. Technologies (Mauritius) Limited ("CSS"), a privately held technology company. *Id.* ¶¶ 10–11. Kumar "told the investors that CSS shares were only available to persons, like himself, with personal connections to the company," and that "it was necessary for the shares to be purchased through a single entity to simplify the transaction for the seller." *Id.* ¶¶ 11–12. He formed a Delaware limited liability company, VRSBS Investment, LLC ("VRSBS"), for the purpose of purchasing the shares. *Id.* ¶¶ 9, 12. Kumar contributed $24,500 to VRSBS, the Investors contributed $874,500, and "Kumar used all of the funds for the purchase of [179,900] CSS shares on behalf of the VRSBS members"—i.e., himself and the eight Investors. *Id.*; Lee Supp'l Decl. (dkt. 35) ¶¶ 3–6 & Ex. A. Kumar was the managing member of VRSBS. Compl. ¶ 14.

The CSS shares were held by VRSBS, but Kumar and the Investors agreed that rights to the shares would be directly proportional to each member's contribution. *Id.* ¶ 13. The "Operating Agreement of VRSBS Investment, LLC," adopted August 8, 2008, provided that VRSBS's "'sole purpose' was to buy and hold CSS shares 'for the benefit of [the VRSBS members],'" that Kumar would notify the investors of the material terms any sale of shares, and that Kumar "was prohibited from commingling the proceeds [of any sale] with his personal accounts." *Id.* ¶ 14 (quoting the Operating Agreement; first alteration in original). At the Investors' request, Kumar procured separate stock certificates from CSS, each representing the number of shares corresponding to an individual Investor's ownership interest. *Id.* ¶ 15. Kumar distributed the physical certificates to each Investor from August 2008 through December 2008, "to ensure that each individual investor would have control over the future sale of his or her shares." *Id.*

[2] The factual allegations of the SEC's Complaint are taken as true in the context of a motion for default judgment, except as to damages. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917–18 (9th Cir. 1987).

About three years later, in November of 2011, Kumar nevertheless reached an agreement to sell 89,950 CSS shares—constituting half of the VRSBS holdings—to three directors of a San Mateo, California venture capital firm. *Id.* ¶ 16. "In negotiating this sale, Kumar concealed the ownership interests of the original investors and falsely told the directors that the shares were 'his shares.'" *Id.* He also signed a stock purchase agreement falsely representing that the shares were not subject to any encumbrance or restriction, and that he was not a party to any agreement granting any other person rights to the shares. *Id.* ¶ 17. At Kumar's instruction, the directors transferred their $359,800 payment for the stock to "a personal trust bank account held in Kumar's name, rather than to the VRSBS bank account." *Id.* ¶ 18. Kumar never transferred those funds to VRSBS or informed the Investors of the sale. *Id.*

When the directors requested stock certificates for the shares they had purchased, Kumar "falsely claimed that new certificates needed to be issued because all his CSS shares were held on a single certificate, which covered a greater number of shares than the directors had purchased." *Id.* ¶ 19. In February of 2012, two of the directors bought an additional 25,000 CSS shares from Kumar for $100,000 under similar circumstances, again transferring funds to "a bank account under Kumar's sole control," and Kumar again failed to notify the VRSBS Investors of the sale. *Id.* ¶¶ 20–21.

Also in February of 2012, Kumar sold 60,000 CSS shares to a private equity fund for $195,000. *Id.* ¶ 20. The private equity fund transferred the $195,000 to the VRSBS bank account, but Kumar depleted all but $500 of that through nine separate transfers to an account under his own control, culminating on March 1, 2012. *Id.* ¶ 21; Lee Decl. (dkt. 27) ¶ 2 & Ex. 1. Again, Kumar never distributed these funds to the VRSBS Investors or notified them of the sale. Compl. ¶¶ 20–21.

When Kumar sought to finalize the resales by procuring new stock certificates, CSS's transfer agent informed him that he would need to return the original certificates for cancellation. Kumar "falsely told the transfer agent during a phone conversation that all of the original stock certificates issued to VRSBS had been lost," when in fact he had distributed them to the Investors as assurance that the stock would not be sold without their consent. *Id.* ¶ 22. Kumar signed an

"Indemnity for Lost Share Certificates" repeating that assertion, and the transfer agent issued new stock certificates to the purchasers in September of 2012 and, "[a]fter an administrative delay," May of 2013. *Id.* All told, Kumar resold 174,950 of VRSBS's 179,900 CSS shares—more than 97% of its holdings. *Id.* ¶¶ 16, 20.

