UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

U.S. SECURITIES AND EXCHANGE COMMISSION, **Plaintiff,** **v.** **EDWARD L. WOOTEN, LEE S. ROSE, JOHN L. KRCIL, and BLACK LION INVESTMENT PARTNERS, INC.,** **Defendants.**	**Civil Action No. 5:21-cv-00270-TES**

PLAINTIFF'S MEMORANDUM
OF LAW IN SUPPORT OF ITS MOTION FOR DEFAULT JUDGMENT
AGAINST DEFENDANTS WOOTEN, ROSE, KRCIL, and BLACK LION

The U.S. Securities and Exchange Commission ("Plaintiff" or the "Commission") submits this Memorandum of Law in support of its Motion for Default Judgment against Defendants Edward L. Wooten ("Wooten"), Lee S. Rose ("Rose"), John L. Krcil ("Krcil"), and Black Lion Investment Partners, Inc. ("Black Lion") (collectively, "the Defendants").

SUMMARY

In 2019, the Defendants executed a prime bank scheme, in which they defrauded at least three investors out of at least $3,340,000. *See* Complaint [*Dkt. 1*], ¶1; s*ee also* Exhibit A, Declaration of William S. Dixon ("*Dixon Decl.*"), filed herewith, ¶2, During the course of their

prime bank scheme, the Defendants made numerous misrepresentations to investors, using offers of high-yield investments, corporate equity, and investment agreements accompanied by escrow agreements that purported to protect the investors' principal. In fact, Defendants' misappropriated the vast majority of these investor funds, transferring them to accounts they controlled and then using the funds to, among other things, pay personal expenses, pay returns to other investors and pay expenses that had no discernible connection with the investment program offered to these investors. *Dkt. 1,* ¶4.

On July 30, 2021, the Commission filed its complaint in this matter. *Dkt. 1.* Between August 3, 2021, and August 19, 2021, the Commission served the Defendants with process. *Dkt. 3-6.* However, none of the Defendants filed answers or responsive pleadings with the Court. On October 8, 2021, Plaintiff filed an Application for Clerk's Entry of Default against the Defendants *Dkt.* 7. On October 12, 2021, a default was entered against them, and the Commission was instructed to file its Motion for Default Judgment within 21 days, or by November 2, 2021.

The Commission now seeks a default judgment against the Defendants, imposing injunctions, disgorgement plus prejudgment interest, and civil penalties in amounts recommended by the Commission. The Defendants are in default, and accordingly, in evaluating the appropriateness of a default judgment, the factual allegations of the Complaint, except those relating to damages, are accepted as true. 10 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure*, § 2688, p. 412 (2d ed. 1983); Thomson v. Wooster, 114 U.S. 104 (1885).

DISCUSSION

A. Defendants Fraudulently Solicited Investments From Three Investors

In pitching the fraudulent investments to investors, Rose identified himself as the President of Black Lion, and Krcil identified himself as Black Lion's Chief Financial Officer. *Dkt. 1*, ¶¶12, 14. Wooten identified himself as Black Lion's President and Chief Executive Officer. *Id.*, ¶13. Wooten is a resident of Macon, Georgia, and Black Lion's principal place of business is in Macon. *Id.*, ¶¶12-15; *Dixon Decl.*, ¶3.

1. Jerlib Investors, LLC

Jerlib Investors, LLC, (identified as "Investor 1" in the Complaint) is an entity created for the purposes of investing in an energy company focused on the development of bio-refineries. *Dkt. 1*, ¶16. In connection with Jerlib's purported $3 million investment in a bio-refinery, Rose and Krcil negotiated an escrow agreement with Jerlib, which provided that Jerlib's $3 million would be escrowed in the Client Trust Account ("CTA") for the law firm of a 91-year old attorney who was Rose's long time friend ("the Attorney"). *Dkt. 1*, ¶22. The escrow agreement, which was siged by Rose, provided that Jerlib would earn monthly returns of 7%. *Dkt. 1*, ¶3; *Dixon Decl.*, ¶6. The escrow agreement further required the escrow agent to ensure the security of the escrowed funds. *Dkt. 1*, ¶22. Rose had full control of the CTA and a busines bank account he convinced the Attorney to open (the "Attorney's business account'), and effected all of the subsequent transfers of funds from them. *Id.*, ¶¶25-26; *Dixon Decl.*, ¶¶8-12.

