UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-19814

In the Matter of

WARREN A. DAVIS,

Respondent.

DIVISION OF ENFORCEMENT'S RENEWED MOTION FOR ENTRY OF DEFAULT AND IMPOSITION OF REMEDIAL SANCTIONS AGAINST RESPONDENT WARREN A. DAVIS

The Division of Enforcement ("Division") hereby moves, pursuant to Rules 155(a) and 220(f) of the Commission's Rules of Practice,[1] for entry of default against Respondent Warren A. Davis ("Davis") and the imposition of remedial sanctions barring him from: (i) association with any broker or dealer; and (ii) participating in any offering of a penny stock.

On October 16, 2020, the Division moved for entry of default and imposition of remedial sanctions against Davis.[2] On October 6, 2021, the Commission issued an Order to Show Cause to Davis, requiring him to show cause by October 20, 2021, "why he should not be deemed to be in default and why this proceeding should not be determined against him due to his failure to file an

[1] 17 C.F.R. §§ 201.155(a) and 201.220(f).
[2] Warren A. Davis (sec.gov)

answer and to otherwise defend this proceeding." *Warren A. Davis*, Exchange Act Release No. 93265, 2021 WL 4593473 at *1 (Oct. 6, 2021). Davis did not respond to the Order to Show Cause. Also in accordance with the Order to Show Cause, the Division now files a renewed motion for entry of default and imposition of remedial sanctions.

I. Background

A. Allegations in the OIP

On May 28, 2020, the Order Instituting Proceedings ("OIP") in this matter was issued pursuant to Section 15(b) of the Exchange Act. *Warren A. Davis.*, Exchange Act Release No. 88962, 2020 WL 2764740 (May 27, 2020). As alleged in the OIP, on July 2, 2015, in a civil action captioned *Securities and Exchange Commission v. Gibraltar Global Securities, Inc. and Warren A. Davis,* case no. 13-cv-02575 (CDB), in the United States District Court for the Southern District of New York (the "Civil Action"), a default judgment was entered permanently enjoining Davis and Gibraltar Global Securities, Inc. ("Gibraltar") from future violations of Section 15(a) of the Exchange Act and Section 5 of the Securities Act of 1933 ("Securities Act"). OIP ¶ II.2. Generally, the OIP also alleges that, between approximately March 2008 through August 2012, Respondent—Gibraltar's President—acted as an unregistered broker-dealer in violation of Section 15(a) of the Exchange Act, and that Respondent participated in the offering and sale of a penny stock. OIP ¶¶ II.1, II.3-4.

Specifically, the OIP alleges that Davis and Gibraltar set up a website through which they solicited prospective U.S. customers by advertising a broad range of brokerage services. OIP ¶ II.3. As an inducement to U.S. customers, Gibraltar's website advertised the formation of offshore international business corporations with nominee officers and directors that enabled U.S. customers to trade anonymously "without paying taxes on [their] profits." *Id.* Gibraltar's business model attracted a number of U.S. customers seeking to sell shares of low-priced, thinly traded microcap

issuers, and Gibraltar routinely accepted deposits of microcap stocks from U.S. promoters and brokers, arranged for the transfer agent to re-title the stock certificates in Gibraltar's name, and deposited the shares into various securities accounts Gibraltar maintained at broker-dealers located in the United States. *Id.* When Gibraltar's customers instructed Gibraltar to sell the microcap stocks, Gibraltar placed corresponding sell orders with U.S. brokers. *Id.* After the sales were executed, Gibraltar instructed the U.S. brokers to wire the sale proceeds back to its bank account maintained at the Royal Bank of Canada in the Bahamas. *Id.* Gibraltar then wired the sale proceeds (less Gibraltar's 2-3% commission) back to its U.S. customers. *Id*. During the relevant time, Davis and Gibraltar sold approximately $100 million of low-priced microcap securities. OIP ¶ II.4. Moreover, in addition to operating as an unregistered broker-dealer in the U.S., Davis and Gibraltar participated in the unlawful unregistered offering and sale of over 10 million shares of MDOR—a penny stock—on behalf of U.S. customers, for proceeds of over $11 million. *Id.* In short, the OIP summarized the allegations forming the basis of the Civil Action. OIP ¶¶ II.1, II.3-4.

B. The Underlying Civil Action

1. Allegations in the Civil Complaint

On April 18, 2013, the Commission filed the Civil Action against Davis and Gibraltar. *See, generally,* Ex. A, Complaint.[3] The Complaint in the Civil Action, incorporated herein by reference,

[3] In further factual support of this Motion, the Division submits as exhibits the following filings from the Civil Action: the Commission's Complaint in the Civil Action dated April 18, 2013 (Ex. A); the District Court's Order granting default judgment dated July 2, 2015, including the entry of the permanent injunction (Ex. B); the Report and Recommendation from the Magistrate Judge dated October 16, 2015 (Ex. C); the District Court's Memorandum Decision and Order regarding Final Judgment dated January 12, 2016 (Ex. D); and the District Court's Final Judgment also dated January 12, 2016 (Ex. E). Pursuant to Commission Rule of Practice 323, 17 C.F.R. § 201.323, official notice may be taken of any material fact in these filings.

described the manner in which Davis and Gibraltar operated as an unregistered broker-dealer in the United States, and how they participated in the offering of a penny stock. Davis is the President and sole owner of Gibraltar, a Bahamian broker-dealer. *Id.* ¶¶ 1, 8-9. As alleged in the Civil Action, between March 2008 and August 2012, through its website, Davis and Gibraltar solicited U.S. customers by advertising a broad range of brokerage services commonly provided by online broker-dealers. *Id.* ¶¶ 1, 15-18. To further entice U.S. customers, the website advertised the formation of offshore international business corporations with nominee officers and directors that enabled U.S. customers to trade anonymously "without paying taxes on [their] profits." *Id.* ¶¶ 1, 16, 19-20. In the relevant timeframe, Davis and Gibraltar sold approximately $100 million of low priced microcap securities on behalf of U.S. customers. *Id.* ¶¶ 2, 21-24. In addition to operating as an unregistered broker-dealer in the United States, Davis and Gibraltar also participated in the offer and sale of over 10 million shares of a penny stock on behalf of U.S. customers, with proceeds of over $11 million. *Id.* ¶¶ 3, 25-29.

2. The District Court's Permanent Injunction

As alleged in the OIP, the United States District Court for the Southern District of New York granted default judgment against Davis and Gibraltar on July 2, 2015. *See* Ex. B. In doing so, the court noted that Davis and Gibraltar did not oppose the Division's motion for entry of default judgment in the Civil Action. *Id.* at 1. As a result of the entry of default judgment against Davis and Gibraltar based on the facts alleged in the Complaint, the court found that Davis and Gibraltar had violated Section 15(a) of the Exchange Act of 1934 and Section 5 of the Securities Act of 1933, and therefore permanently enjoined Davis and Gibraltar from future violations of Section 15(a) of the Exchange Act and Section 5(a) and 5(c) of the Securities Act. *Id.* at 1-2; *see also* Ex. C, Magistrate's Report and Recommendation at 7-11. In the final Default Judgment, the District Court held that

Davis and Gibraltar must pay disgorgement in the amount of $14,449,176, prejudgment interest in the amount of $2,700,483, and for Davis and Gibraltar, each, to pay a tier-two civil penalty in the amount of $3,667,146. *See* Ex. D (Memorandum Decision, adopting Magistrate's Report and Recommendation, except for calculation of prejudgment interest); Ex. E (final Default Judgment). Neither Davis nor Gibraltar have satisfied this judgment.

C. Respondent Davis Has Failed to Answer OIP After Service

Respondent Davis has not responded to the OIP in this proceeding despite having been personally served with a copy of the OIP. The OIP was published by the Commission's Office of the Secretary on May 27, 2020, and the Secretary's Office served Davis by United States Postal Service Global Express service at the address of his Bahamian counsel, at his business address, and at his residence. *See*, *generally*, Declaration of Fernando Campoamor Sánchez to Assist Secretary with Record of Service, dated July 2, 2020. While Davis' Bahamian counsel received a copy of OIP, she informed the undersigned that she is not authorized to accept service on Davis' behalf. *Id.* at 2. The Division then arranged for personal service through a process server, who on June 20, 2020, at approximately 7:40 a.m., personally served Davis at his residence with a copy of the OIP and associated documents. *Id.* at 3. Davis never filed an answer to the OIP with the Secretary's Office, and did not otherwise attempt to communicate with the Division. Davis' failure to answer the OIP is consistent with his prior conduct in the underlying Civil Action, where he explicitly told the Court, through counsel, that he would *not* oppose the entry of default judgment. *See* Ex. B at 1.

Moreover, Davis also failed to answer the Commission's October 6, 2021, Order to Show Cause, which gave Respondent until October 20, 2021, to explain why he should not be deemed to be in default and to file a proposed answer to the allegations in the OIP.

II. Argument

Respondent Davis never filed an answer to the OIP and is therefore in default. *See* 17 C.F.R. §§ 201.155(a), 201.220(f); *see also In the Matter of Alicia Bryan*, Initial Decision of Default, A.P. File No. 3-15937, (Oct. 22, 2014) (Elliot, ALJ). As a result of his default, the Division's allegations in the OIP should be deemed to be true. *See* 17 C.F.R. § 201.155(a); *see also* 17 C.F.R. § 201.220(c) (stating that failure to deny allegations in an OIP constitutes an admission of the same). As explained below, Exchange Act Section 15(b)(6) authorizes the Commission to impose a censure, suspension, or permanent broker-dealer bar and a penny stock bar against a Respondent if: (1) at the time of the alleged misconduct, he was associated with a broker or dealer, seeking to become associated with a broker or dealer or acting as a broker or dealer; (2) he has been enjoined from any action, conduct, or practice specified in Exchange Act Section 15(b)(4)(C); and (3) the sanction is in the public interest. 15 U.S.C. §78o(b)(6)(A)(iii). Each of the requirements of Section 15(b)(6) is established by the uncontroverted allegations in the OIP, uncontroverted evidence in the Civil Action, and the findings and injunctive relief by the District Court in the Civil Action. Therefore, Respondent Davis should be permanently barred from: (i) association with any broker or dealer; and (ii) participating in any offering of a penny stock.

A. Davis is in Default in These Proceedings

The OIP directed Respondent to file an Answer to the allegations in the OIP within twenty (20) days of service of the Order. OIP ¶ IV. In addition, the OIP warned Responded that if he failed to file the directed answer in this proceeding, he may be deemed in default and the proceedings may be determined against him, including that the allegations in the OIP may be deemed as true. *Id.*; *see also In the Matter of Black Diamond Asset Management LLC & Robert Wilson*, Order Finding Respondents in Default, A.P. File No. 3-18099, (Sept. 28, 2017) (Grimes,

ALJ). Despite having been personally served, Respondent has refused to file an Answer or make any appearance in this proceeding. Similarly, despite the fact that the Commission provided Davis with an opportunity to file a proposed answer to the OIP and explain why he had previously failed to answer, Davis ignored the Order to Show Cause and failed to respond or otherwise communicate with the Division. Accordingly, Respondent Davis is in default pursuant to Commission Rule of Practice 155(a)(2), and the allegations in the OIP should be deemed true in accordance with the Commission's Rules of Practice. *See* 17 C.F.R. §§ 201.155(a), 201.220(f).

