UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SECURITIES AND EXCHANGE COMMISSION,

Plaintiffs,

v.

PUNCH TV STUDIOS INC., AND JOSEPH COLLINS,

Defendants.

Case No.: 21-cv-07787-AB-AS

ORDER GRANTING IN PART AND DENYING IN PART SEC'S MOTION FOR REMEDIES [62]

Before the Court is Plaintiff Securities and Exchange Commission's ("SEC") Motion for Remedies ("Motion," Dkt. No. 62). Defendants Punch TV Studios, Inc. and Joseph Collins ("Defendants") filed an opposition (Dkt. No. 81), and the SEC filed a reply (Dkt No. 90)[1]. The parties also filed supporting materials. The Court heard oral argument on April 12, 2024. The Motion is **GRANTED in part and DENIED in part.**

I. BACKGROUND

The Court previously granted the SEC's Motion for Summary Judgment as to liability, concluding that Defendant Joseph Collins and his company, Defendant

[1] This SEC filed the operative reply brief (Dkt. No. 90) on May 8, 2024, pursuant to the parties' stipulation. It supersedes the SEC's original reply brief (Dkt. No. 84).

Punch TV, violated Sections 5(a) and 5(c) of the Securities Act of 1933, 15 U.S.C. §§ 77e(a), 77e(c). *See* Summary Judgment Order (Dkt. No. 57). Section 5(a)(1) of the Securities Act prohibits the direct or indirect sale of securities unless a registration statement is in effect, and Section 5(c) prohibits the offer or sale of securities unless a registration statement is in effect. The Court concluded that the Defendants violated these sections by conducting two offerings of unregistered securities for which no exemption applied. The Court also concluded that there is a likelihood of further violations and therefore permanently enjoined Defendants from violating Section 5.

In particular, the Court's Summary Judgment Order found the following based on undisputed facts: In 2016, Punch TV filed documents ("Offering Statement") with the SEC to conduct an exempt $1 per share offering of unregistered securities under Regulation A. The SEC qualified the offering statement under Regulation A. But Defendants did not comply with Regulation A because the financial statements that Punch TV filed with its Offering Statement were not audited, and because Punch TV failed to file required periodic reports with the SEC. On January 9, 2018, the SEC entered a Suspension Order prohibiting Punch TV from offering or selling its securities in reliance on Regulation A during the period January 10, 2018 through October 9, 2018 ("suspension period"). The Suspension Order also provided that after the suspension period, Punch TV could offer securities under Regulation A only if it filed certain documents and received qualification.

Despite the Suspension Order, Punch TV engaged in the two securities violations at issue in this case: First, despite the Suspension Order, Punch TV continued its $1 stock offering in reliance on Regulation A both before and after the suspension period. This violated the Suspension Order because that Order prohibited any offers or sales in reliance on Regulation A during the suspension period, and the post-suspension period sales violated the Order because Punch TV did not complete certain undertakings the Order required of it to offer securities in reliance on Regulation A after the suspension. Punch TV also failed to take reasonable steps to verify that investors were accredited. And second, between March 2018 and April 2019, Punch TV conducted a second unregistered offering of securities, at $5 per share, under Rule 506(c). But Rule 506(c) permits sales only to "accredited investors" and requires the issuer to take "reasonable steps to verify that purchasers. . . are accredited investors." 17 C.F.R. § 230.506(c)(2). Defendants simply relied on investors' verbal representations of their accreditation status and made no attempt to verify their status.

Thus, the two violations in issue in this case were Defendants' second and third violations, and they occurred after the SEC imposed the Suspension Order for the first violation.

In November 2022, Collins posted a video on Defendants' website directed to Punch TV investors in which he solicited more funds, but in the form of "donations." As of the date of the SEC's Motion for Summary Judgment (6/30/2023), the video and links for investors to contribute remain on the website.

The Court further concluded that the SEC established that Defendant Collins was directly involved in Punch TV's unregistered offerings.

In sum, the Court concluded that the SEC established its prima facie case that that, with both the $1 and $5 offerings, Defendants violated the registration requirement of Section 5, and that the Defendants did not establish any exemption from registration under Regulation A, Rule 506(b), or Rule 506(c).

