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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Western Division

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

STEVE CHEN, *et al*.,

Defendants.

Case No. CV15-07425 RGK (PLA)

PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AS TO LIABILITY AND INJUNCTIVE RELIEF AGAINST STEVE CHEN

Date: November 28, 2016
Time: 9:00 a.m.
Ctrm: 850
Judge: Hon. R. Gary Klausner

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I. INTRODUCTION

Plaintiff Securities and Exchange Commission ("SEC" or "Commission") moves for summary judgment as to liability and injunctive relief on all of its claims against defendant Steve Chen ("Chen"). The undisputed evidence establishes that Chen violated the registration and antifraud provisions of the federal securities laws by offering investors "units" in US Fine Arts, Inc. ("USFIA") and subsequently "points" in USFIA's Currency Fund or what Chen referred to as "Gemcoin." In promoting his securities offerings, Chen made numerous material misrepresentations and omissions to investors concerning his background, his company's assets and future business prospects, and how investors could expect to earn profits from their investments. The uncontroverted evidence shows that USFIA and Gemcoin were nothing more than one continuous pyramid scheme in which investors purportedly received the right to sell and distribute pieces of amber jewelry, but, in reality, the way to earn money was from recruiting additional investors into USFIA and Gemcoin in exchange for cash bonuses and rewards points that were unrelated to the sale of any product. The Ninth Circuit has long held that such offerings are securities and that such schemes are inherently fraudulent, regardless of whether the defendant made any misrepresentations to investors, which Chen nevertheless did in this case. Accordingly, the SEC is entitled to summary judgment on each of its claims.

II. SUMMARY OF UNDISPUTED FACTS

A. Chen's Purported Business Empire

Chen was the President of USFIA, Alliance Financial Group ("AFG"), Amkey, Inc. ("Amkey"), US China Consultation Association ("UCCA"), Quail Ranch Golf Course, LLC ("Quail Ranch"), and several other entities co-located at 135 E. Live Oak Avenue, Arcadia, California ("Live Oak") (collectively, "Defendant Entities"). Dkt. No. 122, SEC's Statement of Uncontroverted Facts and Conclusions of Law ("SUF"), ¶¶ 1, 6, 9, 12, 15. The marketing materials provided to investors who attended meetings at Live Oak portrayed Chen and his defendant entities as a multinational

business empire. In particular, they claimed that USFIA was a vertically integrated jewelry conglomerate that combined gemstone mining, processing and design with retail jewelry sales. *Id.*, ¶¶ 19, 27. USFIA even had a showroom at Live Oak filled with jewelry display cases containing, among other things, amber necklaces and earrings bearing price tags in the thousands, and frequently tens of thousands of dollars. *Id.*, ¶¶ 25, 50. The marketing materials claimed that USFIA got its amber from the El Valle amber mine in the Dominican Republic through its wholly owned subsidiary Ammine, SRL. *Id.*, ¶¶ 19, 28. They claimed that this mine produced gemstone grade amber, including blue amber, which was described as the "King of Amber" and several times more valuable than gold. *Id.* They further claimed that USFIA sold its amber using a "direct selling" model, which allowed USFIA to control costs and provide genuine jewelry to dealers and consumers. *Id.*, ¶¶ 19, 30. They offered investors five different levels of investments ($1,000, $2,000, $5,000, $10,000, or $30,000) and welcomed investors to become USFIA "representatives" for the purported purpose of buying, marketing and selling USFIA products in exchange for salaries and bonuses from USFIA. *Id.*, ¶¶ 19, 31, 32, 40.

The marketing materials made USFIA appear even more robust by stating that USFIA was sponsored and owned by UCCA, a company allegedly brought together by a "group of elites" capable of building a bridge between China and the United States in business and political circles. *Id.*, ¶¶ 18, 33, 34. These "elites" were said to include, among others, Chen in his capacity as Chairman of AFG, John Wuo, who was described as a "US Congressman" and Mayor of Arcadia, California, and nine other undisclosed U.S. members of Congress. *Id.*, ¶¶ 18, 35. The support of the United States was allegedly so strong that UCCA was allowed 1,600 immigrant investor slots for projects like the Los Angeles Quail Ranch Golf Course, which was described as "the American Dream for 500,000 US dollars." *Id.*, ¶¶ 18, 21, 36-38. Investors were told that the investment program of Quail Ranch had been developed and produced in accordance with the requirements of the U.S. EB-5 investment

immigration program, making it a safe and reliable investment. *Id.*, ¶¶ 21, 39.

B. Chen's Underlying Pyramid Scheme

Although some of the marketing materials said that investors in USFIA had the right to receive monthly income and bonuses for promoting and selling USFIA's amber products, a separate handout distributed to investors made clear that the way to make money was to recruit other people to invest in USFIA. *Id.*, ¶ 20. For example, a handout titled "Bonus System" explained how investors could receive an "intermediary bonus" of $1,000 (or 10%) and an additional 12% "teamwork" or "binary" bonus if they recruited someone who purchased a $10,000 "package" in USFIA, or $3,000 and an additional 15% "teamwork" or "binary" bonus if they recruited someone who purchased a $30,000 package, and that they would receive additional "leadership bonuses," including travel to the United States, luxury automobiles and mansions, based on the success of their recruits in recruiting successive generations of lower line investors. *Id*. USFIA even offered to pay investors a monthly income as high as $100,000 and assign them a rank similar to that of a United States military general (one-star, two-star, three-star, four-star), based on the number of investors they recruited. *Id*. The individuals the investors recruited were referred to as "underlines" or "downlines" and were listed in the investor's account in USFIA's "back office" computer system. *Id.*, ¶¶ 47, 56, 100, 103.