From around March of 2012 through July of 2013, Kumar took a number of steps to conceal the resales from the Investors. *Id.* ¶ 23. While "he was in the final stages of the fraudulent resale of the shares," he told the original Investors that he would obtain new stock certificates in the Investors' own names (as opposed to in the name of VRSBS). *Id.* He also told an Investor that CSS was performing well and planning for "a potentially lucrative public offering," and told two Investors that he would try to find buyers for their shares, despite having already sold the stock. *Id.* When CSS announced a dividend, Kumar asked the Investors to provide wire transfer information, even though he had already sold at least some of the stock. *Id.* When certain Investors confronted Kumar in August of 2013 with evidence they had obtained from CSS regarding the fraudulent sales, "Kumar tried to keep his scheme going by falsely claiming that he had not actually sold the shares, but only temporarily 'transferred' them to safeguard them from Kumar's creditors." *Id.* ¶ 24. He also "pretended to restore an original investor's shares through a purported stock transfer from two fictitious shareholders," by sending the Investor "bogus forms purporting to record the transfer of 100,000 shares" from individuals who did not actually own any CSS stock. *Id.* Kumar then "stopped responding to all attempts by the VRSBS members to contact him." *Id.*

B. Procedural History and Communications Between the Parties

During the SEC's investigation of the conduct at issue in this case, SEC attorney William Salzmann spoke to Kumar by telephone, and Kumar informed Salzmann "that e-mail was the best way to send documents to him." Salzmann Decl. (dkt. 26) ¶¶ 1–2. In early October, 2013, Salzmann sent Kumar an administrative subpoena to appear for testimony on October 21, 2013, and Salzmann and other SEC staff members later spoke to Kumar by telephone regarding the schedule for his testimony. *Id.* ¶ 4. "Mr. Kumar stopped responding to the [SEC]'s calls, e-mails, and other written correspondence on or about October 25, 2013 [and] never appeared for

testimony." *Id.*

The SEC filed its Complaint in this action on December 2, 2014. *See generally* Compl. Two days later, the SEC "sent courtesy copies of the complaint, summons and other documents via e-mail" to Kumar. Salzmann Decl. ¶ 5. The SEC later learned that Kumar was in custody at the Dubai Customs Holding Center in the United Arab Emirates ("UAE") on unrelated charges, and on February 9, 2015, served process on a receptionist authorized to accept service at the Dubai Customs Holding Center. *See generally* Certificate of Service (dkt. 16); Singh Decl. (dkt. 34).

Kumar has not responded to the Complaint or otherwise appeared in this action. At a case management conference on June 19, 2015, the SEC stated its intent to seek default judgment. Civil Minute Order (dkt. 23). On June 22, 2015, the SEC sent Kumar, via email, a courtesy copy of the Minute Order reflecting that intent. Salzmann Decl. ¶ 6. The SEC moved for default judgment on July 17, 2015, *see* Mot. (dkt. 25), and filed a separate Request for Entry of Default (dkt. 30) on July 20, 2015. The Clerk entered default as to Kumar on July 21, 2015. Dkt. 31.

The Complaint includes three claims, all based on substantially the same conduct: the first for violation of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder; the second for violation of paragraph (a)(1) of Section 17 of the Securities Act; and the third for violation of paragraphs (a)(2) and (a)(3) of Section 17 of the Securities Act. The SEC's Motion is supported by: (1) a declaration by William Salzmann describing the SEC's communications with Kumar; (2) a declaration by Jason Lee (dkt. 27) attaching summaries of Kumar's relevant financial activity and the SEC's interest calculations; and (3) a request for judicial notice of UAE law regarding service of process ("RJN," dkt. 28). The SEC seeks disgorgement of profit, prejudgment interest, a civil penalty, and an injunction against further violation of the securities laws.

At the hearing on September 11, 2015, the undersigned identified certain deficiencies in the SEC's submissions, specifically the SEC's failure to take into account the stock that Kumar purchased with his own money and inadequate evidence regarding service. *See* Civil Minute Order (dkt. 33). On October 9, 2015, the SEC filed a declaration by Jaswinder Singh (a process server) addressing the SEC's service of process, and a supplemental declaration by SEC attorney Jason Lee explaining what portion of the CSS stock Kumar purchased with his own money and

recalculating damages to account for that. *See generally* Singh Decl.; Lee Supp'l Decl.

