UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. ICOBOX, et al., Defendants.	CV 19-8066 DSF (Ex) Order GRANTING Plaintiff's Motion for Default Judgment (Dkt. 13)

Plaintiff Securities and Exchange Commission (the SEC) moves for default judgment against Defendants ICOBox and Nikolay Evdokimov (collectively, Defendants). Dkt. 13-1 (Mot.). The Court deems this matter appropriate for decision without oral argument. See Fed. R. Civ. P. 78; Local Rule 7-15. The motion is GRANTED.

I. BACKGROUND

ICOBox is an "incubator for digital asset startups." Dkt. 1 (Compl.) ¶ 2. Evdokimov co-founded ICOBox and has served as the CEO since December 27, 2018. Id. ¶ 19. Between August 9, 2017 and September 15, 2017, ICOBox offered for sale and sold approximately $14.6 million in "ICOS" tokens. Id. ICOBox did not register the offering because Defendants believed that "ICOS tokens were not securities or had an 'exemption' because of an unspecified 'utility.'" Id. ¶¶ 6, 76-79. ICOS tokens could be swapped for tokens issued by ICOBox's anticipated clients at a discount. Id. ¶ 4. However, by 2019, Defendants had discontinued the ability to swap ICOS tokens. Id. ¶¶ 8, 84. ICOS tokens trade, if at all, at approximately 1/20th of the purchase price during the offering. Id. ¶¶ 8, 85.

Between 2017 and 2019, ICOBox also facilitated token sales or initial coin offerings (ICOs) for about 35 clients, raising more than $650 million in total. Id. ¶¶ 10, 83, 86. ICOBox provided these clients marketing services which included "advising investors on the merits of the clients' offerings and actively soliciting investors to purchase the clients' tokens." Id. ¶ 89. ICOBox charged its clients a flat fee, depending on the services selected, starting at $250,000. Id. ¶ 92. ICOBox also charged a success fee for successful token offerings, starting at 1.5% of the amounts raised. Id. ¶ 94.

The SEC filed a complaint against Defendants on September 18, 2019, alleging violations of the Securities Act for the unregistered offer and sale of securities and the Exchange Act for the failure to register as Broker-Dealers. Id. Defendants were served on September 21, 2019 at ICOBox's office and Evdokimov's usual place of abode by personal delivery to Maria Batura, the person apparently in charge of ICOBox's office and Evdokimov's co-resident and wife. Dkt. 9 (Proof of Service) ¶¶ 3, 4. On October 4, 2019, the SEC attempted to serve Evdokimov personally, but the process server discovered that Evdokimov and his wife had "'moved out in the middle of the night' with two months' rent unpaid." Dkt. 13-2 (Longo Decl.) ¶ 8. On October 9, 2019, the SEC emailed the summons and complaint to Evdokimov's last known email address. Id. ¶ 9. On October 11, 2019, the SEC attempted to serve ICOBox's registered agent in the Cayman Islands by mail. Id. ¶ 11. However, the SEC was informed that the registered agent had resigned, and the SEC has not been able to locate a new registered agent. Id. ¶¶ 12, 13. Defendants did not respond to the complaint by the deadline of October 15, 2019. On October 21, 2019, the SEC requested entry of default, and the Clerk entered default on October 28, 2019. Dkts. 10, 11. The SEC filed this motion on January 9, 2020. Dkt. 13-1 (Mot.). Defendants were served via email. See Long Decl. ¶ 20.

II. LEGAL STANDARD

Rule 55(b)(2) of the Federal Rules of Civil Procedure permits the Court to enter a default judgment. The Court need not make detailed

findings of fact in the event of default. Adriana Intl. v. Thoeren, 913 F.2d 1406, 1414 (9th Cir. 1990). On entry of a default, well-pled allegations in the complaint regarding liability are generally deemed to be admitted. DIRECTV, Inc. v. Hoa Huynh, 503 F.3d 847, 851 (9th Cir. 2007). Allegations as to damages, however, must be proven. See TeleVideo Sys., Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987). Where damages are liquidated (i.e., ascertainable from definite figures contained in the documentary evidence or in detailed affidavits), default judgment may be entered without a damages hearing. Dundee Cement Co. v. Howard Pipe & Concrete Prods., Inc., 722 F.2d 1319, 1323 (7th Cir. 1983). Unliquidated and punitive damages, however, must be proven at an evidentiary hearing or through other means. Id. at 1323-24.

