

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

CIVIL MINUTES -- GENERAL

Case No. **CV 14-2334-JFW (MRWx)**

Date: February 4, 2015

Title: Securities and Exchange Commission -v- World Capital Market, Inc., et al.

PRESENT:

HONORABLE JOHN F. WALTER, UNITED STATES DISTRICT JUDGE

**Shannon Reilly
Courtroom Deputy**

**None Present
Court Reporter**

ATTORNEYS PRESENT FOR PLAINTIFFS:

None

ATTORNEYS PRESENT FOR DEFENDANTS:

None

PROCEEDINGS (IN CHAMBERS):

ORDER GRANTING PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S MOTION FOR ORDER OF DISGORGEMENT FROM RELIEF DEFENDANTS VINCENT J. MESSINA AND INTERNATIONAL MARKET VENTURES [filed 1/12/2015; Docket No. 266]

On January 12, 2015, Plaintiff Securities and Exchange Commission (the "SEC") filed a Motion for Order of Disgorgement from Relief Defendants Vincent J. Messina and International Market Ventures. On January 16, 2015, on the same day that their Opposition was due, Relief Defendants Vincent J. Messina and International Market Ventures ("IMV") (collectively, "Relief Defendants") filed a Motion for Adjournment of Motion for Order of Disgorgement, seeking an extension of the deadline to respond to the SEC's Motion for Order of Disgorgement and a continuance of the hearing from February 9, 2015 to March 30, 2015, in part, because counsel would be in trial on February 9, 2015. On January 20, 2015, the Court advanced and denied Relief Defendants' Motion for Adjournment of Motion for Order of Disgorgement, but partially granted the relief requested by counsel by agreeing to rule on the pending motion without oral argument. On January 26, 2015, the SEC filed a Notice of Non-Opposition to its Motion for Order of Disgorgement. Without seeking leave of Court to file a late Opposition, on January 26, 2015, Defense Counsel Maranda E. Fritz filed an improper letter to the Court, "confirming" that Relief Defendants would be filing an Opposition to the SEC's Motion for Order of Disgorgement and blaming her failure to file the Opposition on "the closure of this and other offices in the New York area due to a 'blizzard.'" The "blizzard" referred to by Ms. Fritz, however, did not occur until January 26, 2015, more than a week after the deadline to file Relief Defendants' Opposition had already passed. On January 28, 2015, again without seeking leave of Court to file a late Opposition, Relief Defendants simply filed their untimely Opposition. On February 3, 2015, the SEC filed a Reply.

Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court

finds that the SEC's Motion for Order of Disgorgement is appropriate for decision without oral argument. The hearing calendared for February 9, 2015 is hereby vacated and the matter taken off calendar. After considering the moving, opposing, and reply papers, and the arguments therein, the Court rules as follows:

Pursuant to Local Rule 7-9, Relief Defendants were required to file and serve their Opposition or Notice of Non-Opposition "not later than twenty-one (21) days before the date designated for the hearing of the motion." See Local Rule 7-9. Accordingly, because Monday January 19, 2015 was a legal holiday under Federal Rule of Civil Procedure 6(a)(6), Relief Defendants' Opposition was due on or before January 16, 2015. Relief Defendants, however, did not file their Opposition until January 28, 2015, twelve days after the deadline had passed. Local Rule 7-12 provides that "[t]he failure to file any required document, or the failure to file it within the deadline, may be deemed consent to the granting . . . of the motion." See Local Rule 7-12. Pursuant to Local Rule 7-12, the Court deems Relief Defendants' failure to file an Opposition within the deadline as consent to the granting of the SEC's Motion for Order of Disgorgement.

In the alternative, notwithstanding Relief Defendants' failure to comply with Local Rule 7-9, the Court has independently considered the merits of the SEC's Motion for Order of Disgorgement, Relief Defendants' untimely Opposition, and the SEC's Reply, and rules as follows:

I. FACTUAL AND PROCEDURAL BACKGROUND

In this enforcement action, the SEC alleges that Defendants Ming Xu, World Capital Market Inc. ("WCM"), WCM777 Inc., and WCM777 Ltd. d/b/a WCM777 (collectively, "Defendants"), operating under the offering name WCM777, conducted a pyramid and Ponzi scheme and fraudulently misappropriated investor funds in excess of \$80 million through an unregistered offering of securities. In the First Amended Complaint filed on May 7, 2014, the SEC named Vincent J. Messina and IMV as "relief defendants" or nominal defendants and alleges that they hold proceeds of the fraud. [Docket No. 50].