The Court further entered a permanent injunction against future violations of Section 5. The Court noted that Defendants were at least reckless to continue their $1 offer in violation of the SEC Suspension Order, and to fail to verify investors' accreditation status for the $5 offer; that the violations were recurring and within quick succession; and that the Defendants did not acknowledge the wrongfulness of their conduct and continued to seek money from investors in the form of "donations" with the promise of future returns. Based on these conclusions, the Court found that the SEC established that there was a reasonable likelihood that Defendants would violate securities law in the future, thus warranting a permanent injunction.

The SEC now moves for additional remedies for Defendants' violations, and for corresponding Final Judgments: First, the SEC seeks civil penalties of $250,000 against Punch TV and $50,000 against Collins. Second, the SEC seeks joint and several disgorgement of the ill-gotten gains of the two unregistered offerings, totaling $1,201,154, plus prejudgment interest of $132,000. Finally, because the unregistered offerings were offerings of penny stocks, the SEC seeks an order barring Defendants from participating in the offering of a penny stock.

The Defendants oppose the Motion on several grounds.

II. LEGAL STANDARD

The Exchange Act authorizes the SEC to seek penalties and injunctive relief for violations of the Act. 15 U.S.C. § 78u(d). The Exchange Act also grant courts authority to order disgorgement. *See* 15 U.S.C. §§ 78u(d)(3)(A)(ii) (authorizing disgorgement under paragraph 7 of any unjust enrichment), and § 78u(d)(7) (in any SEC action, any federal court may order disgorgement). The Court addresses the standard for in each remedy in turn below.

III. DISCUSSION

The Court first considers threshold arguments Defendants raise in opposition.

Defendants argue that the SEC's approach of filing a motion for summary judgment on liability followed by a separate motion for remedies not under Fed. R. Civ. P. 56 is inconsistent with *SEC v. Husain*, 70 F.4th 1173 (9th Cir. 2023). In *Husain*, the parties cross-moved for summary judgment, with the SEC moving for summary adjudication of liability and a civil penalty remedy in the same motion. The district court granted the SEC's motion. *Id.*, at 1179-1180. But the Ninth Circuit reversed the remedies decision, stating as relevant, "As with all relief under the Securities Act and the Exchange Act, we review the district court's choice of remedy for abuse of discretion. [] *But on a summary judgment record*, the district court can impose a civil penalty only after it has determined that no 'genuine issues of material fact exist' and all factual uncertainty is resolved in favor of the non-moving party." *Id.*, at 1181 (emphasis added). Based on this, Defendants argue that the SEC's remedies motion should be denied on two grounds: first, that the SEC should have filed it under Fed. R. Civ. P. 56, but didn't, so it is procedurally improper and fails to address the applicable legal standard; and second, that triable issues of fact preclude judgment on remedies. The Court addresses each argument in turn.

First, the SEC's practice of moving for summary judgment as to liability and then filing a separate motion for remedies not under Rule 56 is commonplace and is supported by the law. In *SEC v. Murphy ("Murphy II")*, 50 F.4th 832 (9th Cir. 2022), for example, the SEC did just that: it first moved for summary judgment on liability, which the district court granted, and then it moved separately for remedies, resulting in a judgment imposing civil penalties and an injunction. The Ninth Circuit affirmed the district court's remedies judgment. *Husain* did not disapprove of this practice; rather, *Husain* arose in a different procedural posture: the SEC sought adjudication of liability and remedies in a single summary judgment motion, so that is how it reached the Circuit. *Husain* did not disapprove of the bifurcated approach the SEC often takes and that it took in this case.

Second, *Husain* does not foreclose entering remedies in this case, on this record, on this post-summary-judgment motion. The Court acknowledges some difficulty in reconciling *Husain* with existing precedent like *Murphy II*, as reflected in Judge Wardlaw's dissent. *See, e,g., Husain*, 70 F.4th at 1187 (J. Wardlaw, dissenting) ("The majority effectively, and incorrectly, reviews each *Murphy* factor separately and de novo, holding that courts should not make 'credibility' determinations at the summary judgment stage as to a defendant's scienter or contrition, even though the majority's approach is foreclosed by *Murphy* itself, as well as our recent decision in [*Murphy II*]"), and fn. 9 ("[l]ike Husain, the defendants in *Murphy* and *Murphy II* disputed the degree of their scienter and contrition in sworn declarations, yet we affirmed in both cases that it was entirely proper for the district court to weigh those declarations unfavorably against the defendant'' undisputed actions.")

