

U.S.C. § 77q(a)]. Additionally, Defendants violated Sections 5(a) and 5(c) of the Securities Act [15 U.S.C. §§ 77e(a), 77e(c)] by selling unregistered securities.

3. To protect the public from further fraudulent activity, the SEC brings this action against Defendants and seeks: (i) permanent injunctive relief; (ii) disgorgement of ill-gotten gains, plus prejudgment interest; and (iii) civil penalties.

DEFENDANTS

4. **John Fernandez** is 26 years old and resides in Houston, Texas. He is the founder, manager, and CEO of Avail Progression and Elite Generators. Fernandez claims to be a self-taught day-trader who focuses on trading in the foreign exchange market (“forex”).

5. **Avail Progression, LLC** is a Texas limited liability company established in February 2017. Fernandez is Avail Progression’s founder, manager, and CEO.

6. **Elite Generators, Inc.** is a Texas corporation established in July 2019. Fernandez is the founder, manager, and CEO of Elite Generators.

JURISDICTION AND VENUE

7. The Commission brings this action pursuant to authority conferred upon it by Sections 20(b) and 20(d) of the Securities Act [15 U.S.C. §§ 77t(b) and 77t(d)] and Sections 21(d) and 21(e) of the Exchange Act [15 U.S.C. §§ 78u(d) and 78u(e)].

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

9. Fernandez and Avail Progression raised \$1.5 million by selling so-called “promissory notes.” Fernandez and Elite Generators raised an additional \$2.8 million by selling “investment contracts.” Both the Avail Progression promissory notes and the Elite Generators

investments contracts are securities because they fall under the description of notes and investments contracts, respectively, under Section 2(a)(1) of the Securities Act [15 U.S.C. § 77b(a)(1)] and Section 3(a)(10) of the Exchange Act [15 U.S.C. § 78c(a)(10)] and relevant precedent.

10. In connection with the conduct described in this Complaint, Defendants, directly or indirectly, made use of the mails or the means or instruments of transportation or communication in interstate commerce by, among other means, soliciting investments via the internet and accepting investor deposits via wire transfer.

11. Venue is proper in this District because, at all relevant times, Defendants were located, and conducted business, in this District, and Fernandez resided in this District. Further, acts, transactions, and courses of business constituting violations of the federal securities laws alleged in this Complaint occurred within this District, including but not limited to Defendants' solicitations of investors and the acceptance and disbursement of investor funds.

FACTUAL ALLEGATIONS

I. Avail Progression

12. From February 2017 to summer 2019, Fernandez and Avail Progression raised \$1.5 million from approximately 90 investors. Fernandez and Avail Progression required investors to execute a document (drafted by Fernandez) titled "PROMISSORY NOTE," which outlined the terms of the investment. The note listed the date of the initial investment, the amount of monthly return, and the dates upon which returns would be paid.

13. In soliciting potential investors via email, Fernandez and Avail Progression touted his superior trading abilities and highly specialized skill set, informing investors they would receive "guaranteed interest every month." In addition, when Avail Progression personnel

communicated with potential investors in emails, they pitched Avail Progression as a “financial growth company” that will “pay a percentage of guaranteed interest residually.”

14. Despite representing to investors and potential investors that he would trade in forex, Fernandez did not use any of the investor funds raised during the Avail Progression offering for forex trading, as promised. Instead, Fernandez deposited approximately \$281,000 of the \$1.5 million raised into an account at Coinbase – a platform used exclusively for crypto asset trading, not forex trading. Even then, Fernandez conducted minimal crypto asset trading. Further, Fernandez used at least \$290,000 of investor funds to pay his own personal expenses. Fernandez also paid at least \$836,000 back to investors from commingled investor funds, the majority of which were Ponzi payments to create the illusion of successful trading.

15. At all times, Fernandez controlled the Avail Progression bank accounts, where he commingled investor funds with his personal funds.

16. Fernandez promised investors (in emails sent at least through August 2017), that Avail Progression would send investors “documentation of portfolios, bank statements, and history of company growth.” Instead, Fernandez and Avail Progression regularly deceived investors by showing them, and also sending via email, screenshots of a forex trading tracker website he had manipulated to show purported gains from trading that had not occurred.