Although the initial version of the escrow agreement listed Rose as "Escrow Agent" and "Partner" at the Attorney's law firm, Jerlib insisted that Rose have the Attorney sign as escrow

agent instead of Rose, and Rose did so. *Dkt. 1*, ¶¶23-24. On March 18, 2019, Jerlib deposited $3 million in the CTA. *Dixon Decl.*, ¶14.

2. Chris Lombardo

Chris Lombardo (referred to as "Investor 2" in the Complaint), was told about an investment opportunity with Wooten in early 2019 by a casual acquaintance. *Dkt. 1*, ¶30. Soon thereafter, Krcil, acting on behalf of Black Lion, called Lombardo and told him that he would receive $20 million thirty days after he escrowed $285,000. *Dkt. 1*, ¶¶30-31. Krcil then emailed Lombardo two investment agreements and an escrow agreement. *Dkt. 1*, ¶32. One of the investment agreements explained that such profits would be generated by trading "one year and/or medium-term investment grade fixed income securities of top-rated banks or financial institutions," which would produce returns of up to $5 million per week with "[t]otal safety of" principal. *Dkt.* 1, ¶¶2, 33; *Dixon Decl.*, ¶5. That investment agreement was signed by someone purporting to be the Chief Executive Officer of Black Lion. *Dkt. 1*, ¶36.

The escrow agreement provided that the funds would be escrowed in the Attorney's CTA and used for trading in "investment grade fixed income securities." *Dkt. 1*, ¶37. It also contained several provisions to ensure the safekeeping of the escrowed funds. *Id.*, ¶38-39. Rose signed the escrow agreement on behalf of Black Lion, and falsely identified himself in the escrow agreement as a partner at the Attorney's law firm. *Id.*, ¶¶41-42. On February 28, 2019, Lombardo signed the escrow agreement and deposited $285,000 into the CTA. *Id.*, ¶ 40.

3. Carnavale LLC

Carnavale LLC, identified in the Complaint as "Investor 3," is a company specializing in purchasing and renovating real estate. *Dkt. 1*, ¶51. In or around April 2019, Krcil sent an email to Carnavale's principals, in which he stated that escrowing $55,000 would produce a return of $20 million in 45 days. *Id.,* ¶52. Krcil then sent an investment agreement and an escrow agreement to Carnavale. *Id.*, ¶¶53-54. That escrow agreement provided that Carnavale's funds would be escrowed in the Attorney's CTA, and contained substantially similar language as was used in Lombardo's escrow agreement regarding the safekeeping and investment of the escrowed funds. *Id.*, ¶¶54-55. Rose signed the escrow agreement on behalf of Black Lion as "escrow agent." *Id.*, ¶57. Wooten signed the investment agreement on behalf of Black Lion. *Id.*, ¶58. Four days after a representative of Carnavale 3 signed the investment agreement and escrow agreement, Carnavale escrowed $55,000 in the CTA. *Id.*, ¶56, 59.

B. <u>The Defendants Misappropriate Investor Funds</u>

Bank records from the purported escrow account (the Client Trust Account, or "CTA") and other records reveal that the vast majority of investor funds were, shortly after being deposited in the CTA, disbursed by Rose, either directly from the CTA or through another personal bank account he controlled, (i) to the Defendants or companies they owned; (ii) to certain entities that were not investors with the Defendants, and which do not appear to be legitimate business expenses of the Defendants; and (iii) as reimbursements to previous investors. *See, e.g.*, *Dkt.* 1, ¶¶4, 27, 43, 60; *Dixon Decl.*, ¶7. A total of $3,951,787.00 was deposited by 13 investors during the time-periods at issue, of which $3,340,000.00, or approximately 84.6%, came from Jerlib, Lombardo

and Carnavale. *Dixon Decl.*, ¶¶16-19. Of them, Jerlib deposited the most money with the Defendants ($3 million), followed by Lombardo ($285,000.00) and Carnavale ($55,000.00). *Id.,* ¶¶13-15. These investors never received their promised returns or recovered their principal escrowed deposits. *Id.*, ¶57; *Dkt. 1*, ¶¶29, 50, 61.