Nevertheless, in *Husain*, the Court recited the two standards applicable to the two different inquiries: the court reviews "de novo a district court decision to grant summary judgment. [] Viewing the evidence in the light most favorable to the non-moving party, we determine whether genuine issues of material fact exist and whether the district court correctly applied the substantive law. [] As to the district court's formulation of remedies under the Securities Act and the Exchange Act, we review for abuse of discretion." *Husain*, 70 F.4th at 1180. In reviewing the civil penalty decision, the Circuit held that the defendant established a genuine issue of fact as to whether he received all sales proceeds, so the court "erred in finding on summary judgment" the amount of his gross pecuniary gain. *Id.*, at 1183-84. The defendant also established genuine issues of fact as to the degree of his scienter and recognition of the wrongful nature of his conduct, again foreclosing summary judgment as to the civil penalty determination. *Id.*, at 1184. In reversing, the Circuit repeatedly noted the procedural posture of the case: that the district court erred by awarding a civil penalty on summary judgment when there were genuine disputes of fact material to that remedy. However, *Husain* also repeatedly cited with approval the standard set forth in *Murphy II*, and does not purport to weaken or depart from *Murphy II*.

In this case, none of the material facts relevant to the remedies the Court is ordering are genuinely disputed.[2] Thus, insofar as *Husain* may arguably advance a standard substantively different from *Murphy II* on the issue of how to handle disputed facts, any such difference is not material to this case. The *Murphy II* Court also expressly held that "at the remedies stage, the district court was not limited to the evidence considered in its liability order. Rather, the district court could consider more evidence to assess the full extent of [the defendant's] misconduct so long as the new

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[2] Accordingly, the Court **DENIES** Defendants' request for an evidentiary hearing on the ground that there are genuine disputes of material fact.

evidence did not conflict with its liability findings." *Murphy II*, 50 F.4th at 848 (citing with approval *SEC v. Life Partners Holdings, Inc.*, 854 F.3d 765, 781-82 (5th Cir. 2017) ("At the remedies stage, trial judges may make factual findings ... in assessing the amount of civil penalties so long as the court's findings do not conflict with the jury's findings as to liability.")). The Court's resolution of this Motion is governed by these principles.

A. The Court Awards Civil Penalties

Section 20(d)(1) authorizes the Court "to impose, upon a proper showing, a civil penalty to be paid by the person who committed such violation." 15 U.S.C. § 77t(d)(1); *see also* § 78u(d)(3)(A)(i) (same). Civil penalties are "determined by the court in light of the facts and circumstances." § 77t(d)(2)(A); *see also* § 78u(d)(3)(B)(i) (same). The SEC seeks an award of $50,000 in civil penalties against Collins, and $250,000 against Punch TV.

1. Civil Penalties are Warranted in this Case.

The Court first addresses whether to impose a civil penalty.

The purpose of imposing civil penalties for violations of the federal securities law is to deter the wrongdoer from future securities law violations. *Murphy II*, 50 F.4th at 847. In deciding whether to impose civil penalties and the amount thereof, the Court considers the factors set forth in *SEC v. Murphy*, 626 F.2d 633 (9th Cir. 1980). "Under *Murphy*, 'a court must assess the totality of the circumstances surrounding the defendant and his violations,' considering factors such as (1) the degree of scienter, (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 the defendant's occupation, that future violations might occur, and (5) the sincerity of his assurances against future violations." *Murphy II*, at 841–42 (citing *Murphy*, 626 F.2d at 655).

These are the same factors that the Court considered at summary judgment in deciding whether to permanently enjoin the Defendants from violating the securities law. The Court maintains its conclusions.[3]

