

No. 10-6276
IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

U.S. COMMODITY FUTURES
TRADING COMMISSION, et al.,
Plaintiffs - Appellees,

v.

Ken Lee,
Defendant-Appellant,
Sheila M. Lee,
Relief Defendant-Appellant,
Darren Lee,
Relief Defendant-Appellant,
David Lee,
Relief Defendant-Appellant,

and

Prestige Ventures Corp., a Panamanian
corporation, et al.,
Defendants.

Stephen J. Moriarty,
Receiver.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
The Honorable Judge David L. Russell
D.C. No. 5:09-CV-01284-R

BRIEF FOR APPELLEES
U.S. COMMODITY FUTURES TRADING COMMISSION
OKLAHOMA DEPARTMENT OF SECURITIES *EX REL.* IRVING L. FAUGHT

Oral Argument Not Requested

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RELATED APPEAL

A related appeal is pending before this Court: *U.S. Commodity Futures Trading Commission, et al., v. Simon Yang, et al.*, Case No. 10-6287.

Plaintiffs/Appellees, U.S. Commodity Futures Trading Commission (the “CFTC”) and Oklahoma Department of Securities *ex rel.* Irving L. Faught, Administrator (“ODS”) (collectively, “Plaintiffs” or “Appellees”), herein respond to *Appellants’ Opening Briefs*.¹

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction under 7 U.S.C. § 13a-1 and 7 U.S.C. § 13a-2. These provisions empower the CFTC and the states to bring actions in federal district court for violations of the Commodity Exchange Act (“CEA”), including, in particular, 7 U.S.C. § 6m(1) (failure to register as a commodity pool operator), 7 U.S.C. § 6k(2) (failure to register as an associated person of a commodity pool), 7 U.S.C. § 6o(1) (fraud by commodity pool operator), and 7 U.S.C. § 6b (a)(2) (the CEA’s general anti-fraud provision). The latter provision, 7 U.S.C. § 13a-2, provides the State of Oklahoma with the power to enjoin violations or enforce compliance with state law, including claims brought pursuant to Sections 1-603 and 1-608 of the Oklahoma Uniform Securities Act of 2004 (“OUSA”), Okla. Stat. tit. 71 §§ 1-101 through 1-701 (Supp. 2004). The

¹ This brief is signed and submitted jointly by the CFTC and ODS because the Appellees CFTC and ODS are in complete accordance with the facts and law as stated in this brief. However, each appellee is represented by separate counsel.

district court had supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367(a).

This Court has jurisdiction over this appeal from a final decision under 28 U.S.C. § 1291. Defendant Kenneth Wayne Lee (“Lee”) and Relief Defendants – Lee’s wife, Sheila Lee, and two adult sons, Darren Lee and David Lee – timely appealed on December 9, 2010 from the district court’s relief order dated November 29, 2010. v. 1, pt. 1, pp. 1581-1584; v. 1, pt. 1, pp. 1526-1536.²

STATEMENT OF THE ISSUES

1. Where Appellant Lee and Relief Defendants failed to identify or brief issues concerning the district court’s Relief Order, have they waived their right to challenge the Relief Order on appeal?
2. Are Appellant Lee’s and Relief Defendants’ issues of personal jurisdiction, due process and discovery properly before this Court where such issues were only raised, if at all, in the district court after issuance of the relief order in a post-trial motion that is not the subject of this appeal?
3. Where the undisputed evidence established that Lee committed multiple fraudulent acts, violated the CEA and OUSA, and misappropriated over \$2 million of investor funds for his personal and family use, did the district court exercise reasonable discretion in permanently enjoining Lee and ordering him to pay civil monetary penalties and restitution?
4. Did the district court abuse its discretion in ordering disgorgement of assets where there is substantial evidence that Relief Defendants received ill-gotten assets to which they had no legitimate claim?

² As Defendant Lee and Relief Defendants have each filed substantially the same brief with the Court, the CFTC and ODS will address all four briefs in this brief. Appellants’ opening briefs will be cited as “[Appellant] Br. at ___.”

STATEMENT OF THE CASE

This is an appeal from a final judgment of the United States District Court for the Western District of Oklahoma. The district court granted the uncontested summary judgment motion of the CFTC and ODS on their complaint alleging solicitation fraud, misappropriation of investor monies, and other violations of the CEA and OUSA by Lee, Simon Yang (“Yang”) and two corporate defendants – Prestige Ventures Corp. (“Prestige”) and Federated Management Group, Inc. (“Federated”) (collectively “P&F Common Enterprise” as explained in greater detail in Part I.A. of the facts).³ The district court further found that Relief Defendants had no legitimate interest in funds that they received from Prestige and Federated and assets purchased with those funds. v. 1, pt. 1, pp. 1310, 1527. The district court entered a permanent injunction against Lee, imposed \$7.2 million in civil monetary penalties against him, and ordered him to pay over \$5 million in restitution. v. 1, pt. 1, pp. 1532-1534. It also ordered Relief Defendants to disgorge over \$1.8 million to which they had no legitimate claim. v. 1, pt. 1, p. 1533.

³ To alleviate confusion in this brief, the CFTC and ODS refer to the common enterprise as the P&F Common Enterprise although the district court called the common enterprise the Prestige Enterprise.

A. CFTC's and ODS's Complaint.

The CFTC and ODS alleged that from approximately March 2003 through November 20, 2009, Lee and his co-defendants fraudulently solicited and accepted at least \$8.7 million from approximately 140 residents of Oklahoma and other states (“pool participants” or “investors”) to participate in commodity pools for trading commodity futures contracts and other financial instruments.⁴ v. 1, pt. 1, p. 26. The Complaint alleged that Defendants operated a fraudulent scheme in violation of the CEA, CFTC regulations and the Oklahoma Uniform Securities Act of 2004 (“OUSA”). v. 1, pt. 1, p. 27. Specifically, Lee and co-defendants paid so-called profits to investors that actually came from existing investor monies or money invested from subsequent investors instead of profits from successful trading. v. 1, pt. 1, p. 27. On November 20, 2009, the district court entered *ex parte* a statutory restraining order (“SRO”) freezing Defendants’ assets, appointing a Receiver and ordering an accounting. v. 1, pt. 1, pp. 71-88. Lee did not respond to the Complaint.