C. Chen's Role

Chen personally repeated many of these assertions made in the marketing materials and, in several instances, modified or expanded on them. For instance, Chen personally told investors they could make money by recruiting additional investors. *Id.*, ¶ 77. In fact, investors were told that the amber they received at the time of their investment in USFIA was simply a gift and what they actually received in exchange for their investments were "units" in USFIA that would be converted to stock when Chen took the company public in the United States sometime in 2014. *Id.*, ¶¶ 62, 64. Chen claimed that he founded China Unicom in 1993, and said he

would take USFIA public the same way he took China Unicom public in the United States in 2000. *Id.*, ¶¶ 71, 74, 75. [1] Chen told investors that their stock would be worth 64 times their original investment and that USFIA was backed by $50 billion in assets, including an amber mine in the Dominican Republic, which Chen claimed to have purchased over the course of 14 years for $150 million. *Id.*, ¶¶ 72, 73, 75, 76, 78. Chen decided the prices to list on the amber displayed in USFIA's showroom. *Id.*, ¶ 80. Chen told investors they could participate in an EB-5 program if they invested $500,000 in USFIA. *Id.*, ¶ 70.

The undisputed evidence demonstrates that none of Chen's offerings were registered with the SEC, and that Chen's oral and written representations to investors were materially false and misleading. *Id.*, ¶¶ 108-120. According to the court-appointed receiver, the total value of the Defendant Entities was approximately $77.5 million, not $50 billion. *Id.*, ¶ 108. The amber mines referenced in USFIA's marketing materials were purchased in December 2013 for $373,000, not 14 years' earlier for $150 million. *Id.*, ¶ 112. According to SEC filings, Chen was not one of China Unicom's Directors, Executive Officers, or even a Senior Manager when it went public in the United States in 2000; indeed, he is not listed anywhere in China Unicom's SEC filings. *Id.*, ¶ 110. According to the SEC's expert gemologist, the jewelry displayed in USFIA's Live Oak showroom was costume or ornamental jewelry that was essentially worthless but for the silver or gold they were mounted on. *Id.*, ¶ 110. Finally, neither Chen nor any of his entities have been authorized by the U.S. Citizenship and Immigration Services ("USCIS") to offer EB-5 investments to immigrant investors. *Id.*, ¶ 109.

In the fall of 2014, after investors complained that USFIA's IPO had not taken place, Chen launched a new investment he called the USFIA Currency Fund or "Gemcoin." *Id.*, ¶¶ 22, 23. Investors had their "units" in USFIA unilaterally converted

[1] According to Wikipedia, China Unicom is the world's fourth largest mobile service provider by subscriber base. *See* https://en.wikipedia.org.wiki/China_Unicom.

into Gemcoins, that Chen represented was a valuable cryptocurrency, the value of which was backed by $5 billion in gemstones. *Id.*, ¶¶ 67. 94. Although the name may have changed, Gemcoin was simply a continuation of Chen's underlying pyramid scheme. *Id.*, ¶¶ 20, 22, 25, 26. Chen and his marketing materials continued to offer the same "Bonus System" to investors, including the same "binary bonus" system , including travel, automobile and mansion awards, based on the recruitment of generations of new investors and unrelated to the sale of any product. *Id.*, ¶ 23. Gemcoin continued to make many of the same misrepresentations as USFIA. For example, the marketing materials for Gemcoin continued to claim that USFIA was backed by $50 billion in assets, except this time it claimed that such backing came from AFG (not UCCA). *Id.*, ¶ 22. The marketing materials also continued to tout Chen as the founder of China Unicom and the person who took that company public in 2000. *Id.*, ¶ 42. Chen personally claimed that $5 billion in gemstones had been secured in a vault to support the value of Gemcoin. *Id.*, ¶ 94. Chen also represented to investors that Gemcoins were liquid and redeemable at ATMs in the United States and Canada, and were backed by "some of the world's rarest gemstone assets," which he said he would "prove" by hiring a "third-party auditing [firm] to perform an audit on the gemstone asset holdings." *Id.*, ¶¶ 79, 93, 95, 107. The reality of Gemcoin was far different than what Chen and his marketing materials portrayed. The court-appointed receiver only located two ATMs in the reception area at Live Oak, neither of which was connected to any financial institution, one ATM was empty, and the other had just $100 inside. *Id.*, ¶ 119. Moreover, all that the third party "auditor" Chen hired did was count and weigh –*but not value* –the purported gemstones during an announced visit. *Id.*, ¶¶ 44, 79, 93, 95, 116, 117. The SEC's expert gemologist found that the scores of plastic tubs, each separately containing 1000 rings and labeled with a value of $10 million, or $10,000 per ring, that ostensibly secured Gemcoin, were in fact, worth, at most, 1% of the claimed amount, or $10 per ring. *Id.*, ¶ 118.

III. ARGUMENT

A. Standard of Review

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]only 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).