B. Davis Should Be Permanently Barred From Acting As Or Associating With A Broker-Dealer and Participating In Penny Stock Offerings

With its default judgment against Davis, the District Court previously found, *inter alia*, that: (1) Davis had acted as an unregistered broker-dealer in violation of Section 15(a) of the Exchange Act; (2) Davis associated with and used U.S. brokers when he acted as an unregistered broker-dealer; and (3) Davis participated in the sale of a penny stock. *See, e.g.* Ex. D at 3-5. Because the injunction issued by the District Court is precisely within the scope of conduct described in Exchange Act Section 15(b)(4)(C) that merits sanctions under Section 15(b)(6), Davis should be barred from association with any broker or dealer, and from participating in any offering of a penny stock (including acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock). *See* 15 U.S.C. § 78o(b)(4)(C); 15 U.S.C. § 78*o*(b)(6).[4]

* * *

[4] The Division is not seeking to bar Respondent Davis from associating with investment advisers, municipal securities dealers, or transfer agents because his conduct in this matter originated before the passage of the Dodd-Frank Act. *See Bartko v. Sec. & Exch. Comm'n*, 845 F.3d 1217, 1226 (D.C. Cir. 2017).

The Division is prepared to provide further argument on the factors set forth in *Steadman v. SEC*, 603 F.2d 1126 (5th Cir. 1979), should it be deemed necessary despite Davis' default and failure to participate in these proceedings.

III. Conclusion

For the foregoing reasons, the Division respectfully asks for entry of default against Respondent Davis pursuant to Section 15(b) of the Exchange Act, and imposition of sanctions barring him from: (i) association with any broker or dealer; and (ii) participating in any offering of a penny stock.

Respectfully submitted,

DIVISION OF ENFORCEMENT

By its attorney,

/s/Fernando Campoamor Sánchez

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Dated: November 16, 2020

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the Renewed Motion for Default and Imposition of Sanctions was served on this 16th day of November, 2021, in the manner indicated below:

By Email:

[redacted]
Warren A. Davis
[redacted]
Island of New Providence
The Bahamas

By Federal Express:

Warren A. Davis
[redacted]
Island of New Providence
The Bahamas

/s/Fernando Campoamor Sánchez
Fernando Campoamor Sánchez
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Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-19814

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WARREN A. DAVIS,

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INDEX OF ATTACHMENTS TO RENEWED MOTION FOR DEFAULT

Attachment	Description
A	Complaint, dated April 18, 2013
B	District Court's Order granting default judgment, dated July 2, 2015
C	Magistrate Judge's Report and Recommendation, dated October 16, 2015
D	District Court's Memorandum and Decision, dated January 12, 2016
E	District Court's Final Judgment, dated January 12, 2016

Exhibit A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,	:	
Plaintiff,	:	
v.	:	**13 Civ.**
GIBRALTAR GLOBAL SECURITIES, INC., and WARREN A. DAVIS	:	
Defendants.	:	

COMPLAINT

Plaintiff, the Securities and Exchange Commission (the "Commission"), alleges:

NATURE OF THE ACTION

1. Beginning as early as March 2008 and continuing through August 2012, Gibraltar Global Securities, Inc. ("Gibraltar"), a Bahamian broker-dealer wholly owned by its president, Warren A. Davis ("Davis"), and Davis personally, unlawfully operated as broker-dealers in the United States. Through its website, Gibraltar solicited prospective United States customers ("U.S. customers") by advertising a broad range of brokerage services commonly provided by online broker-dealers. As an additional inducement to U.S. customers, Gibraltar's website advertised the formation of offshore international business corporations ("IBCs") with nominee officers and directors that enabled U.S. customers to trade anonymously, "without paying taxes on [their] profits."

2. Gibraltar attracted U.S. customers seeking to sell shares of low-priced, thinly traded microcap issuers. Gibraltar routinely accepted deposits of microcap stocks from U.S. promoters and brokers, arranged for the transfer agent to re-title the stock certificates in Gibraltar's name, and deposited the shares into various securities accounts Gibraltar maintained

at broker-dealers located in the United States ("U.S. brokers"). When Gibraltar customers instructed Gibraltar to sell the microcap stocks, Gibraltar placed corresponding sell orders with U.S. brokers. After the sales were executed, Gibraltar instructed the U.S. brokers to wire the sale proceeds back to its bank account maintained at the Royal Bank of Canada in the Bahamas. Gibraltar then wired the sale proceeds (less Gibraltar's 2-3% commission) back to its U.S. customers. From approximately March 2008 through August 2012, Gibraltar sold approximately $100 million of low-priced microcap securities on behalf of U.S. customers.

3. In addition to operating as an unregistered broker-dealer in the United States, Gibraltar and Davis participated in the unlawful unregistered offering and sale of over 10 million shares of Magnum d'Or, (symbol "MDOR") on behalf of U.S. customers for proceeds of over $11 million.

4. By virtue of the conduct alleged herein, defendants Gibraltar and Davis violated Section 15(a)(1) of the Exchange Act of 1934 (failure to register with the Commission as a broker-dealer) [15 U.S.C. § 78o] and Sections 5(a) and (c) of the Securities Act of 1933 (offering or sale of securities not subject to a registration statement and not exempt from registration) [15 U.S.C. §§ 77e(a) and (c)].

JURISDICTION AND VENUE

5. This Court has jurisdiction over this action pursuant to Section 22(a) of the Securities Act of 1933 ("Securities Act") [15 U.S.C. § 77v(a)] and Sections 21(d)(1), 21(e), and 27 of the Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. §§ 78u(d)(1), 78u(e) and 78aa]. Venue lies in this Court pursuant to Section 22 of the Securities Act [15 U.S.C. § 77v] and Section 27 of the Exchange Act [15 U.S.C. § 78aa]. Certain of the acts, practices, transactions and courses of business alleged herein occurred within the Southern District of New

York. For example, Gibraltar maintained securities accounts within the Southern District of New York. Gibraltar also deposited shares with depository facilities located within the Southern District of New York.

6. The defendants have, directly or indirectly, made use of the means or instrumentalities of interstate commerce, or of the mails, or the facilities of a national securities exchange in connection with the transactions, acts, practices and courses of business alleged herein.

7. The defendants will, unless enjoined, continue to engage in the acts, practices and courses of business alleged herein, or in transactions, acts, practices and courses of business of similar purport and object.

DEFENDANTS

8. Gibraltar Global Securities, Inc., is a broker-dealer domiciled in the Commonwealth of the Bahamas. Since March 2005, Gibraltar has been registered with the Securities Commission of the Bahamas. During the relevant period, Gibraltar employed approximately four representatives. At all times relevant to this complaint, Gibraltar was engaged in the business of effecting transactions for the accounts of others, and made use of the mails and other means and instrumentalities of interstate commerce to effect transactions in, or to induce, or attempt to induce, the purchase or sale of securities. Gibraltar has never been registered with the Commission as a broker or a dealer.

9. Warren Anthony Akinwande Davis, age 38, is a citizen of the Commonwealth of the Bahamas. Davis is the founder, president and sole owner of Gibraltar. At all times relevant to this complaint, Davis, directly or indirectly, controlled Gibraltar's activities. He was its sole owner, and established accounts on Gibraltar's behalf in the United States. Davis also was authorized to trade on Gibraltar's behalf and authorized other Gibraltar

employees to place trades in the United States. Davis has never been registered with the Commission as a broker or a dealer.

OTHER RELEVANT ENTITIES

10. **Magnum d'Or** ("Magnum") is a Nevada corporation formerly headquartered in Fort Lauderdale, Florida, with its principal place of business located in Henderson, Nevada. In February 2012, the United States District Court for the Southern District of Florida entered a final order in favor of the Commission (*SEC v. Magnum d'Or Resources, Inc., et al.* 11-cv-60920) enjoining Magnum from further violations of Sections 5(a), 5(c) and 17(a) of the Securities Act [15 U.S.C. § 77q(a)], and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder [15 U.S.C. § 78j(b) and 17 C.F.R. § 240.10b-5]. The company also was ordered to pay disgorgement of over $7.7 million, representing the proceeds of the unregistered offer and sale of millions of shares of the company's stock through Gibraltar. On April 29, 2011, the Commission suspended trading in Magnum's shares pursuant to Section 12(k) of the Exchange Act [15 U.S.C. § 77l(k)]. The Commission de-registered Magnum's securities pursuant to Section 12(j) on August 3, 2011 [15 U.S.C. § 77l(j)].

11. **Dwight Flatt**, age 29, is a resident of Delray Beach, Florida. In the *Magnum d'Or* complaint, the Commission charged Flatt with acting as a nominee shareholder in the scheme to circumvent the registration provisions alleged in the above-referenced matter. Flatt consented to an injunction against further violations of Sections 5(a) and 5(c) of the Securities Act. Flatt was also barred from participating in penny stock offerings pursuant to Section 20(g) of the Securities Act [15 U.S.C. § 77t(g)] and enjoined from owning, receiving or purchasing Form S-8 stock . In November 2012, the District Court for the Southern District of Florida entered a final judgment ordering Flatt to pay disgorgement and interest of over $2.4 million and a civil penalty of $2.2 million.

12. **David Della Sciucca, Jr.**, age 27, is a resident of Fort Lauderdale, Florida. In the *Magnum d'Or* complaint, the Commission charged Della Sciucca with acting as a nominee shareholder in the scheme to circumvent the registration provisions alleged in the above-referenced matter. Della Sciucca consented to an injunction against further violations of Sections 5(a) and 5(c) of the Securities Act. Della Sciucca was also barred from participating in penny stock offerings and from owning, receiving or purchasing Form S-8 stock. In November 2012, the District Court for the Southern District of Florida entered a final judgment ordering Della Sciucca to pay disgorgement and interest of $725,041 and a civil penalty of $665,141.

13. **Shannon Allen**, age 36, is a resident of Miami, Florida. Allen was a nominee shareholder in the scheme to circumvent the registration provisions alleged in the above-referenced matter. In the *Magnum d'Or* action, the Commission accepted Allen's offer of settlement in which he consented to an injunction against further violations of Sections 5(a) and 5(c) of the Securities Act and other relief.

14. Flatt, Allen and Della Sciucca together (the "Flatt Nominees") deposited over 11 million shares of Magnum d'Or stock into their accounts a Gibraltar.

FACTUAL ALLEGATIONS

GIBRALTAR AND DAVIS SOLICITED BROKER-DEALER CUSTOMERS IN THE UNITED STATES WITHOUT BEING REGISTERED AS BROKER-DEALERS

15. Throughout the period relevant to this complaint, Gibraltar maintained a website located at http://www.ggsibahamas.com. Gibraltar's website described itself as a broker-dealer registered with the Bahamian Securities Commission that offered "offshore" brokerage services with commissions comparable to those on the "mainland." Gibraltar's website solicited prospective customers, including U.S. customers, to establish securities accounts by offering a

variety of brokerage services, such as: (i) online trading in stocks, bonds and options; (ii) 24 hour account access; (iii) efficient execution; and (iv) financial news feeds.

16. On its website, Gibraltar stated that "Using a Gibraltar offshore brokerage account will enable you to trade on most stock exchanges in the world at a cost equivalent to that incurred using mainland brokers, without paying taxes on the profits." Gibraltar's website promised prospective customers an "extra layer of confidentiality" to protect assets from "government seizures or frivolous divorce settlements."

17. Gibraltar's website: (1) showed price-volume graphs solely for U.S. markets; (2) was written only in English; (3) charged fees in U.S. dollars—with no provision for currency exchange; and (4) referenced transfers of shares through a United States depository institution (and not non-U.S. depositories). According to Hupso.com, an internet website analyzer, Gibraltar attracted over 2,200 visitors per day. According to webstatsdomain.com, approximately 79% of the Gibraltar's traffic derived from Canada and 21% from the United States.