17. By spring 2019, Fernandez had spent all of the investor funds. Fernandez stated to his assistant, who nominally held the title of Chief Operating Officer of Avail Progression, that Fernandez had to restart the company because he owed “a million” in taxes. Shortly thereafter, Avail Progression told investors that the company was winding down because of a “tax blowback.” Avail Progression asked investors via email to “roll over” their investments to Elite Generators, which the Avail Progression email described as a “legitimate financial

company.”

18. Of the approximately 90 existing Avail Progression investors, approximately 40 became Elite Generators investors, agreeing to end their contracts with Avail Progression and receive lower monthly returns from Avail Progression between May and July 2019. In total, Avail Progression owed the transitioning investors approximately \$850,000 in interim monthly payments – which Fernandez paid by soliciting, and obtaining investments from, new (Elite Generators) investors. Further, Avail Progression failed to pay the promised monthly returns to the 50 other investors that did not agree to transition their outstanding accounts to Elite Generators.

II. Elite Generators

19. In July 2019, Fernandez formally established Elite Generators, advertising the company on social media, including Instagram and LinkedIn, as a financial investment firm. The company’s LinkedIn profile claimed to “guarantee over 50% growth annually” by managing investor funds in the forex markets. Fernandez promoted Elite Generators through social media postings, email blasts, online message boards, and in face-to-face meetings – telling potential investors that Elite Generators would guarantee returns ranging from 5-100% based solely on his forex trading skills. Fernandez also touted a three-year proven track record although Elite Generators was a newly formed company and his previous company had only a track record of fraud and failure.

20. Fernandez and Elite Generators required investors to execute an “Investment Contract,” which listed the investment amount, the amount of the returns, and the dates on which the investors would receive their returns, as well as other basic contractual terms related to late fees and non-payment. Notably, the Investment Contract allowed that Elite Generators “may

utilize the investment amount for any reason; in any case, it is the parties' desire and goal that the investee [Elite Generators] will utilize the investment amount for money producing investments.”

21. While soliciting investors, however, Fernandez represented that he would use investor funds to trade on the forex market and provide guaranteed returns. At no time did Fernandez reveal to potential Elite Generators investors that the similarly structured Avail Progression had been a sham.

22. Fernandez controlled the Elite Generators bank accounts and regularly commingled investor funds with his personal funds and funds from other sources, including third party lenders and Coinbase.

23. From July 2019 to October 2021, Elite Generators raised \$2.8 million from over 100 investors. Of this amount, Fernandez and Elite Generators deposited only \$93,000 in accounts on forex trading platforms. Instead, Fernandez spent approximately \$1.8 million of the commingled investor funds to make Ponzi payments and used a majority of the remaining funds to sustain his personal lifestyle.

24. In September 2019, because he was not trading and, therefore, not generating returns for investors, Fernandez resorted to obtaining payday loans to pay promised returns to investors – borrowing over \$474,000 at exorbitant interest rates as high as 38%. Fernandez never alerted current or prospective investors to this development or to the fact that the returns were not sourced from forex trading activities.

25. By October 2021, Fernandez had stopped all trading activities and ceased making payments to Elite Generators' investors. When investors sought overdue returns, Fernandez offered a litany of excuses, including “car troubles,” a failed wedding engagement, and a

temporarily frozen trading account. Fernandez eventually stopped even returning investor calls and Elite Generators has no current assets or operations.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

Violations of 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]

26. Plaintiff re-alleges and incorporates paragraphs 1 through 25 of this Complaint by reference as if set forth verbatim in this Claim.

27. By engaging in the acts and conduct alleged herein, Defendants, directly or indirectly, in connection with the purchase or sale of a security, by the use of any means or instrumentality of interstate commerce, or of the mails, knowingly or with severe recklessness:

- a. employed a device, scheme, or artifice to defraud; and/or
- b. made an untrue statement of a material fact, or omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; and/or
- c. engaged in an act, practice, or course of business which operated or would operate as a fraud or deceit upon any person.