On December 2, 2009, Defendant Lee consented to the district court’s jurisdiction and agreed to the terms of a preliminary injunction. v. 1, pt. 1, pp. 101-105. On March 4, 2010, the CFTC and ODS amended their Complaint to add

⁴ Broadly speaking, a commodity pool is analogous to a mutual fund except that the pool invests in commodity futures contracts instead of, or in addition to, securities. *Rosenthal & Co. v. CFTC*, 802 F.2d 963, 965 (7th Cir. 1986).

allegations regarding the three Relief Defendants. v. 1, pt. 1, pp. 369-370, 391-392. At the CFTC's request, the district court amended the SRO and, therefore, the district court also froze the Relief Defendants' assets. v. 1, pt. 1, pp. 168-177; v. 1, pt. 1, pp. 339-357. On March 26, 2010, Lee and Relief Defendants Sheila Lee and David Lee responded to the Amended SRO. v. 1, pt. 1, pp. 504-532. On the same day, Relief Defendant Darren Lee answered the Complaint. v. 1, pt. 1, pp. 484-503. The parties filed a joint status report on March 30, 2010, in which Lee and Relief Defendants stipulated that the district court had jurisdiction over the subject matter and parties and that the chosen venue was proper. v. 1, pt. 1, p. 545. On April 5, 2010, Relief Defendant Darren Lee filed a response to the Amended SRO. v. 1, pt. 1, pp. 568-582. On April 15, 2010, Lee and Relief Defendants Sheila Lee and David Lee filed their Answers. v. 1, pt. 1, pp. 683-796.

B. District Court Grants CFTC and ODS Summary Judgment.

The CFTC and ODS moved for summary judgment as to liability against all parties on September 1, 2010. v. 1, pt. 1, p. 1171. Neither Lee nor the Relief Defendants responded to the motion nor did they dispute any facts presented. v. 1, pt. 1, pp. 1297-1298. On October 27, 2010, the district court granted the CFTC and ODS summary judgment finding Lee and his co-Defendants liable for all of the alleged violations of the CEA, CFTC regulations, and the OUSA ("Summary

Judgment Order”). v. 1, pt. 1, pp. 1297-1317. In its opinion, the district court held, among other things, that:

- (1) there was ample evidence that Lee made material misrepresentations, with scienter, in violation of 7 U.S.C. § 6b(a)(2) and 6b(a)(2)(A)-(C);⁵
- (2) Prestige and Federated were commodity pool operators;
- (3) Lee committed fraud as an associated person and made material misrepresentations with the requisite intent to violate 7 U.S.C. § 6o(1);
- (4) Lee was an associated person of the unregistered commodity pool operators and he violated 7 U.S.C. § 6k by failing to register as such;
- (5) As a controlling person who failed to act in good faith or who knowingly induced the underlying violations of the

⁵ On June 18, 2008, Congress enacted Section 4b(a)(1)(A)-(C), 7 U.S.C. §§ 6b(a)(2)(A)-(C), the Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, Title XIII (the CFTC Reauthorization Act (“CRA”)), §§ 13101-13204, 122 Stat. 1651, which modified and redesignated what was CEA Section 4b(a)(2)(i)-(iii), 7 U.S.C. §§ 6b(a)(2). However, the CRA’s modifications to the CEA do not apply to, and have no substantive effect on, the facts of this case. Accordingly, CEA Section 4b(a)(2)(i)-(iii), 7 U.S.C. §§ 6b(a)(2), applies to violations occurring before June 18, 2008 and Section 4b(a)(1)(A)-(C), 7 U.S.C. §§ 6b(a)(2)(A)-(C), as amended by the CRA, applies to violations occurring on or after that date. Although Lee’s behavior straddles both time periods, for purposes of this brief, Appellees will refer to 7 U.S.C. §§ 6b(a)(2)(A)-(C).

- CEA by Prestige and Federated (the corporate defendants), Lee was liable for the violative acts of Prestige and Federated pursuant to 7 U.S.C. § 13c(b);
- (6) Relief Defendants received money from Prestige and Federated to which they had no legitimate claim;
- (7) Lee and the other Defendants violated the OUSA, Okla. Stat. tit. 71, § 1-301 by failing to register the securities sold by Defendants to investors;
- (8) Lee failed to register as an agent as required by the OUSA, Okla. Stat. tit. 71, § 1-402(A);
- (9) Lee and the other Defendants made material misrepresentations in connection with the offer or sale of a security under the OUSA, Okla. Stat. tit. 71, § 1-501(2);
- (10) Prestige and Federated, acting as a common enterprise, associated with unregistered agents in violation of Okla. Stat. tit. 71 § 1-402; and
- (11) Lee and the other Defendants employed a scheme to defraud investors in violation of the OUSA, Okla. Stat.

tit. 71, §§ 1-501(1) and 1-501(3). v. 1, pt. 1, pp. 1304,
1306, 1308-09, 1311-16.

C. District Court's Relief Trial.

On November 8, 2010, the district court held a bench trial limited to issues of relief. The CFTC and ODS presented testimony and other evidence. v. 1, pt. 1, pp. 1407-08. Glen Grossman ("Grossman"), an ODS investigator and a Certified Public Accountant, testified about the deposits into and disbursements from the P&F Common Enterprise bank accounts. v. 1, pt. 1, pp. 1407-08. While Defendant Yang attended, neither Lee nor the Relief Defendants participated in the trial. v. 1, pt. 1, pp. 1407-08.