B. Chen Violated Section 5(a) and (c) of the Securities Act

Section 5(a)(1) of the Securities Act prohibits the direct or indirect sale of securities unless a registration statement is in effect, and Section 5(c) prohibits the offer or sale of securities unless a registration statement is in effect. The purpose of the registration requirement is "to protect investors by promoting full disclosure of information thought necessary to informed investment decisions." *SEC v. Ralston Purina*, 346 U.S. 119, 124 (1953).

1. Chen's Offerings Involved Securities

The threshold question under Section 5 is whether a security is in involved. Section 2(a)(1) of the Securities Act and Section 3(a)(10) of the Exchange Act define a "security" as, among other things, an "investment contract." In *SEC v. W.J. Howey Co.*, the Supreme Court defined "investment contract" as any "contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect

profits solely from the efforts of the promoter or a third party." *SEC v. W.J. Howey Co.*, 328 U.S. 293, 298-99 (1946). The Ninth Circuit has distilled *Howey*'s definition into a three-part test requiring: (1) an investment of money; (2) in a common enterprise, evidenced by either horizontal or vertical pooling; (3) with an expectation of profits to be derived solely from the efforts of the promoter or a third party. *See SEC v. Ribera*, 350 F.3d 1084, 1090 (9th Cir. 2003); *SEC v. R.G. Reynolds Enters., Inc.*, 952 F.2d 1125, 1130 (9th Cir. 1991); *Hocking v. Dubois*, 885 F.2d 1449, 1459 (9th Cir. 1989); *SEC v. Goldfield Deep Mines Co. of Nevada*, 758 F.2d 459, 463 (9th Cir. 1985).

"A common enterprise is one in which the fortunes of the investor 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). In the Ninth Circuit either horizontal or vertical commonality will satisfy the common enterprise element. *R.G. Reynolds Enters., Inc.*, 952 F.2d at 130. Horizontal commonality occurs where investors pool their assets and "give up any claim to profits or losses attributable to their particular investments in return for a pro rata share of the profits of the enterprise." *Hocking v. Dubois*, 885 F.2d at 1459. Vertical commonality may be established by showing that the fortunes of the investors are linked to those of the promotors. *SEC v. Goldfield Deep Mines Co. of Nevada*, 758 F.2d at 463. An "expectation of profits from the efforts of others" is created when "the efforts made by those other than the investor are the undeniably significant ones, those essential managerial efforts which affect the failure or success of the venture." *R.G. Reynolds Ent. Inc.*, 952 F.2d at 1130 (quoting *SEC v. Glenn W. Turner Ent.*, 474 F.2d 476, 482 (1973)).

Here, the undisputed evidence shows that Chen solicited investors to invest typically between $10,000 and $30,000 in cash in USFIA and Gemcoin and, according to the court-appointed receiver, raised approximately $35.6 million doing so. These cash investments satisfy the first prong of the *Howey* test. *See SEC v. Global Express Capital Real Estate Inv. Fund I, LLC*, No. 2:03-cv-01515-KJD-LRL, 2006 U.S. Dist.

LEXIS 96477, *45 (D. Nev. Mar. 28, 2006), *aff'd in part, revved in part*, 289 Fed. Apex. 183 (9th Cir. 2008); *SEC v. Prime One Partners, Corp*., No. CV 94-3322 SVW (Hex), 1995 U.S. Dist. LEXIS 22587, *6 (C.D. Cal. June 9, 1995).

The second prong of the *Howey* test is satisfied in this action by the existence of both horizontal and vertical commonality. The undisputed evidence in this case satisfies horizontal commonality due to the "Bonus Program" and the fact that investor monies were being pooled to pay "bonuses" to investors for soliciting new investors, as well as to pay additional bonuses to investors based on the success of their "downline" in soliciting new investors. *See, e.g., SEC v. SG Ltd*., 265 F.3d 42 (1st Cir. 2001) (horizontal commonality satisfied based on pooling of funds combined with defendant's promise to pay referral fees to existing participants who recruited new investors); *SEC v. International Loan Network, Inc.*, 968 F.2d 1304, 1308 (D.C. Cir. 1992) (existence of pyramid sales program in which participants stood to receive 50% commissions on membership fees paid by individuals they recruited, plus lesser commissions on sales by those recruited by their recruits, satisfies horizontal commonality). Strict vertical commonality is also satisfied as the fortunes of investors were linked to efforts of Chen to manage, promote and perpetuate USFIA's operations. *See, e.g., 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 both above and below in the pyramid).

The third prong of the *Howey* test is also satisfied, as the investors were dependent on Chen and USFIA to realize a return on their investment. It is irrelevant if an individual investor's ability to realize a profit was dependent, in part, on that investor's ability to bring others into the pyramid. Courts have repeatedly recognized that such ministerial activity does not defeat the "efforts of others" prong of *Howey*, where the defendant provides the entire framework within which an individual investor's efforts would succeed or fail. *See, e.g., Webster v. Omnitrition*, 79 F.3d 776, 784 (9th Cir. 1996) ("we have [previously] declared that investments in a pyramid

scheme were 'investment contracts' and thus securities with the meaning of the federal securities laws.") (citing *SEC v. Glenn W. Turner Enters., Inc*., 474 F.2d at 476); *SEC v. CKB168 Holdings, Ltd.*, 2016 U.S. Dist. LEXIS 136928, *69 ("an investment in a pyramid scheme is itself a security"); *Martinez v. MXI Corp.*, No. 3:15-cv-00243-MMD-VPC, 2016 U.S. Dist. LEXIS 30203, *24 (D. Nev. Mar. 9, 2016) (same).