III. ANALYSIS

A. Preliminary Considerations

1. Jurisdiction

When entry of judgment is sought against a party who has failed to plead or otherwise defend, a district court has the affirmative duty to determine whether it has jurisdiction. *In re Tuli*, 172 F.3d 707, 712 (9th Cir. 1999). The Court has subject matter jurisdiction over this action because it is an action under federal law, and also because it is brought by an agency of the United States. 28 U.S.C. §§ 1331, 1345. As for personal jurisdiction, Kumar "resided in Palo Alto, California at least from 2004 through 2013," a period encompassing most if not all of the conduct at issue. *See* Compl. ¶ 8. Although he has since relocated to the United Arab Emirates, "one cannot defeat personal jurisdiction by a move away from the state in which the underlying events took place." *Steel v. United States*, 813 F.2d 1545, 1549 (9th Cir. 1987) (citing *Ariz. Barite Co. v. Western-Knapp Eng'g Co.*, 170 F.2d 684 (9th Cir. 1948)). This Court therefore has personal jurisdiction over Kumar.

2. Adequacy of Service

Courts must determine the adequacy of service of process on a motion for default judgment. *Bank of the West v. RMA Lumber Inc.*, No. 07-6469 JSW, 2008 WL 2474650, at *2 (N.D. Cal. June 17, 2008). Service outside of the United States must be done in accordance with Rule 4(f) of the Federal Rules of Civil Procedure. Where "there is no internationally agreed means" of service,[3] permissible methods of service include any "method reasonably calculated to give notice . . . as prescribed by the foreign country's law for service in that country in an action in its courts of general jurisdiction." Fed. R. Civ. P. 4(f)(2).

At the time of service, Kumar was incarcerated at the Dubai Customs Holding Center in the UAE. Singh Decl. ¶ 3. UAE law provides for service as follows: "Concerning the prisoners,

[3] The UAE is not a signatory to the Hague Convention on Service Abroad. *See* Hague Conference on Private Int'l Law, *Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters: Members of the Organisation*, http://www.hcch.net/index_en.php?act=conventions.statusprint&cid=17.

the copy shall be delivered to the administration of the place where they were confined in order to deliver it to them." UAE Fed. Law No. 11 Concerning Civil Procedure art. 9 § 5 (official English translation); RJN at ECF pp. 9, 19.[4] On February 2, 2015, through a process server, the SEC served process for this case on Laila Alsaadi, a receptionist authorized to accept service on behalf of Ahmed Mehboob Musabih, Director of Dubai Customs. Singh Decl. ¶ 5; Proof of Service (dkt. 16). When the process server delivered the documents, Alsaadi assured him that Kumar would receive them. Singh Decl. ¶ 6. The process server returned the next day and Alsaadi "confirmed that [Kumar] was still in custody at the facility and . . . had received the summons, complaint, and other documents." *Id.* ¶ 7. Taking notice of UAE law, the undersigned finds that service was adequate under Rule 4(f)(2)(A).

A. Legal Standard for Entry of Default Judgment

After default has been entered against a party, a district court may grant an application for default judgment in its discretion. *See* Fed. R. Civ. P. 55(b)(2). If the court is satisfied that jurisdiction is proper and that service of process upon the defendant was adequate, it then considers several factors in determining whether to grant default judgment:

> (1) the possibility of prejudice to the plaintiff, (2) the merits of plaintiff's substantive claim, (3) the sufficiency of the complaint, (4) the sum of money at stake in the action, (5) the possibility of a dispute concerning material facts, (6) whether the default was due to excusable neglect, and (7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits.

Eitel v. McCool, 782 F.2d 1470, 1471–72 (9th Cir. 1986). In making its decision, the court takes all factual allegations in the complaint, except those relating to damages, as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917–18 (9th Cir. 1987) (citing *Geddes v. United Fin. Grp.*, 559 F.2d 557, 560 (9th Cir. 1977)); *see also* Fed. R. Civ. P. 8(b)(6) ("An allegation—other than one relating to the amount of damages—is admitted if a responsive pleading is required and the allegation is not denied.").