First, as to both the $1 and the $5 offerings, Defendants' degree of scienter was at least recklessness. Regarding the $1 offering, Defendants continued the offering despite the SEC's Suspension Order that they consented to, and in which they committed to not offering securities under Regulation A for the suspension period. This was a direct and egregious violation of the Suspension Order. Regarding the $5 offering, Defendants were at least reckless in offering it to investors without verifying their accreditation status and instead simply accepting those investors' representations that they were accredited. Defendant Collins's deposition shows that Punch TV understood that it had to try to verify whether potential investors were accredited, and its staff asked investors certain questions about their status, but Punch TV simply accepted investors' representations without seeking any documentary or other verification, despite considering engaging a third-party verification company to do that. *See, e.g.*, Collins Depo. (Dkt. No. 46-3, pp. 139-143) 332:13-23 ("Q: And with regard to these accredited investors, did you obtain any documents from them? A: I don't think we got a lot of documentation from them.... And one of the things that we were going to do, although we never really got to it.... we were going to use a third party verification company. And we just never got to it because we're way underneath...") 339:17-20 ("Q: So nobody at Punch TV took any steps to verify whether the investor claiming to be accredited actually was? A: No.") This behavior—understanding the need to take reasonable steps to verify investors' accreditation status but not doing so—is reckless. Defendant Collins asserts that he acted in good faith and not recklessly because Punch TV "engaged a number of professionals, including attorneys and accountants, to ensure compliance with the federal securities laws." Collins Decl. (Dkt. No. 81-3) ¶ 6. But this vague and conclusory statement

[3] Although Defendants invite the Court to depart from its summary judgment conclusions for purposes of this remedies decision, they did not move for reconsideration of that Order.

cannot support a claim of good faith. For one, the SEC points out that Defendants refused to waive privilege during the investigation of this case. *See* Collins Depo. (Canter Decl. Ex. 9, Dkt. No. 84-2) 131:2-132:12. A party cannot invoke good faith reliance on advice of counsel without waiving attorney-client privilege so that the claim can be tested. *See, e.g., SEC v. Frost*, 2022 WL 17327322, at *1 (C.D. Cal. 2022) (barring defendant from presenting evidence of good faith reliance on counsel where they did not waive attorney-client privilege). And the vague reference to unnamed professionals simply does not raise any dispute as to the facts established by Collins's testimony: that Punch TV understood the need to verify potential investors' accreditation status, and had some intention of doing so via a third party business, but it nevertheless failed to. This amounts to recklessness relative to the $5 offering. This weighs in favor of a penalty.

As to the second *Murphy* factor, the violations were not isolated: Defendants committed the first violation despite the existing Suspension Order which they agreed to, and they continued or started their two unlawful unregistered offerings in short succession thereafter and over the course of more than two years. Furthermore, the violations involved numerous investors: 660 investors for the $1 offering, and about 28 for the $5 offering. Thus, Defendants' violations involved multiple transactions and instances, and in that sense were not isolated. On the other hand, the violations were of the same general type. On balance, this factor weighs in favor of a penalty.

As to the third *Murphy* factor, at summary judgment the Court noted that Defendants did not acknowledge the wrongfulness of their conduct. The Collins Declaration filed with the opposition reinforces this conclusion: of course a defendant is entitled to defend himself, but nowhere in is declaration does Mr. Collins acknowledge the wrongfulness of the violations, even though the fact of the violations has already been established. Instead, Mr. Collins states that Punch TV relied on advice of professionals; that as a "Black CEO and entrepreneur seeking investors to support an enterprise designed to benefit my community, I understand I must pay even greater attention to legal and compliance issues than might otherwise be the case"; and that no Punch TV investors told him that they would have preferred the company to incur the expenses necessary to register the stock, that they are grateful that the SEC filed this suit, or that they would have preferred Punch TV to have better complied with exemptions to the registration requirements. *See* Collins Decl. ¶¶ 6-8. Mr. Collins's last two sentiments in particular tend to discount the wrongfulness of the conduct. By speculating that there was an unfair racial element to the SEC's investigation, Collins diverts from the fact that the Defendants in fact violated the Exchange Act twice. And by pointing to the silence (to him) of Punch TV investors, Mr. Collins appears to suggest that perhaps the violations were unimportant or that it is a no-harm-no-foul situation. In none of his statements does Collins acknowledge that violating the securities laws as the Defendants did was wrong. This factor weighs heavily in favor of a penalty.

As to the fourth *Murphy* factor, Mr. Collins's declaration confirms that Punch TV will continue to offer unregistered securities in the future: "I and Punch TV will continue to uphold the federal securities laws going forward. In particular, I now have a greater appreciation for the complexities involved in satisfying the requirements of the different registration exemptions available for securities offerings, including the Regulation A requirements . . ." Collins Decl. ¶ 9. This reinforces this Court's conclusion at summary judgment that future violations may occur due to Mr. Collins's occupation. Furthermore, as noted at summary judgment, the Defendants continued to seek money from investors, including "donations" paired with a promise of future returns. Thus, the relevant circumstances including Defendants' intention to continue to offer unregistered stock and their other solicitations establish that future violations may occur. This factor favors a penalty.

