UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-19333

In the Matter of **BARRY LISS** **Respondent.**

DIVISION OF ENFORCEMENT'S MOTION FOR ENTRY OF DEFAULT JUDGMENT AND SANCTIONS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

FEDERAL STATUTES

SECURITIES EXCHANGE ACT OF 1934

COMMISSION'S RULES OF PRACTICE

Pursuant to the January 25, 2021 Order to Show Cause in this matter, Exch. Act Release No. 90982 (Jan. 25, 2021), the Division of Enforcement ("Division") submits this motion for default judgment and sanctions against Respondent Barry Liss ("Liss" or "Respondent")).

I. INTRODUCTION

Liss was a sales agent for the unregistered securities of Kentucky-Tennessee 50 Wells/400 BBLPD Block, Limited Partnership (a/k/a Warren County 200 Well/1,600 BBLPD Block, Kentucky-Tennessee 200 Well/1600 BBLPD Block) ("K-T 50 Wells"). Liss also acted as an unregistered broker for the offering.

The instant proceeding was commenced on August 13, 2019 based upon the entry of a final judgment against Liss, permanently enjoining him from future violations of Sections 5(a) and 5(c) of the Securities Act of 1933 ("Securities Act"), and Section 15(a) of the Exchange Act, in the civil action entitled *Securities and Exchange Commission v. Carol J. Wayland, et al.,* Civil Action Number 8:17-cv-01156-AG (DFMx), in the United States District Court for the Central District of California. *See* Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("OIP") Exch. Act. Rel. 86638 (Aug. 13, 2019).

Pursuant to SEC Rule of Practice 141(a)(2)(iii), the OIP was served on Respondent. Liss did not file an answer, and thus is in default. Accordingly, the Division moves, pursuant to Rules 155(a)(2) and 220(f) of the SEC's Rules of Practice, for a finding that Liss is in default and for the imposition of remedial sanctions. The Division specifically requests that the Commission issue an order barring Liss from being associated with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, or from participating in an offering of penny stock.

II. FACTS

A. Respondent

Liss, age 60, is a resident of Orange, CA. From approximately August 2014 to at least March 2016, Liss acted as a boilerroom sales person for the unregistered securities of Kentucky-Tennessee

50 Wells/400 BBLPD Block, Limited Partnership (a/k/a Warren County 200 Well/1,600 BBLPD Block, Kentucky-Tennessee 200 Well/1600 BBLPD Block) ("K-T 50 Wells"). Liss also acted as an unregistered broker for the offering. Declaration of Lynn M. Dean ("Dean Decl."), Ex. 1 OIP at ¶ A.1.

B. Entry of the Injunction

On April 18, 2019, a final judgment was entered against Liss, permanently enjoining him from future violations of Sections 5(a) and 5(c) of the Securities Act of 1933 ("Securities Act"), and Section 15(a) of the Exchange Act, in the civil action entitled *Securities and Exchange Commission v. Carol J. Wayland, et al.*, Civil Action Number 8:17-cv-01156-AG (DFMx), in the United States District Court for the Central District of California. Dean Decl., Ex. 1 (OIP. at B.2).

The Commission's complaint alleged that, from at least November 2014 until March 2016, in connection with the sale of limited partnership interests, Liss acted as an unregistered broker and sold unregistered securities of KT-50 Wells. *Id.* OIP. at B.3.

C. Liss is in Default

These proceedings were commenced on August 13, 2019. Exch. Act Rel. No. 86639. The Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("OIP") was served on Liss by sending copies of the OIP addressed to Respondent's last-known address, by U.S. Postal Service certified mail, in accordance with Commission Rule of Practice 141(a)(2). No confirmation of receipt for that delivery was received. Dean Decl., ¶ 2.

On January 16, 2020, the OIP was served on Liss by UPS Overnight Delivery with signature required. Dean Decl., ¶ 3. An adult over the age of 21 signed for the delivery. *Id.*

On January 25, 2021, the Commission issued an Order to Show Cause ordering Liss, by February 8, 2021, to show cause why he should not be deemed to be in default and why this proceeding should not be determined against him due to his failure to file an answer and to otherwise

defend this proceeding. Exch Act. Rel. No. 90982 (Jan. 25, 2021). The Order further directed that if Liss failed to file a response, the Division should file a motion for default and other relief by March 8, 2021. *Id.* Liss did not appear or respond to the OSC. Dean Decl. ¶ 4.

III. ARGUMENT

A. Liss Is In Default and the Allegations of the OIP May Be Deemed To Be True

Because Liss has not responded to the OIP, he is in default. Rule 155(a) of the SEC's Rules of Practice states:

> A party to a proceeding may be deemed to be in default and the Commission or the hearing officer may determine the proceeding against the party upon consideration of the record, including the order instituting proceedings, the allegations of which may be deemed to be true, if that party fails: . . .
>
> (2) To answer, to respond to a dispositive motion within the time provided, or otherwise to defend the proceeding . . . .

17 CFR § 201.155(a). Moreover, the OIP itself provides: "If Respondent fails to file the directed answer . . . . the Respondent may be deemed in default and the proceedings may be determined against him upon consideration of this Order, the allegations of which may be deemed to be true . . . ." Dean Decl. Ex. 1 (OIP at p. 3).

The Commission has already made findings that Liss was properly served with the OIP, and has failed to answer. *See* Order to Show Cause, Exch. Act. Rel. No. 90982 (Jan. 25, 2021). Under Rule 155(a), the allegations of the OIP may thus be deemed to be true and the Commission may determine the proceedings against the party upon consideration of the record, including the OIP. 17 CFR § 201.155(a).

B. The Findings in the Underlying Case Are Binding on Respondent

Where, as here, facts have been litigated and determined in an earlier judicial proceeding, those facts may not be revisited in a subsequent administrative proceeding. *See Peter J. Eichler, Jr.*, Initial Dec. Rel. No. 1032, 2016 WL 4035559 (July 8, 2016) ("It is well-established that the Commission does not permit a respondent to relitigate issues that were addressed in a previous civil proceeding against the respondent, whether resolved by summary judgment, by consent, or after a trial") (collecting cases); *accord Robert Burton*, Initial Dec. Rel. No. 1014, 2016 WL 3030850 (May 27, 2016); *James E. Franklin*, Exchange Act Rel. No. 56649 (Oct. 12, 2007), 91 S.E.C. Docket 2708, 2713 & n.13, 2007 WL 2974200, *petition for review denied*, 285 F. App'x 761 (D.C. Cir. 2008); *In the Matter of Gunderson*, Exchange Act Release No. 61234, 2009 SEC LEXIS 4322 *15-16 (Dec. 23, 2009).

C. Imposition of a Permanent Bar Is Warranted

Based on the record here and in the underlying action, the Division respectfully requests that sanctions be imposed under Section 15(b)(6) of the Exchange Act. That section provides in relevant part:

> With respect to any person who is associated, . . . or, at the time of the alleged misconduct, who was associated . . . with a broker or dealer, . . . the Commission, by order, shall censure, place limitations on the activities or functions of such a person, or suspend for a period not exceeding 12 months, or bar any such person from being associated with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, or from participating in an offering of penny stock, if the Commission finds, on the record after notice and an opportunity for a hearing, that such censure, placing of limitations, suspension, or bar is in the public interest and that such person – . . .

***

(iii) is enjoined from any action, conduct or practice specified in subparagraph (C) of such paragraph (4)" of Section 15(b).

Thus, Section 15(b)(6) authorizes the Commission to impose an associational bar against a respondent if: (1) at the time of the alleged misconduct, he was associated with a broker; (2) he is enjoined from any action, conduct or practice specified in Section 15(b)(4)(C); and (3) a bar is in the public interest.

1. At the Time of the Misconduct, Respondent was Acting as An Unregistered Broker and Was Associated With an Unregistered Broker

Each of these factors is easily met here. First, the district court found that, at the time of the misconduct here, Respondent was acting as an unregistered broker. The Court based its finding on undisputed evidence establishing that:

> Liss was not registered as or associated with any broker-dealers at the time of the KT 50 or CAR offerings. Yet [he] acted as broker dealer, soliciting investors, supervising salespeople, drafting offering documents, and handling investors. Liss [was] paid commissions for selling securities. And [he] solicited investors by phone and managed their questions and expectations. Doing so without proper registration[] was a violation of Section 15 of the Exchange Act.