[4] Courts are "permitted to take judicial notice of authoritative statements of foreign law." *McGhee v. Arabian Am. Oil Co.*, 871 F.2d 1412, 1424 n.10 (9th Cir. 1989). The SEC's request for judicial notice of this provision of UAE law, as stated on the official website of the UAE Ministry of Justice, is therefore GRANTED.

B. *Eitel* Factors

Several of the *Eitel* factors weigh in favor of granting default judgment simply by virtue of the fact that Kumar has not participated in this action. Because Kumar has failed to respond to the complaint or otherwise appear in this action, the SEC will be left without a remedy, and therefore prejudiced, if default judgment is not granted. The sum of money at stake, while significant, is justified by the evidence proffered by the SEC establishing damages, as discussed further below. Kumar was properly served, and there is no indication that his default is due to excusable neglect. Kumar could conceivably dispute some of the material facts if he were to appear, but he has failed to do so. Finally, while there is a strong public policy favoring the resolution of disputes on the merits, that is not possible in this case because Kumar has failed to appear and there is no indication that he intends to do so.

The remaining factors, "the merits of plaintiff's substantive claim" and "the sufficiency of the complaint," are intertwined where, as here, the case has not advanced beyond the pleading stage. As detailed below, the undersigned finds that these factors also favor granting default judgment as to each of the SEC's claims.

1. Claim Under Section 10(b) and Rule 10b-5

Under Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), it is unlawful to use "any means or instrumentality of interstate commerce or of the mails . . . [t]o use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe." 15 U.S.C. § 78j(b). Rule 10b-5 broadly prohibits the use of (a) "any device, scheme, or artifice to defraud"; (b) "any untrue statement of a material fact" or misleading omission of a material fact; or (c) "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. "Liability under Section 10(b) and Rule 10b-5 therefore requires evidence of (1) a material misrepresentation, (2) in connection with the purchase or sale of a security, (3) with scienter, (4) by means of interstate commerce." *SEC v. Todd*, 642 F.3d 1207, 1215 (9th Cir. 2011) (citing *SEC v. Dain Rauscher, Inc.*, 254 F.3d 852, 855–56 (9th Cir. 2001)). To be liable for a fraudulent scheme under Rule

10b-5 paragraphs (a) or (c), the scheme must "encompass[] conduct beyond . . . misrepresentations or omissions." *WPP Luxembourg Gamma Three Sarl v. Spot Runner, Inc.*, 655 F.3d 1039, 1057 (9th Cir. 2011).

Taking the allegations of the Complaint as true, *see TeleVideo Sys.*, 826 F.2d at 917–18, Kumar's conduct here meets each of the four elements set forth in *Todd*.

As for the first element, Kumar made numerous material misrepresentations to the original Investors, the subsequent purchasers of the CSS stock, and the CSS transfer agent, including that he owned all of the shares he was selling, Comp. ¶ 16, that the shares were not encumbered and that he was free to sell them, *id.* ¶ 17, that all shares were held on a single stock certificate, *id.* ¶ 19, that the original stock certificates had been lost, *id.* ¶ 22, that the Investors would get new stock certificates in their own names, *id.* ¶ 23, that he would try to find buyers for shares he had in fact already sold, *id.*, that he had merely transferred the shares to protect them from creditors, *id.* ¶ 24, and that two individuals who in fact owned no CSS stock were holding 100,000 of the Investors' shares, *id.* Kumar also made significant material omissions, most notably by failing to inform the Investors that he had sold their stock. *Id.* ¶¶ 18, 20. Kumar's fraudulent conduct also extended beyond misrepresentations or omissions, and thus meets the "fraudulent scheme" standard of paragraphs (a) and (c), because he took concrete steps including reselling the stock without permission and transferring the proceeds of one sale from VRSBS to his own account. *Id.* ¶¶ 16–21; Lee Decl. Ex. 1.

For the second element, the CSS shares plainly constitute "a security," and all of the fraudulent conduct at issue occurred "in connection with the purchase or sale of [that] security." *See Todd*, 642 F.3d at 1215.