As to the fifth *Murphy* factor, Mr. Collins attests that he and Punch TV have a greater appreciation for the importance of adhering to the federal securities laws and they "will continue" to uphold those laws going forward. Collins Decl. ¶ 9. But this is a rote assurance that lacks substance. For example, Mr. Collins does not describe any actual steps that the Defendants will take to ensure their compliance in the future. Some specific plan seems warranted in light of Mr. Collins's claim that their conduct occurred despite consulting with professionals, and considering that the initial Suspension Order was based on Punch TV's failure to audit its financial statements or file timely periodic reports—tasks delegated to professionals. Especially when viewed in light of Defendant Collins's failure to acknowledge the wrongfulness of the violations, Defendants' assurances against future violations lack sincerity. This factor weighs in favor of a penalty.

Having considered all of the relevant circumstances, the Court finds that they all favor imposing a civil penalty.

2. The Court Imposes a $44,000 Civil Penalty on Mr. Collins, and an $88,000 Civil Penalty on Punch TV.

The Court now determines the amount of the civil penalty for each Defendant.

Section 20(d)(2) establishes a three-tier system for assessing the amount of the penalty: where the violations do not involve fraud, first-tier penalties apply, while violations that do involve fraud are subject to second- and third-tier penalties. *See* 15 U.S.C. § 77t(d)(2). Here, the violations do not involve fraud, so they are subject to first-tier penalties. The penalty may be either an inflation-adjusted maximum statutory penalty for each violation, or "the gross amount of pecuniary gain to such defendant as the result of the violation." *Id*. The SEC seeks a statutory penalty in this case. The maximum statutory penalty is $11,162 for individuals and $111,614 for entities such as Punch TV. *See* 17 C.F.R. § 201.1003 (SEC rule setting forth the inflation adjustments). The court may impose a penalty for each violation, that is, it may determine the penalty by multiplying the number of a defendant's violations by the dollar amount of the appropriate tier. But "each violation" is not defined, and courts have defined "violation" in different ways: by the number of investors, the number of transactions, the number of securities laws violated, or the duration of the violations, for example. *Murphy II*, 50 F.4th at 849-50 ("district courts have discretion to determine what constitutes a 'violation' and have relied on various proxies," including the number of investors involved, the number of unlawful transactions, the number of statutes violated, the number of schemes, the number of victims, or the duration of the unlawful conduct in months). "A district court has discretion to impose civil penalties so long as the amount is within the statutory maximum." *Id.*, at 847 (citing *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 229 n.6 (1975)).

The SEC requests a civil penalty of $50,000 against Collins and $250,000 against Punch TV. Although the SEC states that each Defendant committed two violations of Section 5 by conducting two unregistered offerings, the SEC seeks more than two times the maximum penalty, which would be $11,162 x 2 = $22,324 for Collins, and $111,614 x 2 = $223,228 for Punch TV. The SEC argues that a higher penalty is warranted for two reasons: First, because the conduct was egregious given that the Defendants violated their agreed-to Suspension Order. And second, because the Court could count each and every unregistered securities sale as a separate violation, which would result in hundreds of violations and multi-million dollar civil penalties far exceeding the SEC's request. Neither reason is sound.

As for the SEC's first reason, the Court is not convinced that it can, let alone should, increase the per-violation civil penalty above the statutory "maximum" on the sole ground that the violations were egregious. The maximum is the maximum. And the SEC's second reason is not logically an argument for increasing the per-violation penalty above the statutory maximum; it is instead an argument for using a different metric to count the number of violations.

Accordingly, the Court starts by determining the number of violations. Deeming Defendants to have engaged in just 2 violations does not reflect the extent of the conduct, as more than 680 investors in total and numerous sales were involved over more than two years. At the same time, counting each and every investor and/or transaction as a violation overstates the conduct because that fails to recognize that those acts were sub-acts within the two unlawful offerings. The Court finds that the duration, in months, of the offerings here is a salient factor that well-captures the extent and character of the violation conduct as discussed above in connection with the *Murphy* factors, and should determine the number of violations.