The Defendants' demonstrated their true intentions from the outset. *The same day* that Jerlib deposited its $3 million in the CTA, the Defendants, through Rose, in violation of the escrow agreement, transferred some of those funds to the Attorney's business account. *Dixon Decl.*, ¶14. *The day after* Lombardo deposited his $285,000 in the CTA, Rose, in violtion of the escrow agreement, transferred those funds to another account. *Dkt. 1*, ¶43. And Carnavale's money was transferred *within two hours* of its deposit.to reimburse a previous Black Lion investor. *Dixon Decl.,* ¶15.

In total, Rose directed four payments of investor funds to Wooten, totaling $1,355,000.00, which Wooten used to live lavishly (he paid $87,566.00 for a new car, $260,020.00 for a home, made expensive renovations to his home, had a $100,000.00 cashier's check issued to his fiancé and a $783,775,20 cashier's check issued to himself, etc.). *Dixon, Decl.*, ¶¶21-23. Rose directed two distributions of investors' funds to Krcil, totaling $250,000.00, funneled through Krcil's company, Game Time Sports. *Id., ¶26.* Krcil then transferred those funds to his personal account and used them for his personal expenses (home expenses, travel, pay-off his student loan, etc.). *Id.*, ¶¶26-28. Rose made one distribution of $175,000.00 from investors' funds to himself, which he transferred to his personal bank account. *Id.*, ¶29. Rose made two distributions of investors' funds to Sinowide Energy, LLC ("Sinowide"), totaling $1.425 million, which Sinowide sent to a

personal injury attorney who transferred them to several foreign countries. *Id.*, ¶¶30, 38. Rose also made one distribution of $200,000.00 from investors' funds to Westlea Holdings, LLC ("Westlea"), which Westlea distributed to certain confederates in smaller amounts. *Id.*, ¶¶31, 39.

C. Defendants Conceal Their Fraudulent Conduct

On or about July 1, 2019, Lombrdo requested proof that his $285,000.00 deposit remained on deposit in the CTA. *Dkt 1*, ¶45. In what proved to be a successful effort to trick Lombardo, into believing that his deposit was safe and secure, Rose and Wooten transferred approximately $175,000.00 from Wooten's personal account to the CTA, to artificially (and temporarily) inflate the balance in it. *Dkt 1*, ¶46. Then, on or about July 3, 2019, Rose sent an email to Lombardo, along with a redacted bank statement, which reflected an amount of $296,837.00 in the account, along with a handwritten note from Rose, which stated, "here is your bank statement with other client funds removed. Your funds are covered[.]" Dkt. 1, ¶¶47-48. Approximately one month later, Rose returned the $175,000.00 from Wooten to a Black Lion bank account. Dkt 1, ¶49; *Dixon Decl.*, ¶¶48-50

Rose also went to extreme lengths to deceive the U.S. District Court for the Northern District of Illinois. On November 13, 2019, during a show cause hearing in a related case (*Jerlib Investors, LLC, v. Cohn & Cohn, et al.*, Case Number 19-cv-06203 (N.D.IL. 2019)) (the "private party case"), Rose told the District Court Judge that, "as of November 12, 2019 … there was *$99.9 billion* in the [CTA]" (emphasis added). He also provided the Court with an obviously altered

document to support his preposterous claim.[1] *See* Exhibit B, attached hereto ("Rose's document submission"). In fact, only $46,870 remained in the CTA at the time.[2] *Dixon Decl.*, ¶51-52.