The third element, scienter, can be met by showing either "'intent to deceive, manipulate, or defraud,'" *id.* (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976)), or "[r]eckless conduct"—i.e., "a highly unreasonable act or omission that is an 'extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it,'" *id.* (quoting *Dain Rauscher*, 254 F.3d at 856). Here, Kumar's repeated efforts to conceal his fraud

demonstrate the requisite intent to support a claim. The most significant example is Kumar's conduct after some of the original Investors learned from CSS that Kumar had sold their stock:

> Even then, Kumar tried to keep the scheme going by falsely claiming that he had not actually sold the shares, but only temporarily 'transferred' them to safeguard them from Kumar's creditors. Later that month, Kumar pretended to restore an original investor's shares through a purported stock transfer from two fictitious shareholders. As proof, Kumar sent the investors bogus forms purporting to record the transfer of 100,000 shares, but, in reality, neither of the two purported transferors owned any CSS shares. At this point, Kumar stopped responding to all attempts by the VRSBS members to contact him.

Compl. ¶ 24. These efforts are not consistent with any explanation except intent to defraud. *See SEC v. Smart*, 678 F.3d 850, 857 (10th Cir. 2012) (holding that where a defendant did not use investors' funds in the manner that he said he would, used some funds for his own personal expenses, "ignored investors' inquiries about the status of their funds[,] and provided false accountings," the "circumstances go beyond mere recklessness and indicate a deliberate intent to defraud investors").

The final element requires that the fraudulent scheme occur "by means of interstate commerce." *Todd*, 642 F.3d at 1215. The SEC's present Motion does not address this element, and the Complaint is largely silent as to *how* Kumar communicated with the Investors, the subsequent purchasers, and CSS. *See generally* Mot.; Compl. The Complaint does, however, include a number of allegations that relate to interstate commerce. Kumar formed a Delaware limited liability company, VRSBS, which he operated in California for the purpose of holding CSS shares. Compl. ¶ 9–12. CSS, whose stock Kumar purchased and whose employees he communicated with on a number of occasions, "is a private Mauritius company." *Id.* ¶ 10. Kumar resold a number of CSS shares to "a Cayman Islands private equity firm managed out of Hong Kong." *Id.* ¶ 20. He instructed certain purchasers "by email" to send funds to a bank account that he controlled. *Id.* ¶ 21. He also "falsely told the [CSS] transfer agent *during a phone call* that all of the original stock certificates issued to VRSBS had been lost." *Id.* ¶ 22 (emphasis added). Finally, the scheme involved a number of wire transfers. *See id.* ¶¶ 18, 21. The undersigned is therefore satisfied that the fraudulent scheme here involved "means or instrumentalit[ies] of

interstate commerce, or of the mails." *See* 15 U.S.C. § 78j; 17 C.F.R. § 240.10b-5.

Because each of the *Todd* elements is satisfied, the Complaint is sufficient to state a claim for violation of Section 10(b) and Rule 10b-5. Taking the allegations of the Complaint as true, both the "the merits of plaintiff's substantive claim" and "the sufficiency of the complaint" favor granting default judgment on this claim. *See Eitel*, 782 F.2d at 1471–72.

2. Claims Under Section 17(a)

Section 17(a) of the Securities Act of 1933 reads as follows:

> It shall be unlawful for any person in the offer or sale of any securities . . . by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly—
>
> (1) to employ any device, scheme, or artifice to defraud, or
>
> (2) to obtain money or property by means of any untrue statement of a material fact or any omission 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; or
>
> (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

15 U.S.C. § 77q(a). Paragraph (1) if Section 17(a) requires scienter, but paragraphs (2) and (3) do not. *Aaron v. SEC*, 446 U.S. 680, 701–02 (1980).

For substantially the same reasons discussed above in the context of Section 10(b) and Rule 10b-5, the undersigned finds that the SEC's Complaint states a claim for violation of paragraphs (1) and (3) of Section 17(a). Taking the SEC's allegations as true, Kumar used means or instruments of interstate commerce in the sale of a security to employ a "scheme . . . to defraud" and engage in a "transaction, practice, or course of business which operate[d] . . . as a fraud or deceit upon the purchaser[s]," with respect to both the original Investors (whom he fraudulently convinced that they would maintain control over their portion of the stock) and the subsequent purchasers (whom he fraudulently convinced that he owned the stock that he sold them). With respect to the scienter requirement of paragraph (1), the undersigned finds the allegations sufficient to show that Kumar acted with intent to defraud.