18. Gibraltar's website contained no disclaimers advising prospective customers that it would not service U.S. investors and Gibraltar provided brokerage services to numerous entities and individuals from the United States.

19. Gibraltar also solicited prospective customers, including U.S. customers, by offering them vehicles by which they could trade anonymously. In this regard, Gibraltar's website offered to form IBCs with nominee officers and directors. According to Gibraltar, trading through IBCs with nominee directors and officers provided an added layer of confidentiality which allowed customers to protect their identity.

20. To sell securities in the United States, Gibraltar created numerous accounts at U.S. brokers. In order to enable U.S. customers to avoid paying taxes on proceeds from the account, Davis submitted false IRS W8-BEN withholding forms to the U.S. brokers. The withholding forms Davis submitted falsely certified that Gibraltar was the beneficial owner of the income relating to the securities accounts, and that the beneficial owner was not a U.S. person. In purported reliance on the false withholding certificates, U.S. brokers did not withhold taxes because Gibraltar was a foreign entity exempt from withholding pursuant to treaty.

21. Throughout the period 2008 through 2012, Gibraltar accepted shares of low-priced, thinly-traded stock from customers, including U.S. customers, and sold them through accounts maintained at U.S. brokers. To facilitate the sales, Gibraltar arranged to have the share certificates re-registered in its name. In many instances, Gibraltar titled the certificates in its name, but included the abbreviation "fbo" followed by the name of the particular customer to show that Gibraltar held the shares "for the benefit of" U.S. customers.

22. After the share certificates were re-titled in its name, Gibraltar deposited them with U.S. brokers. U.S. customers then placed sell orders with Gibraltar through its website, telephonically or through e-mail. Gibraltar then followed its customers' orders by placing corresponding sell orders with its U.S, brokers who sold the shares on the open market.

23. After the shares were sold on behalf of U.S. customers, Gibraltar instructed the U.S. brokers to wire the net proceeds to its bank account maintained at the Royal Bank of Canada in the Bahamas. Gibraltar then deducted commissions of between 2-3% of the net proceeds and forwarded the remaining proceeds back to its U.S. customers via wire transfer.

24. Neither Gibraltar nor Davis at any time registered with the SEC as a broker or dealer as is required for individuals and firms seeking to engage in securities transactions for U.S. customers. As the person who controlled Gibraltar, Davis is liable for Gibraltar's failure to register as well as his own.

GIBRALTAR AND DAVIS PARTICIPATED IN UNREGISTERED OFFERINGS AND SALES OF SECURITIES

25. Beginning on or about November 2008 through approximately September 2009, the Flatt Nominees deposited over 11 million shares of Magnum d'Or stock into their accounts at Gibraltar. Gibraltar and Davis knew or should have known that the Flatt Nominees acquired the shares directly from the issuer, Magnum d'Or.

26. After the Magnum share certificates were retitled in Gibraltar's name, Davis (and other Gibraltar employees) deposited the shares into Gibraltar's accounts at U.S. brokers by mail.

27. As set forth below, throughout the period November 2008 through December 2009 Gibraltar and Davis sold over 10 million shares of Magnum d'Or in over 600 transactions through four U.S brokers raising proceeds of approximately $11.4 million.

Broker Dealer	Date Range	Shares MDOR sold	Sales Proceeds
Oppenheimer & Co.	11/28/08 to 4/28/09	969,822	$ 857,406
Noble Trading	12/9/08 to 8/3/09	6,310,094	$ 6,377,002
Alpine Securities Corp.	8/31/09 to 12/15/09	2,121,725	$ 2,389,777
Scottsdale Capital Advisers	9/8/09 to 12/10/09	1,315,419	$ 1,760,402
Totals		**10,717,060**	**$11,384,589**

28. There was no registration statement filed with the Securities and Exchange Commission with respect to any of the sales in Magnum d'Or effected by Gibraltar and Davis on behalf of the Flatt Nominees. Nor did the issuance qualify for any exemptions from registration.

29. After the sales of Magnum d'Or were executed, Gibraltar instructed the U.S. brokers to wire the sales proceeds from its accounts located in various locations in the United States to its account located at the Royal Bank of Canada in the Bahamas. Thereafter Gibraltar wired approximately $7.175 million directly back to Magnum d'Or.

FIRST CLAIM FOR RELIEF

Gibraltar and Davis, for Himself and as the Controlling Person of Gibraltar, Unlawfully Operated as Broker/Dealers Trading Securities for U.S. Customers Without Registering With the Commission in Violation of Sections 20(a) and 15(a)(1) of the Exchange Act [15 U.S.C. §§ 78t and 78o]

30. Paragraphs 1 through 29 are re-alleged and incorporated by reference.

31. Defendants Gibraltar and Davis have, by engaging in the conduct set forth above, made use of the mails and means or instrumentalities of interstate commerce to effect transactions in, and induced and attempted to induce the purchase or sale of, securities (other than exempted securities or commercial paper, bankers' acceptances, or commercial bills) without being registered with the Commission in accordance with Section 15(b) of the Exchange Act [15 U.S.C. § 78o(b)] and without complying with any exemptions promulgated pursuant to Section 15(a)(2) [15 U.S.C.§ 78o(a)(2)]

32. By reason of the foregoing, Gibraltar and Davis, for himself and as control person over Gibraltar, directly and indirectly, violated Section 15(a) of the Exchange Act, and are likely to commit such violations in the future unless enjoined from doing so.

SECOND CLAIM FOR RELIEF

Gibraltar and Davis Unlawfully Offered and Sold Unregistered Magnum d'Or Securities in Violation of Section 5(a) and 5(c) of the Securities Act [15 U.S.C. §§ 77e(a) and 77e(c)]

33. The Commission hereby incorporates Paragraphs 1 through 31 by reference.

34. Defendants Gibraltar and Davis have, by engaging in the conduct set forth above, directly or indirectly:

a. Made use of the means or instruments of transportation or communication in interstate commerce or of the mails, offered to sell or sold securities;

b. Carried or caused such securities to be carried through the mails or in interstate commerce, by means or instruments of transportation, for the purpose of sale or delivery after sale; although

c. No registration statement was filed with the Commission or was in effect with respect to the securities offering and sale by defendants prior to the offer or sale of these securities and no exemption from registration applied.

35. By reason of the foregoing, Defendants have directly or indirectly violated Sections 5(a) and 5(c) of the Securities Act [15 U.S.C. §§ 77e(a) and 77e(c)], and unless restrained and enjoined will continue to violate these provisions.

PRAYER FOR RELIEF

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

I.

Permanently restraining and enjoining each of the defendants, their agents, servants, employees, attorneys in-fact, and all persons in active concert or participation with them who receive actual notice of the injunction by personal service or otherwise, and each of them, from violating Section 15(a) of the Exchange Act [15 USC 78o], and Section 5 of the Securities Act [15 U.S.C. §§ 77e(a) and 77e(c)].

II.

Ordering Defendants to disgorge all profits realized from the unlawful trading alleged herein, with prejudgment interest.

III.

Ordering Defendants to pay civil monetary penalties pursuant to Section 21A of the Exchange Act [15 U.S.C. § 78u-1].

IV.

Granting such other relief as this Court may deem just and appropriate.

Dated: April 18, 2013

Respectfully submitted,

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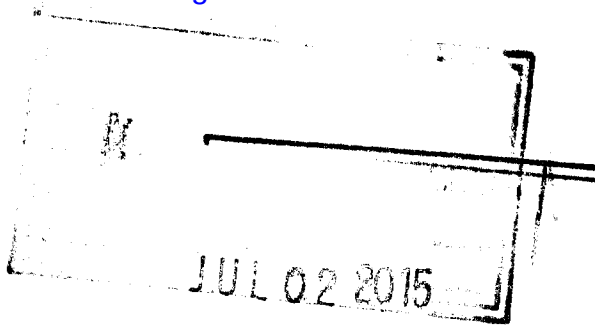
Exhibit B



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

-against-

GIBRALTAR GLOBAL SECURITIES, INC., and WARREN A. DAVIS,

Defendants.

ORDER

13 Civ. 2575 (GBD) (JCF)

GEORGE B. DANIELS, United States District Judge:

On June 12, 2015, the Plaintiff moved for the entry of a default judgment against Defendants Gibraltar Global Securities, Inc. and Warren Davis in the above-captioned action. (ECF No. 68.) The motion represents that the Defendants "have announced that they do not oppose the Plaintiff's motion and the entry of a default judgment," (*see id.*), which accords with Defendants' counsel's May 13, 2015 application to be relieved, and representation to this Court that an application for a default "will not be opposed by Mr. Davis, by this law firm or by any other law firm." (*See* ECF No. 65.)

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff's motion for a sanction of default judgment pursuant to Federal Rule of Civil Procedure 37(b)(2)(A)(vi) and Rule 37(d)(3) against Defendants Gibraltar Global Securities, Inc. and Warren Davis is GRANTED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendants Gibraltar Global Securities, Inc. and Warren Davis are permanently restrained and enjoined from violating Section 15(a) of the Securities Exchange Act, 15 U.S.C. § 78o, by, directly or indirectly, in the

absence of any applicable exemption: making use of the mails or any means or instrumentality of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) unless registered with the Commission.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendants Gibraltar Global Securities, Inc. and Warren Davis are permanently restrained and enjoined from violating Section 5 of the Securities Act, 15 U.S.C. § 77e, by, directly or indirectly, in the absence of any applicable exemption:

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

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

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

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraphs also bind the following who

receive actual notice of this Order by personal service or otherwise: (a) Defendants' officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Defendants or with anyone described in (a).

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this matter be and is hereby referred to Magistrate Judge James C. Francis IV for an inquest on disgorgement, prejudgment interest, and civil monetary penalties to be imposed.

Dated: New York, New York
July 2, 2015

SO ORDERED:

GEORGE B. DANIELS
United States District Judge

Exhibit C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,	13 Civ. 2575 (GBD) (JCF)
Plaintiff,	REPORT AND RECOMMENDATION
- against -	
GIBRALTAR GLOBAL SECURITIES, INC. and WARREN A. DAVIS,	
Defendants.	

TO THE HONORABLE GEORGE B. DANIELS, U.S.D.J.:

This is an action brought by the Securities and Exchange Commission (the "SEC") alleging various violations of the federal securities laws. The SEC asserts that between March 2008 and August 2012, Gibraltar Global Securities, Inc. ("Gibraltar"), a Bahamian company under the direction of its president and sole shareholder, Warren A. Davis, operated as an offshore, unregistered broker-dealer in violation of 15 U.S.C. §§ 78o(a)(1) and 78t(a) (the "Section 15 claims"). The SEC further alleges that the defendants engaged in the sale of millions of shares of unregistered stock in a company called Magnum d'Or in violation of 15 U.S.C. §§ 77e(a) and 77e(c) (the "Section 5 claims").

On July 2, 2015, the Honorable George B. Daniels, U.S.D.J., granted judgment by default for the SEC and referred the case to me for a calculation of damages. (Order dated July 2, 2015). I held an inquest on September 18, 2015; the defendants did not appear. Accordingly, the following findings are based on evidence the SEC presented at the hearing and information it submitted beforehand. For the reasons set forth below, I recommend that the defendants be

held liable, jointly and severally, for disgorgement in the amount of $14,449,176 and for prejudgment interest in the amount of $2,700,443. I further recommend that a tier two civil penalty be entered against each defendant in the amount of $3,667,146.