The SEC filed a list of stock purchases for each of the offerings. *See* Kim Reply Decl. Exs. 1, 2, Dkt. No. 84-6. The list reflects that Defendants offered their $1 penny stock in violation of the Suspension Order from January 2018 to June 2020, which is 30 months. The Defendants offered their $5 stock from March 2018 to April 2019, which is 14 months. Thus, Defendants' conduct continued for 44 months (30 months + 14 months), so the Court concludes they engaged in 44 violations. The Court will impose on Defendant Collins a penalty of $1,000 for each of the 44 violations for a total penalty of $44,000, and on Punch TV a penalty of $2,000 per violation for a total penalty $88,000. The Court finds that these amounts are sufficient to capture the nature and scope of the violations and to punish and deter the Defendants.

B. The Court Imposes a Penny Stock Bar.

Section 20(g)(1) of the Securities Act provides that a court may prohibit any person, who at the time of the violation was participating in an offering of penny stock—an equity security with a price of less than $5.00—"from participating in an offering of penny stock conditionally or unconditionally, and permanently or for such time as the court shall determine." 15 U.S.C. § 77e(g)(1). The Defendants' $1 per share offering of Punch TV stock was an offering of a penny stock, and that offering violated the securities laws, so the Court may impose a penny stock bar.

The factors that the Court considers in determining whether to impose a penny stock bar "are essentially the same factors that govern the imposition of an officer or director bar." *SEC v. Alliance Transcription Services, Inc.*, 2009 WL 5128565, at *10 (D.Ariz. 2009) (citing *SEC v. Steadman*, 603 F.2d 1126, 1140 (5th Cir. 1979). These factors are: (1) the egregiousness of the underlying securities violation; (2) the defendant's repeat offender status; (3) the defendant's role or position when he engaged in the fraud; (4) the defendant's degree of scienter; (5) the defendant's economic stake in the violation; and (6) the likelihood that misconduct will recur. *See SEC v. First Pac. Bancorp*, 142 F.3d 1186, 1193 (9th Cir. 1998) (citing *SEC v. Patel*, 61 F.3d 137, 141 (2d Cir. 1995)).[4]

Many of these factors overlap with the *Murphy* factors the Court analyzed above in connection with the SEC's civil penalty request, and the Court finds that the same factors favor a penny stock bar. The factors unique to the analysis also favor a penny stock bar. The underlying securities violation was egregious because Defendants continued to sell their $1 penny stock in violation of the Suspension Order that they agreed to. The same facts establish that the Defendants are repeat offenders, as does the fact that they sold the $1 penny stocks over 30 months to 660 investors. The Defendants' role or position, and their economic stake, are not in dispute and they, too, favor a bar: Defendant Collins was the CEO of Punch TV and actively participated in the offering, and Punch TV, as the issuer, benefitted from the funds raised by the illegal offering. All of these factors weigh in favor of a penny stock bar to protect the public from in the increased risks of investing in penny stocks. The Court notes that the Defendants will still be able to engage in offerings of other securities. The Court will therefore enter a penny stock bar.

C. The Court <u>DENIES</u> the SEC's Request for Disgorgement.

"In any action or proceeding brought by the Commission under any provision of the securities laws, the Commission may seek, and any Federal court may order, disgorgement." 15 U.S.C. § 78u(d)(7). "The district court has broad equity powers to order the disgorgement of 'ill-gotten gains' obtained through the violation of the securities laws." *First Pac. Bancorp*, 142 F.3d at 1191 (citations omitted). "Disgorgement is designed to deprive a wrongdoer of unjust enrichment, and to deter

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[4] The Court need not conduct an evidentiary hearing before imposing a penny stock bar. All of the material facts considered in this analysis are not genuinely disputed and support imposing a bar.

others from violating securities laws by making violations unprofitable." *Id.* The court may order "a disgorgement award that does not exceed a wrongdoer's net profits and is awarded for victims." *Liu v. SEC*, 591 U.S. 71, 74-75 (2020). "Courts may not enter disgorgement awards that exceed the gains 'made upon any business or investment, when both the receipts and payments are taken into the account.... courts must deduct legitimate expenses before ordering disgorgement under § 78u(d)(5)." *Id.* at 91-92 (cleaned up). However, "[d]isgorgement need be 'only a reasonable approximation of profits causally connected to the violation.' " *SEC v. Platforms Wireless Int'l Corp.*, 617 F.3d 1072, 1096 (9th Cir. 2010) (quoting *First Pac. Bancorp*, 142 F.3d at 1191). The SEC first "establishes a reasonable approximation of defendants' actual profits," then "the burden shifts to the defendants to 'demonstrate that the disgorgement figure was not a reasonable approximation.' " *Platforms Wireless,* 617 F.3d at 1096 (citation omitted). "The SEC 'bears the ultimate burden of persuasion that its disgorgement figure reasonably approximates the amount of unjust enrichment.' " *Platforms Wireless*, 617 F.3d at 1096 (cleaned up).