The Court considers several factors "in exercising discretion as to the entry of a default judgment includ[ing]: (1) the possibility of prejudice to the plaintiff, (2) the merits of plaintiff's substantive claim, (3) the sufficiency of the complaint, (4) the sum of the money at stake in the action, (5) the possibility of a dispute concerning material facts, (6) whether the default was due to excusable neglect, and (7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits." Eitel v. McCool, 782 F.2d 1470, 1471-72 (9th Cir. 1986).

III. DISCUSSION

A. Service of Process

An individual can be served by "leaving a copy of [the summons and the complaint] at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there." Fed. R. Civ. P 4(e)(2)(B). A limited liability company can be served "by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process and—if the agent is one authorized by statute and the statute so requires—by also mailing a copy of each to the defendant." Fed. R. Civ. P 4(h)(1)(B). Both individuals and limited liability companies can also be served in

accordance with California law for service. Fed. R. Civ. P 4(e)(1); Fed. R. Civ. P 4(h)(1)(A). California law permits substituted service by "leaving a copy of the summons and complaint during usual office hours in [the defendant's] office . . . with the person who is apparently in charge thereof, and by thereafter mailing a copy of the summons and complaint by first-class mail, postage prepaid to the person to be served at the place where a copy of the summons and complaint were left." Cal. Civ. Proc. Code § 415.20(a).

The SEC properly served Evdokimov by leaving a copy of the summons and Complaint at his home with his wife, who also resides there, under Rule 4(e)(2)(B). Longo Decl. ¶ 5. It is not clear from the record whether Maria Batura was "an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process" on behalf of ICOBox under Rule 4(h)(1)(B).[1] Nevertheless, ICOBox was properly served under the California rules, Section 415.20(a), as the SEC left a copy of the summons and Complaint at around 2:30pm in ICOBox's office with Ms. Batura, who was apparently in charge, and mailed a copy of the documents to the same address. Longo Decl. ¶¶ 4, 6.

B. Eitel Factors

1. Prejudice to Plaintiff

The SEC will suffer prejudice without a default judgment. If liability under the securities laws could be avoided by not responding to a complaint, the SEC's ability to enforce the federal securities laws would be undermined. See S.E.C. v. Wallace, No. SACV 16-01788 AG (FFMx), 2017 WL 8230026, at *3 (C.D. Cal. May 8, 2017) ("The SEC's duty to enforce federal securities laws would be undermined if the Court were to allow [defendant], who is aware of this lawsuit, to escape

[1] The Court acknowledges that other district courts have held that where service is effective as to a company's officer individually, the company can be deemed served under Rule 4(h)(1)(B). Wood v. Hampton-Porter Inv. Bankers, No. C-02-5367 MMC, 2004 WL 546888, at *2 (N.D. Cal. Mar. 11, 2004). However, the Court need not resolve that issue here.

liability simply by not responding to the case"). This factor favors default.

2. Merits of Plaintiff's Claim and Sufficiency of Complaint

a. Section 5 of the Securities Act

"Sections 5(a) and (c) of the Securities Act, 15 U.S.C. § 77e(a), (c), make it unlawful to offer or sell a security in interstate commerce if a registration statement has not been filed as to that security, unless the transaction qualifies for an exemption from registration." S.E.C. v. CMKM Diamonds, Inc., 729 F.3d 1248, 1255 (9th Cir. 2013) (quoting S.E.C. v. Platforms Wireless Int'l Corp., 617 F.3d 1072, 1085 (9th Cir. 2010)). "To establish a prima facie case for violation of Section 5, the SEC must show that (1) no registration statement was in effect as to the securities; (2) the defendant directly or indirectly sold or offered to sell securities; and (3) the sale or offer was made through interstate commerce." Id. "[S]cienter is not an element of Section 5 liability." Id. at 1256.