Background

From approximately March 2008 through August 2012, the defendants operated as unregistered broker-dealers, offering their customers -- many of whom resided in the United States -- a means to engage in securities transactions anonymously and without paying taxes on their profits. (Complaint, ¶ 1). During the relevant period, Gibraltar maintained a website that encouraged customers to establish brokerage accounts with the defendants by offering a variety of brokerage services, as well as confidentiality, protection against asset seizure, and tax avoidance. (Complaint, ¶¶ 15-16). For example, Gibraltar advertised the ability to form international business corporations ("IBCs") with nominee officers and directors, thereby allowing customers to trade through their IBCs without disclosing their identities. (Complaint, ¶¶ 1, 19). To enable customers to avoid U.S. taxes, Mr. Davis submitted withholding forms to brokers in the U.S. that falsely certified that Gibraltar -- a non-U.S. entity exempt from withholding -- was the beneficial owner of the income generated from its transactions. (Complaint, ¶ 20).

The defendants' illegal operation functioned as follows. First, Gibraltar received from its customers "shares of low-priced, thinly-traded stock." (Complaint, ¶ 21). Next, Gibraltar retitled

the shares in its name and deposited them in accounts it maintained with brokers in the U.S. (Complaint, ¶ 21-22). Gibraltar customers could then convey sell orders to the defendants, who conveyed those orders to their U.S. brokers, who sold the corresponding stock on the open market. (Complaint, ¶ 22). Once the U.S. brokers sold the shares, Gibralter instructed them to wire the proceeds to an account it maintained with the Royal Bank of Canada in the Bahamas. (Complaint, ¶ 23). Finally, after deducting its commission of 2-3%, Gibraltar wired the remaining sale proceeds back to its customers in the U.S. (Complaint, ¶ 23). Throughout the relevant time period, neither Gibraltar nor Mr. Davis were registered as brokers with the SEC as required by 15 U.S.C. § 78o(a)(1). (Complaint, ¶ 8).

The defendants' legal transgressions did not end there. Starting in November 2008 and continuing through September 2009, Dwight Flatt, David Della Sciucca, and Shannon Allen (referred to collectively in the complaint as "the Flatt nominees") deposited over 11 million shares of stock in a company called Magnum d'Or ("Magnum") in accounts they held with Gibraltar. (Complaint, ¶¶ 10-14, 25). Gibraltar retitled the Magnum shares -- which the Flatt nominees had acquired directly from the issuer -- in its own name and deposited them in four accounts it maintained with U.S. brokers. (Complaint, ¶¶ 25-26). Between November 2008 and December 2009, the defendants sold over 10 million shares of Magnum stock through their U.S. brokers, generating total proceeds of $11,384,589. (Complaint, ¶ 27). The defendants never filed a

registration statement with the SEC in connection with any sale of Magnum stock. (Complaint, ¶ 28). As described above, the U.S. brokers then wired the proceeds from these sales to Gibraltar's account in the Bahamas. (Complaint, ¶ 29). Gibraltar eventually wired approximately $7.175 million directly back to Magnum. (Complaint, ¶ 29).

In light of these violations, the SEC seeks disgorgement of the defendants' profits, including prejudgment interest, and a civil monetary penalty to be imposed against each defendant. (Memorandum in Support of Securities and Exchange Commission Motion for a Sanction of Default Judgment and Related Remedies Against Defendants Gibraltar Global Securities, Inc. and Warren Davis ("Pl. Memo.") at 1).

Discussion

A. Liability

Where a defendant has defaulted, all of the facts alleged in the complaint, except those relating to the amount of damages, must be accepted as true. See Greyhound Exhibitgroup, Inc. v. E.L.U.L. Realty Corp., 973 F.2d 155, 158 (2d Cir. 1992); see also City of New York v. Mickalis Pawn Shop, LLC, 645 F.3d 114, 137 (2d Cir. 2011) ("It is an 'ancient common law axiom' that a defendant who defaults thereby admits all 'well-pleaded' factual allegations contained in the complaint." (quoting Vermont Teddy Bear Co. v. 1-800 Beargram Co., 373 F.3d 241, 246 (2d Cir. 2004))). Nonetheless, a court "must still satisfy itself that the plaintiff has established a sound legal basis upon which liability may be

imposed." Jemine v. Dennis, 901 F. Supp. 2d 365, 373 (E.D.N.Y. 2012). The SEC asserts two causes of action against the defendants. The facts alleged establish the defendants' liability on both counts.

1. Mr. Davis' Liability

The SEC alleges that Mr. Davis "is the founder, president and sole owner of Gibraltar" and that during the relevant period he, "directly or indirectly, controlled Gibraltar's activities." (Complaint, ¶ 9). Because the SEC's theory for holding Mr. Davis liable under § 78o(a)(1) differs from its theory of his liability under § 77e, it is useful to address each theory at the outset.

Pursuant to 15 U.S.C. § 78t(a), anyone who "directly or indirectly, controls any person liable" under the Securities Exchange Act of 1934 (the "1934 Act") or its regulations is liable to the same extent as the controlled person, "unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation."[1] To establish "control person" liability, a plaintiff must show, at the very least, "(1) a primary violation by the controlled person and (2) control of the primary violator by the defendant." Special Situations Fund III QP, L.P. v. Deloitte Touche Tohmatsu CPA, Ltd., 33 F. Supp. 3d 401, 437 (S.D.N.Y. 2014).

With respect to the first element, I address below Gibraltar's liability under the 1934 Act as the controlled person. Regarding

[1] As used in the statute, "person" includes a company. 15 U.S.C. § 78c(a)(9).

the second element, as the founder, president, and sole owner of Gibraltar, Mr. Davis undoubtedly had control over that entity. See Dietrich v. Bauer, 126 F. Supp. 2d 759, 765 (S.D.N.Y. 2001) ("[O]wnership strongly suggests that the defendant has the potential power to influence and direct the activities of the wrongdoer."). Indeed, the complaint indicates that Mr. Davis was responsible for authorizing Gibraltar employees to place trades in the U.S. (Complaint, ¶ 9).

The Second Circuit has repeatedly stated that liability under § 78t(a) further requires "culpable participation" by the controlling person in the illegal conduct. See Special Situations Fund, 33 F. Supp. 3d at 438 (collecting cases).[2] To the extent

[2] Not only is the precise import of the phrase "culpable participation" unclear, see In re Philip Services Corp. Securities Litigation, 383 F. Supp. 2d 463, 486 (S.D.N.Y. 2004) ("[D]istrict courts in the Circuit are split as to what exactly the phrase means."), but its applicability to the present action is complicated by the fact that the concept developed in the context of holding a control person liable for another's fraud, see 69A Am. Jur. 2d Securities Regulation-Federal § 1211 ("Some courts require that, in order to hold liable a person who is deemed to control a person who commits fraud, it must be established that the controlling person was a culpable participant in the fraud." (emphasis added)); see also Carpenters Pension Trust Fund of St. Louis v. Barclays PLC, 750 F.3d 227, 236 (2d Cir. 2014) (discussing culpable participation in the context of control person liability for fraud); ATSI Communications, Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 108 (2d Cir. 2007) (same); Boguslavsky v. Kaplan, 159 F.3d 715, 720 (2d Cir. 1998)(same); SEC v. First Jersey Securities, Inc., 101 F.3d 1450, 1472 (2d Cir. 1998) (same); Lanza v. Drexel & Co., 479 F.2d 1277, 1299 (2d Cir. 1973) (arguing that the control person provision in the statute was intended to "impose liability only on those [control persons] . . . who are in some meaningful sense culpable participants in the fraud perpetrated by controlled persons" (emphasis added)). Indeed, much of the confusion surrounding the meaning of "culpable participation" has to do with how the phrase relates to the heightened pleading standards required in actions alleging fraud. See, e.g., Mishkin v. Ageloff, No. 97 Civ. 2690, 1998 WL 651065, at *22-25 (S.D.N.Y. Sept. 23,

that the SEC is required to establish Mr. Davis' culpable participation in Gibraltar's § 78o(a)(1) violation, it is sufficient that he both established Gibraltar's brokerage accounts in the U.S. and authorized Gibraltar (through its employees) to place trades. (Complaint, ¶ 9).

To establish Mr. Davis' liability for the Section 5 claims, the SEC does not rely on a theory of control person liability. Instead, the SEC would hold Mr. Davis directly liable under the statute, which requires only that the defendant be "a necessary and substantial participant in the unregistered sale[]" of securities. SEC v. Verdiramo, 890 F. Supp. 2d 257, 271 (S.D.N.Y. 2011). The SEC's allegations (described in detail below) concerning Mr. Davis' involvement in the unregistered sale of Magnum stock satisfy that standard.

2. Section 15 Claims

Section 15(a)(1) of the 1934 Act, 15 U.S.C. § 78o(a)(1), makes it unlawful for (1) an unregistered (2) broker or dealer (3) to make use of the mails or any means or instrumentality of interstate commerce (4) to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security. No showing of scienter is required to establish a violation under Section 15(a)(1). SEC v. Aronson, No. 11 Civ. 7033, 2013 WL 4082900, at *7 (S.D.N.Y. Aug. 6, 2013).

1998) (exploring relationship between culpable participation requirement and pleading standards for actions alleging fraud). Because the SEC has sufficiently pled facts that show Mr. Davis' culpable participation in Gibraltar's violation, I need not resolve this lack of clarity in the case law.

At the time the SEC filed its complaint, neither defendant had ever registered as a broker-dealer. (Complaint, ¶¶ 8-9, 24). Between 2008 and 2012, Gibraltar received stock shares from its customers, retitled the shares in its name, deposited the shares with U.S. brokers, sold the shares through the U.S. brokers pursuant to its customers' instructions, had the sale proceeds wired to an account maintained at the Royal Bank of Canada, and then forwarded the proceeds to its customers after deducting a 2-3% commission. (Complaint, ¶¶ 21-23). Accordingly, the SEC has adequately demonstrated that the defendants are unregistered and that Gibraltar effected transactions in, or induced the purchase and sale of securities. Therefore, the first and fourth requirements of the statute are met.

A "'broker' [is] any person engaged in the business of effecting transactions in securities for the account of others." 15 U.S.C. § 78c(a)(4)(A). Courts look at "regularity of participation in securities transactions 'at key points in the chain of distribution'" in determining whether a defendant acted as a broker. SEC v. StratoComm Corp., 2 F. Supp. 3d 240, 262 (N.D.N.Y. 2014) (quoting Massachusetts Financial Services, Inc. v. Securities Investor Protection Corp., 411 F. Supp. 411, 415 (D. Mass.), aff'd, 545 F.2d 754 (1st Cir. 1976); accord SEC v. Hansen, No. 83 Civ. 3692, 1984 WL 2413, at *10 (S.D.N.Y. April 6, 1984). Evidence of brokerage activity may include "receiving transaction-based compensation . . . and possessing client funds and securities." SEC v. Margolin, No. 92 Civ. 6307, 1992 WL 279735, at

*5 (S.D.N.Y. Sept. 30, 1992); see also 15 David A. Lipton, Broker-Dealer Regulation § 1:6 (describing various "badges" of broker status including "effecting transactions for others," "earning of a commission," "[s]olicitation of business," and "transmission of funds or securities in conjunction with transactions in such securities"). Gibraltar's activities, as described in the complaint, demonstrate that it acted as a broker as that term is defined in the statute.