28. By reason of the foregoing, Defendants have violated, and unless enjoined will continue to violate, 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].

SECOND CLAIM FOR RELIEF

Violations of Section 17(a) of the Securities Act [15 U.S.C. § 77q(a)]

29. Plaintiff re-alleges and incorporates paragraphs 1 through 25 of this Complaint by reference as if set forth verbatim in this Claim.

30. By engaging in the acts and conduct alleged herein, Defendants, directly or indirectly, in the offer or sale of a security, by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, have:

a. knowingly or with severe recklessness employed a device, scheme, or artifice to defraud; and/or

b. knowingly, recklessly, or negligently obtained money or property by means of an untrue statement of a material fact or an 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; and/or

c. knowingly, recklessly, or negligently engaged in a transaction, practice, or course of business which operated or would operate as a fraud or deceit upon the purchaser.

31. By reason of the foregoing, Defendants have violated, and unless enjoined will continue to violate, Section 17(a) of the Securities Act [15 U.S.C. § 77q(a)].

THIRD CLAIM FOR RELIEF

Violations of Sections 5(a) and (c) of the Securities Act [15 U.S.C. §§ 77e(a) & (c)]

32. Plaintiff re-alleges and incorporates paragraphs 1 through 25 of this Complaint by reference as if set forth verbatim in this Claim.

33. By engaging in the acts and conduct alleged herein, Defendants, directly or indirectly:

- a. made use of the means or instruments of transportation or communication in interstate commerce or of the mails to sell, through the use or medium of any prospectus or otherwise, securities as to which no registration statement was in effect; and/or
- b. for the purpose of sale or delivery after sale, carried or caused to be carried through the mails or in interstate commerce, by means or instruments of transportation, securities as to which no registration statement was in effect; and/or
- c. made use of means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell, through the use or medium of any prospectus or otherwise, securities as to which no registration statement had been filed.

34. By engaging in the conduct described above, Defendants have violated, and unless enjoined will continue to violate, Sections 5(a) and 5(c) of the Securities Act [15 U.S.C. §§ 77e(a) and (c)].

PRAYER FOR RELIEF

WHEREFORE, the Commission respectfully requests that the Court enter a judgment:

1. Permanently enjoining Defendants from violating Sections 5(a), 5(c), and 17(a) of the Securities Act [15 U.S.C. §§ 77e(a) and (c) and 77q(a)] and 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];
2. Permanently enjoining Defendant Fernandez from directly or indirectly, including, but not limited to, through any entity he owns or controls, participating in the issuance, offer, purchase, or sale of any security, provided, however, that such injunction shall not prevent Defendant Fernandez from purchasing or selling securities for his own personal account;
3. Permanently enjoining Defendant Fernandez from serving as an officer or director of any issuer required to file reports with the SEC under Section 12(b), 12(g), or 15(d) of the Exchange Act [15 U.S.C. §§ 78l(b), 78l(g), and 78o(d)] pursuant to Section 21(d)(2) of the Exchange Act [15 U.S.C. § 78u(d)(2)];
4. Ordering the Defendants to disgorge ill-gotten gains as a result of the violations alleged herein, pursuant to Sections 21(d)(3), 21(d)(5), and 21(d)(7) of the Exchange Act [15 U.S.C. §§ 78u(d)(5) & 78u(d)(7)], plus prejudgment interest thereon;
5. Imposing civil penalties against Defendants 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)] for violations of the federal securities laws as alleged herein;
6. Imposing such other and further relief as the Court may deem just and proper.

Dated: December 16, 2022

Respectfully submitted,

UNITED STATES SECURITIES AND
EXCHANGE COMMISSION



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CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

SECURITIES AND EXCHANGE COMMISSION

(b) County of Residence of First Listed Plaintiff (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number) Matthew J. Gulde, 801 Cherry Street, Ste. 1900, Ft Worth, Texas 76102, 817-978-1410

DEFENDANTS

JOHN FERNANDEZ, AVAIL PROGRESSION, LLC, AND ELITE GENERATORS, INC.