On November 29, 2010, the district court entered a Relief Order against all Defendants and Relief Defendants ("Relief Order"). v. 1, pt. 1, p. 1526. The district court:

- (1) permanently enjoined Lee and the other Defendants from
certain conduct relating to the trading of commodity
futures and the sale of securities under the OUSA;
- (2) authorized the court-appointed Receiver to take possession
of, market and sell the real property owned by Lee and
Relief Defendants and the boat owned by Relief
Defendants David and Darren Lee;

- (3) ordered Relief Defendants to disgorge ill-gotten funds
disbursed to them in the following amounts:
 - a. \$711,855 against Sheila Lee;
 - b. \$638,938 against Darren Lee;
 - c. \$574,273 against David Lee;
- (4) ordered Prestige, Federated, and Lee, jointly and severally,
to pay restitution in the amount of \$5,857,503 (plus
prejudgment and post judgment interest), representing the
amount of funds that Prestige investors deposited into
bank accounts controlled by Lee;
- (5) ordered Prestige and Federated, jointly and severally, to pay
\$18.2 million in civil monetary penalties to the CFTC,
plus post-judgment interest. This figure represents
\$130,000 times the 140 known investors; and
- (6) ordered Lee to pay a \$7.2 million civil monetary penalty to
the CFTC, reflecting three times his direct, personal
monetary gain of approximately \$2.4 million plus post-
judgment interest. v. 1, pt. 1, p. 1534.

Lee and the Relief Defendants appeal the Relief Order. v. 1, pt. 1, pp.
1581-1583; attached as Exhibit A.

FACTS⁶

I. Lee Created and Operated a Fraudulent Commodity Pool Enterprise.

A. The Commodity Pools: Prestige and Federated.

Lee, a convicted bank-fraud felon and a college dropout, has been the sole director and President of Prestige, a Panamanian corporation, since July 2003. v. 1, pt. 3, pp. 3-4 (8-9)⁷, 5 (15-16); v. 1, pt. 3, doc. 109-9, p. 8 (27-28); v. 1, pt. 4, doc. 109-25, p. 7, ¶ 16. Lee was also a director and majority owner of Federated, a Texas corporation. v. 1, pt. 4, doc. 109-25, p. 7, ¶ 15. Before his involvement with these companies, Lee declared personal bankruptcy in 1985. v. 1, pt. 3, doc. 109-6, p. 16 (59).

Prestige and Federated acted as a common enterprise (“P&F Common Enterprise”). They were used as part of a scheme to solicit pool participants. v. 1, pt. 1, pp. 1182-1183, ¶ 14-16; v. 1, pt. 3, doc. 109-2, p. 5. v. 1, pt. 3, doc. 109-1, pp. 11-12, ¶ 35. Lee used both companies to solicit and accept investors’ funds to be pooled together to trade various financial instruments, including commodity

⁶ The facts are based on the uncontested Summary Judgment Order and Relief Order granted by the district court as well as the uncontested facts put forward by the CFTC and ODS in their motion for summary judgment and at the relief trial.

⁷ Where a citation to the record is to a page of a deposition transcript with multiple pages on a single page of the record, the pinpoint citation is in parentheses for ease in locating the pertinent deposition testimony.

futures, stocks, stock options, and foreign currency. v. 1, pt. 1, p. 1183, ¶ 17; v. 1, pt. 4, doc. 109-16, p. 2, ¶ 4; v. 1, pt. 1, doc. 109-19, p. 2, ¶ 4; v. 1, pt. 4, doc. 109-14, pp. 2-3, ¶ 7; v.1, pt. 4, doc. 109-15, p. 2, ¶ 4; v. 1, pt. 4, doc. 109-17, p. 2, ¶ 4; v. 1, pt. 4, doc. 109-18, p. 2, ¶ 5. Federated and Prestige shared offices, telephone numbers and solicitation materials. v. 1, pt. 1, pp. 1182-83, ¶¶ 14-16; v. 1, pt. 4, doc. 109-25, p. 7, ¶ 16; v. 1, pt. 3, doc. 109-1, p. 11, ¶ 35; v. 1, pt. 4, doc. 109-15, pp. 17-19. Both entities claimed to use proprietary software, the Legacy Trading System, to trade on behalf of the pools. v. 1, pt. 1, p. 1183, ¶ 15; v. 1, pt. 3, doc. 109-4, p. 42 (161); v. 1, pt. 4, doc 109-24, p. 44; v. 1, pt. 4, doc. 109-17, pp. 19-35. Federated and Prestige had common employees, agents or officers, including Lee and co-Defendant Yang. v. 1, pt. 4, doc. 109-16, p. 2, ¶ 7; v.1, pt. 4, doc. 109-19, p. 2, ¶ 7; v. 1, pt. 4, doc. 109-14, p. 2, ¶ 4; v.1, pt. 4, doc. 109-15, p. 2, ¶ 6; v. 1, pt. 4, doc. 109-17, pp. 2-3, 19-35; v. 1, pt. 4, doc. 109-18, p. 2, ¶¶ 4-5. Pool participants often did not know the difference between the two companies. v. 1, pt. 1, p. 1183, ¶ 16; v.1, pt. 4, doc. 109-16, p. 5, ¶ 22; v. 1, pt. 4, doc. 109-19, p. 4 ¶ 17. Neither company registered any securities or filed any notices of intent to rely on an exemption from registration under the OUSA. v. 1, pt. 1, pp. 1181-1182, ¶¶ 7, 10.

Lee met his co-Defendant Yang in 2003 when Lee placed an ad in Investors' Business Daily for an investment opportunity and Yang responded. v. 1, pt. 3, doc.