Dean Decl. Ex. 2 (summary judgment order, p. 8 (internal citations omitted). Based on that evidence, the Court concluded that Liss had acted as an unregistered broker under the Act and enjoined him from future violations of Section 15(a) of the Exchange Act. *Id.* As previously discussed, Respondent is bound by the district court's finding here. Administrative proceedings for sanctions against unregistered broker dealers are properly instituted under Section 15(b)(6), and the Commission regularly issues bars against unregistered brokers pursuant to that section. *See, e.g., Hector J. Garcia*, Exch. Act Rel. No. 54116, (July 10, 2006); *James Joseph Conway*, Exch. Act Rel. No. 53722 (Apr. 25, 2006).

2. The District Court Enjoined Liss Against Violations of the Securities Laws

The second element under Section 15(b)(6) is also established by the record in the underlying action because Respondent was enjoined from conduct specified in Section 15(b)(4)(C). The acts enumerated under Section 15(b)(4)(D) include willful violations of the Securities Act, the Exchange Act or any rules or regulations under such statutes. Here, the district court permanently enjoined Respondent from violating Section 15(a) of the Exchange Act and Sections 5(a) and (c) of the Securities Act. *See* Dean Decl., Ex. 4 (Final Judgment).

3. A Bar Is In the Public Interest

Finally, the record establishes that a bar is in the public interest. In determining whether an administrative sanction is in the public interest, the Commission considers a number of factors, including (1) the egregiousness of the respondent's actions; (2) the isolated or recurrent nature of the infraction; (3) the degree of scienter involved; (3) the sincerity of the respondent's assurances against future violations; (4) recognition of wrongful conduct; and (5) the likelihood that the respondent's occupation will present future opportunities for violations. *See Steadman v. SEC,* 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 81 (1981); *Lonny S. Bernath*, Initial Dec. Rel. No. 993 at 4, 2016 SEC LEXIS 1222 *10-11 (Apr. 4, 2016) (*Steadman* factors used to determine whether a bar is in the public interest). The district court found that all of these factors weighed in favor a permanent injunction. Dean Decl. Ex. 3.

As to whether a permanent bar is appropriate in a follow-on proceeding, "[t]he existence of an injunction can, in the first instance, indicate the appropriateness in the public interest of a suspension or bar from participation in the securities industry*." Michael V. Lipkin and Joshua Shainberg*, Init. Dec. Rel. No. 317, 88 SEC Docket 2346, 2006 WL 2422652, at *4 (Aug. 21, 2006), *notice of finality*, 88 S.E.C. Docket 2872, 2006 WL 2668516 (Sept. 15, 2006).

a. Respondent's violations were egregious, intentional and recurrent

As previously noted, in the underlying district court action, the Court found that Liss, violated the law and that his conduct was "fraudulent, deceitful, and manipulative and resulted in loss to other persons." Dean Decl. Ex. 2, at p. 14. Further, Respondent's fraud was not an isolated incident. Instead, he participated in the scheme to defraud over a number of years that raised over $2.4 million form over 40 investors. Dean Decl. Ex. 2 at p. 2. In sum, the egregiousness and extent of Respondent's fraud clearly favor a permanent bar under *Steadman*.

b. The remaining *Steadman* factors also favor a permanent bar

The remaining Steadman factors also favor a permanent bar. Respondent has failed to appear and provide any assurance against future violations and he lacks any apparent recognition of his wrongful conduct. The "absence of recognition by [a respondent] of the wrongful nature of his conduct" favors a permanent bar. *Jonathan D. Havey, CPA*, Initial Dec. Rel. No. 959, 2016 SEC LEXIS 522, at *11 (Feb. 11, 2016) (granting permanent bar on motion for summary disposition in follow-on proceeding to criminal conviction); *Siming Yang*, Initial Dec. Rel. No. 788, 2015 SEC LEXIS 1735, at *10 (May 6, 2015) (noting, as part of grant of summary disposition and imposing of permanent bar in follow on proceeding to civil injunction, that, "[c]onsistent with a vigorous defense of the charges, [respondent] ha[d] not recognized the wrongful nature of his conduct"); *Delsa U. Thomas and The D. Christopher Capital Management Group, LLC*, Initial Dec. Rel. No. 205, 2014 SEC LEXIS 4181, at 24 (Nov. 4, 2014) (imposing permanent bar and revoking adviser's registration on summary disposition following civil fraud injunction, noting that "Respondents do not recognize the wrongful nature of their conduct. Instead, they deny any culpability, insist that none of their conduct was inappropriate, and accuse the Commission and the Commission's witnesses of bias or lying"); *Terrence O'Donnell*, Initial Dec. Rel. No. 334, 2007 SEC LEXIS 2148, at *14 (Sept. 20, 2007) (weighing in favor of bar respondent's "protest" that the securities laws were not sufficiently

clear, finding this "evidence that [respondent] still seeks to minimize his misconduct"); *Steadman*, 603 F.2d at 1140.

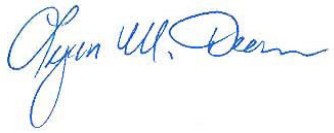
In addition, the final *Steadman* factor considers "the likelihood that the respondent's occupation will present future opportunities for violations." While Liss's current occupation is unknown, his failure to appear and defend himself make this factor at best, neutral. Moreover, Liss has made a career of being a boiler room sales person. He was identified as such in a newspaper article in 2011, and when attempting to serve one on Liss's co-defendants in the underlying litigation, the Division's process server snapped a photograph of Liss at a new boiler room sales operation. Dean Decl. ¶¶ 8-9, Exs. 5-7.

In sum, all of the *Steadman* factors favor the imposition of the bar, which is strongly in the public's interest.

IV. CONCLUSION

For the foregoing reasons, the Division respectfully requests that Respondent be barred from being associated with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, or from participating in an offering of penny stock.

March 8, 2021 Respectfully submitted,



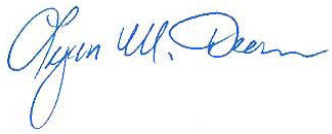
Lynn M. Dean (323) 965-3245
Securities and Exchange Commission
Los Angeles Regional Office
Securities and Exchange Commission
444 South Flower Street, Suite 900
Los Angeles, CA 90071

CERTIFICATE OF SERVICE

I certify that on March 8, 2021, I caused the foregoing document to be served on the following persons, by electronic mail, facsimile, or by UPS overnight mail as stated:

Securities and Exchange Commission (By Electronic mail)
APFilings@sec.gov

By UPS
Mr. Barry Liss
[redacted]
Long Beach, CA [redacted]



Lynn M. Dean

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-19333

In the Matter of

BARRY LISS

Respondent.

DECLARATION OF LYNN M. DEAN IN SUPPORT OF DIVISION OF ENFORCEMENT'S MOTION FOR ENTRY OF DEFAULT JUDGMENT AND SANCTIONS

I, Lynn M. Dean, declare pursuant to 28 U.S.C. § 1746 as follows:

1. I am an attorney at law admitted to practice law in the State of California and before the United States District Court for the Central District of California. I am employed as an attorney in the Los Angeles Regional Office of the U.S. Securities and Exchange Commission ("SEC"), and am counsel for the Division of Enforcement in this case. I have personal knowledge or knowledge based upon my review of the file of the facts set forth in this Declaration and, if called and sworn as a witness, could and would competently testify thereto.

2. These proceedings were commenced on August 13, 2019. The Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("OIP") was served on Barry Liss ("Liss") by sending copies of the OIP to Liss's last-known address, by U.S. Postal Service certified mail, in accordance with SEC Rule of Practice 141(a)(2). Liss did not appear or respond to the OIP and the SEC was unable to obtain delivery confirmation. A true and correct copy of the OIP is attached hereto as Exhibit 1.

3. On January 16, 2020, the OIP was served on Liss by UPS Overnight Delivery with signature required. An adult over the age of 21 signed for the delivery. I provided proof of that service to the Commission by declaration dated January 30, 2020.

4. On January 25, 2021, the Commission issued an Order to Show Cause ordering Liss, by February 8, 2021, to show cause why it should not be deemed to be in default and this proceeding be determined against him due to his failure to file an answer and to otherwise defend. Order, Exch Act. Rel No. 90982 (Jan. 25, 2021). The Order further directed that if Liss failed to file a response, the Division should file a motion for default and other relief by March 8, 2021. *Id.* Liss did not appear or respond to the OSC.

5. A true and correct copy of the Minute Order granting summary judgment in in the civil action entitled *Securities and Exchange Commission v. Carol J. Wayland, et al.*, Civil Action Number 8:17-cv-01156-AG (DFMx) is attached hereto as Exhibit 2.