On March 27, 2014, the Court determined that the SEC had established a *prima facie* case that Defendants were violating the securities laws and issued a Temporary Restraining Order [Docket No. 14]. Shortly thereafter, the principal individual defendant, Ming Xu did not oppose or contest the entry of a preliminary injunction and appointment of a permanent receiver. [Docket No. 32]. On July 30, 2014, Defendant Xu consented, without admitting or denying the allegations of the Complaint, to the entry of a permanent injunction and an order requiring disgorgement of his ill-gotten gains from the fraud. [Docket Nos. 123, 124]. Xu further agreed that the precise amount of disgorgement would be determined by the Court upon motion of the SEC, and that in connection with that motion, he would be "precluded from arguing that he did not violate the federal securities laws as alleged in the Complaint" and that "solely for the purposes of such motion, the allegations of the Complaint shall be accepted as and deemed true by the Court." [Docket Nos. 123, 124]. The SEC has not yet filed a motion for order of disgorgement from Defendant Xu or any of the other Defendants.

Krista L. Freitag, the Court-appointed permanent receiver (the "Receiver") for Defendants, as well as Relief Defendants Kingdom Capital Market, LLC; Manna Holding Group, LLC; Manna Source International, Inc.; WCM Resources, Inc.; ToPacific Inc.; To Pacific Inc.; and their

subsidiaries and affiliates (collectively, the “Receivership Entities”) has performed a forensic accounting and determined that the Receivership Entities had no significant source of revenue other than deposits associated with the WCM777 offering, and that Defendants commingled funds among the various Receivership Entities. Declaration of Krista L. Freitag [Docket No. 142] at ¶¶ 22-31; Declaration of Krista L. Freitag [Docket No. 268] at ¶¶ 5-6. A certified public accountant employed by the SEC, Maria Rodriguez, also analyzed the various accounts utilized by Defendants and found that the funds deposited into the various bank accounts used by Defendants, including ToPacific’s bank accounts, were investor funds related to the WCM777 offering. Declaration of Maria Rodriguez [Docket No. 141] at ¶¶ 9, 11-16.

It is undisputed that Defendant Xu caused the transfer of \$5 million from Relief Defendant ToPacific Inc.’s bank account at Comerica Bank (account ending in 0854) to Vincent Messina’s Bank of America attorney trust account (account ending in 2887), and that Vincent Messina transferred a total of \$1,050,000 of Defendants’ funds to IMV. On September 5, 2014 and September 17, 2014, the Court conducted an evidentiary hearing to determine whether Vincent Messina and IMV had any legitimate claim to those funds. On November 14, 2014, the Court issued Post-Hearing Findings of Fact and Conclusions of Law [Docket No. 252] and concluded that: (1) Vincent Messina does not have a legitimate claim to the \$5 million that he received from ToPacific Inc.; and (2) IMV does not have a legitimate claim to \$941,505 of the funds that it received from Vincent Messina. The SEC now moves for an order of disgorgement of those funds.

II. LEGAL STANDARD

“Nominal defendant status is an obscure common law concept that has come to be applied in the context of the Securities Exchange Act [] of 1934.” *Commodities Futures Trading Commission v. Kimberlynn Creek Ranch, Inc.*, 276 F.3d 187, 191 (4th Cir. 2002) (quotations and citations omitted). A relief or nominal defendant “is a person who holds the subject matter of the litigation in a subordinate or possessory capacity as to which there is no dispute.” *SEC v. Colello*, 139 F.3d 674, 676 (9th Cir. 1998) (quotations and citation omitted). “As the nominal defendant has no legitimate claim to the disputed property, he is not a real party in interest.” *Id.* A “relief” or “nominal” defendant “can be joined to aid the recovery of relief without an assertion of subject matter jurisdiction only because he has no ownership interest in the property which is the subject of litigation.” *SEC v. Cherif*, 933 F.2d 403, 414 (7th Cir. 1991). “Although the paradigmatic example of a nominal defendant is a ‘bank or trustee [that] has only a custodial claim to the property,’ the term is broad enough to encompass persons who are in possession of funds to which they have no rightful claim, such has money that has been fraudulently transferred by the defendant in the underlying securities enforcement action.” *SEC v. Ross*, 504 F.3d 1130, 1141 (9th Cir. 2007) (quoting *Colello*, 139 F.3d at 677).

Federal courts have “broad equitable powers” which “can be employed to recover ill gotten gains for the benefit of the victims of wrongdoing, whether held by the original wrongdoer or by one who has received the proceeds after the wrong.” *Colello*, 139 F.3d at 676. Federal courts therefore have “inherent equitable authority to issue a variety of ancillary relief measures in actions brought by the SEC to enforce the federal securities laws,” which “extends over third parties to the action.” *Id.* (quotations and citations omitted).