Interstate commerce is defined in the statute to include "trade, commerce, transportation, or communication . . . between any foreign country and any State." 15 U.S.C. § 78c(a)(17). Operating from the Bahamas, Gibraltar accepted stock deposits from U.S. customers, deposited those stocks in U.S. brokerage accounts, received sell orders from its customers telephonically or through email, placed those orders with its U.S. brokers, instructed those brokers to wire sale proceeds to Gibraltar's account in the Bahamas, and wired the proceeds back to its U.S. customers after deducting their commission. These actions, alone and in combination, satisfy the interstate commerce element of Section 15(a). Cf. SEC v. Spinosa, 31 F. Supp. 3d 1371, 1376 (S.D. Fla. 2014) (holding that use of telephone and internet sufficient to satisfy interstate commerce requirement and collecting authority). Accordingly, the SEC has established the required elements of the Section 15(a)(1) claim for both Gibraltar and for its control person, Mr. Davis.

3. Section 5 Claims

"Section 5 [of the Securities Act of 1933, 15 U.S.C. § 77e,] requires that securities be registered with the SEC before any person may sell or offer to sell such securities." SEC v. Cavanagh, 445 F.3d 105, 111 (2d Cir. 2006). The elements of a Section 5 violation are as follows: "(1) That the defendant directly or indirectly sold or offered to sell securities; (2) that no registration statement was in effect for the subject securities; and (3) that interstate means were used in connection with the offer or sale." SEC v. Universal Express, Inc., 475 F. Supp. 2d 412, 422 (S.D.N.Y. 2007). Scienter is not a required element under Section 5, and the defendant bears the burden of proving the applicability of any registration exemption. SEC v. Czarnik, No. 10 Civ. 745, 2010 WL 4860678, at *11 (S.D.N.Y. Nov. 29, 2010).

Between November 2008 and September 2009, the Flatt nominees deposited more than 11 million shares of Magnum stock into accounts they held with the defendants. (Complaint, ¶ 25). More than 10 million of those shares were subsequently retitled in Gibraltar's name, deposited (by Mr. Davis) in Gibraltar's U.S. brokerage accounts via mail, and then sold (by both Gibraltar and Mr. Davis) through U.S. brokers between November 2008 and December 2009. (Complaint, ¶ 26-27). Gibraltar then instructed the U.S. brokers to wire the proceeds from those sales ($11,384,589) to its account with the Royal Bank of Canada in the Bahamas, at which point Gibraltar wired $7.175 million back to Magnum. (Complaint, ¶ 29). No registration statement was filed with the SEC with respect to

any of the sales of Magnum d'Or stock effected by the defendants. (Complaint, ¶ 28; Attestations of Larry Mills dated March 24, 2015, attached as Exhs. 4 & 5 to Pl. Memo.).

The facts related above are sufficient to establish that the defendants violated Section 5. By retitling the shares in Gibraltar's name, transferring the shares to U.S. brokers and instructing those brokers to sell the shares, the defendants sold securities within the meaning of Section 5. Cf. SEC v. Greenstone Holdings, Inc., No. 10 Civ. 1302, 2012 WL 1038570, at *11 (S.D.N.Y. March 26, 2012) ("A person not directly engaged in the transfer of the title of a security can be held liable if he has 'engaged in steps necessary to the distribution of [unregistered] security issues.'" (alteration in original) (quoting SEC v. Chinese Consolidated Benevolent Association, Inc., 120 F.2d 736, 741 (2d Cir. 1941))). The securities were unregistered and were transferred to the U.S. brokers by mail. Having refused to further participate in this matter (Order dated July 2, 2015, at 1), the defendants cannot satisfy their burden of proving the applicability of any registration exemption.

B. Damages

Once it demonstrates liability, a plaintiff must present evidence that establishes the amount of damages with reasonable certainty. See United States v. DiPaolo, 466 F. Supp. 2d 476, 483 (S.D.N.Y. 2006). Courts, in calculating damages, may make "all reasonable inferences from the evidence" the plaintiff has offered to support its demand for a default judgment. Labarbera v. ASTC

Laboratories Inc., 752 F. Supp. 2d 263, 270 (E.D.N.Y. 2010). Based on the pleadings, the documentary evidence, and the testimony presented at the inquest, the plaintiff is entitled to a judgment as follows.

1. Disgorgement

"Disgorgement of ill-gotten gains is a congressionally and judicially recognized remedy for a violation of the securities law." SEC v. Shehyn, No. 04 Civ. 2003, 2010 WL 3290977, at *7 (S.D.N.Y. Aug. 9, 2010) (footnote omitted) (awarding disgorgement for, inter alia, violation of Section 15); see also SEC v. Tavella, 77 F. Supp. 3d 353, 359-60 (S.D.N.Y. 2015) (awarding disgorgement for violation of Section 5). Disgorgement aims to deprive lawbreakers of all unjust enrichment and, thereby, deter others from committing similar violations. SEC v. Universal Express, Inc., 646 F. Supp. 2d 552, 563 (S.D.N.Y. 2009); see also SEC v. StratoComm Corp., 89 F. Supp. 3d 357, 367 (N.D.N.Y. 2015). While courts have broad discretion in determining both whether to order disgorgement and the amount to be disgorged, SEC v. First Jersey Securities, Inc., 101 F.3d 1450, 1474 (2d Cir. 1996), in setting the disgorgement amount, "a court must focus on the extent to which a defendant has profited from his [illegal conduct]," Universal Express, 646 F. Supp. 2d at 563; see also SEC v. Patel, 61 F.3d 137, 139 (2d Cir. 1995) ("[D]isgorgement need only be a reasonable approximation of profits causally connected to the violation." (alteration in original) (quoting SEC v. First City Financial Corp., 890 F.2d 1215, 1231 (D.C. Cir. 1989))). Any uncertainty in

calculating the defendants' illicit gains should be resolved in favor of the plaintiff. Patel, 61 F.3d at 140. The plaintiff here seeks two distinct disgorgement amounts: one amount based on the Section 15 claims and one amount based on the Section 5 claims. I address each in turn.

Regarding the Section 15(a) violation, the plaintiff argues for disgorgement of $3,486,867. (Pl. Memo. at 17). To arrive at this figure, the SEC has identified wire transfers from the defendants to their U.S.-based customers during the relevant period totaling approximately $116 million. (Declaration of Gary L. Peters dated June 11, 2015 ("Peters 6/11/15 Decl."), ¶ 17).[3] The SEC plausibly argues that these transactions represent the defendants' return of stock sale proceeds to their customers. (Pl. Memo. at 17). Based on admissions the defendants made, the SEC assumes that the defendants earned a 3% commission on these sales. (Pl. Memo. at 16); see also Wells Submission on Behalf of Warren Davis and Gibraltar Global Securities, Inc., attached as Exh. 6 to Pl. Memo., at 2). Taking 3% of the total outgoing transfers, the SEC arrives at its disgorgement amount. Considering that this amount (1) disregards more than $46 million worth of wire transfers to customers whose residency could not be determined (Peters 6/11/15 Decl., ¶ 15), and (2) almost certainly undervalues the

[3] The precise figure, based on a spreadsheet provided by the SEC, appears to be $116,228,909.52. (See Penalty and Disgorgement Table, attached as Exh. C to Peters 6/11/15 Decl.).

defendants' profits,[4] the SEC's Section 15 disgorgement calculation is a reasonable approximation of the defendants' illicit profits. Accordingly, the SEC should be awarded the amount of disgorgement it requested in connection with the defendants' Section 15 violation, i.e., $3,486,867.

The basis for the disgorgement amount the SEC requests in connection with the Section 5 claims is more attenuated but ultimately also represents a fair approximation of the defendants' ill-gotten gains. The amount -- $10,962,309 (Revised Proposed Findings of Fact and Conclusions of Law Submitted by Plaintiff Securities and Exchange Commission ("Revised Proposed Findings"), ¶ 25) -- represents the total revenue generated by the defendants' sale of Magnum stock, less some minor deductions.[5] What the SEC's figure does not account for is the $7,175,757 that the defendants wired back to Magnum and its subsidiary. (Peters 6/11/15 Decl., ¶ 23). The SEC would have the Court overlook this transfer and treat all of the revenue from the illegal sales as the defendants' profit. According to the SEC, "[t]he use of proceeds as the

[4] By the time the defendants wired proceeds back to their customers they would presumably have already deducted their commission. As such, the SEC calculated the defendants' commission based on a post-commission amount. Had the SEC based the defendants' commission on the pre-commission amount, they would have come up with profits of $3,594,708 (i.e., 116,228,909.52/.97 x 3%).

[5] To avoid having the defendants disgorge commissions already accounted for in the Section 15 calculation, the SEC reduced the total proceeds by 3%. (Peters 6/11/15 Decl., ¶ 25). The SEC further reduced the requested disgorgement amount by $80,742 to account for a disgorgement payment it received from one of the Flatt nominees. (Declaration of Gary L. Peters dated Sept. 9, 2015 ("Peters 9/9/15 Decl."), ¶¶ 1-3).

appropriate measurement of Section 5 disgorgement is supported by case law." (Pl. Memo. at 17-18). While that may be true, the SEC's position conflates two distinct issues: (1) Whether the Court can treat the total revenue generated from the sale of Magnum stock as being subject to disgorgement and (2) whether the Court can order the defendants in this case to disgorge that amount.

It is well-settled that a disgorgement award should reflect the amount by which the defendant has enriched himself through illegal conduct. See SEC v. Inorganic Recycling Corp., No. 99 Civ. 10159, 2002 WL 1968341, at *2 (S.D.N.Y. Aug. 23, 2002) ("The principal issue, therefore, in determining the amount of disgorgement to be ordered is the amount of gain received . . . ." (emphasis added)). However, where a defendant fails to come forward with evidence that distinguishes between his total proceeds and his net gain, it is within a court's discretion to use the amount of proceeds as the appropriate measure of disgorgement. See SEC v. Platforms Wireless International, Corp., 617 F.3d 1072, 1096-97 (9th Cir. 2010) ("[G]iven this failure of proof from defendants, it was not an abuse of discretion for the district court to conclude that the entire proceeds from the sale were a 'reasonable approximation' of the profits from the transactions."); cf. First City Financial Corp., 890 F.2d at 1232 (shifting to defendants burden of demonstrating that SEC's disgorgement calculation was not reasonable approximation of profit); SEC v. Johnson, No. 03 Civ. 177, 2006 WL 2053379, at *8 (S.D.N.Y. July 24, 2006) (same).

It does not necessarily follow, however, that these defendants should be ordered to disgorge all proceeds generated by their sale of the unregistered Magnum stock. On the one hand, courts have the discretion to reduce the disgorgement amount by any necessary transaction costs associated with the illegal conduct. See SEC v. McCaskey, No. 98 Civ. 6153, 2002 WL 850001, at *4 (S.D.N.Y. March 26, 2002) ("Courts in this Circuit consistently hold that a court may, in its discretion, deduct from the disgorgement amount any direct transaction costs . . . that plainly reduce the wrongdoer's actual profit."). The SEC's own submissions make it clear that the majority of the revenue generated by the sale of Magnum stock "ultimately flowed to Magnum d'Or," (Peters 6/11/15 Decl., ¶ 23), presumably reducing the defendants' actual profits. On the other hand, a court's discretion to award disgorgement is not limited to a defendant's personal pecuniary gain. See SEC v. Contorinis, 743 F.3d 296, 306 (2d Cir. 2014) ("The amount a court may order a wrongdoer to disgorge may not exceed the total amount of gain from the illegal action, but that does not entail that the gain must personally accrue to the wrongdoer."), petition for cert. filed, No. 14-471 (U.S. Oct. 23, 2014); United States Securities and Exchange Commission v. Universal Express, Inc., 438 F. App'x 23, 26 (2d Cir. 2011) (upholding disgorgement award that included $2.6 million defendant paid to separate entity); SEC v. Tourre, 4 F. Supp. 3d 579, 590 (S.D.N.Y. 2014) ("The Second Circuit has upheld the disgorgement of all profits received, even though a portion of those profits were later transferred to another party . . . .").