6. A true and correct copy of the Minute Order granting the SEC's motion for

injunctions and civil penalties in the civil action entitled *Securities and Exchange Commission v. Carol J. Wayland, et al.*, Civil Action Number 8:17-cv-01156-AG (DFMx) is attached hereto as Exhibit 3.

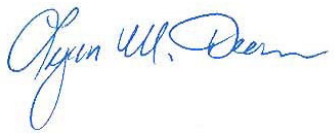
7. A true and correct copy of the Final Judgment against Barry Liss in the civil action entitled *Securities and Exchange Commission v. Carol J. Wayland, et al.*, Civil Action Number 8:17-cv-01156-AG (DFMx) is attached hereto as Exhibit 4.

8. A true and correct copy of an August 31, 2011 article from the online version of the Orange County Register, titled "Irvine Music Festival Raises Money Boiler-room Style" is attached hereto as Exhibit 5. The article identifies Barry Liss as a principal of Elevated Sound Productions, an unregistered offering soliciting investors through boiler-room sales calls.

9. On August 11, 2017, the SEC's process server attempted to serve Defendant John Mueller at his most recent place of business. When he arrived, he snapped a photograph of the location, which was a boiler room sales operation. A true and correct copy of that photograph is attached hereto as Exhibit 6. The seated man on the right of the photograph is Barry Liss. To verify this, I performed a Google search looking for images of Mr. Liss. One of the results was an archived website for an entity named childrensfoodproject.org that contains photographs with captions identifying the persons in the photographs. Attached hereto as Exhibit 7 is a true and correct copy of a printout from https://web.archive.org/web/20180903012548/http://childrensfoodproject.org/cifpsite/about/ that purports to be a photograph of Barry Liss with actor Jeremy Piven.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 8th day of March, 2021 in Los Angeles, California.



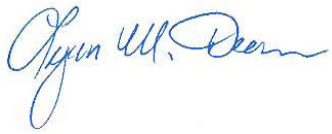
Lynn M. Dean

CERTIFICATE OF SERVICE

I certify that on March 8, 2021, I caused the foregoing document to be served on the following persons, by electronic mail, facsimile, or by UPS overnight mail as stated:

Securities and Exchange Commission (By Electronic mail)
APFilings@sec.gov

By UPS
Mr. Barry Liss
[redacted]
Long Beach, CA [redacted]



Lynn M. Dean

EXHIBIT 1

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 86638 / August 13, 2019

ADMINISTRATIVE PROCEEDING
File No. 3-19333

In the Matter of **BARRY LISS,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934 AND NOTICE OF HEARING**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") against Barry Liss ("Respondent" or "Liss").

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. Liss, age 60, is a resident of Orange, CA. From approximately August 2014 to at least March 2016, Liss acted as a boilerroom sales person for the unregistered securities of Kentucky-Tennessee 50 Wells/400 BBLPD Block, Limited Partnership (a/k/a Warren County 200 Well/1,600 BBLPD Block, Kentucky-Tennessee 200 Well/1600 BBLPD Block) ("K-T 50 Wells"). Liss also acted as an unregistered broker for the offering.

B. ENTRY OF THE INJUNCTION

2. On April 18, 2019, a final judgment was entered against Liss, permanently enjoining him from future violations of Sections 5(a) and 5(c) of the Securities Act of 1933 ("Securities Act"), and Section 15(a) of the Exchange Act, in the civil action entitled Securities and Exchange Commission v. Carol J. Wayland, et al., Civil Action Number 8:17-cv-01156-AG (DFMx), in the United States District Court for the Central District of California.

3. The Commission's complaint alleged that, from at least August 2014 until March 2016, in connection with the sale of limited partnership interests, Liss acted as an unregistered broker and sold unregistered securities of KT-50 Wells.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate in the public interest that public administrative proceedings be instituted to determine:

A. Whether the allegations set forth in Section II hereof are true and, in connection therewith, to afford Respondent an opportunity to establish any defenses to such allegations;

B. What, if any, remedial action is appropriate in the public interest against Respondent pursuant to Section 15(b) of the Exchange Act; and

C. Whether, pursuant to Section 15(b) of the Exchange Act, it is appropriate and in the public interest to suspend or bar Respondent from participating in any offering of penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock; or inducing or attempting to induce the purchase or sale of any penny stock.

IV.

IT IS ORDERED that a public hearing before the Commission for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened at a time and place to be fixed by further order of the Commission, pursuant to Rule 110 of the Commission's Rules of Practice, 17 C.F.R. § 201.110.

IT IS FURTHER ORDERED that Respondent shall file an Answer to the allegations contained in this Order within twenty (20) days after service of this Order, as provided by Rule 220(b) of the Commission's Rules of Practice, 17 C.F.R. § 201.220(b).

IT IS FURTHER ORDERED that the Division of Enforcement and Respondent shall conduct a prehearing conference pursuant to Rule 221 of the Commission's Rules of Practice, 17 C.F.R. § 201.221, within fourteen (14) days of service of the Answer. The parties may meet in person or participate by telephone or other remote means; following the conference, they shall file

a statement with the Office of the Secretary advising the Commission of any agreements reached at said conference. If a prehearing conference was not held, a statement shall be filed with the Office of the Secretary advising the Commission of that fact and of the efforts made to meet and confer.

If Respondent fails to file the directed Answer, or fails to appear at a hearing or conference after being duly notified, the Respondent may be deemed in default and the proceedings may be determined against him upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f) and 310 of the Commission's Rules of Practice, 17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310.

This Order shall be served forthwith upon Respondent by any means permitted by the Commission's Rules of Practice.

Attention is called to Rule 151(b) and (c) of the Commission's Rules of Practice, 17 C.F.R. § 201.151(b) and (c), providing that when, as here, a proceeding is set before the Commission, all papers (including those listed in the following paragraph) shall be filed with the Office of the Secretary and all motions, objections, or applications will be decided by the Commission. The Commission requests that an electronic courtesy copy of each filing should be emailed to APFilings@sec.gov in PDF text-searchable format. Any exhibits should be sent as separate attachments, not a combined PDF.

The Commission finds that it would serve the interests of justice and not result in prejudice to any party to provide, pursuant to Rule 100(c) of the Commission's Rules of Practice, 17 C.F.R. § 201.100(c), that notwithstanding any contrary reference in the Rules of Practice to filing with or disposition by a hearing officer, all filings, including those under Rules 210, 221, 222, 230, 231, 232, 233, and 250 of the Commission's Rules of Practice, 17 C.F.R. §§ 201.210, 221, 222, 230, 231, 232, 233, and 250, shall be directed to and, as appropriate, decided by the Commission. This proceeding shall be deemed to be one under the 75-day timeframe specified in Rule of Practice 360(a)(2)(i), 17 C.F.R. § 201.360(a)(2)(i), for the purposes of applying Rules of Practice 233 and 250, 17 C.F.R. §§ 201.233 and 250.

The Commission finds that it would serve the interests of justice and not result in prejudice to any party to provide, pursuant to Rule 100(c) of the Commission's Rules of Practice, 17 C.F.R. § 201.100(c), that the Commission shall issue a decision on the basis of the record in this proceeding, which shall consist of the items listed at Rule 350(a) of the Commission's Rules of Practice, 17 C.F.R. § 201.350(a), and any other document or item filed with the Office of the Secretary and accepted into the record by the Commission. The provisions of Rule 351 of the Commission's Rules of Practice, 17 C.F.R. § 201.351, relating to preparation and certification of a record index by the Office of the Secretary or the hearing officer are not applicable to this proceeding.

The Commission will issue a final order resolving the proceeding after one of the following: (A) The completion of post-hearing briefing in a proceeding where the public hearing has been completed; (B) The completion of briefing on a motion for a ruling on the pleadings or a motion for summary disposition pursuant to Rule 250 of the Commission's Rules of Practice, 17

C.F.R. § 201.250, where the Commission has determined that no public hearing is necessary; or (C) The determination that a party is deemed to be in default under Rule 155 of the Commission's Rules of Practice, 17 C.F.R. § 201.155, and no public hearing is necessary.

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

For the Commission, by its Secretary, pursuant to delegated authority.

Vanessa A. Countryman
Secretary

EXHIBIT 2

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JS-6

CIVIL MINUTES – GENERAL

Case No.	SACV 17-01156 AG (DFMx)	Date	April 8, 2019
Title	SECURITIES AND EXCHANGE COMMISSION v. CAROL J. WAYLAND ET AL.		