2. The SEC's *Prima Facie* Case Under Section 5

A *prima facie* violation of Section 5 is established by a showing that: (1) no registration statement was in effect as to the securities at issue; (2) the defendants directly or indirectly, sold or offered to sell the securities; and (3) the sale or offer was made through interstate commerce. *SEC v CMKM Diamonds, Inc*., 729 F. 3d 1248, 1255 (9th Cir. 2013); *SEC v. Phan*, 500 F.3d 895, 902 (9th Cir. 2007). Section 5 is a strict liability offense and requires no showing of scienter, or even negligence. *CMKM Diamonds, Inc*., 729 F. 3d at 1257; *SEC v. Holschuh*, 694 F.2d 130, 137 n.10 (9th Cir. 1982). In this case, the *prima facie* elements of a Section 5 violation are present.

As to the first element of a Section 5 violation, it is undisputed that none of Chen's offerings were registered with the Commission. SUF, ¶ 111. Likewise, the uncontroverted evidence establishes that Chen directly and indirectly sold and offered to sell securities to investors. Chen participated in in-person meetings with prospective investors, held himself out as the President of USFIA, spoke to large audiences at investor conferences, allowed his image to be used in various promotional materials, and appeared in videotaped presentations posted on YouTube. This is sufficient under Sections 5(a) and (c), which impose liability on persons who "directly or indirectly" offer or sell an unregistered security. In other words, Section 5 is not limited to the person or entity that ultimately passes title to the security and it is not necessary for the SEC to prove that Chen personally solicited each one of USFIA's thousands of investors. *See SEC v. Murphy*, 626 F.2d 633, 649 (9th Cir. 1980). "Instead, courts 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." *Id.* Thus, Section 5 liability extends to those who are "both a necessary participant and substantial factor in the sales transaction[s]." *SEC v. CMKM Diamonds, Inc.*, 729 F.3d at 1255 (quoting *SEC v. Phan*, 500 F.3d at 906).

The third and final element of the Section 5 violation – the offer or sale of securities through interstate commerce – is also easily satisfied. Chen's investors were located all over the country – indeed, they were located all over the world – and their monies were solicited and received by means of the interstate communications, including credit card transactions and wire transfers to and from domestic financial institutions as well as Internet-based solicitations. SUF, ¶¶ 98, 99.[2]

3. Chen Cannot Carry His Burden To Show That An Exemption From Registration Exists

Having established the registration violation, the burden shifts to Chen to prove that an exemption to registration applies. *See SEC v. Ralston Purina Co.*, 346 U.S. at 126 (1953); *SEC v. CMKM Diamonds, Inc.*, 729 F.3d at 1255 (9th Cir. 2013); *SEC v. Murphy*, 626 F.2d at 641. Registration exemptions are narrowly construed to promote full disclosure of information for the protection of the investing public. *SEC v. Platforms Wireless Int'l Corp.*, 617 F.3d at 1086; *SEC v. Cavanagh*, 445 F.3d 105, 115 (2d Cir. 2006); *SEC v. Murphy*, 626 F. 2d at 641. Chen has produced no evidence to suggest he can meet the heavy burden of showing that a registration exemption exists in this case and has instead broadly asserted his Fifth Amendment right against self-incrimination. SUF, ¶¶ 152-154.

[2] "All that is required to establish a violation of [the federal securities laws] is a showing that a means, instrumentality or facility of a kind described in the introductory language of the section was used, and this in connection with that use an act of a kind described …occurred." *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).

C. Chen Violated the Antifraud Provisions of the Securities Laws

Section 17(a) prohibits fraud in the offer or sale of securities, and Section 10(b) prohibits fraud in connection with the purchase or sale of any security. 15 U.S.C. § 77q(a); 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5; *SEC v. Glt Dain Rauscher, Inc.*, 254 F.3d 852, 855 (9th Cir. 2001). Violations of Section 17(a)(1), Section 10(b) and Rule 10b-5 require a showing of scienter, whereas violations of Section 17(a)(2)-(3) only require a showing of negligence. *Aaron v. SEC*, 446 U.S. 680 (1980). Scienter is defined as a "mental state embracing intent to deceive, manipulate or defraud." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976). In the Ninth Circuit, scienter may be established by a showing of either "deliberate recklessness" or "conscious recklessness." *SEC v. Platforms Wireless Int'l Corp.*, 617 F.3d at 1093. Recklessness may be inferred from circumstantial evidence. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390-91, n.30 (1983); *SEC v. Burns*, 816 F.2d 471, 474 (9th Cir. 1987). Negligence, by contrast, is the absence of "reasonable prudence." *SEC v. Glt Dain Rauscher, Inc.*, 254 F.3d at 856-57.

1. Chen Engaged In a Scheme to Defraud

To be liable for a scheme to defraud, a defendant must have engaged in conduct that had the principal purpose and effect of creating a false appearance of fact in furtherance of the scheme. *See Simpson v. AOL Time Warner, Inc.*, 452 F.3d 1040, 1048 (9th Cir. 2006), *vacated on other grounds sub nom., Avis Budget Group Inc. v. Cal. State Teachers' Ret. System*, 552 U.S. 1162 (2008). In other words, to establish liability under Section 17(a)(1) or Section 10(b) and Rule 10b-5(a), the SEC must show, in connection with or in the offer or sale of a security: (1) that the defendant engaged in a scheme to defraud; (2) with scienter; (3) by means on interstate commerce. Alternatively, under Section 17(a)(3), the SEC must show that the defendant: (1) engaged in a course of business that would operate as a fraud or deceit upon a purchaser; (2) acted negligently; (3) by means of interstate commerce.