With respect to Rose's distributions to Sinowide ($1.425 million) and Westlea ($200,000.00), Wooten claimed during his investigative testimony before the Commission that the funds were used for "security and investigative services", ostensibly provided to Black Lion. *Id.*, ¶32. At first, Rose feigned ignorance about them during his March 26, 2021 deposition, and testified that he did not know anything about Sinowide. Rose then altered course, and testified that the distributions to Sinowide were for it to conduct "some research on other projects, including the Jerlib matter", although he added, "I can't tell you exactly everything they were doing."[3] *Id.*, ¶33.

With respect to Westlea, Rose testified during the same deposition that the reason he sent investors' funds to it was "to investigate Jerlib."[4] Rose further testified that Westlea had not invested money with the Defendants. *Id.*, ¶34.

The claims by Rose and Wooten that investors' funds (which did not belong to them) were sent to Sinowide and Westlea (who are not in the private investigation business) so they could

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[1] Rose's figure is *greater* than the 2021 Gross National Product of more than 135 countries, including Slovakia, Luxembourg, Jordan, Panama, Bahrain, Costa Rica, Cyprus and Bermuda. awbs://www.macrotrends.net/countries/ranking/gnp-gross-national-product.

[2] Six days later, during his November 19, 2019, deposition in the private party case, Rose conceded that his "99.9 billion" representations to the District Court were "wrong." *Id.*, ¶53.

[3] Rose testified that Wooten and Krcil asked him to send the funds to Sinowide. When asked if Sinowide was Wooten's company, Rose eventually said, "I guess so." *Id.*, ¶33.

[4] Rose testified that he met Westlea through Wooten. *Id.*, ¶34.

provide "investigative" services for Black Lion strain credulity. One would think that such significant disbursements would generate some kind of verifiable documentary support if they were legitimate. However, Rose and Wooten have not provided it (undoubtedly because it does not exist), despite attempts to obtain it from them. *Dixon Decl.,* ¶35. Moreover, their claims are inconsistent with the Commission's analysis of the transfers to and from Sinowide and Westlea, as referenced above. In sum, the Commission's investigation has not revealed any verifiable evidentiary support that Rose's transfers to Sinowide and Westlea were (a) for "security and investigative services", (b) legitimate expenses of the Defendants, or (c) related in any way to the investment programs the Defendants offered toJerlib, Lombardo and Carnavale. *Id.*, ¶35.

Rose's stunning contempt for the law and his complete indifference to the consequences of the Defendants' illegal conduct upon the lives of their victims was on full display during his March 26, 2021, deposition testimony. During it, he boldly and unapologetically proclaimed that he was free to do "whatever he wanted" with Investor 1's $3 million, and viewed it as a "perfect gift to [the defendants]", because the escrow agreement was, in Rose's opinion, invalid. *Id.*, ¶54.

Rose's explanation why the escrow agreement was supposedly invalid is as follows:

> **A**. Your whole basis of your whole allegation is based on fraud. You do not have a valid escrow agreement. You're basing on the fact that this is a legitimate escrow agreement when in fact it's completely worthless. So you want to continue the charade, we will do that.
> **Q**. You know, I learn something every day. Mr. Rose, please tell me why the escrow agreement is invalid in your opinion.
> **A**. Very easy. Show me one copy where all the signatures are on one page of the agreement.
> **Q**. You understand that a document can be executed in counterpart, sir?
> **A**. Nope. They have to be one agreement for an escrow. And not all the participants signed the one page. I have four versions of the escrow agreement with various signatures on various pages.

Q. Is that your defense to this action?
A. Yes it is. It's no contract.

Id., ¶55.