Present: The Honorable	ANDREW J. GUILFORD	
Melissa Kunig	Not Present	
Deputy Clerk	Court Reporter / Recorder	Tape No.
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:	

Proceedings: **[IN CHAMBERS] ORDER REGARDING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

The Securities and Exchange Commission ("SEC") filed a lawsuit against Kentucky-Tennessee 50 Wells/400 BBLPD Block, Limited Partnership ("KT 50 Wells"), HP Operations, LLC ("HP"), CAR Leasing, LLC ("CAR"), and five individual defendants, Carol J. Wayland, John C. Mueller, Mitchell B. Dow, Barry Liss, and Steve G. Blasko. The SEC has since dismissed claims against John C. Mueller, who has passed away. (Dkt. 67.) The SEC's complaint includes five claims: (1) violation of § 10(b) of the Securities Exchange Act of 1934 (referred to as the "Exchange Act" for short) and SEC Rule 10b–5; (2) violation of § 17(a)(2) of the Securities Act of 1933; (3) violation of § 17(a)(1) and § 17(a)(3) of the Securities Act; (4) violation of § 5(a) and § 5(c) of the Securities Act; and (5) violation of § 15(a) of the Exchange Act. (*See* Dkt. No. 1.) The SEC now moves for summary judgment against all Defendants.

The Court GRANTS IN PART the SEC's motion. (Dkt. 61-1.)

1. BACKGROUND

The parties. Wayland and Mueller operated KT 50 Wells and wholly owned HP and CAR. HP was the managing general partner of KT 50 Wells and had "sole discretion over the business." (Compl., Dkt. 1 at ¶ 13.) CAR performed the administrative tasks, including administration of investments before the offering. (*Id.*) Wayland and Mueller drafted and revised KT 50 Wells's offering document, the Private Placement Memorandum, or "PPM," which included statements about their experience managing oil and gas investment projects and about the commitment KT 50 Wells was making regarding its use of investor money. Dow, Liss, and

Blasko were salespersons for KT 50 Wells. Specifically, they were "closers." They were the ones ultimately in charge of convincing investors to invest in KT 50 Wells, and they made the largest commissions.

Defendants' Business Plan. The SEC describes Defendants' alleged scheme as follows. Wayland founded KT 50 and operated it through managing general partner HP. (Statement of Uncontroverted Facts and Conclusions of Law ("SUF"), Dkt. 61-2 at No. 16.) KT 50 purported to be an investment in the development and operation of oil wells, and the KT 50 PPM dated July 21, 2014 stated that 65% of investor funds would be used for "drilling efforts." (*Id.* Nos. 24, 50.) The PPM also stated that 35% of the funds raised would go to business expenses. (*Id.* No. 51.)

Wayland and Mueller set up a boiler room in Irvine, California under the fictitious name "Sahara Wealth Advisors" to attract investors. (*Id.* No. 26.) KT 50 salespeople, who were divided into "fronters" and "closers" solicited investments by phone and email and earned commissions on their sales. (*Id.* Nos. 32-43.) From about May 2014 to February 2016, Defendants sold KT 50 securities to at least 41 investors in an unregistered securities offering of limited partnership units. (*Id.* No. 17.) Defendants raised at least $2,417,257. (*Id.*) Neither KT 50 nor CAR were ever registered with the SEC, nor did they sell to accredited investors. (SUF Nos. 8, 18, 20-22, 67.)

Despite the representations made in the PPM, Wayland used investor funds to pay business expenses beyond those described in the offering documents and only spent 13% of the money raised on oil well development and operation. (SUF Nos. 52-53.) While the Executive Summary for the KT 50 offering projected annual returns of between 43.2% and 345% for each $100,000 investment, most investors received much smaller and less frequent returns, with some receiving only $17. (*Id.* Nos. 61-63.) Defendants also misrepresented their expertise with oil investment projects and misappropriated over one third of the money raised. (*Id.* Nos. 54, 64, 65.) Wayland and Mueller spent investments received on personal expenses, including groceries, dining, car payments, cash, and rare coins. (*Id.* No. 54.)

Procedural History. The Court denied Defendants' motions to dismiss in October 2017, finding the SEC had properly stated claims for violation of the Securities Exchange Act of 1934

("Exchange Act") and Securities Act of 1933 ("Securities Act"). (Order Denying Motions to Dismiss, Dkt. 27.) In October 2018, the Court granted Defendants' counsel's motion to withdraw, and since then, no attorneys have made an appearance on behalf of Defendants. The corporate Defendants (KT 50, HP, and CAR) may not proceed in federal court as unrepresented organizations. *See* L.R. 83.3. The individual Defendants participated in a mediation with SEC attorneys on March 13, 2019, but no agreement was reached. (Declaration of Lynn M. Dean, ¶ 2.)

The SEC's summary judgment motion argues that Defendants' own admissions and the undisputed evidence prove that all Defendants violated Section 5(a) and 5(c) of the Securities Act by offering and selling over $2.4 million in unregistered securities. (Motion for Summary Judgment, Dkt. 61-1.) The SEC also argues that the undisputed evidence shows that Wayland, Dow, Liss, and Blasko violated Section 15 of the Exchange Act by offering and selling securities while they were neither registered broker-dealers nor associated with a registered broker-dealer. And it argues the undisputed evidence shows Wayland, KT 50, HP, and CAR violated Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, and Rule 10b-5 by engaging in a scheme to defraud and making material misrepresentations regarding the offer and sale of the KT 50 offering.

Defendants haven't filed any opposition to the SEC's pending motion for summary judgment. Still, the Court has thoroughly analyzed the sufficiency of the facts and legal conclusions offered by the SEC.

2. LEGAL STANDARD

A party is entitled to summary judgment if "there is no genuine issue as to any material fact and … the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). To defeat a summary judgment motion, the non-moving party may not merely rely on its pleadings or conclusory statements, nor may the non-moving party merely attack or discredit the moving party's evidence. *Campbell v. Medtronic MiniMed, Inc.*, No. 2:15-CV-08091-RGK-PJW, 2016 U.S. Dist. LEXIS 120929, *6 (C.D. Cal. Sept. 6, 2016). Rather, the non-moving party must affirmatively present specific admissible evidence sufficient to create a genuine issue of material fact. Id. Furthermore, "[o]nly disputes

over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 248 (1986).

3. ANALYSIS

3.1 Sections 5(a) and (c) of the Securities Act

Sections 5(a) and (c) of the Securities Act prohibit the unregistered offer or sale of securities in interstate commerce, unless an exemption from registration applies. *See SEC v. Eurobond Exch.*, 13 F.3d 1334, 1338 (9th Cir. 1994). To show a Section 5 violation, the SEC must prove that (1) defendants, directly or indirectly, offered or sold securities, using interstate transportation or communication or the mails; and (2) no registration was in effect or filed with the SEC. *See* 15 U.S.C. §§ 77e(a), 77e(c); *SEC v. Phan*, 500 F.3d 895, 902 (9th Cir. 2007). Section 5 is a strict liability statute. *See SEC v. Holschuh*, 694 F.2d 130, 137 n.10 (9th Cir. 1982) ("good faith is not relevant to whether there has been a primary violation of the registration requirements"); *see also SEC v. CMKM Diamonds, Inc.*, 729 F. 3d 1248, 1257 (9th Cir. 2013) (Section 5 "imposes strict liability for violations of its registration requirement.")

3.1.1 Offering or Sale of Securities Using Interstate Commerce

The Securities Acts define "security" as, among other things, an "investment contract." *See* 15 U.S.C. §§ 77b(a)(1), 78c(a)(10) (2003); *see also S.E.C. v. Rubera*, 350 F.3d 1084, 1090 (9th Cir. 2003). And the Ninth Circuit defines an investment contract as "(1) an investment of money (2) in a common enterprise (3) with an expectation of profits produced by the efforts of others." *SEC v. Ribera*, 350 F.3d 1084, 1090 (9th Cir. 2003) (citing *S.E.C. v. W.J. Howey Co.*, 328 U.S. 293, 298-99 (1946)). Here, Defendants' investment opportunity satisfies all the "essential ingredients" of an investment contract. *See Howey*, 328 U.S. at 301; *see also Ribera*, 350 F.3d at 1091.