The operation of a pyramid scheme constitutes fraud for purposes of Section

17(a) of the Securities Act and Section 10(b) of the Exchange Act. *Omnitrition*, 79 F.3d at 781. Such schemes are inherently fraudulent as they are destined to collapse. *Id*., *see also Torres v. S.G.E. Mgmt., L.L.C.*, No. 14-21028, 2016 U.S. App. LEXIS 17746, *19-20 (5th Cir. Sept. 30, 2016) ("[p]yramid schemes are 'inherently fraudulent' and are *per se* mail fraud" even if no misrepresentations occur); *FTC v. Burnlounge, Inc.*, 753 F.3d 878, 880 (9th Cir. 2014) ("operation of a pyramid scheme constitutes an unfair or deceptive act or practice in or affecting commerce for the purposes of § 5(a) [of the Federal Trade Commission Act"); *United States v. Gold Unlimited*, 177 F.3d 474, 484 (6th Cir. 1999) ("Unquestionably, an illegal pyramid scheme constitutes a scheme to defraud."); *Kerrigan v. Visalus, Inc*., No. 14-cv-12696, 2016 U.S. Dist. LEXIS 29958, *48 (E.D. Mich. Mar. 9, 2016) ("operators of a pyramid scheme engage in fraudulent and deceptive conduct even if the operators make no false statements to potential enrollees about the enrollees' chances for success.").

Pyramid schemes are characterized as follows:

> the payment by participants of money to the company in return for which they receive (1) the right to sell a product and (2) the right to receive in return for recruiting other participants into the program rewards which are unrelated to the sale of the product to ultimate users.

Omnitrition, 79 F.3d at 781 (quoting *In the Matter of Koscot Interplanetary, Inc.*, 86 F.T.C. 1106, 1181 (1975), *aff'd mem. sub nom, Turner v. FTC*, 580 F.2d 701 (D.C. Cir. 1978)). The satisfaction of the second element is the "*sine qua non* of a pyramid scheme: 'As is apparent, the presence of this second element, recruitment with rewards unrelated to product sales, is nothing more than an elaborate chain letter device in which individuals who pay a valuable consideration with the expectation of recouping it to some degree via recruitment are bound to be disappointed.'" *Id*., 781 (quoting *Koscot*, at 1181).

The undisputed evidence satisfies both *Koscot* elements. USFIA's marketing materials made clear that it was a "multinational jewelry enterprise that combines gemstone mining, processing and design as well as jewelry sales." SUF, ¶ 27. They

said USFIA relied on "direct selling" and "welcome[d] all of [their] customers to become Franchise representatives of USFIA," which meant they would have the right to "market and sell AMN ambers." *Id.*, ¶ 30, 37, 46. They promised to "reward" their franchise representatives in a "favorable" manner. *Id.*, ¶ 46. The "USFIA Membership Application" investors signed described itself as a "distributor contract" that investors were entering into with USFIA. *Id.*, ¶ 90. However, separate marketing materials outlining the "Bonus System" and how it worked made clear that the way investors earned their bonuses, salaries, and rewards was to recruit more investors into USFIA. This is corroborated by the receiver's declaration, where he found that USFIA and the other defendant's entities "recruited new investors through a network of distributors" and those distributors "received commissions and awards for bringing in new investors." *Id.*, ¶ 100. The receiver's review of USFIA's financial records shows that USFIA raised $35.6 million from investors and that the company had "no other source of revenue." *Id.*, ¶ 127. Of the money raised from investors, "approximately one third or $11.6 million was paid to distributors in the form of commissions, not including $1.3 million in awards of vehicles, electronics, jewelry, and expensive bags." *Id.*, ¶ 128. And, as is common in all pyramid schemes, only a few investors received the bulk of the so-called commissions. According to the receiver's forensic analysis, 0.6% of investors received 32% of the commissions, and just 1.9% of the investors received over half of the commissions. *Id.*, ¶ 101. *See, e.g.*, *Omnitrition*, 79 F.3d at 781 ("[l]ike chain letters, pyramid schemes may make money for those at the top of the chain or pyramid, but 'must end up disappointing those at the bottom who can find no recruits.'" (quoting *Koscot*, 86 F.T.C. at 1181).

2. Chen Made Material Misrepresentations and Omissions

Chen is liable for securities fraud not only because he orchestrated a wide-scale pyramid scheme, but also because he made several material misrepresentations and omissions to investors in connection with his USFIA and Gemcoin offerings.

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 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).[3]

The uncontroverted evidence shows that Chen operated a pyramid scheme and that investors were told that they could recoup their investment and earn additional cash bonuses and reward points simply by recruiting more investors. The whole notion, however, that all of the investors could make back their initial investment is by itself false and materially misleading. As the Ninth Circuit observed in *Omnitrition*, "Pyramid schemes are destined to collapse, and the most recent entrants to lose their money. This fact would always be present to undermine the truth of promotional statements." 79 F.3d at 785; *see also SEC v. CKB168 Holdings, Ltd.*, 2016 U.S. Dist. LEXIS 136928, *51 (where defendant operated a pyramid scheme, "it was false as a matter of law for defendants to claim that new investors could make active returns.").