Rose's position is manifestly wrong. It is also contrary to the express terms of Jerlib's escrow agreement (which *Rose* negotiated), which specifically authorized multiple counterparts. The parties' escrow agreement treated them as originals, and part of one agreement, as set forth below:

> MULTIPLE COUNTERPARTS; ELECTRONIC TRANSACTION. This Agreement may be executed in multiple counterparts, each of which shall be regarded for all purposes as an original, and such counterpart shall constitute but one and the same instrument. In addition, the transaction described herein may be conducted and related documents may be stored by electronic means. Copies, telecopies, facsimilies, electronic files, and other reproductions of original executed documents shall be deemed authentic and valid counterparts of such original documents for all purposes, including the filing of any claim, action of suit in the appropriate court of law.

Id., ¶56.

The Defendants' scorn for the rule of law and their victims should not be countenanced by the Court.

ARGUMENT

A. The Defendants Violated the Anti-Fraud Provisions of the Federal Securities Laws

Section 17(a) of the Securities Act of 1933 ("Securities Act") [15 U.S.C. § 77q(a)] prohibits fraud in the offer or sale of a security, and Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5] prohibits fraudulent conduct in connection with the purchase and sale of securities. These

provisions make it unlawful to employ, or cause to be employed, devices, schemes or artifices to defraud, or to make any untrue statement of material fact or omit to state material facts in connection with the sale of securities. The Commission must establish that the Defendants acted with scienter to prove violations of Section 17(a)(1) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5. *Aaron v. SEC*, 446 U.S. 680 (1980). To prove violations based on misrepresentations or omissions, the Commission must show that the misrepresentations or omissions were material. *SEC v. Texas Gulf Sulphur*, 401 F.2d 833 (2d Cir. 1968), *cert. denied sub nom*, 394 U.S. 976 (1969), *reh'd denied* 404 U.S. 1064 (1972). A misrepresentation or omission is material if there is a substantial likelihood that under all circumstances it would have assumed actual significance in the deliberations of a reasonable investor. *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988); *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1976).

In addition to liability for fraudulent misrepresentations and omissions, the Securities Act and Exchange Act - specifically, Sections 17(a)(1) and (3) and Exchange Act Rules 10b-5(a) and (c) - impose what is commonly referred to as "scheme liability." Scheme liability exists when a "defendant's conduct or role in an illegitimate transaction has the principal purpose and effect of creating a false appearance of fact in furtherance of a scheme to defraud." *Simpson v. AOL Time Warner Inc.*, 452 F.3d 1040, 1050 (9th Cir. 2006), *vacated by Simpson v. Homestore.com, Inc.*, 519 F.3d 1041 (9th Cir. 2008); *see also Aaron*, 446 U.S. at 696 n.13 (defining "scheme" as "'[a] plan or program of something to be done; an enterprise; a project; as, a business scheme [, or] [a] crafty, unethical project").

1. The Defendants Made Material Misrepresentations

The Defendants made numerous material misrepresentations to investors concerning their ability to trade securities, obtain significant returns and protect investors' escrowed deposits, including that: (i) the Defendants were "[t]rading in one year and/or medium-term investment grade securities of top rated banks or financial institutions"; (ii) funds escrowed in the CTA by Lombardo and Carnavale would be used to establish a "secured credit facility" for trading in "investment grade" securities; (iii) Jerlib had the "absolute right" to remove its funds from the CTA upon written notice to the escrow agent, which would be returned to it in five days; (iv) Lombardo and Carnavale would receive returns of $20 million within thirty or forty five days, respectively, of their deposits, and minimum returns of $5 million per week; (v) investors' escrowed deposits would not be removed from the CTA; (vi) Rose was an attorney and a partner at the Attorney's law firm; and, (vii) the Defendants would only act upon the investors' written instructions, in accordance with the terms of their escrow agreements, and would not exercise ownership of the escrowed funds. *Dkt. 1*, ¶¶2, 27, 31-34, 38-39, 42, 52, 54-55; *Dixon Decl.*, ¶45.