To begin, the undisputed facts show that Defendants solicited investors to raise about $2.4 million. (SUF No. 17.) So the "investment of money" prong of *Howey* has been satisfied. Next, the SEC has shown that the KT 50 offering was a "common enterprise," which the

Ninth Circuit defines as "one in which the fortunes of investors are interwoven with and dependent upon the efforts and success of those seeking the investment or of third parties." *SEC v. Glenn W. Turner Enterprises, Inc.*, 474 F.2d 476, 482 (9th Cir 1973). Horizontal or vertical commonality satisfies the common enterprise element, and here there was both. *R.G. Reynolds Enters., Inc.*, 952 F.2d at 130. The investors in KT 50 pooled their money – to develop and operate oil wells, they thought – and were promised a pro rata share of the profits. *See, e.g.*, SUF No. 24. This shows horizontal commonality. And the investors' fortunes were linked to Mueller's and Wayland's efforts to manage and promote KT 50 and CAR's operations, showing vertical commonality. *See SEC v. CKB168 Holdings, Ltd.*, No. 13-CV-5584 (RRM) (RLM), 2016 U.S. Dist. LEXIS 136928, *70 (E.D.N.Y. Sept. 28, 2016) (finding both horizontal and vertical commonality where returns depended on the efforts of others). So the commonality prong of *Howey* has been met. And for the same reason – investors' reliance on Defendants' efforts – the third prong of expecting profits based on the promoter's efforts is also satisfied.

Regarding the requirement that the offer or sale of securities occurs through interstate commerce, "[a]ll that is required . . . is a showing that a means, instrumentality or facility described in the introductory language of the [federal securities laws] was used," and that such use was connected to the alleged violations. *Matheson v. Armburst*, 284 F.2d 670, 673 (9th Cir. 1960). *See, e.g., United States v. Nader*, 542 F.3d 713, 717 (9th Cir. 2008) ("Telephones are instrumentalities of interstate commerce ..."); *Utah Lighthouse Ministry v. Foundation for Apologetic Info. & Research*, 527 F.3d 1045, 1054 (10th Cir. 2008) ("We agree that the Internet is generally an instrumentality of interstate commerce."); *SEC v. CKB168 Holdings, Inc.*, 2016 U.S. Dist. LEXIS 136928, * 45 (use of emails, wire transfers, and the Internet are all instrumentalities of interstate commerce). This requirement is easily met in this case, where KT 50 salespeople regularly communicated with prospective and actual investors by phone and email, organized bank transfers, and received checks in the mail. *See, e.g.* SUF Nos. 23, 33, 37, 41, 44.)

3.1.2 Integration

The SEC has also shown through uncontroverted evidence that the KT 50 and CAR offerings were integrated in violation of Section 5. The factors used to consider whether offerings can be integrated are: (1) whether the sales are part of a single plan of financing; (2) whether the

sales involve issuance of the same class of securities; (3) whether the offerings were made at or about the same time; (4) whether the same type of consideration is being received; and (5) whether the sales are made for the same general purpose. *See* SEC Rel. No. 33-4552, 1962 WL 69540, at *3 (Nov. 6, 1962). Before considering these factors, the Court first looks at whether the offerings are subject to issuer integration, meaning that they are offered by the same issuer. *See Rathbone, King & Seeley, Inc.*, SEC No-Action Letter, 1987 WL 107900, at *3 (Apr. 20, 1987). Here, Wayland had common control over both KT 50 and CAR. (SUF No. 2.) Defendants disregarded entity form by rolling investors who had invested in CAR into the KT 50 offering and treating them as KT 50 investors. (*Id.* No. 17.) Wayland also used CAR to perform administrative and other tasks for KT 50. (*Id.* No. 7.) So the SEC has shown issuer integration.

Next, applying the five-factor integration test to Defendants' offerings shows the offerings themselves were integrated. Both offerings were part of a single plan of financing and for the same general purported purpose, which was to develop and operate oil wells. (*Id.* No. 17, 84-86.) The offerings appear to have overlapped for part of 2014, and both offerings received cash as consideration. (*Id.* No. 23, 84-86.) The only factor that slightly tips in favor of non-integration is that the offerings involved different classes of securities (second factor), but all other factors point toward integration.

3.1.3 Wayland's Liability

The fact that Wayland didn't personally solicit each investor doesn't limit her liability. Under Section 5, liability extends to "direct" or "indirect" offers of sales of securities. 15 U.S.C. § 77e(a). "[C]ourts have established the concept of 'participant' liability to bring within the confines of § 5 persons other than the sellers who are responsible for the distribution of the unregistered securities." *SEC v. Murphy*, 626 F.2d 633, 649 (9th Cir. 1980). Wayland need only be a "substantial factor in the sales transaction[s]" to be liable under Section 5. *SEC v. CMKM Diamonds, Inc.*, 729 F.3d at 1255. Wayland's integral oversight of the sales efforts, communications with investors, and handling of offering materials is undisputed, and thus liability for her conduct has been established. (SUF Nos. 45-49.)

3.1.4 No Registrations and No Exemptions

It is undisputed that neither the KT 50 nor CAR offerings were registered with the SEC. (SUF Nos. 8, 18, 67.) The KT 50 PPM purported to rely on the Rule 506(c) exemption for accredited investors. (*Id.* Nos. 19-22.) But Defendants allowed unaccredited investors to invest, so that exemption is inapplicable. *See id.*; 17 C.F.R. 230.505(c) (only accredited investors may invest in a Rule 506(c) offering); Dean Decl. Ex. 6 at HP002263-HP002264, HP002267; Dean Decl. Ex. 60 at 36:11-16.) In any case, registration exemptions are narrowly construed to promote full disclosure of information to the investing public. *SEC v. Platforms Wireless Int'l Corp.*, 617 F.3d at 1086; SEC v. Cavanagh, 445 F.3d 105, 115 (2nd Cir. 2006). Defendants haven't submitted any opposition or made any effort to prove that an exemption to the registration violation applies, as is their burden after the SEC makes a *prima facie* showing. *See SEC v. Ralston Purina Co.*, 346 U.S. at 126 (1953). Thus, no exemption applies.

The SEC has shown that Defendants violated Section 5 of the Securities Act.

3.2 Section 15 of the Exchange Act

Section 15(a) of the Exchange Act requires brokers or dealers who "effect any transaction in, or induce or attempt to induce the purchase or sale of, any security" through the use of interstate commerce, to be registered with the SEC or, if the broker or dealer is a natural person, to be associated with a registered broker or dealer that is not a natural person. 15 U.S.C. § 78o(a). The term "broker" includes "any person engaged in the business of effecting transactions in securities for the account of others." 15 U.S.C. § 78c(a)(4)(A). Scienter isn't required to prove a violation of Section 15(a). *S.E.C. v. Interlink Data Network of Los Angeles, Inc.*, Civ. A. No. 93-3073 R., 1993 WL 603274, at *10 (C.D. Cal. Nov. 15, 1993). In deciding whether someone is a broker, courts have considered whether the individual (1) is an employee of the issuer; (2) received commissions as opposed to a salary; (3) is selling, or previously sold, the securities of other issuers; (4) is involved in negotiations between the issuer and the investor; (5) makes valuations as to the merits of the investment or gives advice; and (6) is an active rather than passive finder of investors. *SEC v. Martino*, 255 F. Supp. 2d 268, 283 (S.D.N.Y. 2003).

The undisputed evidence shows that Wayland, Liss, Blasko, and Dow were not registered as or associated with any broker-dealers at the time of the KT 50 or CAR offerings. *See, e.g.*, SUF Nos. 69, 73, 77, 81. Yet they acted as broker dealers, creating a boiler room, soliciting investors, supervising salespeople, drafting offering documents, and handling investors. (*Id.* Nos. 25-30, 45-49, 68, 70, 74, 78.) Liss, Blasko, and Dow were paid commissions for selling securities. (*Id.* Nos. 72, 76, 80.) And they solicited investors by phone and managed their questions and expectations. (*Id.* Nos.25-31, 45-49.) Doing so without proper registrations was a violation of Section 15 of the Exchange Act.

3.3 Section 17 of the Securities Act and Section 10(b) and Rule 10b-5 of the Exchange Act (Antifraud Provisions)

Section 17(a) of the Securities Act applies to sellers and makes it unlawful for anyone to commit fraudulent acts in connection with the offer or sale of securities. 15 U.S.C.A. § 77q; *Aaron v. Sec. & Exch. Comm'n*, 446 U.S. 680, 687 (1980). Exchange Act 10(b) and Rule 10b-5 apply to both sellers and buyers and make it unlawful to commit fraudulent acts in connection with the purchase or sale of a security. 15 U.S.C.A. § 78j; 17 CFR § 240.10b–5 (1979); *Aaron*, 446 U.S. at 687.