The SEC alleges that (1) "ICOBox took no steps to register the ICOS offering or qualify for any exemption," Compl. ¶ 75; (2) "ICOBox was the issuer of the tokens, and directly offered and sold the ICOS tokens to investors through its website" and "Evdokimov directly offered and sold the ICOS tokens," by "promot[ing] the offering online, through social media and interviews, as well as by Evdokimov's appearances at several crypto-enthusiast conferences," id. ¶¶ 29, 68-69; and (3) "Defendants advertised the ICOS tokens as being available for purchase by the 'public globally' including in the United States," and "announced [the offering] via social media and its website," id. ¶¶ 27, 33. The Court accepts these allegations as true on a motion for default judgment. See DIRECTV, 503 F.3d at 851 (well-pled allegations in the complaint regarding liability are generally deemed to be admitted). Therefore, the SEC has established a prima facia case, so long as ICOS coin is a "security."

The test for determining whether a financial interest is an investment contract constituting a security was set out in S.E.C. v. W.J. Howey Co., 328 U.S. 293 (1946). The elements of this test are "(1) an investment of money (2) in a common enterprise (3) with an expectation of profits produced by the efforts of others." S.E.C. v. Rubera, 350 F.3d 1084, 1090 (9th Cir. 2003) (quoting S.E.C. v. R.G. Reynolds Enterprises, Inc., 952 F.2d 1125, 1130 (9th Cir. 1991)). First, the SEC alleges that investors had to purchase an ICOS tokens with "bitcoin, ether, litecoin, dash, zcash, ethereum classic, and US dollars." Compl. ¶ 35; see also id. ¶ 32 ("During the two 'presale' phases, investors were required to purchase between 1,000 and 10,000 tokens"). And in fact, "ICOBox raised roughly $14.6 million from approximately 2,122 investors, including U.S. investors, between August 9, 2017 and September 15, 2017." Id. ¶ 67. This satisfies the first element.

Second, the SEC alleges a common enterprise. A common enterprise can be vertical (between the investor and the seller or promoter) or horizontal (between a group of investors). R.G. Reynolds Enterprises, 952 F.2d at 1130. Here, the SEC has sufficiently alleged horizontal commonality because the amounts raised would be pooled "to fund the provision of ICOBox's facilitation services to other potential ICO issuers who could not afford ICOBox's fees." Compl. ¶ 39. The SEC has also sufficiently alleged vertical commonality because "the success of its platform depended on ICOBox's management team, and in particular on Evdokimov." Id. ¶ 59. The value of the tokens depended in large part on ICOBox procuring clients that would issue sufficiently valuable tokens. See id. ¶¶ 57, 81; id. ¶¶ 93-94 (ICOBox would also receive a percentage of any successful ICO). "[W]here an investor's avoidance of loss depends on the promoter's 'sound management and continued solvency,' a common enterprise exists." S.E.C. v. Eurobond Exch., Ltd., 13 F.3d 1334, 1340 (9th Cir. 1994) (citing United States v. Carman, 577 F.2d 556, 563 (9th Cir. 1978)). The SEC has alleged facts supporting this element.

Third, the SEC alleges that ICOBox stated in its promotional materials that "ICOS token holders could profit in two different ways—from discounts on the ICOS platform and by trading ICOS tokens on

digital asset platforms." Compl. ¶ 45. "ICOBox highlighted the ability of ICOS token holders to profit by swapping their ICOS tokens at a roughly one-to-four rate for tokens that would be issued during future ICOs by ICOBox's clients." Id. ¶ 46. ICOS tokens were also offered on secondary trading platforms, such as HitBTC, Etherdelta, and Tidex. Id. ¶ 57-58. The third element is satisfied.