County of Residence of First Listed Defendant Waller (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff, 2 U.S. Government Defendant, 3 Federal Question (U.S. Government Not a Party), 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

Table with columns for Plaintiff (PTF) and Defendant (DEF) citizenship: Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation.

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Click here for: Nature of Suit Code Descriptions.

Large table with categories: CONTRACT, REAL PROPERTY, CIVIL RIGHTS, TORTS, PRISONER PETITIONS, HABEAS CORPUS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, INTELLECTUAL PROPERTY RIGHTS, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding, 2 Removed from State Court, 3 Remanded from Appellate Court, 4 Reinstated or Reopened, 5 Transferred from Another District (specify), 6 Multidistrict Litigation - Transfer, 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): Sections 5(a), 5(c) & 17(a) Securities Act [15 U.S.C. §§ 77e(a) & (c) & 77q(a)] and Sections 10(b), 12(b), 12(g), 15(d) Exchange Act [15 USC § 78(b) 78l1(b), 78l(g) and 78o(d)] pursuant Section 21(d)(2) Exchange Act [15 USC § 78u(d)(2)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5]

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ CHECK YES only if demanded in complaint: JURY DEMAND: [X] Yes [] No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE DOCKET NUMBER

DATE Dec 16, 2022 SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
- (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
 United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here. United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
 Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
 Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If there are multiple nature of suit codes associated with the case, pick the nature of suit code that is most applicable. Click here for: [Nature of Suit Code Descriptions](#).
- V. Origin.** Place an "X" in one of the seven boxes.
 Original Proceedings. (1) Cases which originate in the United States district courts.
 Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441.
 Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
 Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
 Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
 Multidistrict Litigation – Transfer. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407.
 Multidistrict Litigation – Direct File. (8) Check this box when a multidistrict case is filed in the same district as the Master MDL docket.
PLEASE NOTE THAT THERE IS NOT AN ORIGIN CODE 7. Origin Code 7 was used for historical records and is no longer relevant due to changes in statute.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service.
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
 Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
 Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.

Complaints and Other Initiating Documents

[4:22-cv-04365 Securities And Exchange Commission v. Fernandez et al](#)

U.S. District Court

SOUTHERN DISTRICT OF TEXAS

Notice of Electronic Filing

The following transaction was entered by Gulde, Matthew on 12/16/2022 at 9:18 AM CST and filed on 12/16/2022

Case Name: Securities And Exchange Commission v. Fernandez et al

Case Number: [4:22-cv-04365](#)

Filer: Securities And Exchange Commission

Document Number: [1](#)

Docket Text:

COMPLAINT against Avail Progression, LLC, Elite Generators, Inc., John Fernandez filed by Securities And Exchange Commission. (Attachments: # (1) Civil Cover Sheet)(Gulde, Matthew)

4:22-cv-04365 Notice has been electronically mailed to:

Matthew J Gulde guldem@sec.gov, FairchildR@sec.gov, JusticeT@sec.gov, MinnickD@sec.gov, StewartAn@sec.gov

4:22-cv-04365 Notice has not been electronically mailed to:

The following document(s) are associated with this transaction:

Document description:Main Document

Original filename:n/a

Electronic document Stamp:

[STAMP dcecfStamp_ID=1045387613 [Date=12/16/2022] [FileNumber=38852934-0] [39d9faa6831db93685ac2ae768f3df2ccedfabe7631b971011bd79d3b417f25bbd2d3bc6e7e7892153ea0c7e0b2ff70ca8a70ef1a23f9b8443a3090c3d63d4dd]]

Document description:Civil Cover Sheet

Original filename:n/a

Electronic document Stamp:

[STAMP dcecfStamp_ID=1045387613 [Date=12/16/2022] [FileNumber=38852934-1] [72e434d6a1172a5cdac34951cce035420ddaaab954bbb7d12c139e5f4b2bd4408da008edd49e9ecd8a2da277f22ab3cd29f14add833db33a88b708fc72b5371e]]