But Chen did not stop there. To make the investment appear even more attractive, Chen made numerous other false and misleading statements about USFIA and Gemcoin, and their business prospects. As stated above, Chen falsely represented that: (1) USFIA and its Currency Fund were backed by $50 billion in

[3] The 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. Liability arises not only from affirmative representations but also from failures to disclose material information. *SEC v. Glt Dain Rauscher*, 254 F.3d at 855-56.

assets; (2) USFIA's amber mines in the Dominican Republic cost $150 million; (3) Chen was the one who took China Unicom public in the United States in 2000; (4) Chen would take USFIA public; (5) the amber displayed in USFIA's Live Oak showroom was worth tens of thousands of dollars; (6) Gemcoin was backed by $5 billion in gemstones; and (7) USCIS had approved Chen and his defendant entities to participate in the EB-5 foreign investor program. These misrepresentations were all materially false. *See, e.g., SEC v. Murphy*, 626 F.2d at 653 ("surely the materiality of information relating to financial condition, solvency and profitability is not subject to serious challenge"); *SEC v. CKB168 Holdings, Ltd.*, 2016 U.S. Dist. LEXIS 136928, *53 (claim company would go public materially misleading); *SEC v. Platinum Invest. Corp.*, No. 02-cv-6093 (JSR), 2006 U.S. Dist. LEXIS 67460 (S.D.N.Y. Sept 20, 2006) (holding that 'there can be no question" that claims regarding the timing of an IPO and the likely growth in share price, as well as false claims about the company's business prospects and management, were material as a matter of law."); *SEC v. Credit Bancorp, Ltd.*, 195 F. Supp. 2d 475, 292 (S.D.N.Y. 2002) ("[s]ummary judgment on matters of materiality in a securities fraud case is appropriate when the omission and misrepresentations in questions are 'so obviously important to the investor that reasonable minds cannot differ on the question of materiality.") (quoting *SEC v. Research Automation Corp.*, 585 F.2d 31, 35 (2d Cir. 1978)).

There is also no dispute Chen was responsible for making these representations to his investors. Anyone who "makes" a misleading statement or omission, or who has "ultimate authority over" it, can be liable under Rule 10b-5(b). *See Janus Capital Group, Inc. v. First Derivative Traders*, 564 U.S. 135, 142 (2011). Several investors testified that Chen made these seven misstatements to them, either at investor conferences or in-person meetings, or through audio-video presentations posted on the Internet. The fact that Chen made these statements is corroborated by the marketing materials, which contained essentially the same representations. As the Supreme Court stated in *Janus Capital*, "[o]ne 'makes' a statement by stating it." *Id.*, at 142.

Furthermore, unlike liability under Rule 10b-5(b), *Janus Capital* has no bearing on claims under Section 17(a)(2) of the Securities Act. *SEC v. Liu*, No. SACV 16-00974-CJC(AGRx), 2016 U.S. Dist. LEXIS 91078, *25 (C.D. Cal. July 11, 2016) ("[T]he vast majority of courts dealing with the question of whether *Janus* also applies to claims under Section 17 have answered that question with a resounding 'no.'") (quoting *SEC v. Benger*, 931 F. Supp. 2d 904, 905-06 (N.D. Ill. 2013)). Here, there can be no question that Chen obtained money or property "by means of" false statements, even assuming – *contrary to the evidence* – that he did not make the statements at issue. *SEC v. Big Apple Consulting, USA, Inc.*, 783 F.3d 786, 797 (11th Cir. 2015) (obtaining money by means of an untrue statement, under Section 17(a)(2), encompasses a broader range of conduct that making a statement as defined in Rule 10b-5(b)). Similarly, *Janus Capital* has no application to Rule 10b-5(a) or (c). *Id.*, at 796; *SEC v. Monterosso*, 756 F.3d 1326, 1334 (11th Cir. 2014); *SEC. v. Familant*, 910 F. Supp. 2d 83, 94-6 (D.D.C. 2012). In other words, the Court may grant the SEC's motion for summary judgment based on the undisputed evidence that Chen derived money from the scheme to defraud, even if he did not "make" any of the statements behind the scheme.

Finally, there can also be no dispute that these misrepresentations were all made in connection with the purchase or sale of securities. *See SEC v. Zanford*, 535 U.S. 813, 819 (2002) ("[i]t is enough if the scheme to defraud and the sale of securities coincide"). Here the receiver has found that payments to earlier investors were made from funds received from more recent ones. SUF ¶¶ 129, 133-135. This is sufficient to show that the sale of the securities and the scheme to defraud occurred at the same time. *See, e.g., SEC v. Wang*, No. LA CV13-07553 JAK (SSx), Dkt. No. 246, p. 21 of 25 (C.D. Cal. Aug 18, 2015); *Bald Eagle Area Sch. Dist. v. Keystone Fin., Inc.*, 189 F.3d 321, 330 (3d Cir. 1999) ("conduct undertaken to keep a securities fraud Ponzi scheme alive is conduct undertaken in connection with the purchase and sale of securities.").