The Complaint sufficiently states a claim for violation of Section 5 of the Securities Act. See Day v. Boyer, No. 2:19-cv-01669-ODW (RAOx), 2020 WL 292180, at *2 (C.D. Cal. Jan. 21, 2020) (granting motion for default judgment based on "sale of unregistered securities in violation of federal law" where complaint "alleges that MobileCoin is a security and had no registration statement in effect when [defendant] made use of email and text message communications to sell MobileCoin to [plaintiff]").

b. Section 15 of the Exchange Act

"Section 15(a)(1) of the Exchange Act makes it unlawful for a 'broker . . . to induce or attempt to induce the purchase or sale of[ ] any security' without registering with the SEC." S.E.C. v. Hui Feng, 935 F.3d 721, 731 (9th Cir. 2019) (alteration in original) (citing 15 U.S.C. § 78o(a)(1)). Courts consider the following nonexclusive factors in determining whether someone is a broker:

> [W]hether [the defendant]:
>
> (1) is an employee of the issuer of the security;
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> (2) received transaction-based income such as commissions rather than a salary;
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> (3) sells or sold securities from other issuers;
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> (4) was involved in negotiations between issuers and investors;
>
> (5) advertis[ed] for clients;

(6) gave advice or made valuations regarding the investment;

(7) was an active finder of investors; and

(8) regularly participates in securities transactions.

Id. at 732 (9th Cir. 2019) (third alteration in original). The SEC alleges that Defendants acted as unauthorized brokers when they facilitated "approximately 35 clients launching ICOs." Compl. ¶ 86. Although Defendants are not employees of these issuers, they received "success fees," id. ¶¶ 93-94, helped at least one client to sell securities and communicated "with potential investors about the merits of the offering," id. ¶¶ 95-105, and provided marketing services and participated in finding investors, including "advising investors on the merits of the clients' offerings and actively soliciting investors to purchase the clients' tokens." id. ¶¶ 89-90. Specifically, Evdokimov "managed ICOBox's operations, including overseeing and engaging in the 'marketing' services described above, id. ¶ 106, "personally registered ICOBox's website, id. ¶ 107, actively solicited clients for ICOBox, id. ¶ 108, and "personally disseminated information about ICOBox's clients' offerings to prospective investors" and "discussed the merits of the offering with prospective investors on an ICOBox social media channel," id. ¶¶ 109-11. The SEC has sufficiently alleged that Defendants acted as unregistered brokers in violation of the Exchange Act.

Therefore, these two factors favor default.

3. Amount in Dispute

The SEC seeks the imposition of $14.6 million in disgorgement plus pre-judgment interest of about $1.5 million. Longo Decl. ¶¶ 21-27. The SEC also seeks the imposition of $186,426 in civil penalties against Evdokimov. Mot. at 2. Because the civil penalties are small relative to the disgorgement, the recovery sought is proportional to the harm caused by Defendants' conduct.

4. Possibility of Dispute of Material Facts

On entry of default, all well-pleaded facts in the complaint are taken as true, except those relating to damages. Accordingly, no genuine dispute of material facts would preclude granting Plaintiff's motion.

5. Whether Default was Due to Excusable Neglect

The risk of excusable neglect is remote. Defendants were properly served with the summons and Complaint, and subsequently vacated their residence, caused ICOBox to be deregistered as an entity, and took down ICOBox's website. Longo Decl. ¶¶ 8, 11-12, 14. This factor favors default.

6. Policy in Favor of Decisions on the Merits

The policy favoring decisions on the merits does not weigh against entry of default judgment because Defendants have failed to respond to the Complaint, making a decision on the merits impossible.

C. Relief Sought

The SEC's demand for relief must be specific. Fed. R. Civ. P. 8(a)(3). The SEC seeks 1) to enjoin Defendants from violating Sections 5(a) and 5(C) of the Securities Act and 15(a) of the Exchange Act, 2) disgorgement and prejudgment interest, and 3) civil penalties. Compl., Prayer for Relief.