109-2, pp. 10, 84 (33-36, 324-327). Yang traveled from his home in Oklahoma to Fort Worth, Texas to meet with Lee and was so impressed with Lee that he invested \$100,000 with Lee. v. 1, pt. 4, doc. 109-3, p. 17; v. 1, pt. 3, doc. 109-2, p. 10 (33-36). After learning of Lee's purported trading results, Yang told some of his friends in Oklahoma about them. v. 1, pt. 3, doc. 109-2, pp. 11, 15, 16-17 (38, 53-55, 60, 61-63); v. 1, pt. 3, doc. 109-2, p. 78 (303). With Defendant Yang as a front-man, Lee recruited investors from the Chinese Baptist Church in Oklahoma City, Oklahoma. v.1, pt. 1, p. 1186, ¶ 31; v.1, pt. 4, doc. 109-3, pp. 20-22. In exchange for these investor referrals, Lee paid Yang a 3% commission by way of a credit to Yang's trading account, v.1, pt. 3, doc. 109-2, p. 17 (64), until sometime in 2004 when Lee started paying Yang \$3000 per month out of the hypothetical earnings in Yang's account. v. 1, pt. 3, doc 109-2, p. 18 (65-68). Lee also used Yang as a go-between with investors in Oklahoma, *e.g.* in late 2009, after the Complaint had been filed in this matter and Lee's assets frozen, Lee asked Yang to communicate to investors that no account statements would be forthcoming. v. 1, pt. 3, doc. 109-2, p. 89 (346). In addition to soliciting for the P&F Common Enterprise, Lee had Yang perform administrative functions for the P&F Common Enterprise, including answering email and drafting correspondence addressing pool participants' concerns about investing, account status and margin requirements. v. 1, pt. 4, doc. 109-16, p. 5, ¶ 24; v. 1, pt. 4, doc. 109-16, pp. 22-23; v. 1, pt. 4, doc.

109-14, pp. 7-10; v. 1, pt. 4, doc. 109-17, pp. 8-17, 50-53, 137, 143-44, 157-160.

Lee provided Yang with solicitation and disclosure materials and was aware that

Yang was soliciting on behalf of the P&F Common Enterprise. v. 1, pt. 3, doc.

109-2, p. 87 (337); v. 1, pt. 3, doc. 109-2, p. 87 (339).

B. Lee Deceived and Made Misrepresentations to Investors.

Through false statements in Prestige's and Federated's solicitation materials,

Lee misled investors. For example, the Federated Disclosure Document ("FDD"),

dated May 23, 2003, claimed that Lee used the "Legacy Trading System," an

allegedly successful and propriety trading system that achieved annual profits

ranging from 16.89% in 1991 to 51.04% in 2003 from trading. v. 1, pt. 4, doc.

109-16, pp. 29-35; v. 1, pt. 3, doc. 109-2, pp. 163-165, FDD. According to the

same materials, the Legacy Trading System outperformed both the S&P 500 and

the futures Managed Account Reports ("MAR Futures") during the same period.

v. 1, pt. 4, doc. 109-2, pp. 163-165. The Prestige marketing materials made similar

claims and stated, "[a]mazingly there has been no [sic] a single loss year for

Legacy Trading System over the 18-year history." v. 1, pt. 4, doc. 109-17, pp. 28-

30.

Lee was not a successful trader. v. 1, pt. 4, doc. 109-25, p. 8, ¶ 23.

Federated and Prestige had approximately thirty-two accounts that traded on-

exchange commodity futures and off-exchange foreign currency at CFTC-

registered Futures Commissions Merchants between January 2004 and July 2009. v. 1, pt. 4, doc. 109-25, pp. 37-41. The P&F Common Enterprise sustained net losses of \$4.3 million trading in these accounts. v. 1, pt. 4, doc. 109-25, p.8, ¶ 23. Lee also opened and controlled two securities trading accounts and sustained net losses of approximately \$70,000 in those accounts. v. 1, pt. 4, doc. 109-25, p. 8, fn. 4. Moreover, Lee never used a “Legacy Trading System.” v. 1, pt. 3, doc. 109-1, p. 11, ¶ 35; v. 1, pt. 3, doc. 109-2, p. 26 (99-101).

The FDD stated that Federated had assets of approximately \$379 million as of April 30, 2003. v. 1, pt. 3, doc. 109-2, p. 166. The Prestige marketing materials also claimed that, at the end of December 2003, Prestige had \$1 billion under management. v. 1, pt. 4, doc. 109-17, p. 28. The combined Prestige and Federated amounts would have equaled \$1.3 billion. Yet, at the end of 2003, the P&F Common Enterprise bank accounts showed a balance of only \$113,588.58. Five years later, in June 2008, the P&F Common Enterprise bank account had a balance of just \$2,123. v. 1, pt. 4, doc. 109-22, p. 3, ¶¶ 10-11.

Lee made other false statements. He told pool participants and prospective participants that funds were protected by a credit union, which did not exist. v. 1, pt. 4, doc. 109-16, p. 5, ¶ 20; v. 1, pt. 4, doc. 109-25, p. 7, ¶ 18. He also falsely proclaimed that Federated’s marketers were members of the National Futures Association and registered with the CFTC. v. 1, pt. 4, doc. 109-16, p. 5, ¶ 20; v. 1,

pt. 4, doc. 109-25, p. 7, ¶ 17. Neither Lee nor Yang was registered with the CFTC or under the OUSA. v. 1, pt. 1, p. 691; v. 1, pt. 3, doc. 109-4, p. 34 (128-129); v. 1, pt. 1, pp. 1179-1180, ¶¶ 3, 5. In addition, Lee failed to disclose material facts to investors such as Lee's 1995 criminal conviction and subsequent incarceration, and a civil judgment against Lee related to the underlying criminal behaviors. v. 1, pt. 3, doc. 109-2, pp. 5-6 (15-17).