3. Chen Acted With Scienter

Since Chen operated a pyramid scheme, which is *per se* inherently fraudulent,

his scienter, for purposes of liability for all claims under Section 17 of the Securities Act, and Section 10(b) and Rules 10b-5(a) and (c), may be presumed. *See Omnitrition*, 79 F.3d at 785 ("A jury could rationally conclude that promotion of a pyramid scheme demonstrates the necessary fraudulent intent."); *SEC v. Tropikgadget FZE*, No. 15-cv-10543-ADB, 2016 U.S. Dist. LEXIS 117444, *21 (D. Mass. Aug. 31, 2016) (operation of a classic pyramid scheme supports the requisite inference of scienter).

In addition to operating a pyramid scheme, Chen used investors' funds to support a lavish lifestyle for himself and his dependents. According to the receiver, this included Chen's $149,000 Mercedes, a $2.345 million home for the mother of his son, a $4.424 million home for his former spouse, and a $5.3 million home for himself and his current spouse. SUF, ¶¶ 136-149. The Court may rely on this undisputed evidence to find that Chen acted with the requisite 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 to defraud and intent to defraud); *SEC v. Capital Cove Bancorp, LLC*, No. SACV 15-980-JLS (JCx), 2015 U.S. Dist. LEXIS 174962, *19 (C.D. Cal. Sept. 1, 2015) (misuse of investor funds for personal expenses or Ponzi-like payments evidenced scheme to defraud); *SEC v. Wilde*, No. SACV 11–0315 DOC (AJWx), 2012 U.S. Dist. LEXIS 183252, *15 (C.D. Cal. Dec. 17, 2012) (promoter of prime bank fraud committed fraudulent scheme by diverting investor funds for business and personal expenses); *SEC v. Merrill Scott & Assocs., Ltd.*, 505 F. Supp. 2d 1193, 1214 (D. Utah 2007) (promoter engaged in scheme to defraud when it failed to disclose that funds would be used for personal expenses; *see also, SEC v. Small Business Capital Corp.*, No. 5:12–CV–3237 EJD, 2013 U.S. Dist. LEXIS 116607, *14 (N.D. Cal. Aug. 16, 2013) (granting summary judgment based on material misrepresentations under Section 10(b) and Section 17(a), where principal disclosed one use for investor monies, but was "in fact causing the Funds to loan money to himself and [his affiliated entity]" for other purposes); *SEC v. Milanowski*, No. 2:08–CV–00511–KJD–PAL, 2010 U.S. Dist. LEXIS 447770, at *36

(D. Nev. Mar. 15, 2010) (same).[4]

4. An Adverse Inference Should Be Drawn Against Chen

Chen invoked his Fifth Amendment right against self-incrimination in response to the court-ordered accounting (Dkt. No. 17); to every allegation in the SEC's complaint (Dkt. No. 24); in his initial disclosures pursuant to Fed. R. Civ. P. 26(a) (SUF ¶ 153); and in response to every substantive question at his deposition. SUF ¶ 152.

The Supreme Court has held that, "the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them." *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976). '"Failure to contest an assertion … is considered evidence of acquiescence … if it would have been natural under the circumstances to object to the assertion in question.'" *Id*. (quoting *United States v. Hale*, 422 U.S. 171, 176 (1975)); *see also*, *SEC v. Colello*, 139 F.3d 674, 677 (9th Cir. 1998) ("Parties are free to invoke the Fifth Amendment in civil cases, but the court is equally free to draw adverse inferences from their failure of proof.").

The question of whether to draw an adverse inference involves "tension between one party's Fifth Amendment rights and the other party's right to a fair proceeding." *Nationwide Life Ins. Co. v. Richards*, 541 F.3d 903, 911-12 (9th Cir. 2008). In this Circuit, that tension is resolved on a case-by-case basis, and an adverse inference should not be drawn unless: (1) the SEC has substantial need for the information; (2) no other less burdensome means of obtaining the information exists; (3) "the value of presenting [the] evidence" is not "substantially outweighed by the danger of unfair prejudice to the party asserting the privilege;" and (4) independent evidence of the fact about which the party refused to testify exists. *SEC v. Luna*, No. 2:10-CV-2166-PMP-CWH, 2014 U.S. Dist. LEXIS 24263, *35 (D. Nev. Feb. 26,

[4] Unlike a private plaintiff, the SEC is not required to prove reliance, transaction or loss causation, or economic loss in a 10b-5 case. *Gebhart v. SEC*, 595 F.3d 1034, 1041 (9th Cir. 2010); *SEC v. Rana Research*, 8 F.3d at 1364.

2014) (quoting *Nationwide Life Ins*. 541 F.3d at 909); *see also Doe el rel. Rudy-Glanzer v. Glanzer*, 232 F.3d 1258, 1265 (9th Cir. 2000).