2. The Defendants Orchestrated a Fraudulent Scheme

The Defendants knowingly carried out a scheme to defraud at least three investors out of at least $3,340,000, which included the following: (i) Rose obtained control of the Attorney's CTA through deceptive means, without the knowledge of investors; (ii) Rose obtained control of the Attorney's business account through deception; (iii) Rose and Krcil, acting on behalf of Black Lion, negotiated an escrow agreement with Jerlib laden with misrepresentations, which was designed to induce it to escrow money in the CTA; (iv) Rose, who is not an attorney, initially listed

himself as a "Partner" at the Attorney's law firm and as "Escrow Agent" for Jerlib's deposit, and persuaded the Attorney to sign as "Escrow Agent", in a successful effort to placate Jerlib's concerns about the security of its funds; (v) Rose illegally disbursed investors' funds to the Defendants and others shortly they were deposited; (vi) Krcil told Lombardo that Lombardo would receive $20 million thirty days after he escrowed money in the CTA, and sent two investment agreements and an escrow agreement to him, which were laden with misrepresentations designed to induce him to do so; (vii) Rose signed Lombardo's escrow agreement as escrow agent on behalf of Black Lion, and falsely identified himself as a partner at the Attorney's law firm; (viii) Rose and Wooten engaged in an elaborate ruse designed to deceive Lombardo and artificially (and temporarily) inflate the balance in the CTA, by transferring $175,000 from Wooten's personal account to it, even though the Investor 2's funds had been disbursed from the CTA over four months earlier; (ix) Krcil advised Carnavale that it would receive $20 million forty five days after he escrowed funds in the CTA, and e-mailed an investment agreement and an escrow agreement to it, which were laden with misrepresentations designed to induce it to do so. *Id.*, ¶¶21-23, 25-26, 32-35, 41-42, 45-49, 52, 54-55, 57-58; *Dixon Decl.*, ¶¶8-15, 47-50.

3. The Defendants Acted with Scienter

Despite their repeated assurances that they would ensure the security of investors' funds and act in accordance with the terms of their escrow agreements, the Defendants' stole them. They did so beginning on the *same day* as Jerlib's deposit, *one day after* Lombardo's deposit, and *within two hours* of Carnavale's deposit. *Dixon Decl.*, ¶¶13-15.

Rose (a) went to extreme lengths to deceive the U.S. District Court for the Northern District of Illinois, (b) cavalierly testified that he could do "whatever he wanted" with Investor 1's $3 million deposit, and viewed it as a "gift" to the Defendants, because, in his opinion, the escrow agreement (which he negotiated) was invalid, and, (c) along with Wooten, falsely testified that the transfers of investors' funds to Sinowide and Westlea were for investigative services on the Defendants' behalf. *Dkt. 1*, ¶¶27-29, 40, 43, 50, 59-61; *Dixon Decl.*, ¶¶10-11, 18-19, 28-30.

B. Appropriate Relief

1. Permanent Injunctions

Sections 20 and 22 of the Securities Act and [15 U.S.C. § 77t, 77v] and Sections 21(d) and 21(e) of the Exchange Act [15 U.S.C. §§ 78u(d), (e)] authorize the Commission to seek injunctive relief where it appears that a person is engaged or about to engage in violations of the federal securities laws.

The Commission here seeks a permanent injunction, enjoining the Defendants from violating Section 17(a) of the Securities Act [15 U.S.C. § 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].

In considering requests for permanent injunctions, courts determine whether there is a reasonable likelihood that the defendant will engage in future violations of the federal securities laws by examining several factors, including the egregiousness of the violation, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, and the defendant's recognition of the wrongful nature of his conduct. *See SEC v. Ginsburg*, 362 F.3d 1292, 1304 (11th Cir. 2004).

Injunctive relief is appropriate in this case because the Defendants' fraudulent conduct was egregious, occurred repeatedly with different victims, they acted with scienter, and have not acknowledged their wrongful conduct. Moreover, there is a high likelihood that, unless enjoined, the Defendants will continue to engage in similar misconduct in the future. The Defendants have not provided, and cannot provide, any assurances to the contrary. The Court should issue permanent injunctions against them.