In reliance on the solicitations described above, prospective pool participants invested in the P&F Common Enterprise pools. v. 1, pt. 4, doc. 109-16, p. 6, ¶ 27; v. 1, pt. 4, doc. 109-19, p. 5, ¶ 22; v. 1, pt. 4, doc. 109-14, p. 2, ¶ 5; v. 1, pt. 4, doc. 109-15, p. 7, ¶ 12; v. 1, pt. 4, doc. 109-17, p. 5, ¶ 17; v. 1, pt. 4, doc. 109-18, p. 4, ¶ 13.

C. Lee Misappropriated Investor Money.

The P&F Common Enterprise and Lee misappropriated millions of dollars in pool participant funds. v. 1, pt. 4, doc. 109-22, p. 2-5, ¶¶ 7-15. For example, Lee used pool participant funds for personal gain and used the P&F Common Enterprise bank account as his personal bank account paying for such things as his family's health insurance premiums, lawn care, houses and cars. v. 1, pt. 4, doc. 109-22, p. 4, ¶¶ 12-15. The P&F Common Enterprise and Lee also used pool participant funds to make Ponzi purported "profit" payments to other pool participants. v. 1, pt. 4, doc. 109-22, p. 4, ¶ 10a; v.1, pt. 4, doc. 109-16. p. 9,

¶¶ 41-42. Lee admitted he was using participant funds in this way by writing in an email to a pool participant, “[y]ou need to hope that someone DOES invest more in [Prestige] as that is what will get your account closed or be able to release funds to you.” (emphasis in original). v. 1, pt. 4, doc. 109-16, p. 8, ¶ 42, p. 57; v. 1, pt. 4, doc. 109-14, p. 4 ¶ 13, pp. 13-15; v. 1, pt. 4, doc. 109-17, p. 13 ¶ 56, p. 368.

D. Lee Issued False Account Statements.

To conceal their trading losses and misappropriation, Lee and the P&F Common Enterprise issued statements to pool participants reflecting consistent monthly trading profits. The account statements showed monthly profits of up to 4% and no losses. v. 1, pt. 4, doc. 109-16, pp. 37, 39, 41; v. 1, pt. 4, doc. 109-17, pp. 46-135, 236-243, 273-282, 288-335. These statements were false. As described in subpart I.B., the P&F Common Enterprise sustained trading losses. And the bank records indicated minimal assets.

II. Relief Defendants.

From 2003 until late 2009, Lee and the P&F Common Enterprise diverted approximately \$2 million in pool participant funds to the Relief Defendants, v. 1, pt. 4, doc. 109-22, pp. 3-5, ¶¶ 10(d), 12-14, to pay for family expenses, such as health insurance, salaries, houses, and cars. v. 1, pt. 4, doc. 109-22, pp. 4-5, ¶¶ 12-14; v. 1, pt. 4, doc. 109-22, pp. 3-5, ¶¶ 10(d), 12-14.

A. Sheila Lee Received Assets from the P&F Common Enterprise.

Relief Defendant Sheila Lee, Defendant Lee's wife, is a high school graduate with some secretarial training and, until 2003 she worked for Wyndham Hotels for a salary of \$40,000 per year. v. 1, pt. 3, doc. 109-6, pp. 6, 10 (16, 32); v. 1, pt. 3, doc. 109-7, p. 5, ¶12. Sheila Lee was never a part of her husband's business. v. 1, pt. 3, doc. 109-6, p. 8 (25), 11 (37); v. 1, pt. 3, doc. 109-7, p. 3, ¶ 2; v. 1, pt. 3, doc. 109-2, p. 55 (209). But Mrs. Lee received a total of \$233,624 from Appellant Lee for "housekeeping" from March 2003 until November 2009. v. 1, pt. 3, doc. 109-6, p. 10 (35); v. 1, pt. 4, doc. 109-22, p. 4, ¶ 12(a). She possessed no savings. v. 1, pt. 3, doc. 109-6, p. 10(32). Sheila Lee lived with Appellant Lee in a \$288,000 house purchased by check drawn on the P&F Common Enterprise bank accounts. v. 1, pt. 3, doc. 109-2, p. 82 (316), v. 1, pt. 4, doc. 109-22, p. 4 ¶ 12(c). Mrs. Lee also drove a Jaguar purchased with P&F Common Enterprise money. v. 1, pt. 3, doc. 109-6, p. 9 (31); v. 1, pt. 4, doc. 109-22, p. 4, ¶ 12(b). Mrs. Lee with her husband owned a boat that was purchased and maintained with P&F Common Enterprise funds. v. 1, pt. 4, doc. 109-22, p. 4, ¶ 12(e).

B. Darren Lee Received Assets from the P&F Common Enterprise.

Son of Appellant Lee and Sheila Lee, Darren Lee, spent three years in a Texas prison on drug and alcohol related charges. v. 1, pt. 3, doc. 109-9, pp. 3, 16,

18-19 (6, 57, 68-69); v. 1, pt. 3, doc. 109-6, p. 21(79). Darren Lee has not held a steady job since 2003. v. 1, pt. 3, doc. 109-9, p. 9 (31-32). Defendant Darren Lee's deposition testimony was that he was never a P&F Common Enterprise employee nor did he perform any services for pool participant accounts, nor did he know anything about pool participants. v.1, pt. 1, doc. 109-8, p. 4; v. 1, pt. 3, doc. 109-8, p. 10; v. 1, pt. 3, doc. 109-2, p. 79 (305-307); v. 1, pt. 3, doc. 109-9, p. 20 (76). Darren Lee also collected a weekly salary of \$1500 from Prestige, corporate defendant. v. 1, pt. 3, doc. 109-8, p. 12. This amounted to approximately \$371,407 from March 2003 until November 2009. v. 1, pt. 4, doc. 109-22, p. 5, ¶ 14(a). In exchange for the salary, Darren Lee performed select services for his father which included looking at software at his parents' house and doing yard work for them. v. 1, pt. 3, doc. 109-9, pp. 5, 9, 21 (15, 32, 77).