As compared to Section 10(b) and Rule 10b-5(b), Section 17(a)(2) adds the requirement

that the defendant "obtain money or property" by means of his material misrepresentation. 15 U.S.C. § 77q(a)(2). The Complaint adequately alleges that Kumar's false representation that he owned the stock resulted in his obtaining money from the purchasers of the stock. Compl. ¶¶ 18, 21; *see also* Lee Decl. ¶ 2 & Ex. 1.

The undersigned finds that the SEC's Complaint adequately states a claim under each paragraph of Section 17(a), and that the "the merits of plaintiff's substantive claim" and "the sufficiency of the complaint" therefore favor granting default judgment on these claims. *See Eitel*, 782 F.2d at 1471–72.

C. Disgorgement

"The district court has broad equity powers to order the disgorgement of 'ill-gotten gains' obtained through the violation of the securities laws. Disgorgement is designed to deprive a wrongdoer of unjust enrichment, and to deter others from violating securities laws by making violations unprofitable." *SEC v. First Pac. Bancorp*, 142 F.3d 1186, 1191 (9th Cir. 1998) (citations omitted). "[A]lthough it is normally within the district court's discretion to order that disgorged funds be used to compensate securities fraud victims, there is no merit in [the] contention that such an order is required." *SEC v. Fischbach Corp.*, 133 F.3d 170, 176 (2d Cir. 1997); *see also First Pac. Bancorp*, 142 F.3d at 1193 (citing *Fischbach* with approval). "The district court [is] not required to trace every dollar of the . . . proceeds," and may properly order disgorgement of "only 'a reasonable approximation of profits causally connected to the violation.'" *First Pac. Bancorp*, 142 F.3d at 1192 n.6 (quoting *SEC v. First Jersey Secs., Inc.*, 101 F.3d 1450, 1475 (2d Cir. 1996)).

The evidence demonstrates that Kumar obtained $654,300 from the resale of CSS stock: $459,800 directly from the venture capital firm directors, and $194,500 that he transferred to his own accounts from the VRSBS account after the private equity fund purchaser paid $195,000 to that account. Lee Decl. ¶ 2 & Ex. 1. Because Kumar had used $24,500 of his own money to purchase the stock, subtracting that amount from the $654,300 he received from the resales yields a total illicit gain of $629,800. The undersigned therefore recommends that Kumar be ordered to disgorge $629,800.

D. Prejudgment Interest

Awards of prejudgment interest fall within the district court's discretion. *See SEC v. Platforms Wireless Int'l Corp.*, 617 F.3d 1072, 1099 (9th Cir. 2010). In its administrative proceedings, the SEC has adopted the prejudgment interest rate set forth at 26 U.S.C. § 6621(a)(2), which by its terms governs underpayment of taxes. *See Platforms Wireless*, 617 F.3d at 1099. The Ninth Circuit has "conclude[d] that the SEC's reasoning on this issue is persuasive" and affirmed a district court order applying that rate to disgorgement of profit obtained in violation of the securities laws. *Id.* Section 6621(a)(2) provides for an interest rate equal to "(A) the Federal short-term rate . . . plus (B) 3 percentage points." 26 U.S.C. § 6621(a)(2).

The SEC submits a declaration by Jason Lee indicating that the SEC calculated interest through September 30, 2015 using the method prescribed by § 6621(a)(2), and attaching a worksheet showing quarterly interest calculations. Lee Supp'l Decl. ¶ 8 & Ex. B. The undersigned finds these calculations to be generally correct[5] and recommends that disgorgement include $71,213.94 in prejudgment interest, for a total of $701,013.94.

E. Civil Penalties

The SEC also asks that the Court impose civil monetary penalties on Kumar pursuant to Section 20 of the Securities Act and Section 21 of the Exchange Act. *See* 15 U.S.C. §§ 77t(d)(2), 78u(d)(3). The purpose of imposing monetary penalties in addition to disgorgement of profits is to punish the violator as well as deter future violations of the securities laws. *SEC v. Moran*, 944 F. Supp. 286, 296 (S.D.N.Y. 1996). With disgorgement alone, absent any mechanism for an additional penalty, "even a violator who is caught is required merely to give back his gains with interest, leaving him no worse off financially than if he had not violated the law." H.R. Rep. No. 101-616 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1379, 1384 (explaining the legislative intent behind the civil penalty statutes).