"Violations of Sections 17(a)(2) and (3) require a showing of negligence."*S.E.C. v. Dain Rauscher, Inc.*, 254 F.3d 852, 856 (9th Cir. 2001). And "[v]iolations of Section 17(a)(1), Section 10(b) and Rule 10b-5 require *scienter*." *Id.* Scienter is defined as a "a mental state embracing intent to deceive, manipulate, or defraud." *Aaron*, 446 U.S. at 686 n.5 (1980). "*Scienter* is satisfied by recklessness." *Dain Rauscher, Inc.*, 254 F.3d at 856.

3.3.1 Misrepresentations

To establish a violation of Section 17(a)(2), the SEC must prove, in connection with the offer or sale of a security: (1) a material false statement or omission; (2) made with at least negligence; (3) the receipt of money or property by means thereof; (4) by means of interstate commerce. *See, e.g., SEC v. Glt Dain Rauscher, Inc.*, 254 F.3d at 856. To establish a violation of Section 10(b) and Rule 10b-5(b), the SEC must show that a defendant, in connection with the purchase or sale of a security: (1) made an untrue statement or omitted to state a material fact,

(2) with scienter; (3) by means of interstate commerce. See 17 C.F.R. § 240.10b-5(b). *SEC v. Platforms Wireless Int'l Corp.*, 617 F.3d 1072, 1092 (9th Cir. 2010); *see also SEC v. Rana Research, Inc.*, 8 F.3d 1358, 1364 (9th Cir. 1993). To be actionable, misstatements and omissions must concern material facts. *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988). A fact is material if there is a substantial likelihood that a reasonable investor would consider it important in making an investment decision. *See TSC Indus. v. Northway*, 426 U.S. 438, 449 (1976); *SEC v. Platforms Wireless*, 617 F.2d at 1092.

The evidence of misrepresentations in this case is uncontroverted. Wayland, KT 50, and HP represented to investors that 65% of their money would be used to fund the development and operation of oil wells. (SUF Nos. 50, 61-63.) But only 13% of the money raised was actually allocated to that purpose. (SUF No. 52.) The KT 50 PPM also stated that 65% of funds raised would be used for business expenses. (*Id.* No. 51.) But Wayland and Mueller used at least $871,463 (36% of the offering) for personal expenses, including purchasing rare coins and groceries. (*Id.* No. 54.) Wayland, KT 50, and HP also misrepresented the rate of return on the KT 50 investment. The PPM's Executive Summary projected annual returns between 43.2% and 345% for each$100,000 unit of investment. (*Id.* No. 61.) These projections had no reasonable basis, considering that Defendants used the funds they received for personal expenses and didn't spend the required minimum on oil production. (*Id.* No. 62.) Wayland, KT 50, and HP also misrepresented the experience of the involved "directors" of the offerings. In the KT 50 PPM, they stated that the company's directors had a combined 80 years of experience with oil investment projects, plus 34 years in geological work, and that Wayland had "extensive experience in oil and gas administration." (*Id.* No. 64.) But neither Wayland nor Mueller had any experience in oil and gas investment projects. (*Id.* 65.)

3.3.2 Materiality

These misrepresentations were material, as similar cases involving channeling investments for personal use have established. *See SEC v. Capital Cove Bancorp LLC*, Case No. SACV 15-980-JLS (JCx), 2015 WL 9704076, at *7 (C.D. Cal. Sept. 1, 2015) ("Committing to invest Fund proceeds in real estate while channeling those investments to either personal use or Ponzi-like payments is clearly a material misrepresentation."); *SEC v. Interlink Data Network of Los Angeles, Inc.*, Civ. A. No. 93-3073 R, 1993 WL 603274, at *47 (C.D. Cal. Nov. 15, 1993) (failure to

disclose monies raised were used to pay for offeror's personal expenses was a material misrepresentation). The misrepresentations involving rates of return and management experience, each of which relate to the offering's profitability, were also material. *Murphy*, 626 F.2d at 653 ("[s]urely the materiality of information relating to financial condition, solvency, and profitability is not subject to serious challenge"); *CFTC v. Next Fin. Servs. Unlimited, Inc.*, 2006 U.S. Dist. LEXIS 19451 (S.D. Fla. Mar. 30, 2006) (trading experience material "because a reasonable investor would have considered these factors important when making an investment decision").

Further, the investors in this case testified that they would have considered it important in their investment decision to know that funds raised from KT 50 investors were being used to pay personal expenses or other KT 50 investors. (SUF Nos. 59-60; Dean Decl., Ex. 55 at 65:13-20; Ex. 56 at 88:14-89:22; Ex. 58 at 88:1-23; Ex. 59 at 40:19-41:25, 42:21-43:13.) The misrepresentations shown by the SEC are so clearly important to investors that summary judgment on the question of materiality is appropriate. *See SEC v. Credit Bancorp, Ltd.*, 195 F. Supp. 2d 475, 292 (S.D.N.Y. 2002).

3.3.3 Liability for Statements

Wayland, KT 50, and HP are liable under Rule 10b-5(b) for the misrepresentations because they had "ultimate authority" over them. *See Janus Capital Group, Inc. v. First Derivative Traders*, 564 U.S. 135, 142 (2011). Wayland reviewed and revised written documents for the KT 50 offering, communicated with KT 50 salespeople, and helped distribute the PPM and Executive Summary. (SUF Nos. 45-49.) Each of these actions demonstrates ultimate authority over the false statements. Unlike Rule 10b-5(b), Section 17(a)(2) of the Securities Act doesn't require the SEC to show that Wayland, KT 50, or HP "made" any false statements directly, only that they derived profits from the scheme to defraud. *See, e.g., SEC v. Big Apple Consulting, USA, Inc.*, 783 F.3d 786, 797 (11th Cir. 2015) (Section 17(a)(2) requires showing that defendant obtained money by means of an untrue statement, which includes a broader range of conduct than making a false statement). The SEC has thus shown, through uncontroverted evidence of Defendants' making false statement and deriving money from them, that Wayland, KT 50, and HP are liable for the misrepresentations.

3.3.4 Scheme to Defraud

The SEC has also proved that Wayland, KT 50, HP, and CAR engaged in a scheme to defraud. In the Ninth Circuit, scheme liability requires that the defendant engaged in deceptive acts that had "the principal purpose and effect of creating a false appearance of fact in furtherance of the scheme." *SEC v. Baccam*, 2017 U.S. Dist. LEXIS 88450 *16 (C.D. Cal., June 8, 2017) (quoting *Burnett v. Rowzee*, 561 F. Supp 2d 1120 (C.D. Cal. 2008)). The scheme alleged here is that Defendants raised funds purportedly for oil well projects, misrepresented the profitability of the offering and allocation of funds, and made Ponzi payments to investors. (SUF Nos. 50-63.) The SEC has shown that Defendants then used proceeds for personal expenses. Such conduct is sufficient to establish scheme liability. *See SEC v. Small Business Capital*, 2013 U.S. Dist. LEXIS 159227 (N.D. Cal., Aug. 6, 2013), at *14-24 (granting summary judgment on allegations that defendant used investor funds to pay expenses in violation of representations in offering documents).

3.3.5 Scienter

Next, Wayland's misappropriation of investor money for personal use is sufficient proof of scienter. *See, e.g., United States v. Booth*, 309 F.3d 566, 575 (9th Cir. 2002) (misuse of client funds is probative of both scheme and intent to defraud). Since Wayland was ultimately responsible for the statements made to investors, and since she controlled the bank accounts that she and Mueller used to misappropriate funds, she either knew or was reckless or negligent in not knowing that those statements were false. The rate returns couldn't be accurate, for example, when she knew investors' money wasn't going to oil projects.

To the extent direct evidence of Wayland's scienter is light, it bears noting that Wayland has invoked her Fifth Amendment right against self-incrimination, limiting the SEC's ability to gather evidence. (SUF No. 82.) However, the circumstantial evidence of her intent to defraud is sufficient to satisfy the scienter element here. It is thus unnecessary for the Court to draw an adverse inference from Wayland's invocation of the Fifth Amendment.

The SEC has shown that there is no dispute of material fact regarding violation of the antifraud provisions of the Securities Act (Section 17(a)) and the Exchange Act (Section 10(b)

and Rule 10b-5). The Court GRANTS summary judgment on these claims in favor of the SEC.