From the P&F Common Enterprise money, Lee paid for Relief Defendant Darren Lee's wedding pictures, an expensive honeymoon, and a \$240,000 house in Mt. Pleasant, SC, among other things. v. 1, pt. 3, doc. 109-6, p. 21 (78); v. 1, pt. 3, doc. 109-2, p. 82 (317); v. 1, pt. 3, doc. 109-9, pp. 6, 22 (19-20, 81-82); v. 1, pt. 4, doc. 109-22, pp. 4-5, ¶ 14(c).

C. David Lee Received Assets from the P&F Common Enterprise.

Appellant Lee and Relief Defendant Sheila Lee's other son, David Lee, also spent three years in state prison on various drug charges. v. 1, pt. 3, doc. 109-12,

pp. 3, 32 (6-7, 121-124). David Lee provided deposition testimony that the only services he provided to the P&F Common Enterprise, if any, included watching his father trade, watching the markets, and doing odd jobs, such as cleaning Appellant Lee's office and mowing the lawn around Lee's house. v. 1, pt. 3, doc. 109-12, pp. 16, 28 (57-58, 105). For this work, Appellant Lee paid Relief Defendant David Lee a weekly salary of \$1500 for a total of \$307,401 from early 2003 until November 2009. v. 1, pt. 3, doc. 109-12, p. 28 (105-106); v. 1, pt. 4, doc. 109-22, p. 4, ¶ 13(a).

Lee also purchased a \$218,000 house for Relief Defendant David Lee and two cars. v. 1, pt. 3, doc. 109-12, p. 27 (102-104); v. 1, pt. 4, doc. 109-22, p. 4, ¶ 13(c); v. 1, pt. 4, doc. 109-22, p. 4, ¶ 13(b); v. 1, pt. 3, doc. 109-12, pp. 19, 29-30 (70-72, 111-113). Additionally, as a combined birthday gift for both Relief Defendants Darren and David Lee, Appellant Lee purchased a \$25,000 boat and paid the related expenses. v. 1, pt. 1, doc. 109-9, p. 15 (54-56); pt. 4, doc. 109-22, pp. 4-5, ¶¶ 13-14. All assets were purchased with money from the P&F Common Enterprise. v. 1, pt. 4, doc. 109-22, pp. 4-5, ¶¶ 13-14.

III. Lee and Relief Defendants' Participation in District Court Proceedings.

A. Lee and Relief Defendants did not Oppose the Summary Judgment Motion.

As described in the Statement of the Case, neither Lee nor Relief Defendants opposed the summary judgment motion or statement of undisputed material facts. In its Summary Judgment Order deciding liability against Lee and finding Sheila Lee, Darren Lee and David Lee to be proper relief defendants, the district court specifically noted Lee and Relief Defendants' lack of participation in the process. v. 1, pt. 1, pp. 1297-1298.

B. Lee and Relief Defendants did not Participate in the Relief Trial.

Before the November 8 relief trial, Relief Defendant Darren Lee moved to continue the trial on the basis that he did not believe the CFTC had sufficiently responded to his discovery requests. v. 1, pt. 1, pp. 1336-1403. The district court denied Darren Lee's continuance request stating that Relief Defendant Darren Lee had not indicated that he would move to compel discovery. v. 1, pt. 1, pp. 1404-1405. The district court further noted that a motion to compel would be untimely because the discovery period had closed. v. 1, pt. 1, p. 1405.

Lee and Relief Defendants did not participate at the trial: they did not attend nor did they submit any evidence to forward their theory of the case or to rebut the CFTC's and ODS's facts or theory of the case. The CFTC and ODS proffered two

live witnesses. v. 1, pt. 1, pp. 1407-1408. The hearing lasted 2 1/2 hours with co-defendant Yang present who represented himself and asked questions of the live witnesses. v. 1, pt. 1, pp. 1407-1408. *See also, e.g.,* supp. vol. 1, trans. at pp. 29-34.

Witness Grossman testified about the money flows from the Prestige checking account and the two Federated checking accounts between March 2003 and November 2009. supp. v. 2, trans. pp. 3-4. His testimony was supported by six trial exhibits that set out in detail money coming into each account and money leaving each account. supp. v. 1, pp. 19-66. Grossman tracked investor money by investor name, and, in the case of unidentified cash deposited, by the bank source of the cash. supp. v. 2, trans. pp. 8-9. Grossman also testified that approximately \$1.3 million of the P&F Common Enterprise funds came from “unknown” sources because he was unable to attach a specific investor name to the specific deposits. He was however able to identify from which bank and from which geographical location the money came that was deposited into the P&F Common Enterprise accounts. supp. v. 1, trans. pp. 28-29. Identified investors deposited approximately \$9,215,235.45 into the P&F Common Enterprise accounts with Lee disbursing \$3,357,732.10 to identified investors. supp. v. 1, p. 19.

Grossman testified that the Lee family (Lee, Relief Defendants Sheila Lee, Darren Lee and David Lee) deposited only \$64,284 into the accounts and withdrew

approximately \$2,442,733. supp. v. 1, trans. p. 11; supp. v. 1, pp. 19, 27-31.

Grossman’s trial exhibits showed the following deposits into the P&F Common Enterprise bank accounts by the Lees and the amounts disbursed to them or for their benefit from the same accounts:

	P&F Common Enterprise payments to Lee and Relief Defendants:	Lee’s and Relief Defendants’ deposits to bank accounts:
Ken Lee	\$453,937	\$31,822
Sheila Lee	\$728,953	\$17,108
David Lee	\$574,464	\$190
Darren Lee	\$654,101	\$15,162

supp. v. 1, p. 59.