[5] The SEC's calculations appear to compound interest quarterly rather than daily. *See* 26 U.S.C. § 6622(a) (providing that for tax underpayment, interest "shall be compounded daily"). Because any difference resulting from that discrepancy is de minimis and favors Kumar, the undersigned recommends that the Court award the SEC the $71,213.94 in prejudgment interest that it requests.

Congress has established a three-tiered system to guide courts in determining the appropriate amount of civil monetary penalties. *See* 15 U.S.C. §§ 77t(d)(2), 78u(d)(3). A "first-tier" penalty of up to $7,500 for an individual and $75,000 for any other entity may be imposed for each violation of the securities laws, a "second-tier" penalty of up to $75,000 for an individual and $375,000 for any other entity may be imposed for violations of the securities laws that involve fraud or deceit, and a "third-tier" penalty of up to $150,000 for an individual and $725,000 for any other entity may be imposed for violations of the securities laws that involved fraud or deceit and resulted in substantial loss or a significant risk of substantial loss. 15 U.S.C. §§ 77t(d)(2), 78u(d)(3); 17 C.F.R. § 201.1004 & Table IV (adjusting statutory penalties for inflation). A court may alternatively impose a penalty up to "the gross amount of pecuniary gain to [the] defendant as a result of the violation," regardless of the tier. 15 U.S.C. §§ 77t(d)(2), 78u(d)(3). Subject to those maximum limits, the amount of the penalty is left to the discretion of the court, to be determined "in light of the facts and circumstances" of the case. 15 U.S.C. §§ 77t(d)(2)(A), 78u(d)(3)(B)(i).

The undersigned finds that Kumar's conduct in this case falls within the third tier. As discussed above, Kumar engaged in extensive fraud and deceit directed at three separate groups: the Investors whose stock Kumar sold for his own gain, the resale purchasers who believed Kumar owned the stock he was selling them, and the CSS transfer agent who issued new stock certificates based on Kumar's false representation that he had lost the original certificates. His conduct also resulted in a "substantial loss" to the Investors, because Kumar took for himself the $629,800 he obtained by selling the Investors' shares (after accounting for his own $24,500 investment). In light of Kumar's flagrant deception and misappropriation of funds, his protracted efforts to conceal his wrongdoing, and his apparent flight from the United States to avoid facing liability, the undersigned recommends imposing the maximum civil penalty, equal to Kumar's pecuniary gain of $629,800.[6] *See SEC v. Razmilovic*, 738 F.3d 14, 38–39 (2d Cir. 2013) (affirming a civil

[6] The SEC has not addressed whether prejudgment interest on the defendant's initial gain can be included in calculating a civil penalty under §§ 77t(d)(2) and 78u(d)(3). (The SEC did not include such interest in its description of the maximum civil penalty. *See* Mot. at 16–17.) The Court need not address that issue—even if including interest would be permissible, the undersigned finds

penalty of over twenty million dollars, equal to half of the defendant's pecuniary gain, where the defendant "was a direct participant in pervasive fraud scheme, . . . fled the country, continues to refuse to admit any wrongdoing, and has never expressed any remorse" (emphasis omitted)).

F. Injunctive Relief

Both the Securities Act and the Exchange Act give the Court discretion to enjoin practices that violate those acts where there is a reasonable likelihood of future violations. 15 U.S.C. §§ 77t(b), 78(u)d; *see also SEC v. Fehn*, 97 F.3d 1276, 1295 (9th Cir. 1996). In determining whether there is a likelihood of future violations, courts consider the following factors:

> (1) the degree of scienter involved; (2) the isolated or recurrent nature of the infraction; (3) the defendant's recognition of the wrongful nature of his conduct; (4) the likelihood, because of defendant's professional occupation, that future violations might occur; (5) and the sincerity of his assurances against future violations.

Fehn, 97 F.3d at 1295.

Here, each factor favors granting an injunction. First, as discussed above, the undersigned finds that Kumar acted with intent to defraud. Second, although the allegations reflect only one fraudulent scheme, the misconduct at issue is more properly characterized as "recurrent" than "isolated": Kumar's scheme extended over a period of years, he engaged in numerous acts of deception both to perpetrate the fraud and to conceal it after the fact, and he failed to meaningfully cooperate with the SEC's administrative investigation. Third, Kumar has shown no recognition of wrongful conduct. Fourth, Kumar solicited investments for a period of approximately five years, placing him in an occupation with a high risk of future violations.[7] *See* Compl. ¶ 8. Finally, there is no indication that Kumar has made any assurance against future violations. The undersigned therefore recommends that the Court grant the SEC's proposed injunction.