1. Injunctive Relief

"To obtain a permanent injunction, the SEC 'ha[s] the burden of showing there [i]s a reasonable likelihood of future violations of the securities laws.'" S.E.C. v. Fehn, 97 F.3d 1276, 1295 (9th Cir. 1996) (quoting S.E.C. v. Murphy, 626 F.2d 633, 655 (9th Cir. 1980)). "[P]ast violations may give rise to an inference that there will be future violations." Id. (quoting Murphy, 626 F.2d at 655). Courts consider the following facts in predicting whether defendants are likely to commit future violations:

> 1) the degree of scienter involved; (2) the isolated or recurrent nature of the infraction; (3) the defendant's recognition of the wrongful nature of his conduct; (4) the likelihood, because of defendant's professional occupation, that future violations might occur; (5) and the sincerity of his assurances against future violations

Id. at 1295-96 (citing Murphy, 626 F.2d at 655). The SEC contends that it has sufficiently alleged that Defendants "raised $14.6 million in an unregistered securities offering, and charged fees for their facilitation of the sales of other securities offerings, with at least reckless disregard of the requirement to register ICOBox's securities and to register or associate with a broker." Mot. at 20. As evidence of Defendants' scienter, the SEC has alleged that two weeks before the sale of ICOS, the SEC issued a report concluding that sale of tokens or coins would be considered a sale of securities that would need to be registered with the SEC, and that Evdokimov read the report and gave an (erroneous) interpretation of that report online. See Compl. ¶¶ 26, 76. Defendants' infractions were recurrent in that they participated in 35 ICOs over a two-year period. Id. ¶ 86. Because Defendants have not responded to the Complaint, and appear to have fled after being served, the Court has no information about the third or fifth factors. As to the fourth factor, Evdokimov has also "founded or been affiliated with several other blockchain-related companies." Id. ¶ 19. Based on these factors, the Court concludes that a permanent injunction is appropriate.

2. Disgorgement

The Court "has broad equity powers to order the disgorgement of ill-gotten gains obtained through the violation of the securities laws." S.E.C. v. Platforms Wireless Int'l Corp., 617 F.3d 1072, 1096 (9th Cir. 2010) (quoting S.E.C. v. First Pac. Bancorp, 142 F.3d 1186, 1191 (9th Cir. 1998)). "Disgorgement need be 'only a reasonable approximation of profits causally connected to the violation.'" Id. (citing First Pac. Bancorp, 142 F.3d at 1192 n.6). "Once the SEC establishes a reasonable approximation of defendants' actual profits, . . . the burden

shifts to the defendants to 'demonstrate that the disgorgement figure was not a reasonable approximation.'" Id. (quoting S.E.C. v. First City Fin. Corp., 890 F.2d 1215, 1232 (D.C. Cir. 1989)).

The SEC has alleged and presented evidence that Defendants raised $14.6 million through the unregistered offering. Compl. ¶¶ 1-2, 67, 71; Long Decl. ¶¶ 21-24, Exs. 10-13. This constitutes a reasonable approximation of Defendants' profits. Platforms Wireless Int'l Corp., 617 F.3d at 1097 (The "entire proceeds" from an unregistered sale of securities constitutes a reasonable approximation of the profits); see also S.E.C. v. JT Wallenbrock & Assocs., 440 F.3d 1109, 1111, 1114 (9th Cir. 2006) (all of the "nearly $253.2 million [raised] from thousands of investors through the fraudulent sale of unregistered promissory notes" constituted "an ill-gotten gain that unjustly enriched the defendants"). And because all control persons are jointly and severally liable for violations of Section 5 of the Securities Act, 15 U.S.C § 77o, and because Defendants "have a close relationship in engaging in violations of the securities laws," id. at 1098 (quoting First Pac. Bancorp, 142 F.3d at 1191), it is appropriate to hold Defendants jointly and severally liable for the disgorgement.

The SEC also seeks prejudgment interest of $1,459,428.99 from September 15, 2017 through September 17, 2019. Mot. at 23. The Ninth Circuit has upheld prejudgment interest at the tax underpayment rate provided in 26 U.S.C. § 6621 starting from the "date the securities were sold in violation of Section 5." Platforms Wireless Int'l Corp., 617 F.3d at 1099-1100. This is what the SEC did in calculating the prejudgment interest here. Longo Decl. ¶¶25-26, Ex. 14. Therefore, the Court concludes that $14.6 million in disgourgment and $1,459,428.99 in prejudgment interest, totaling $16,059,428.99, is appropriate.