2. Disgorgement and Prejudgment Interest

A district court's authority to order disgorgement in a Commission enforcement action is well established. *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1104 (2d Cir. 1975) (asserting deterrent effect of an SEC enforcement action would be greatly undermined if securities law violators were not required to disgorge illicit proceeds); *SEC v. Calvo*, 378 F.3d 1211, 1217 (11th Cir. 2004).

The law does not require precision in determining the proper amount of disgorgement. Before disgorgement may be imposed, the Commission must first "establish[] a reasonable approximation of the profits casually related to the fraud." *SEC v. Razmilovic*, 738 F.3d 14, 31 (2d Cir. 2013). Any "risk of uncertainty in calculating disgorgement should fall upon the wrongdoer whose illegal conduct created that uncertainty." *SEC v. Contorinis*, 743 F.3d 296, 305 (2d Cir. 2014); see also *SEC v. Calvo*, 378 F.3d 1211, 1217 (11th Cir. 2004) (same). All doubts "are to be resolved against the defrauding party." *SEC v. First City Fin. Corp.*, 688 F. Supp. 705, 727 (D.D.C. 1988) (quoting *SEC v. McDonald*, 699 F2d 47, 55 (1st Cir. 1983)).

In *Liu, et al. v. SEC*, 140 S. Ct. 1936 (2020), the Supreme Court held that disgorgement awards not exceeding a wrongdoer's net profits are permissible equitable relief under federal securities laws. Disgorgement is frequently defined as "[r]estitution measured by the defendant's wrongful gain." *Id.*, at 1943. However, where the "entire profits of a business or undertaking results from the wrongdoing … the defendant will not be allowed to diminish the show of profits by putting in unconscionable claims for personal services or other inequitable deductions." *Id.*, at 1941.

Disgorgement is authorized in SEC enforcement actions to the extent it "may be appropriate or necessary for the benefit of investors." *Id.*, at 1947 "While Liu limited to a certain extent the scope of the disgorgement remedy, a district court retains broad equitable power to fashion appropriate remedies for federal securities law violations, including imposing disgorgement." *SEC v. Cope,* 2021 U.S. Dist. LEXIS 31206, at *2 (S.D.N.Y. 2021).

When calculating each Defendant's net profits for purposes of measuring disgorgement, the Commission included the amount of investors' funds diverted to that individual Defendant, or to a company owned by that Defendant. The Commission also seeks disgorgement for Rose's transfers to Sinowide and Westlea, for which Rose and Wooten are equally responsible, *see Dixon Decl.*, ¶¶30-35, 37-42, because there is no verifiable evidence that they were legitimate expenses pursuant to *Liu,* supra. Any uncertainty regarding them should be borne by Wooten and Rose, who created it.

The amount of disgorgement, exclusive of prejudgment interest, is $1,460,740.30 for Wooten, $853,244.52 for Rose, and $211,455.31 for Krcil. *Dixon Decl.*, ¶¶27, 43-44. The

Commissions recommends that the Court impose disgorgement plus prejudgment in the following amounts against Wooten, Rose and Krcil: $1,621,699.23 against Wooten, $927,280.08 against Rose, and $234,754.44 against Krcil. *See* Exhibits C, D and E, attached hereto (prejudgment interest amounts for Wooten, Rose and Krcil, respectively).

The Commission does not seek (i) disgorgement for Carnavale's $55,000.00 investment[5] or (ii) disgorgement (or a civil penalty) from Black Lion.[6]

3. Civil Penalties

Sections 20(d) of the Securities Act and 21(d) of the Exchange Act provide that the Commission may seek to have a court impose civil monetary penalties for any violations of the Act. "Civil penalties are intended to punish the individual wrongdoer and to deter him and others from future securities violations." *SEC v. Monterosso*, 756 F.3d 1326, 1338 (11th Cir. 2014); *SEC v. Universal Express, Inc.*, 646 F. Supp. 2d 552, 567 (S.D.N.Y. 2009) (noting that "penalties are designed to deter future violations of the securities laws and thereby further the goals of encouraging investor confidence, increasing the efficiency of financial markets, and promoting the stability of the securities industry."). Civil penalty amounts are periodically adjusted to the cost of living.[7]

[5] Once could argue that the reimbursement to a previous investor does not qualify as part of the Defendants' net profits.