Alternatively, courts have discretion to impose joint and several liability for "combined profits" where, as is the case here, there are "collaborating or closely related parties," i.e., the defendants, Magnum, and the Flatt nominees. See SEC v. AbsoluteFuture.com, 393 F.3d 94, 97 (2d Cir. 2004); see also SEC v. Verdiramo, 907 F. Supp. 2d 367, 373 & n.12 (S.D.N.Y. 2012) (stating that courts have discretion to impost joint and several liability for combined profits and collecting cases).

The indispensable role the defendants played in selling the unregistered Magnum stock, combined with their refusal to participate in discovery (and thereby shed light their relationship with Magnum and the Flatt nominees), makes it appropriate to hold them jointly and severally liable for the total proceeds generated by their illegal conduct.[6] Accordingly, based on the evidence the SEC has offered, I recommend that the defendants be held jointly and severally liable for a disgorgement judgment of $10,962,309 in connection with their Section 5 violation.

2. Prejudgment Interest

A court's discretion in fashioning a remedy for violations of the securities laws includes the discretion to both order the payment of prejudgment interest and set the rate at which such interest is calculated. Tourre, 4 F. Supp. 3d at 591. This remedy

[6] Of course, in the event that the defendants actually disgorge these proceeds, they could seek contribution from other individuals or entities involved in the scheme. See Steed Finance LDC v. Laser Advisers, Inc., 258 F. Supp. 2d 272, 277 (S.D.N.Y. 2003) (setting out requirements for stating claim for contribution under federal securities laws).

"ensure[s] that the defendant does not profit [by] obtaining the time-value of any unlawful profits." SEC v. World Information Technology, Inc., 590 F. Supp. 2d 574, 578 (S.D.N.Y. 2008). In general, the rate used to calculate prejudgment interest is the IRS underpayment rate, see 26 U.S.C. § 6621(a)(2), which "reflects what it would have cost to borrow money from the government and therefore reasonably approximates one of the benefits the defendant derived" from his illegal conduct. First Jersey Securities, 101 F.3d at 1476.

The SEC has calculated prejudgment interest separately (and differently) for each of the disgorgement amounts. To calculate interest for the Section 15 violation, the SEC isolated the defendants' commissions on a month-by-month basis and then applied the interest rate at the end of each month, compounding the interest on a quarterly basis. (Peters 6/11/15 Decl., ¶ 20; Transcript dated Sept. 18, 2015, at 5-6). This resulted in a total of $614,995 in prejudgment interest for the Section 15 violation. For the section 5 violation, the SEC simply took the total disgorgement amount and calculated interest starting on the date of the last relevant transaction. (Peters 9/9/15 Decl., ¶ 3). This resulted in a total of $2,085,488 in prejudgment interest for the Section 5 violation. The SEC's calculations accurately reflect the value of the "interest free loan" the defendants received by virtue of their violations. SEC v. Moran, 944 F. Supp. 286, 295 (S.D.N.Y. 1996). Accordingly, I recommend that the defendants be held jointly and severally liable for $2,700,443 in prejudgment

interest.

3. Civil Penalties

The federal securities laws empower courts to impose civil penalties for violations based on a three-tiered system. See 15 U.S.C. §§ 77t(d)(2) & 78u(d)(3)(B). Under any tier, a court has the authority to impose a penalty equal to the amount of "pecuniary gain" the defendant received as a result of the violation.[7] Id. Below that amount, the size of the penalty is left to the court's discretion. SEC v. Kern, 425 F.3d 143, 153 (2d Cir. 2005). The factors a court may consider in setting the size of the penalty to impose include:

[7] As a practical matter, the tier designation for the defendants' violations in this case is mostly beside the point, as their pecuniary gain far exceeds the alternative cap for even the highest tier (three) violation. See 15 U.S.C. §§ 77t(d)(2) & 78u(d)(3)(B) (setting alternative cap for tier three violations at $100,000 for a natural person and $500,000 for any other person). Moreover, it is not necessarily true that a lower tier penalty corresponds to a lower penalty amount. Compare SEC v. Jean-Pierre, No. 12 Civ. 8886, 2015 WL 1054905, at *11-12 (S.D.N.Y. March 9, 2015) (assessing tier two penalty of $1,425,000), and SEC v. Elliott, No. 09 Civ. 7594, 2012 WL 2161647, at *11 (S.D.N.Y. June 12, 2012) (awarding tier one penalties of $6,500 per transaction in case involving at least 328 transactions), with StratoComm Corp., 89 F. Supp. 3d at 373 (awarding tier three penalties of $100,000, $50,000 and $25,000 against three separate defendants). One way in which the tier could be relevant here is if the Court were to treat each of the defendants' transactions as a distinct violation, see SEC v. Pentagon Capital Management PLC, 725 F.3d 279, 288 n.7 (2d Cir. 2013) ("[W]e find no error in the district court's methodology for calculating the maximum penalty by counting each [transaction] as a separate violation."), which, depending on the tier, could quickly lead to an exorbitantly high maximum penalty. However, in this case the defendants' illicit profits seem an appropriate benchmark for establishing their civil penalty. Regardless of the tier assigned to a violation, the appropriate amount of the penalty imposed is determined by the "particular facts and circumstances" in each case. SEC v. Opulentic, LLC, 479 F. Supp. 2d 319, 331 (S.D.N.Y. 2007) (quoting Moran, 944 F. Supp. at 297).

> (1) the egregiousness of the violations at issue, (2) defendants' scienter, (3) the repeated nature of the violations, (4) defendants' failure to admit 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 that would otherwise be appropriate should be reduced due to defendants' demonstrated current and future financial condition.

SEC v. Lybrand, 281 F. Supp. 2d 726, 730 (S.D.N.Y. 2003). Unlike with disgorgement, a court may not impose a civil penalty on a joint and several basis. SEC v. Pentagon Capital Management PLC, 725 F.3d 279, 288 (2d Cir. 2013). Furthermore, the amount of "pecuniary gain" is limited to gains received within a five-year statute of limitations.[8] SEC v. Cole, No. 12 Civ. 8167, 2014 WL 4723306, at *5 (S.D.N.Y. Sept. 22, 2014).

Of the relevant considerations listed above, factors 1, 3, 4, and 6 suggest that a substantial civil penalty is appropriate in this case. The defendants' repeated Section 15 violations generated hundreds of millions of dollars in revenue while both encouraging and helping customers avoid taxes. The Section 5 violations resulted in millions of unregistered Magnum shares being sold in the open market. Mr. Davis unequivocally declared his intention to cease cooperating in this litigation but never admitted to any wrongdoing on the part of either defendant. (Declaration of Warren A. Davis dated April 23, 2015, attached as Exh. 1 to Letter of Philip C. Patterson dated April 24, 2015, ¶ 5).

[8] The SEC's proposed penalty amounts account for the statute of limitations by excluding gains earned prior to May 2008. (Peters 6/11/15 Decl., ¶ 18).

As to the defendants' scienter, the SEC has argued persuasively that the defendants committed the Section 5 violations knowing of Magnum's illegal capital-raising scheme, but otherwise ignored the issue. (Pl. Memo. at 11). The SEC has not attempted to demonstrate that the defendants' conduct created substantial loss or a risk thereof, although the SEC emphasizes the sheer volume of illegal transactions.

In light of these considerations, the SEC argues that the amount of each defendant's penalty should correspond to half of the total disgorgement amount, including prejudgment interest but less any gains generated outside the statutory period. (Pl. Memo. at 20). In the absence of any information as to how profits were shared as between Gibraltar and Mr. Davis, I agree that it is reasonable to apportion half of their combined profits to each defendant for purposes of establishing their respective penalties.[9] (Pl. Memo. at 20). I further agree that the complaint establishes at the very least that the defendants acted with "deliberate or

[9] Courts in this circuit have developed divergent interpretations of the statutory phrase "gross amount of pecuniary gain to such defendant" in light of the Second Circuit's prohibition on joint and several liability for civil penalties. On the one hand, one could read the statute as prohibiting the imposition of separate civil penalties that, when combined, exceed the total gain shared by multiple defendants. See SEC v. Syndicated Food Service International, Inc., No. 04 CV 1303, 2014 WL 1311442, at *26 n.22 (E.D.N.Y. March 28, 2014). On the other hand, the statute could be construed to permit the imposition of a civil penalty against every defendant equal to the total amount of shared profit, so long as liability is not joint and several. See SEC v. Amerindo Investment Advisors Inc., No. 05 Civ. 5231, 2014 WL 2112032, at *11 & n.11 (S.D.N.Y. May 6, 2014), appeal filed, No. 14-2425 (2d Cir. July 6, 2014). Whether or not a $14 million penalty could be imposed against each of these defendants, I do not consider such a penalty necessary.

reckless disregard of a regulatory requirement," see 15 U.S.C. §§ 77t(d)(2)(B) & 78u(d)(3)(B)(ii), making tier two penalties appropriate.

However, I disagree with the SEC as to the appropriate size of the penalty in this case. The SEC has not cited any case law to suggest that a $7,246,024 civil penalty for each defendant is reasonable in this case. In light of the substantial disgorgement and prejudgment interest award I have recommended, the "punitive and deterrent purposes of the civil penalty statutes" can be achieved by penalties below the maximum. SEC v. Razmilovic, 822 F. Supp. 2d 234, 282 (E.D.N.Y. 2011) (assessing civil penalty equal to half of maximum possible penalty in light of other relief granted), vacated in part on other grounds, 738 F.3d 14 (2d Cir. 2013). I recommend that each defendant be assessed a tier two civil penalty of $3,667,146. This figure represents (1) the commissions received in connection with the Section 15 violations during the statute of limitations period ($3,448,998) (Peters 6/11/15 Decl., ¶ 21), plus (2) the total proceeds generated by the Section 5 violations after accounting for the SEC's double-counting deduction ($11,043,051) (Peters 6/11/15 Decl., ¶ 25), less (3) the $7,157,757 that the defendants wired back to Magnum (Peters 6/11/15 Decl., ¶ 23), (4) divided equally between the defendants. This substantial amount maintains a relationship between the penalty and the defendants' ill-gotten gains, see SEC v. One Wall Street, Inc., No. 06 CV 4217, 2008 WL 5082294, at *9 (E.D.N.Y. Nov. 26, 2008) (noting that penalties should bear some relationship to amount of

ill-gotten gains and collecting cases), while adequately punishing the defendants for their violations.

Conclusion

For the reasons stated above, I recommend a judgment be entered against the defendants as follows:

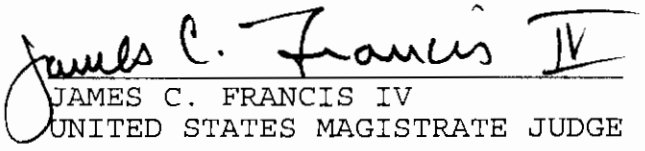
1. Disgorgement of $14,449,176, representing the defendants' illicit profits, joint and several;

2. Disgorgement of $2,700,443, representing prejudgment interest on the defendants' illicit profits, joint and several; and

3. A tier two civil penalty against each defendant in the amount of $3,667,146.

Pursuant to 28 U.S.C. § 636(b)(1) and Rules 72, 6(a), and 6(d) of the Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from this date to file written objections to this Report and Recommendation. Such objections shall be filed with the Clerk of the Court, with extra copies delivered to the chambers of the Honorable George B. Daniels, Room 1310, 500 Pearl Street, New York, New York 10007, and to the chambers of the undersigned, Room 1960, 500 Pearl Street, New York, New York 10007. Failure to file timely objections will preclude appellate review.