IV. CONCLUSION

For the reasons stated above, the undersigned recommends that the Court GRANT the

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$629,800 to be a sufficient penalty to serve the statutes' punitive and deterrent purposes.

[7] Because Kumar's current professional occupation is not clear from the Complaint or the record, this factor does not weigh as strongly as it would if Kumar were currently soliciting investments. In conjunction with the other factors, however, the undersigned finds Kumar's recent work in investments sufficient to support an injunction.

SEC's motion for default judgment, order that Kumar disgorge $701,013.94 of ill-gotten profit (including prejudgment interest of $71,213.94), assess a civil penalty of $629,800, and enjoin Kumar from any further violation of the securities laws.

Given the magnitude of the recommended judgment and its foundation primarily on the unanswered allegations of the SEC's Complaint, the undersigned further recommends that the Court require the SEC to serve a copy of this Report on Kumar. The undersigned recommends that the Court withhold judgment until fourteen days after service to allow Kumar a final opportunity to respond to the SEC's allegations. *See Automattic Inc. v. Steiner*, 82 F. Supp. 3d 1011, 1016 (N.D. Cal. 2015) (noting that although 28 U.S.C. § 636(b) includes "no clear requirement" for such service, "the court normally requests that the moving party do so," but in that case would not require further expenditure of resources to complete international service before entering a $25,084 judgment).

Dated: October 19, 2015

JOSEPH C. SPERO
Chief Magistrate Judge

United States District Court
Northern District of California

EXHIBIT 5

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

VINAY KUMAR NEVATIA,

Defendant.
_____/

No. C14-05273 CRB

ORDER ADOPTING REPORT AND RECOMMENDATION

The Court has reviewed Magistrate Judge Spero's Report and Recommendation Regarding SEC's Application for Default Judgment (dkt. 36), and notes that fourteen days have passed since the SEC served Defendant Vinay Kumar Nevatia with the Report and Recommendation on October 21, 2015, see Certificate of Service (dkt. 40), and that no opposition has been filed. The Court finds the Report correct, well-reasoned, and thorough, and ADOPTS it in every respect. Accordingly, the SEC's Application (dkt. 25) is GRANTED, and the Court enters default judgment against Nevatia. Nevita is further ORDERED to disgorge $701,013.94 of ill-gotten profit (including prejudgment interest of $71,213.94), to pay a civil penalty of $629,800, and to abstain from any further violation of

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the securities laws.

IT IS SO ORDERED.

Dated: November 9, 2015

CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE

EXHIBIT 6

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

VINAY KUMAR NEVATIA,

Defendant.
_____/

No. C14-05273 CRB

JUDGMENT

Having granted the SEC's Application for Default Judgment, the Court enters judgment for Plaintiff the SEC and against Defendant Vinay Kumar Nevatia. Nevita is further ORDERED to disgorge $701,013.94 of ill-gotten profit (including prejudgment interest of $71,213.94), to pay a civil penalty of $629,800, and to abstain from any further violation of the securities laws.

IT IS SO ORDERED.

Dated: November 9, 2015

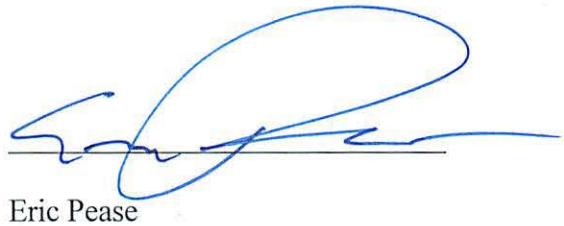
CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that, concurrent with this certificate of service, original and three copies of the foregoing were filed with the Securities and Exchange Commission, Office of the Secretary, 100 F Street, N.E., Washington, D.C. 20549-9303, and that a true and correct copy of the foregoing has been served via e-mail and as indicated below this 29th day of January 2016, on the following persons entitled to notice:

Honorable Cameron Elliot (via e-mail)
Administrative Law Judge
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-2557

Respondent Vinay Kumar Nevatia (via e-mail)



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Division of Enforcement
U.S. Securities and Exchange Commission