To obtain relief against a nominal defendant, the SEC must demonstrate that the nominal defendant (1) received ill gotten funds and (2) does not have a legitimate claim to those funds.

See *Colello*, 139 F.3d at 677. As discussed, the Court has already determined that (1) Vincent Messina does not have a legitimate claim to the \$5 million that he received from ToPacific Inc.; and (2) IMV does not have a legitimate claim to \$941,505 of the funds that it received from Vincent Messina. Accordingly, the only issues to be resolved are whether those funds were “ill gotten” and the amount of disgorgement.

III. DISCUSSION¹

The Court concludes that the funds received by Vincent Messina and IMV were “ill gotten funds” and that they must disgorge the entire amount of these funds.

“[T]he amount of disgorgement should include all gains flowing from the illegal activities.” *SEC v. JT Wallenbrock & Assocs.*, 440 F.3d 1109, 1114 (9th Cir. 2006) (quotation marks omitted). Disgorgement need be “only a reasonable approximation of profits causally connected to the violation.” *First Pac. Bancorp.*, 142 F.3d at 1192 n. 6. “The SEC ‘bears the ultimate burden of persuasion that its disgorgement figure reasonably approximates the amount of unjust enrichment.’” *SEC v. Platforms Wireless Internat’l Corp.*, 617 F.3d 1072, 1096 (9th Cir. 2010) (quoting *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1232 (D.C. Cir.1989)).

The SEC has presented undisputed evidence that the only significant source of funds in Defendants’ bank accounts, including the relevant ToPacific account, were proceeds from the unregistered and fraudulent WCM777 offering, and thus that the entirety of the \$5 million received by Relief Defendants were “ill gotten funds”. Moreover, even assuming that the SEC can only seek disgorgement of funds related to domestic securities transactions (as Relief Defendants contend), the undisputed evidence demonstrates that those funds amount to well over the \$5 million received by the Relief Defendants. See e.g., Declaration of Maria Rodriguez [Docket No. 141] at ¶¶ 11-16; Declaration of Maranda Fritz [Docket No. 279] at ¶¶ 12-13.

The Court rejects Relief Defendants’ argument that IMV should not be ordered to disgorge any funds because IMV no longer possesses those funds and did not benefit from those funds. An order to disgorge ill-gotten gains is not limited to funds still in a relief defendant’s possession or control. See U.S. *Commodity Futures Trading Comm’n v. Gresham*, 2012 WL 1606037, at *3 (N.D. Ga. May 7, 2012) (holding that possession of funds is not required for disgorgement). Moreover, under the circumstances of this case, the equities weigh in favor of holding IMV jointly liable with Vincent Messina for disgorgement of \$941,505. As the Court found in its Post-Hearing Findings of

¹Relief Defendants argue that they need additional discovery in order to fully respond to the SEC’s Motion for Order of Disgorgement. However, the Relief Defendants have had more than an adequate opportunity to conduct discovery. Indeed, more than eight months have passed since Judge Snyder issued her May 21, 2014 Order which authorized the parties, including Relief Defendants, to engage in expedited discovery in accordance with the Federal Rules of Civil Procedure. [Docket No. 75]. To the extent Relief Defendants were not satisfied with any responses to their discovery requests, they could have, and should have, filed a motion to compel before the magistrate judge. Moreover, and more importantly, Relief Defendants have failed to identify the particular facts that they reasonably expect to obtain with further discovery, or explain why those facts would preclude granting the SEC’s Motion for Order of Disgorgement.

Fact and Conclusions of Law, Gary Messina, the principal of IMV and nephew of Vincent Messina, "chose to act as a mere conduit for the funds and willingly transferred those funds to third parties as directed by Vincent Messina" even though he was aware that Defendants were the original source of the funds and that Defendants were under investigation by the SEC for violation of the securities laws. Post-Hearing Findings of Fact and Conclusions of Law [Docket No. 252] at 11:10-15.

For the reasons stated in the SEC's Reply, the Court rejects the remainder of Relief Defendants' arguments as frivolous.

IV. CONCLUSION

For the foregoing reasons, the SEC's Motion for Order of Disgorgement from Relief Defendants Vincent J. Messina and International Market Ventures is **GRANTED**. Relief Defendant Vincent Messina shall disgorge \$5,000,000. Relief Defendants Vincent Messina and IMV shall be jointly liable for \$941,505 of that amount. Relief Defendants Vincent Messina and IMV shall satisfy their disgorgement obligation by paying the funds to the Receiver on or before **February 17, 2015**. Interest, allowable by law, shall accrue on any unpaid amount beginning on February 17, 2015.

IT IS SO ORDERED.