C. The District Court Issued the Relief Order Based on the Undisputed Evidence.

On November 29, 2010, the district court issued its Relief Order based on the evidence presented by the CFTC and ODS because Lee and Relief Defendants did not timely submit any evidence or legal arguments to the court for consideration. v. 1, pt. 1, pp. 1526-1536. In light of Lee’s prior conduct and that Lee and the defendants defrauded investors out of millions of dollars which they “whittled away to thousands” and refused to acknowledge their misdeeds, the district court found that there was a reasonable likelihood that Lee would continue

his conduct and that a permanent injunction was warranted. v. 1, pt. 1, p. 1530. Additionally, the district court held that the uncontroverted facts and conclusions of law supported imposition of civil monetary penalties and the award of restitution against Lee. v. 1, pt. 1, p. 1530. Finally, the court ordered the Relief Defendants to disgorge the monies they received from the P&F Common Enterprise. v. 1, pt. 1, p. 1533.

D. Lee’s and Relief Defendants’ Motions for Reconsideration.

Lee and Relief Defendants moved the district court to reconsider the Relief Order under Fed. R. Civ. P. 59 and 60. They raised the following arguments: (1) that the district court denied Lee and Relief Defendants due process; (2) that a genuine issue of material fact existed; (3) that there was “newly discovered evidence” requiring a new trial; (4) that the CFTC and ODS withheld information during discovery; (5) that Lee and Relief Defendants were denied their right to counsel; (6) that Lee and Relief Defendants did not receive proper notice of the trial. v. 1, pt. 1, pp. 1539-1575.

After full briefing, the district court issued an order denying the motions for reconsideration. v. 1, pt. 1, pp. 1638-1641. In doing so, the district court emphasized Defendant Lee and Relief Defendants’ lack of participation:

Defendant and Relief Defendants first contend that Plaintiffs did not present all applicable evidence to the Court in pursuit of summary judgment and during trial on the issues of penalties, damages and disgorgement.

Defendant and Relief Defendants misapprehend the Plaintiffs' role in this adversarial process. Defendants and Relief Defendants were required to respond to the motion for summary judgment, which they failed to do. They did not respond nor seek an extension of time in which to respond. It is not Plaintiffs' obligation to present evidence in support of Defendant's and Relief Defendants' contentions, that was purely their obligation. Additionally, Defendant and Relief Defendants were aware of the trial in this matter and chose not to attend.

v. 1, pt. 1, p. 1639 (footnote omitted). The district court concluded by stating, “[a]gain, the Court cannot table consideration of the merits of litigation until such time as litigants decide they wish to participate.” v. 1, pt. 1, p. 1641.

SUMMARY OF ARGUMENT

Appellant Lee and Relief Defendants waived their arguments on appeal because they did not identify or brief any errors with the district court order they appealed – the Relief Order. v. 1, pt. 1, pp. 1581-1583. The Relief Order was fully supported by the evidence presented at the relief trial. Lee and Relief Defendants did not participate in the relief trial. The order enjoining Lee from certain conduct relating to the trading of commodity futures and the sale of securities was justified by his participation in the fraudulent enterprise in this case. The restitution award against Lee was the amount of money investors deposited into the P&F Common Enterprise accounts less money returned to investors. v. 1, pt. 1, pp. 1533-1534. The civil monetary penalty imposed on Lee reflects three

times his direct, personal monetary gain as permitted by the CEA. v. 1, pt. 1, p. 1534.

The district court properly awarded disgorgement of assets to which Relief Defendants had no legitimate claim. The district court ordered disgorgement of the funds directly traceable to money from the P&F Common Enterprise. v. 1, pt. 1, p. 1533.

Lee and Relief Defendants also waived their arguments regarding due process, personal jurisdiction and discovery failures. They failed to raise them with the district court in a timely manner. They also consented to personal jurisdiction. The district court's Relief Order should be affirmed in its entirety.

ARGUMENT

I. Appellant Lee and Relief Defendants Raise Issues on Appeal Not Properly Before the Court.

A. Appellant Lee and Relief Defendants fail to identify or brief any errors with the district court's relief order; therefore, any arguments challenging relief are waived.

Despite the liberal construction afforded *pro se* pleadings, this Court has held that it will not consider arguments not identified in a notice of appeal nor will it “construct arguments or theories for the plaintiff in the absence of any discussion of those issues.” *Drake v. City of Fort Collins*, 927 F.2d 1156, 1159 (10th Cir. 1991) (citing *Dunn v. White*, 880 F.2d 1188, 1197 (10th Cir. 1989) and *Cunico v. Pueblo School Dist. No. 60*, 917 F.2d 431, 444 (10th Cir. 1990)). Additionally,

those arguments that a *pro se* appellant does raise on appeal need to be briefed with some semblance of legal and factual arguments. *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840-841 (10th Cir. 2005) (arguments waived where *pro se* appellant's appeal consisted of "mere conclusory allegations with no citations to the record or any legal authority for support.")(citations omitted); *Johnson v. Miller*, 387 Fed. Appx. 832, 838 (10th Cir. 2010) (issues waived where *pro se* plaintiff failed to develop an argument with record citations to support alleged constitutional-rights violation)(citations omitted).

Appellants filed their Notice of Appeal on December 9, 2010. They stated that they were appealing the district court's Relief Order.⁸ v. 1, pt. 1, pp. 1581-1583. But Appellants have failed to identify any specific errors made by the district court in its Relief Order. Accordingly, they waived any argument they might have regarding the relief granted by the district court.

- 1. Assuming the appeal of the relief order is properly before this Court, the district court properly acted within its discretion.**
 - a. The standard of review for the relief granted is abuse of discretion.**

⁸ Appellant Lee does not challenge any findings that he violated the CEA and OUSA. Instead, it appears from the record below and their Notice of Appeal that Appellant Lee and Relief Defendants are attempting to escape the penalties imposed upon them by the Relief Order.