Respectfully submitted,



JAMES C. FRANCIS IV
UNITED STATES MAGISTRATE JUDGE

Dated: New York, New York
October 16, 2015

Copies transmitted this date to:

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Exhibit D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

-against-

GIBRALTAR GLOBAL SECURITIES, INC. and WARREN A. DAVIS,

Defendants.

MEMORANDUM DECISION AND ORDER

13 Civ. 2575 (GBD) (JCF)

GEORGE B. DANIELS, United States District Judge:

The Securities and Exchange Commission ("the SEC") brought this action alleging violations of the federal securities laws by Defendants, Gibraltar Global Securities, Inc. ("Gibraltar"), a Bahamian broker-dealer, and its president and sole shareholder, Warren A. Davis ("Davis"). (Compl., (ECF No. 1).) According to the SEC, Gibraltar, under Davis's direction operated as an offshore, unregistered broker-dealer in violation of Section 15(a)(1) of the Exchange Act of 1934, 15 U.S.C. §§ 78o(a)(1), 78t(a). (*See id.*, ¶¶ 30-32.) The SEC also alleged that Gibraltar and Davis engaged in the sale of millions of shares of unregistered stock in a company, Magnum d'Or, in violation of Sections 5(a) and (c) of the Securities Act of 1933, 15 U.S.C. § 77e(a), (c). (*See id.*, ¶¶ 33-35.)

On June 12, 2015, the SEC moved for the entry of a default judgment against Defendants, representing that Defendants "repeatedly announced that they will no longer defend themselves." (Mot. for Default J.., (ECF No. 68); Mem. in Support of Mot. for Default J., (ECF No. 69), at 3; *see* Aff. of Warren A. Davis, (ECF No. 63-1), ¶¶ 2, 5, 7.) On July 2, 2015, this Court entered default judgment for the SEC against Defendants. (July 2, 2015 Order, (ECF No. 73).) This Court referred the case to Magistrate Judge James C. Francis for an inquest on damages, (ECF

No. 71), which Magistrate Judge Francis held on September 18, 2015. Defendants failed to appear at the inquest hearing. (Inquest Hr'g Tr., (ECF No. 82), at 2:6-8.)

Before this Court is Magistrate Judge Francis's October 16, 2015 Report and Recommendation ("Report," (ECF No. 81)), recommending that Defendants be held jointly and severally liable for disgorgement in the amount of $14,449,176 and for prejudgment interest in the amount of $2,700,443. (Report at 2.) Magistrate Judge Francis also recommended that this Court enter a tier two civil penalty against each Defendant in the amount of $3,667,146. (*See id.*) This Court adopts those recommendations IN PART, differing as to the proper calculation of total prejudgment interest in the amount of $2,700,483.

I. LEGAL STANDARD

This Court may accept, reject, or modify, in whole or in part, the findings set forth in the Report. 28 U.S.C. § 636(b)(1)(C). When no party files objections to a Report, the Court may adopt the Report if "there is no clear error on the face of the record." *Adee Motor Cars, LLC v. Amato*, 388 F. Supp. 2d 250, 253 (S.D.N.Y. 2005) (quoting *Nelson v. Smith*, 618 F. Supp. 1186, 1189 (S.D.N.Y. 1985)); *Wilds v. United Parcel Service, Inc.*, 262 F. Supp. 2d 163, 169 (S.D.N.Y. 2003) ("To accept the report and recommendation of a magistrate, to which no timely objection has been made, a district court need only satisfy itself that there is no clear error on the face of the record" (internal citations and quotation marks omitted).).

Magistrate Judge Francis advised the parties that failure to file timely objections to the Report would constitute a waiver of those objections on appeal. (Report at 23); *see also* 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b). As of the date of this Order, no objection to the Report has been filed. This Court is satisfied that the Report contains no clear error of law and adopts the Report, differing only as to the proper calculation of total prejudgment interest.

II. DEFENDANTS' LIABILITY

Where, as here, a defendant has defaulted, all of the facts alleged in the complaint, except those relating to the amount of damages, must be accepted as true. *See Greyhound Exhibitgroup, Inc. v. E.L.U.L. Realty Corp.*, 973 F.2d 155, 158 (2d Cir. 1992). Magistrate Judge Francis properly found the facts alleged in the Complaint established a "sound legal basis upon which liability may be imposed." (*See* Report, at 4-5 (citing *Jemine v. Dennis*, 901 F. Supp. 2d 365, 373 (E.D.N.Y. 2012)).)

A. SECTION 15

Under Section 15 of the Exchange Act of 1934, it is unlawful for an unregistered broker or dealer to make use of the mails or any means or instrumentality of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security. *See* 15 U.S.C § 78o(a)(1). A showing of scienter is not required to establish a Section 15(a)(1) violation. *See S.E.C. v. Aronson*, No. 11 Civ. 7033, 2013 WL 4082900, at *7 (S.D.N.Y. Aug. 6, 2013).

The Report correctly held that the SEC sufficiently alleged that Gibraltar "effected transactions in, or induced the purchase and sale of securities." (Report at 8; Compl., ¶¶ 16-23.) Gibraltar "received from its customers 'shares of low-priced, thinly-traded stock,'" retitled those shares in its name, and deposited them in its own U.S.-based brokerage accounts. (Report at 2-3 (citing Compl., ¶¶ 21-22).) Accordingly, Gibraltar's customers then conveyed sell orders to Defendants using Gibraltar's website, e-mail, or telephone, for Defendant's U.S. brokers[1] to sell

[1] A "broker is any person engaged in the business of effecting transactions in securities for the account of other." (*See* Report, at 8 (quoting 15 U.S.C. § 78c (a)(4)(A)) (internal quotation marks omitted)).) Gibraltar was clearly a broker under Section 15(a) because evidence of brokerage activity may include "receiving transaction-based compensation . . . and possessing client funds and securities." (*See id.*

the customers' stock under Gibraltar's name on the open market. (*See* Compl., ¶ 22.) Gibraltar instructed the U.S. brokers to wire the sale proceeds to a Royal Bank of Canada account Gibraltar maintained in the Bahamas. (*See id.*, ¶ 23; 15 U.S.C § 78o (a)(1); *S.E.C. v. Cavanagh*, 445 F.3d 105, 108-110 (2d Cir. 2006); *S.E.C. v. Spinosa*, 31 F. Supp. 3d 1371, 1376 (S.D. Fla 2014) (holding that the use of telephone and internet is sufficient to satisfy interstate commerce requirement of Section 15(a)).) After deducting its commission of 2-3% of the proceeds, Gibraltar wired the remaining money back to its U.S.-based customers, thereby employing instrumentalities of interstate commerce to effect transactions in any security. (*See* Report, at 8 (citing Compl. ¶¶ 21-23).)

Magistrate Judge Francis also found that the Complaint established Defendant Davis' "control person" liability under Section 15, as well as Gibraltar's liability as a "controlled person" for the time period of March 2008 until August 2012. (*See id*, at 2, 5-6; Comp., ¶ 9.) *See also* 15 U.S.C. § 78t. During this time, Defendant Davis was the "founder, president, and sole owner" of Gibraltar, and the Complaint indicates that Davis had more than "the potential power to influence and direct the activities of the wrongdoer," Gibraltar. *See Dietrich v. Bauer*, 126 F. Supp. 2d 759, 765 (S.D.N.Y. 2001). (*See* Comp., ¶ 9.) Davis "was responsible for authorizing Gibraltar employees to place trades in the U.S," thereby fulfilling Section 15's "culpable participation" requirement for establishing liability. (*See* Report, at 6-7 (citing Compl., ¶ 9; *Special Situations Fund III QP, L.P. v. Deloitte Touche Tohmatsu CPA, Ltd.*, 33 F. Supp. 3d 401, 438 (S.D.N.Y. 2014) (collecting cases)).)

Throughout this time period, neither Defendant complied with Section 15(a)(1)'s requirement to register as broker-dealers with the SEC with regard to Magnum stock, or any

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(citing *S.E.C. v. Margolin*, No. 92 Civ. 6307, 1992 WL 278735, at *5 (S.D.N.Y. Sept. 30, 1992) (internal quotation marks omitted)).)

other stock. *See* 15 U.S.C. § 78o(a)(1); (Report, at 3-4, 8 (citing Compl., ¶¶ 8-9, 24, 28)). Nor had Defendants registered as a broker-dealer at the time the SEC filed the Complaint. (Report, at 8 (citing Compl., ¶¶ 8-9, 28).) Defendants' conduct thereby violated Section 15(a) of the Exchange Act of 1934.

B. SECTION 5

A defendant violates Section 5 of the Securities Act of 1933 if (1) he directly or indirectly sold or offered to sell securities, (2) no registration statement was in effect for the subject securities, and (3) interstate means were used in connection with the offer or sale. *See S.E.C. v. Universal Exp., Inc.*, 475 F. Supp. 2d 412, 422 (S.D.N.Y. 2007); 15 U.S.C. § 77e. Section 5 liability does not require scienter, and the defendant bears the burden of proving whether any registration exemption is applicable. *See S.E.C. v. Czarnik*, No. 10 Civ 745, 2010 WL 4860678, at *11 (S.D.N.Y. Nov. 29, 2010).

Accordingly, Magistrate Judge Francis properly found that the facts established that Defendants violated Section 5. (*See Report*, at 10-11.) Specifically, from November 2008 until about September 2009, Dwight Flatt, David Della Sciucca, and Shannon Allen (together, "the Flatt nominees") deposited with Gibraltar over 11 million shares of stock in a company called Magnum d'Or that the nominees received from the issuer. (*See* Report, at 3 (citing Compl. ¶¶ 10-14, 25).) Following the general scheme described above, Defendants sold over 10 million of those Magnum shares through their U.S. brokers to generate $11,384,589 in proceeds, in violation of Section 5. (*See id.* at 3 (citing Compl. ¶¶ 10-14, 25, 27)). Gibraltar eventually wired about $7.175 million directly back to Magnum. (*See id.* at 4 (citing Compl. ¶ 29).) During this time, the Magnum securities were unregistered and transferred from the Bahamas to Defendant's U.S. brokers via mail. (*See id.* at 11.) The facts as alleged in the Complaint therefore

established Defendants' liability for violating Section 5 of the 1933 Securities Act. *See Universal Exp., Inc.*, 475 F. Supp. at 422.

III. DISGORGEMENT OF ILL-GOTTEN GAINS

Magistrate Judge Francis recommended that the SEC be awarded $3,486,867 in disgorgement from Defendants' illicit profits in violation of Section 15(a)(1) as requested by the SEC. (*See* Report, at 14; Pl.'s Revised Proposed Findings of Fact and Conclusions of Law, (ECF No. 78), ¶ 18.) This amount was calculated as follows:

Proceeds wire-transferred to U.S.-based customers	$116,228,909.52
Defendants' commission rate	x 0.03
Section 15 Disgorgement	$3,486,867

This Court finds that recommendation reasonable because although any uncertainty in calculating the defendants' illicit gains "should be resolved in favor of the plaintiff," the amount of disgorgement requested for Defendants' Section 15 violations, in fact, underestimates Defendants' total ill-gotten gains. *See S.E.C. v. Patel*, 61 F.3d 137, 140 (2d Cir. 1995) (agreeing "with the District of Columbia Circuit that any 'risk of uncertainty [in calculating disgorgement] should fall on the wrongdoer whose illegal conduct created that uncertainty" (alteration in original) (internal quotation marks omitted).). First, the proceeds amount disregards more than $46 million worth of wire transfers to Gibraltar customers with unknown residency. (*See* Report, at 13 (citing Peters June 11, 2015 Decl., ¶¶ 15-17, (ECF No. 70)).)