The SEC seeks joint and several disgorgement of the ill-gotten gains of the two unregistered offerings, which the SEC contends total $1,201,154, plus prejudgment interest of $132,000. With its motion, the SEC filed the Declarations Lucee S. Kirka ("Kirka Decl.," Dkt. No. 62-3), an attorney with the SEC, and Carol Kim ("Kim Decl.," Dkt. No. 62-4), the SEC staff accountant assigned to the investigation. Ms. Kirka and Ms. Kim worked together to calculate the Defendants' proceeds from the $1 and $5 stock offerings as $681,924 and $519,230,[5] respectively. Their declarations describe the documents and other evidence they relied on, generally how they

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[5] Ms. Kim indicates in her reply declaration that the calculations understate the total amounts received by about $1,400. *See* Kim Reply Decl. (Dkt. No. 84-5) ¶¶ 17, 18. But because the Court is declining to order disgorgement, this discrepancy is immaterial so the Court will continue to use the numbers the SEC presents in the opening motion papers.

attempted to reconcile the various versions of the Master Spreadsheets that Defendants used to track shareholder transactions and information, and generally how Ms. Kim arrived at the amounts raised. The SEC contends that the entire amount raised is "a reasonable approximation of the Defendants' net profits from their violations because 'all of the securities transactions at issue were unlawful.' " Mot. 5:11-15.

Defendants objected (Dkt. No. 81) to the declarations as hearsay, as lacking foundation or personal knowledge, as violating the best evidence rule, and as improper opinion, among other objections. Defendant Collins's declaration also attaches Punch TV's Quickbooks Profit and Loss Reports for January 9, 2018 through August 30, 2020, showing that Punch TV paid $1,576,910.64 in expenses during this period. *See* Collins Decl. ¶¶ 2, 3, Ex. 1. The Defendants contend that these expenses show that Punch TV's profits cannot be the entire $1.2 million amounts raised. Mr. Collins also contends that the Master Spreadsheets reflected funds that Punch TV expected to receive but in fact didn't, and that the company's "bank records" should be consulted to determine the proceeds. *Id.* ¶¶ 4, 5. By this it appears that Mr. Collins suggests that the SEC's calculations include funds that Punch TV did not actually receive.

In response to Defendants' objections, the SEC filed reply declarations from Kirka and Kim (Dkt. No. 84-3). Kirka explains in greater detail that Punch TV's bank records lacked sufficient information to estimate how much investors invested in Punch TV's securities offerings, and how she used other Punch TV records (credit card charge slips and amendments to subscription agreements) to compile a more complete list of investments not fully reflected in the incomplete Master Spreadsheets that Punch TV personnel provided. *See* Kirka Reply. Decl. ¶¶ 4-11. And Kim explains in greater detail how she reconciled the six different version of the Master Spreadsheets and that her calculations do not include investments reflected in the Master Spreadsheets but for which the Spreadsheet did not reflect a payment amount and for which Kim could not locate other documentation of payment. Kim also attached spreadsheets showing the lists of amounts raised by each offering. *See* Kim Reply Decl. Exs. 1, 2.

Defendants then objected that the SEC provided a more extensive evidentiary record on reply than it did with the opening brief.

The Court has carefully reviewed the entirety of the record. Kirka's and Kim's declarations and the evidence filed therewith establish that they diligently and reliably examined and sifted through Punch TV's incomplete records and that Kim's resulting calculation of $1,201,154 is in fact a reasonable approximation of amounts raised, i.e., the proceeds, of the Defendants' two unlawful offerings. Defendants' fault-finding with Kirka's and Kim's necessary reliance on the incomplete records that Defendants themselves provided is without merit, and their complaint that Kim's calculations include funds not actually received is fully refuted by Kim's reply declaration. Nor did the SEC improperly file the additional evidence in reply: the additional evidence was rebuttal to Defendants' opposition. Nor are the Defendants' evidentiary objections meritorious.