3.4 The Requested Relief

3.4.1 Injunction

A permanent injunction may be granted under Section 20(b) of the Securities Act, 15 U.S.C. § 77t(b), and Section 21(d) of the Exchange Act, 15 U.S.C. § 78u(d)(1), in an enforcement action brought by the SEC. To obtain an injunction, the SEC must establish that there is "a reasonable likelihood of future violations of the securities laws." *S.E.C. v. Murphy*, 626 F.2d 633, 655 (9th Cir. 1980). Whether a likelihood of future violations exists depends upon the totality of the circumstances. *Id.* The existence of past violations may give rise to an inference that there will be future violations. *Id.* But "[t]he fact that illegal conduct has ceased does not foreclose injunctive relief." *S.E.C. v. Koracorp Indus., Inc.*, 575 F.2d 692, 698 (9th Cir. 1978). Courts consider factors such as "the degree of scienter involved; the isolated or recurrent nature of the infraction; the defendant's recognition of the wrongful nature of his conduct; the likelihood . . . that future violations might occur; and the sincerity of his assurances against future violations." *Murphy*, 626 F.2d at 655.

The SEC hasn't offered sufficient evidence for the Court to issue a permanent injunction at this time. It is unclear from their summary judgment briefing whether the Defendants are still engaged in the conduct at issue in this case or what the likelihood of repeat violations may be. The Court DENIES the SEC's request for a permanent injunction.

3.4.2. Disgorgement

The 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. Platforms Wireless Int'l Corp.*, 617 F.3d 1072, 1096 (9th Cir. 2010). The amount of disgorgement should include all gains from the illegal activities. *Id.* "Disgorgement

need be 'only a reasonable approximation of profits causally connected to the violation.'" *Id.* (quoting *SEC v. First Pac. Bancorp*, 142 F.3d 1186, 1192 n.6 (9th Cir.1998)).

Here, the disgorgement figure satisfies the reasonable approximation standard. The SEC seeks disgorgement of each Defendant's personal gain from investors' money. Specifically, the SEC seeks $464,665 from Wayland (the amount she misappropriated), and $198,478, $160,751, and $59,461 from Dow, Liss, and Blasko (respectively), the amounts of their sales commissions. *See* SUF Nos. 36, 40, 43, 55. These amounts are well documented in the Declarations of Lorraine Pearson. *See, e.g.,* Pearson Decl. ¶ 17 ("According to the analysis, Wayland's personal expenses were $413,211, her cash withdrawals were $166,263, and her share of the deposits which did not represent investor funds was $114,809, for a net total of $464,665.) The amounts are calculated based on Pearson's analysis of "account statements, account opening documents, signature cards, wire transfers, deposit slips and copies of items deposited, checks, withdrawal slips and bank account transfers," and also her "conduct related inquiries and investigations." (*Id.* ¶¶ 3-4.)

The prejudgment interest amount is also appropriate. Disgorgement normally includes prejudgment interest to ensure that wrongdoers do not profit from their illegal conduct. *See SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1105 (2d Cir. 1972); *Cross Fin. Services*, 908 F. Supp. at 734. The SEC used the post-judgment rate of interest prescribed by 28 U.S.C. § 1961 to calculate prejudgment interest. (Lynn Dean Decl. (Dkt. 63) at ¶ 64.) The SEC calculated that from February 2016 to March 2019, the prejudgment interest on the SEC-recommended disgorgement amounts is $64,057.72 for Wayland, $27,361.75 for Dow, $22,160.78 for Liss, and $59,461 for Blasko. (*Id.* ¶ 64, Exs. 69-72.)

The Court GRANTS the SEC's requests for disgorgement and prejudgment interest.

3.4.3. Civil Penalties

Due to their violations, Defendants are liable for penalties under Section 20(d)(1) of the Securities Act and Section 21(d)(3) of the Exchange Act. 15 U.S.C. §§ 77t(d)(1), 78u(d)(3)(A). Civil penalties are meant to serve the dual goals of punishing wrongdoers and deterring others from committing future securities law violations. *S.E.C. v. Kenton Capital, Ltd.*, 69 F. Supp. 2d

1, 17 (D.D.C. 1998). Under Section 20(d)(2)(A) of the Securities Act and Section 21(d)(3)(B) of the Exchange Act, the amount of any civil penalty "shall be determined by the court in light of the facts and circumstances." 15 U.S.C. §§ 77t(d)(2)(A), 78u(d)(3)(B).

The factors courts consider when awarding civil penalties are: (i) the degree of scienter; (ii) the isolated or recurrent nature of the infraction; (iii) the defendant's recognition of the wrongful nature of his conduct; (iv) the likelihood, because of the defendant's professional occupation, that future violations might occur; and (v) the sincerity of his assurances against future violations. *See Murphy*, 626 F.2d at 655; *see also CMKM Diamonds*, 635 F. Supp. 2d at 1192.

The Securities Act and the Exchange Act provide a three-tier system. Second-tier penalties apply to violations that "involved fraud, deceit, manipulation or deliberate or reckless disregard of a regulatory requirement." *See* 15 U.S.C. §§ 77t(d)(2)(B), 78u(d)(3)(B)(ii). Third-tier penalties apply to violations that (i) involve "fraud, deceit, manipulation, or reckless disregard of a regulatory requirement" and (ii) "directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons." *Id.* §§ 77t(d)(2)(C), 78u(d)(3)(B)(iii). The statute also provides for a penalty equal to "the gross amount of pecuniary gain to such defendant as the result of the violation." *Id.* §§ 77t(d)(2), 78u(d)(3)(B). For second-tier penalties involving violations that occurred between 2014 and 2016, the statutory amount, adjusted for inflation, is $80,000 for natural persons. *Id.* §§ 77t(d)(2)(C), 78u(d)(3)(B)(iii); 17 C.F.R. § 201.1003 (SEC rule setting forth inflation adjustments).

Regarding the first requirement, Wayland's, Dow's, Liss's, and Blasko's business practices were fraudulent, deceitful, and manipulative and resulted in loss to other persons. *See, e.g. CMKM Diamonds, Inc.*, 635 F. Supp. 2d at 1191-92. But the SEC hasn't engaged with the other factors from *Murphy* sufficient to justify the specific penalties sought here. The SEC must present more than a conclusory recitation of the factors, and may do so through a separate motion, if it so chooses. The Court DENIES the SEC's request for civil penalties.

4. DISPOSITION

Any facts, arguments, or authorities not addressed in this order were found unnecessary to the Court's analysis and conclusions here.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	SACV 17-01156 AG (DFMx)	Date	April 8, 2019
Title	SECURITIES AND EXCHANGE COMMISSION v. CAROL J. WAYLAND ET AL.		

Finding no material disputes of material fact to contradict the SEC's allegations in this lawsuit, the Court GRANTS summary judgment against the Defendants on all claims. The Court DENIES the SEC's request for an injunction and for civil penalties and GRANTS the SEC's requests for disgorgement and prejudgment interest. The April 29, 2019 pretrial conference and May 17, 2019 trial in this matter are VACATED.

: 0

Initials of Preparer mku

EXHIBIT 3

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	SACV 17-01156 AG (DFMx)	Date	May 8, 2019
Title	SECURITIES AND EXCHANGE COMMISSION v. WAYLAND, ET AL.		

Present: The Honorable	ANDREW J. GUILFORD	
Melissa Kunig/Rolls Royce Paschal	Not Present	
Deputy Clerk	Court Reporter / Recorder	Tape No.
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:	

Proceedings: **[IN CHAMBERS] ORDER REGARDING PROPOSED JUDGMENTS**

The Court granted summary judgment against the Defendants on all claims in this case. (Dkt. 71.) The Court has reviewed the SEC's supplementary briefing regarding injunctive relief and civil penalties and finds that the relief sought by the SEC is justified. The SEC has submitted proposed final judgments for each Defendant. (Dkt. Nos. 74-3, 74-4, 74-5, 74-6, 74-7, 74-8, and 74-9.) The Court has concerns about expansive injunctions and the Court's ability to enforce them. *See United States Commodity Futures Trading Comm'n v. Intelligent Trades, LLC* , 2016 WL 6078718, at *1 (C.D. Cal. Oct. 12, 2016). With all this in mind, and having received no oppositions from the Defendants, the Court signs the proposed final judgments.

: 0

Initials of Preparer mku/rrp

EXHIBIT 4

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

CAROL J. WAYLAND, JOHN C. MUELLER, KENTUCKY-TENNESSEE 50 WELLS/400 BBLPD BLOCK, LIMITED PARTNERSHIP, HP OPERATIONS, LLC, C.A.R. LEASING, LLC, MITCHELL B. DOW, BARRY LISS, AND STEVE G. BLASKO,

Defendants.