Additionally, the SEC's requested amount clearly underestimates Defendants' ill-gotten Section 15 gains, which were calculated with the assumption that by the time Defendants wired the proceeds back to their customers, Defendants would have already deducted their commission (e.g. post-commission). (*See id.* at 13-14, n.4.) Had the SEC based its Section 15 disgorgement

request on the pre-commission amount, that different amount would have been $3,594,708.54, calculated as follows:

Proceeds wire-transferred to U.S.-based customers	$116,228,909.52
Accounting for 3% already taken	÷ 0.97
Total pre-commission proceeds	$119,823,618.06
Defendants' commission rate	x 0.03
Pre-commission ill-gotten gains	$3,594,708.54

Because disgorgement "'need only be a reasonable approximation of profits causally connected to the violation,'" this Court accepts the Report's recommendation as reasonable. *Patel*, 61 F.3d at 139 (quoting *S.E.C. v. First City Financial Corp.*, 890 F.2d 1215, 1231 (D.C. Cir. 1989)).

Magistrate Judge Francis also recommended that the SEC be awarded $10,962,309 in Section 5 disgorgement, to be paid jointly and severally by Defendants. This amount was calculated as follows:

Pre-commission ill-gotten Magnum proceeds	$11,384,589
Defendants' estimated commission from Section 15 (at 3%)[2]	- $341,538
Adjusted pre-commission Magnum proceeds	$11,043,051
Disgorgement payment from Flatt Nominee Allen[3]	- $80,742
Section 5 Disgorgement	$10,962,309

Magistrate Judge Francis properly noted that the SEC's submissions make clear that Defendants' conveyed the majority of the $11,384,589 revenue generated by the sale of Magnum stock back to Magnum d'Or in the amount of $7,175,757, presumably reducing Defendants' profits. (*See* Report at 14, 16; Peters June 11, 2015 Decl., ¶ 23, (ECF No. 70).) However, the

[2] The SEC subtracted the Defendants' 3% commission rate from the initial Magnum proceeds to avoid "any potential double counting." (*See* Report, at 14 n.5 (citing Peters June 11, 2015 Decl., ¶ 25).)

[3] The SEC learned that one of the Flatt Nominees, Shannon Allen, had already paid disgorgement as of September 9, 2015 and adjusted their calculations accordingly. (*See* Report, at 14 n.5 (citing Peters Sept. 9, 2015 Decl., (ECF No. 79), ¶¶ 1-3); Pl.'s Revised Proposed Findings of Fact and Conclusions of Law, ¶ 25.)

SEC did not subtract the approximately $7 million sent back to Magnum in its calculation of the Magnum proceeds. (*See* Peters June 11, 2015 Decl., ¶ 23.) Because district courts have discretion to award disgorgement beyond a defendant's personal pecuniary gain, and because Defendants played an "indispensable role" in selling the unregistered Magnum stock and also refused to participate in discovery, Magistrate Judge Francis properly recommended that it is appropriate and within the District Court's discretion to hold Defendants jointly and severally liable for the total proceeds in the amount of $10,962,309. *See S.E.C. v. Contorinis*, 743 F.3d 296, 306 (2d Cir. 2014), *petition for cert. filed*, No. 14-471 (U.S. Oct. 23, 2014); *S.E.C. v. Tourre*, 4 F. Supp. 3d 579, 590 (S.D.N.Y. 2014) ("The Second Circuit has upheld the disgorgement of all profits received, even though a portion of those profits were later transferred to another party . . . . "); (Report, at 16-17).

IV. PREJUDGMENT INTEREST ON ILL-GOTTEN GAINS

The Report recommends that the Defendants be held jointly and severally liable for $2,700,443 in prejudgment interest on their ill-gotten gains. (*See* Report, at 18.) Awards of prejudgment interest and disgorgement ensure that defendants do not profit from their ill-gotten gains, including the time value of money. *See SEC v. World Info. Tech., Inc.*, 590 F. Supp. 2d 574, 578 (S.D.N.Y. 2008).

Magistrate Judge Francis properly weighed

> the need to fully compensate the wronged party for actual damages suffered[,] . . . considerations of fairness and the relative equities of the award[,] . . . the remedial purpose of the statute involved[,] . . . and other such factors as are deemed relevant by the court.

Id. (quoting *SEC v. First Jersey, Secs., Inc.*, 101 F.3d 1450, 1476 (2d Cir. 1996)) (internal quotation marks omitted)). Magistrate Judge Francis derived the total amount of the

prejudgment interest[4] from the SEC's separate calculations of $614,995 in interest for Defendants' Section 15 violations and $2,085,488 for the Section 5 violations. (*See* Report, at 18 (citing Peters Sept. 9, 2015 Decl., ¶ 3; Tr. at 5:9-6:17).) Magistrate Judge Francis properly found that the SEC's separate calculations for Section 15 and Section 5 prejudgment interest accurately reflect the value of the "interest free loan" Defendants received as a result of their violations. (*See id.* (citing *S.E.C. v. Moran*, 944 F. Supp. 286, 295) (S.D.N.Y. 1996).)

This Court accepts Magistrate Judge Francis' recommendation that Defendants be held jointly and severally liable for prejudgment interest calculated as the sum of the prejudgment interest amounts for the Section 15 and Section 5 violations. *See S.E.C. v. Tourre*, 4 F. Supp. 3d 579, 591 (S.D.N.Y. 2014) ("Whether to grant prejudgment interest, and the rate of any such interest, is left to the broad discretion of this Court."); *see also* 15 U.S.C. § 77t(d)(2) ("The amount of the penalty shall be determined by the court in light of the facts and circumstances."). However, upon this Court's review of the calculations done by the S.E.C., the total prejudgment interest is not $2,700,443, but $2,700,483.[5]

V. CIVIL MONETARY PENALTIES

The Report further recommends that each Defendant pay a second-tier civil monetary penalty of $3,667,146. (*See* Report, at 22.) When determining the egregiousness of Defendants' conduct, Magistrate Judge Francis properly considered 1) that Defendants engaged in repeated

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[4] The SEC used the IRS underpayment rate as the prejudgment interest rate, which "reflects what it would have cost to borrow money from the government and therefore reasonably approximates one of the benefits the defendant derived" from his illegal conduct. (*See* Report, at 18 (citing *First Jersey Secs.*, 101 F.3d at 1476); 26 U.S.C. § 6621(a)(2).) *See also S.E.C. v. World Info. Tech., Inc.*, 590 F. Supp. 2d 574, 578 (S.D.N.Y. 2008) (also using the IRS underpayment rate provided at 26 U.S.C. § 6621(a)(2)).

[5] This total was calculated as follows: Section 15 prejudgment interest of $614,995 plus the Section 5 prejudgment interest of $2,085,488 for a total of $2,700,483 using the numbers supplied by the SEC. (*See* Peters Sept. 9, 2015 Decl., ¶ 5.)

Section 15 violations while encouraging and aiding customers in avoiding taxes; 2) that Defendant Davis indisputably conveyed his intention to cease cooperating in this litigation; and, 3) that Defendants knowingly committed Section 5 violations. (*See* Report, at 20-21.) *See also S.E.C. v. Lybrand*, 281 F. Supp. 2d 726, 730 (S.D.N.Y. 2003) *aff'd sub nom. S.E.C. v. Kern*, 425 F.3d 143 (2d Cir. 2005). Accordingly, Magistrate Judge Francis calculated the tier two civil penalties as follows:

Commissions derived from Section 15 violations within 5-year Statute of Limitations	$3,448,998
Adjusted total proceeds generated by Section 5 violations	+ $11,043,051
	$14,492,049
Proceeds Defendants wired back to Magnum	- $7,157,757
Total Tier Two Penalty	$7,334,292
Divided Equally Between Defendants	÷ 2
Tier Two Penalty per Defendant	$3,667,146

Magistrate Judge Francis properly reasoned that this substantial amount "maintains a relationship between the penalty and Defendants' ill-gotten gains." (*See* Report, at 22 (citing *SEC v. One Wall St., Inc.*, No. 06 CV 4217, 2008 WL 5082294, at *9 (E.D.N.Y. Nov. 26, 2008) (citing cases in this District that support the proposition that penalties should bear some relationship to the amount of ill-gotten gains)).) This Court therefore adopts the Report's tier two civil penalty recommendation of $3,667,146 for each Defendant.

VI. CONCLUSION

This Court adopts all of the Report, save for the error in calculation of total prejudgment interest. Judgment therefore is entered against Defendants as follows:

1. Disgorgement of $14,449,176,[6] representing Defendants' illicit profits, joint and several;

2. Disgorgement of $2,700,483,[7] representing prejudgment interest on Defendants' illicit profits, joint and several; and

3. A tier two civil penalty against each Defendant in the amount of $3,667,146.

This Order resolves the motion at ECF No. 68. The Clerk of the Court is directed to enter judgment accordingly and close this case.

Dated: New York, New York
January 11, 2016

SO ORDERED.

JAN 12 2016

GEORGE B. DANIELS
United States District Judge

[6] The total amount of $14,529,918 was derived from the sum of Defendants' Section 15 ill-gotten gains of $3,486,867 and the Section 5 ill-gotten gains of $10,962,309.

[7] *See* n.5 *supra*.

Exhibit E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,

13 **CIV** 2575 (GBD) (JCF)

-against-

DEFAULT JUDGMENT

GIBRALTAR GLOBAL SECURITIES, INC. and WARREN A. DAVIS,
Defendants.

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Whereas on June 12, 2015, the Securities and Exchange Commission ("the SEC") having moved for the entry of a default judgment against Defendants; on July 2, 2015, this Court having entered default judgment for the SEC against Defendants; the Court having referred the case to Magistrate Judge James C. Francis for an inquest on damages, which Magistrate Judge Francis held on September 18, 2015; Defendants having failed to appear at the inquest hearing; before the Court is Magistrate Judge Francis's October 16, 2015 Report and Recommendation ("Report"), recommending that Defendants be held jointly and severally liable for disgorgement in the amount of $14,449,173 and for prejudgment interest in the amount of $2,700,443; Magistrate Judge Francis also having recommended that this Court enter a tier two civil penalty against each Defendant in the amount of $3,667,146, and the matter having come before the Honorable George B. Daniels, United States District Judge, and the Court, on January 11, 2016 having issued its Memorandum Decision and Order adopting all of the Report, save for the error in calculation of total prejudgment interest, entering judgment against Defendants as follows:

1. Disgorgement of $14,449,176, representing Defendants' illicit profits, joint and several;

2. Disgorgement of $2,700,483, representing prejudgment interest on Defendants' illicit

profits, joint and several;

3. A tier two civil penalty against each Defendant in the amount of $3,667,146; and

directing the Clerk of the Court to enter judgment accordingly and close this case, it is,

ORDERED, ADJUDGED, AND DECREED, That pursuant to the Court's Memorandum Decision and Order dated January 11, 2016, all of the Report is adopted, save the error in calculation of total prejudgment interest; Judgment therefore is entered against Defendants as follows:

1. Disgorgement of $14,449,176, representing Defendants' illicit profits, jointly and severally;

2. Disgorgement of $2,700,483, representing prejudgment interest on Defendants' illicit profits, jointly and severally; and

3. A tier two civil penalty against each Defendant in the amount of $3,667,146.

Accordingly, this case is closed.

DATED : New York, New York
January 12, 2016

RUBY J. KRAJICK

Clerk of Court

By: _____
Deputy Clerk

THIS DOCUMENT WAS ENTERED
ON THE DOCKET ON _____