[6] Black Lion was the corporate alter ego of Wooten, Rose and Krcil, who identified themselves as its officers during their dealings with investors. To the Commission's knowledge, Black Lion does not have an office or employees. *Id.*, ¶36.

[7] *See* 17 C.F.R. § 201.1001, Adjustment of Civil Monetary Penalties.

The Defendants' misconduct in this case occurred in 2019. *Dkt. 1*, ¶ 1. Thus, the adjustments from November 3, 2015 to the present apply to the imposition of civil monetary penalties. *See* Inflation Adjustments to the Civil Penalties Administered by the Securities and Exchange Commission as of January 15, 2020, attached hereto as Exhibit F.

There are three tiers of civil monetary penalties. *SEC v. BIH Corp.*, 2014 WL 7057748 at *2 (M.D. Fla. 2014); *see also* 15 U.S.C. § 78u(d)(3). First-tier penalties apply to any violations of the Act. *Id*. Second-tier penalties apply to violations involving "fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement." *Id*. Third-tier penalties apply to any violation satisfying the second-tier criteria that also "resulted in substantial losses or created a significant risk of substantial losses to other persons." *Id*. The penalty amounts for each violation shall not exceed the following for natural persons: $9,639 (for first-tier violations), $96,384 (for second-tier violations) and $192,768 (for third-tier violations). *See* Exhibit F.

In determining whether to impose civil penalties, courts look to a number of factors, including: (1) the egregiousness of the defendants' conduct; (2) the degree of the defendants' scienter; (3) the repeated nature of the violations; (4) defendants' failures to admit to their wrongdoing, (5) whether defendants' conduct created substantial losses or the risk of substantial losses to other persons, (6) defendants' lack of cooperation and honesty with authorities, if any, and (7) whether the penalty should be reduced due to the defendants' demonstrated current and future financial condition. *See, e.g., SEC v. Radius Capital Corp*, 2015 WL 1781567, *8 (M.D. Fla. Apr. 20, 2015). While these factors are helpful in characterizing a particular defendant's actions, the civil penalty framework is of a "discretionary nature," and each case "has its own

particular facts and circumstances which determine the appropriate penalty to be imposed." *SEC v. Moran*, 944 F. Supp. 286, 295 (S.D.N.Y. 1996).[8]

The Defendants engaged in egregious misconduct, acted with scienter, failed to admit their wrongdoing, were thoroughly dishonest with authorities, and have not demonstrated their financial means. Since their violations involved fraud and deceit and resulted in substantial losses to their victim investors, the Commission recommends that the Court order Wooten, Rose and Krcil to each pay third-tier civil penalties of $192,768.

CONCLUSION

For the aforementioned reasons, the Commission's Motion for Default Judgment should be granted. A proposed Final Judgment has been attached hereto as Exhibit G, for the Court's convenience and consideration.

DATED: November 2, 2021.

Respectfully submitted,

/s/ Robert F. Schroeder
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[8] The Commission has exercised significant restraint in recommending these penalty amounts. Because the statute allows penalties "for each violation," some courts have imposed separate penalties based upon the number of statutes violated or for each false statement. *See, e.g.*, *SEC v. Miller*, 744 F. Supp. 2d 1325, 1345 (N.D. Ga 2010); *SEC v. Tourre*, 4 F. Supp. 3d 579, 592-94 (S.D.N.Y. 2014) (imposing separate penalty for each of defendant's seven false statements)

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CERTIFICATE OF SERVICE

On November 2, 2021, I electronically filed **Plaintiff's Motion and Memorandum of Law for Default Judgment Against Defendants Wooten, Rose, Krcil and Black Lion,** and the exhibits referenced therein, using the CM/ECF system, and served them upon the following by UPS overnight delivery:

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/s/ Robert F. Schroeder
Robert F. Schroeder