Case No. 8:17-cv-01156-AG (DFMx)

FINAL JUDGMENT AS TO BARRY LISS

This matter came before the Court upon Plaintiff Securities and Exchange Commission's ("SEC") Motion for Summary Judgment against defendants Kentucky-Tennessee 50 Wells/400 BBLPD Block, Limited Partnership, HP Operations, LLC, C.A.R. Leasing, LLC, Carol J. Wayland, Mitchell B. Dow, Barry Liss, and Steve G. Blasko, made pursuant to Federal Rule of Civil Procedure 56. The Court having considered the memoranda and evidence filed by the parties, and all other argument and evidence presented to it, and good cause appearing therefor, granted the SEC's Motion on April 8, 2019.

On April 18, 2019, the SEC submitted a Supplemental Memorandum of Points and Authorities in support of its motion for permanent injunctions and civil penalties. The Court having considered the memoranda and evidence submitted by the SEC, and all other argument and evidence presented to it, and good cause appearing therefor, grants the SEC's Motion and enters this Final Judgment as to Barry Liss ("Defendant").

I.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant is permanently restrained and enjoined from violating Section 5 of the Securities Act of 1933 [15 U.S.C. § 77e] ("Securities Act"), by, directly or indirectly, in the absence of any applicable exemption:

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

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

(c) Making use of any means or instruments of transportation or

> communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed with the Commission as to such security, or while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under Section 8 of the Securities Act [15 U.S.C. § 77h].

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Final Judgment by personal service or otherwise: (a) Defendant's officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Defendant or with anyone described in (a).

II.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant is permanently restrained and enjoined from violating Section 15(a) of the Securities Exchange Act of 1934 [15 U.S.C. § 78o(a)] ("Exchange Act"), in connection with the purchase or sale of a security, by the use of means or instrumentalities or interstate commerce, of the mails, or of the facilities of a national securities exchange, directly or indirectly effecting transactions in, or inducing or attempting to induce the purchase or sale of, securities without being registered with the SEC, or affiliated with a broker-dealer registered with the SEC.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Judgment by personal service or otherwise: (a) Defendant's officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Defendant or with anyone described in (a).

III.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant is liable for disgorgement of $160,751, representing profits gained as a result of the conduct alleged in the Complaint, together with prejudgment interest thereon in the amount of $22,160.78, and a civil penalty in the amount of $160,000 pursuant to Section 20(d) of the Securities Act and Section 21(d)(3) of the Exchange Act [15 U.S.C. §§ 77t(d), 78u(d)(3)]. Defendant shall satisfy this obligation by paying $342,911.78 to the Securities and Exchange Commission within 14 days after entry of this Final Judgment.

Defendant may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request. Payment may also be made directly from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm. Defendant may also pay by certified check, bank cashier's check, or United States postal money order payable to the Securities and Exchange Commission, which shall be delivered or mailed to

Enterprise Services Center
Accounts Receivable Branch
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

and shall be accompanied by a letter identifying the case title, civil action number, and name of this Court; Barry Liss as a defendant in this action; and specifying that payment is made pursuant to this Final Judgment.

Defendant shall simultaneously transmit photocopies of evidence of payment and case identifying information to the Commission's counsel in this action. By making this payment, Defendant relinquishes all legal and equitable right, title, and interest in such funds and no part of the funds shall be returned to Defendant. The Commission shall send the funds paid pursuant to this Final Judgment to the United States Treasury.

The Commission may enforce the Court's judgment for disgorgement and prejudgment interest by moving for civil contempt (and/or through other collection procedures authorized by law) at any time after 14 days following entry of this Final Judgment. Defendant shall pay post judgment interest on any delinquent amounts pursuant to 28 U.S.C. § 1961.

IV.

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

V.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that this Court shall retain jurisdiction of this matter for the purposes of enforcing the terms of this Final Judgment.

VI.

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

Dated: May 7, 2019

HON. ANDREW J. GUILFORD
UNITED STATES DISTRICT JUDGE

EXHIBIT 5

NEWS

Irvine festival promoters sold unregistered investment

Irvine festival promoters sold unregistered investment

By RONALD CAMPBELL | Orange County Register
August 31, 2011 at 3:45 pm

The organizers of a Labor Day weekend music festival in Irvine may have run afoul of state law with an unusual financing scheme: signing up investors using boiler-room style phone calls.

Billed as a "new music experience in Orange County," the two-day **Playground Festival** will gather more than two dozen hip-hop and rock acts at Hidden Valley, a grassy area adjacent to Verizon Amphitheater, on Saturday and Sunday. Rapper the Game and rock bands the Bravery and Panic! are the headliners.

Salespeople for **Elevated Sound Productions** told a Michigan resident he could double his money in just a few weeks by investing in the festival.

ESP hasn't registered its investments with the state – and it probably should have registered if it is "cold-calling" investors, a spokesman for the state **Department of Corporations** said.

Steve Blasko, an ESP managing partner, denied that the company made unsolicited calls to investors. He said it only contacted people who had previously expressed interest through the company's website.

If anyone got an unsolicited call to invest, Blasko said, it was because "wires were crossed somewhere."

But that's not what Jake Hurtado, a senior ESP salesman, said during a recorded 16-minute phone call on Aug. 11.

Hurtado was trying to close a $67,137 deal with a man he thought was named Bob. "Bob" was actually Ken Ascher, a licensed private investigator in Ann Arbor, Mich., who was investigating shady oil-and-gas operators and had placed several fake names on their call sheets.

Here's a partial transcript of that Aug. 11 phone call, recorded by Ascher and made available by him to the Register.

Ascher: "How did you even find out about me?"

Hurtado: "Looks like you – you know, we buy all of our leads from a lead broker. Looks like you had showed some interest in an oil project in the past, for energy, and so we were calling to get you on board here, show you how you could get 2 to 1 on your capital in a quick turnaround."

A "lead broker" is a person or business that sells lists of people who have purchased a particular product or investment in the past.

Blasko, the ESP managing partner, denied that his company uses lead brokers. He said Hurtado probably just couldn't find the paperwork explaining how "Bob" came to be on ESP's call sheet and said the first thing that came into his head.

"If I had heard that discussion (of lead brokers) out there, the seat belt would have come off," Blasko said. "It would come to a stop."

Mark Leyes, a spokesman for the California Department of Corporations, said ESP should have registered with the state before selling investments to the public.

"It sounds like they'd have to register with us," Leyes said, "and as near as I can tell they have not."

Registration is supposed to ensure that investors aren't cheated. Generally, businesses that sell securities to the public must register those securities with a state or with the federal **Securities and Exchange Commission**.

Blasko said ESP is seeking an exemption from federal securities law, which would allow the company to sell securities nationwide.

The SEC exempts private placements from registration. These are sold exclusively to wealthy investors. In recent years a handful of private placements collapsed amid fraud charges, notably Orange County-based **Medical Capital Holdings**.

ESP salesmen used high-pressure tactics in their two recorded phone calls to Ascher, the Michigan private investigator.

One salesman compared the Playground Festival, ESP's first event, to the long-established **Coachella Festival** and the **Electric Daisy Carnival** in Las Vegas – both of which brought in tens of millions of dollars.

"Wouldn't you like to have some of that money in your pocket?" a salesman named Charlie asked Ascher in one recorded call.

"We're looking at maybe 2-to-1 on your money in five weeks. Ticket sales have already begun. We only have two-and-a-half units left, which means there's not going to be, the opportunity is not going to be available for that much longer. I'm not trying to hard-sell you, but that's just the reality."

In another phone call on Aug. 18, when ESP reduced its request from $67,000 to $23,497.95, Hurtado – using Ascher's real name this time – told him to write a check immediately.

"And I will have **FedEx** come out and pick up that check along with the paperwork that I'm going to be sending you," Hurtado said. "It's really simple, real easy. There's only a couple pages you need to put pen to paper on. And pick that up, be part of the family, have a fun ride, make some money and be part of something beautiful, Ken."

Ascher passed. The Aug. 18 call, like the Aug. 11 call, ended with Hurtado hanging up.

Tags: **SoCal Watchdog**

Ronald Campbell

EXHIBIT 6

EXHIBIT 7

good works comes from real giving. We will work tirelessly to

productive life. We thank all of our wonderful supporters for their ongoing support and for their help leaving a mark behind of a brighter, healthier, more prosperous future.

CLICK IMAGES TO ENLARGE

The league Soccer Champions at one of the orphanages we serve pictured with CIFP Directors B. Paul and Brian Dow and also Mike.

CIFP Director B Paul Liss talking to Jeremey Piven at a special fundraising event.

CIFP Director Brian Dow playing guitar on stage with Dick Van Dyke

CIFP Director B Paul Liss with Los Angeles Mayor Villaraigosa and The Midnight Mission's President and