The problem with the SEC's request, however, is that it asks for disgorgement of the total amounts Defendants received, whereas disgorgement is a profit-based remedy: it is measured by the *net profit* from wrongdoing. As such, the SEC must deduct legitimate expenses from gross proceeds in order to establish a disgorgement amount consistent with the principles of equity. *Liu*, 591 U.S. at 91-92 ("Courts may not enter disgorgement awards that exceed the gains 'made upon any business or investment, when both the receipts and payments are taken into the account.' [C]ourts must deduct legitimate expenses before ordering disgorgement under § 78u(d)(5).") (cleaned up). Here, the amounts received are not the net profits, they are the total proceeds from which SEC made no deductions. This does not satisfy *Liu*.

Liu does recognize an exception to the requirement that expenses must be deducted: "when the 'entire profit of a business or undertaking' results from the wrongdoing, a defendant may be denied 'inequitable deductions'." *Id.*, at 92 (a district court need not deduct legitimate expenses if "they were incurred for the purposes of furthering an entirely fraudulent scheme"). The SEC attempts to fit this case within that exception, arguing that the total proceeds are "a reasonable approximation of the Defendants' net profits from their violations because 'all of the securities transactions at issue were unlawful.' *SEC v. Russell*, No. 22-55093, 2023 WL 4946603, at *2 (9th Cir. Aug. 3, 2023)." Mot. 5:11-15. But this case does not fit within the exception. In *Russell*, for example, not only were all of the securities transactions unlawful, the company's "entire profit arose from wrongdoing," because all of the enterprise's gross proceeds were derived from investors who were deceived through "sham transactions" into buying "fictitious" shares "lacking any actual economic substance or value" in a putative cannabis company that generated no revenue and that may not have been a legitimate business at all. *See Russell, supra*, at *1-2, and fn. 2. Thus, because "the only revenues generated . . . were the funds unlawfully obtained from investors, [the] 'entire profit' arose from Russell's wrongdoing, and the district court was not required to deduct any of Russell's business expenses from the investor funds he took in before ordering disgorgement." *Id.*, at *2. The SEC has made no such showing here, so the exception excusing the SEC from deducting legitimate expenses does not apply.

In reply, the SEC suggests that it was Defendants' burden to establish what legitimate expenses should be deducted. But in *Platforms Wireless*, the Ninth Circuit adopted a burden-shifting framework that puts the initial burden of calculating net profits on the SEC: "[o]nce 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.' " *Platforms Wireless*, 617 F.3d at 1096 (citations omitted). The SEC has simply not met its initial burden. It could have done as it did in *SEC v. Mizrahi*, 2020 WL 6114913, at *2 (C.D. Cal. 2020), for example, where it calculated the total proceeds ($6.6 million) and identified legitimate deductions ($4.4 million, including money already returned and business expenses), to arrive at net profits ($2.4 million), which the Court found was a reasonable approximation. *Id.*, at *2. The burden then shifted to the defendant to challenge that calculation, which he unsuccessfully tried to do. The record here reflects no such effort on the SEC's part to calculate *net profits*.

In summary, the SEC seeks disgorgement of the total amount raised by the unlawful offerings, without making any deductions, and without establishing that it was excused from doing so because the entire enterprise was unlawful. This is inconsistent with equitable principles governing disgorgement as set forth in *Liu*. Therefore, the SEC has not met its initial burden of establishing a reasonable approximation of Punch TV's net profits. The Court therefore declines to impose disgorgement and denies that part of the motion.

IV. CONCLUSION

For the reasons set forth above, the Court **GRANTS** the SEC's Motion for civil penalties and imposes a civil penalty of $44,000 on defendant Joseph Collins, and a civil penalty of $88,000 on defendant Punch TV Studios Inc. The Court also **GRANTS** the SEC's Motion insofar as it seeks a penny stock bar.

However, the Court **DENIES** the SEC's Motion insofar as it seeks disgorgement.

Within 10 days of the issuance of this Order, the SEC must file a new Proposed Judgment consistent with this Order. Defendants have 7 days thereafter to object as to form.

IT IS SO ORDERED.

Dated: August 21, 2024

HONORABLE ANDRÉ BIROTTE JR.
UNITED STATES DISTRICT JUDGE