Here, the SEC has substantial need for Chen's testimony, as well as information concerning the identity of any individuals upon whom he may rely in support of his various affirmative defenses set forth in his answer. Although there is strong circumstantial evidence against him, the SEC has no other, less burdensome means of obtaining information concerning Chen's mental state and intent to defraud, other than by putting questions to him. *See, e.g., SEC v. Luna*, 2014 U.S. Dist. LEXIS 24263, *36. But at every turn Chen has asserted his Fifth Amendment privilege. Chen's silence and failure to contest the allegations and evidence against him is itself evidence of his acquiescence to the fact that he knowingly and purposely defrauded investors. Based on his silence, and in the face of the SEC's affirmative evidence against him, the Court should draw an adverse inference against Chen in this case. *See, e.g., SEC v. Loomis*, 969 F. Supp. 2d 1226, 1235 (E.D. Cal. 2013) (drawing adverse inference on summary judgment); *SEC v. Smart*, No. 2:09cv00224 (DAK), 2011 U.S. Dist. LEXIS 61134, *48 (D. Utah June 8, 2011) (same); *SEC v. Prime One Partners, Corp.*, 1995 U.S. Dist. LEXIS 22587, *14 (same).[5]

D. The Court Should Issue a Permanent Injunction

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), provide that when the evidence establishes a reasonable likelihood of a future violation of the securities laws, a permanent injunction shall be granted in enforcement actions brought by the SEC. *SEC v. Murphy*, 626 F.2d at 633; *SEC v. Koracorp Indus., Inc.*, 575 F.2d 692 (9th Cir. 1978); *SEC v. Fehn*, 97 F.3d 1276, 1295-96 (9th Cir. 1996). Factors to be considered

[5] In addition, should Chen attempt, at this late date, to offer testimonial evidence – be it his own or that of others – the Court should reject it, as it would give him an unfair advantage of asserting evidence as to which he had withheld from disclosure. *Nationwide Life Ins. Co. v. Richards*, 541 F.3d at 910; *Hoffman v. Constr. Protective Servs., Inc.*, 541 F.3d 1175, 1179 (9th Cir. 2008); *SEC v. Benson*, 657 F. Supp. 1122, 1129 (S.D.N.Y. 1987).

include the degree of scienter involved; the isolated or recurrent nature of the infractions; the defendant's recognition of the wrongful nature of his conduct; the likelihood that, based on the defendant's occupation, future violations might occur; and the sincerity of the defendant's assurances against future violations. *Id.* Here, the totality of the circumstances weighs in favor of a permanent injunction. As stated above, Chen acted with a high degree of scienter, his conduct also extended over a period of years, and there is no evidence that he has recognized the wrongful nature of his conduct, nor provided any assurances against future violations. The Court should therefore enter a permanent injunction against future violations.[6]

IV. CONCLUSION

Based on the undisputed evidence, the SEC is entitled to summary judgment as to liability and injunctive relief on all of its claims.

Dated: October 26, 2016

Respectfully submitted,

/s/ Douglas Miller

Douglas Miller
Donald W. Searles
Peter DelGreco
Attorneys for Plaintiff
Securities and Exchange Commission

[6] As to monetary relief, the SEC intends to seek disgorgement with prejudgment interest, and a substantial civil penalty, once the court-appointed receiver completes his forensic accounting, which will allow the SEC to present to the Court with accurate information concerning Chen's ill-gotten gains for purposes of calculating disgorgement and the gross amount of his pecuniary gains for the purpose of assessing a civil penalty. *See SEC v. Rind*, 991 F.2d 1486 , 1493 (9th Cir. 1993); 15 U.S.C. §§ 77t(d)(2)(A), 78u(d)(3)(B)(i).

PROOF OF SERVICE

I am over the age of 18 years and not a party to this action. My business address is:

U.S. SECURITIES AND EXCHANGE COMMISSION,
444 S. Flower Street, Suite 900, Los Angeles, California 90071
Telephone No. (323) 965-3998; Facsimile No. (213) 443-1904.

On October 26, 2016, I caused to be served the document entitled **PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AS TO LIABILITY AND INJUNCTIVE RELIEF AGAINST STEVE CHEN** on all the parties to this action addressed as stated on the attached service list:

☐ **OFFICE MAIL:** By placing in sealed envelope(s), which I placed for collection and mailing today following ordinary business practices. I am readily familiar with this agency's practice for collection and processing of correspondence for mailing; such correspondence would be deposited with the U.S. Postal Service on the same day in the ordinary course of business.

☐ **PERSONAL DEPOSIT IN MAIL:** By placing in sealed envelope(s), which I personally deposited with the U.S. Postal Service. Each such envelope was deposited with the U.S. Postal Service at Los Angeles, California, with first class postage thereon fully prepaid.

☐ **EXPRESS U.S. MAIL:** Each such envelope was deposited in a facility regularly maintained at the U.S. Postal Service for receipt of Express Mail at Los Angeles, California, with Express Mail postage paid.

☐ **HAND DELIVERY:** I caused to be hand delivered each such envelope to the office of the addressee as stated on the attached service list.

☐ **UNITED PARCEL SERVICE:** By placing in sealed envelope(s) designated by United Parcel Service ("UPS") with delivery fees paid or provided for, which I deposited in a facility regularly maintained by UPS or delivered to a UPS courier, at Los Angeles, California.

☐ **ELECTRONIC MAIL:** By transmitting the document by electronic mail to the electronic mail address as stated on the attached service list.

☒ **E-FILING:** By causing the document to be electronically filed via the Court's CM/ECF system, which effects electronic service on counsel who are registered with the CM/ECF system.

☐ **FAX:** By transmitting the document by facsimile transmission. The transmission was reported as complete and without error.

I declare under penalty of perjury that the foregoing is true and correct.

Date: October 26, 2016

/s/ Amanda Liston
Amanda Liston

SEC v. Steve Chen, USFIA, Inc., et al
United States District Court – Central District of California
Western Division
Case No. CV 15-07425 (RGK)(GJSx)
LA-4482

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