3. Civil Penalties

The SEC seeks imposition of $186,426 in civil penalties against Evdokimov.[2] Mot. at 2. The securities laws provide for civil monetary

[2] The SEC does not seek civil penalties against ICOBox. Mot. at 24 n.8.

penalties in three tiers. The SEC seeks second-tier penalties here. Mot. at 23-24 & n.7. A court may impose second tier penalties when the violations "involve[] fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement." 15 U.S.C. §§ 77t(d)(2)(B), 78u(d)(3)(B)(ii). A second-tier penalty "shall not exceed the greater of (i) $[96,384] . . . or (ii) the gross amount of pecuniary gain to such defendant as a result of the violation." Id.[3]

District courts in the Ninth Circuit sometimes consider the Fehn/Murphy factors in deciding whether to award a civil penalty. See, e.g., S.E.C. v. Loomis, 17 F. Supp. 3d 1026, 1032 (E.D. Cal. 2014); S.E.C. v. Wilde, No. SACV 11-0315 DOC, 2012 WL 6621747, at *16 (C.D. Cal. Dec. 17, 2012), aff'd sub nom. S.E.C. v. Wilde, 669 F. App'x 423 (9th Cir. 2016); S.E.C. v. Abacus Int'l Holding Corp., No. C 99-02191, 2001 WL 940913, at *5 (N.D. Cal. Aug. 16, 2001). Although neither of the claims for relief has a scienter requirement, the SEC contends that "Evdokimov acted with at least reckless disregard of the registration requirements for the ICOS tokens, and for ICOBox's broker activities." Mot. at 24. Specifically, Evdokimov was "well aware of the SEC's then-recently issued July 2017 *DAO Report* and the potential implications of the federal securities laws on sales of digital assets," yet "gave interviews (including to Reuters) and made statements online about his interpretation of the *DAO Report*, incorrectly claiming that the ICOS offering was not a security or had an 'exemption' from registration because the token had a 'utility.'" Compl. ¶¶ 75-76. For similar reasons, Evdokimov acted with at least reckless disregard in promoting the sale of Paragon Coin, Inc.'s tokens without registering as

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[3] The original statutes set a penalty cap of $50,000 per violation. The Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Bipartisan Budget Act of 2015, Pub. L. 114-74, § 701, 129 Stat. 584, 599 (2015) (codified at 28 U.S.C. § 2461 note), authorizes the SEC to adjust that maximum penalty for inflation. On the basis of that authority, the SEC has raised the cap to $96,384 for penalties imposed after January 15, 2020 based violations that occurred after November 2, 2015. See 17 C.F.R. § 201.1001(b); see also https://www.sec.gov/enforce/civil-penalties-inflation-adjustments.htm.

a broker. Id. ¶¶ 109-111. Therefore, the SEC has established that Evdokimov acted with reckless disregard for the purposes of second-tier penalties and the first Fehn/Murphy factor.

Further, the fact that Evdokimov has apparently fled weighs in favor of imposing a civil penalty, as he does not acknowledge the wrongful nature of his conduct or therefore will not assure that future violations will not occur. Finally, that Evdokimov has been involved in multiple ICOs and is involved in other digital asset companies weighs in favor of a penalty.

The Court imposes a civil penalty of $96,384 per violation, totaling $192,768.[4]

IV. CONCLUSION

The SEC's motion for default judgment is GRANTED. Defendants are permanently enjoined from committing future violations of Sections 5(a) and 5(c) of the Securities Act and Section 15(a) of the Exchange Act. Furthermore, Defendants, jointly and severally, shall pay $14,600,000 in disgorgement and $1,459,428.99 in prejudgment interest, totaling $16,059,428.99, and Evdokimov shall pay $192,768 as a civil penalty.

IT IS SO ORDERED.

Date: March 5, 2020

Dale S. Fischer
United States District Judge

[4] The SEC based its $186,426 penalty request on the cap for penalties in effect at the time it filed its motion for default judgment, $94,713. However, the Court considers the date of judgment as the date the penalties are imposed and therefore uses the 2020 cap of $96,384.