This Court reviews the district court's issuance of a permanent injunction for abuse of discretion. *Prows v. Federal Bureau of Prisons*, 981 F.2d 466, 468 (10th Cir. 1992); *Harolds Stores, Inc., v. Dillard Dep't Stores, Inc.*, 82 F.3d 1533, 1555 (10th Cir. 1996) (citing *SEC v. Pros Int'l, Inc.*, 994 F.2d 767, 769 (10th Cir. 1993)). Orders of disgorgement and restitution and imposing civil penalties under the CEA are also reviewed for abuse of discretion. *See Roberts v. Colorado State Bd. of Agriculture*, 998 F.2d 824, 826 (10th Cir. 1993) (equitable remedies are reviewed for abuse of discretion) (citing *Keyes v. School Dist. No. 1*, 895 F.2d 659, 665 (10th Cir. 1990)). Under the abuse of discretion standard, the Court accepts the district court's factual findings unless they are clearly erroneous and reviews application of legal principles *de novo*. *Mitchell*, 218 F.3d at 1198; *Harolds Stores, Inc.*, 82 F.3d at 1555.

b. The district court properly enjoined Lee.

The district court's discretion to enter a permanent injunction is “necessarily broad and a strong showing of abuse must be made to reverse it.” *F.T.C. v. Accusearch Inc.*, 570 F.3d 1187, 1201 (10th Cir. 2009) (quoting *U.S. v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953)). The district court was authorized, upon a proper showing, to enter a permanent injunction against Lee and the other Defendants to enforce compliance with the CEA and any rule, regulation or order thereunder, and the OUSA. 7 U.S.C. § 13a-1; Okla. Stat. tit. 71, § 1-603(B)(1).

The CFTC and ODS had to show a reasonable likelihood that Lee and the other Defendants would violate the CEA and/or the OUSA in the future. *CFTC v. Risk Capital Trading Group, Inc.*, 452 F. Supp. 2d 1229, 1247 (N.D. Ga. 2006); *SEC v. Pros Int'l, Inc.*, 994 F.2d 767, 769 (10th Cir. 1993). “The factors to be considered are ‘the egregiousness of the defendant’s actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant’s assurances against future violations, the defendant’s recognition of the wrongful nature of his conduct, and the likelihood that the defendant’s occupation will present opportunities for future violations.’” *Risk Capital Trading Group, Inc.*, 452 F. Supp. 2d at 1247 (quoting *SEC v. Ginsburg*, 362 F.3d 1292, 1304 (11th Cir. 2004)).

Applying the proper legal standard, the district court found that for reasons specified in the Relief Order and the district court’s order granting the CFTC and ODS summary judgment, there was a reasonable likelihood that Lee and the other Defendants would violate the CEA in the future.⁹ v. 1, pt. 1, pp. 1529-1530.

⁹ The district court referred to the CEA as the “Act” and did not reference the OUSA in connection with this finding. The failure to include the OUSA in this finding, or to state a similar finding with respect to the OUSA, appears to be an unintentional oversight in light of the district court’s findings that Lee violated Sections 1-301, 1-402, 1-501(1)-(3) of the OUSA in its order granting the CFTC and ODS summary judgment and the district court’s issuance of the permanent injunction which, in part, enjoins Lee from “transacting business in and/or from the State of Oklahoma as an issuer, issuer agent, broker-dealer, broker-dealer agent,

Those reasons include, but are not limited to, Lee's prior conduct, notably Lee's prior conviction for fraud-related activities, Lee's activities of defrauding the P&F Common Enterprise investors out of millions of dollars, and Lee's continued refusal to acknowledge his misdeeds in any manner. v. 1, pt. 1, p. 1530.

Accordingly, the district court permanently enjoined Lee and the other Defendants and "all persons insofar as they are acting in the capacity of their agents, servants, employees, successors, assigns, and attorneys, and all persons insofar as they are acting in active concert or participation with them who receive actual notice of such order by personal service or otherwise" from engaging in certain activities relating to commodities and securities. v. 1, pt. 1, pp. 1530-1536.¹⁰ The district court did not abuse its discretion in granting the permanent injunction against Lee and this Court should affirm the district court's issuance of a permanent injunction.

investment adviser and investment adviser representative" under the OUSA. Lee has not made this oversight an issue on appeal.

¹⁰ In Section 4 of their opening briefs in this matter, the Relief Defendants state that the district court placed a permanent injunction on them. Darren Lee Br. at p. 7; David Lee Br. at p. 7; David Lee Br. at p. 6. The Relief Defendants are not subject to the injunction, except to the extent that they are acting in the capacity of the Defendants' agents, servants, employees, successors, assigns, or attorneys or in active concert or participation with Defendants. v. 1, pt. 1, p. 1530.

c. The district court properly ordered restitution.

The district court has the authority to award restitution under the CEA and OUSA. *CFTC v. Brockbank*, 505 F. Supp. 2d 1169, 1175 (D. Utah 2007); Okla. Stat. tit. 71, § 1-603(B)(2)(c). “The purpose of restitution is to ‘restore the status quo and order [] the return of that which rightfully belongs to’ the investors.” *CFTC v. Brockbank*, 505 F. Supp.2d 1169, 1175 (D. Utah 2007) (quoting *CFTC v. Nobel Wealth Data Info. Serv., Inc.*, 90 F. Supp. 2d 676, 692-93 (D. Md. 2000) *aff’d in part and vacated in part*, 278 F.3d 319 (4th Cir. 2002) (imposing restitution)); *see also Porter v. Warner Holding Co.*, 328 U.S. 395, 402 (1946). The amount of restitution is to be determined from the amount invested by the investors less any refunds made by the defendants. *Brockbank*, 505 F. Supp. 2d at 1175 (citing *Noble Wealth*, 90 F. Supp. 2d at 693).

The district court ordered Lee, jointly and severally with Prestige and Federated, to pay restitution totaling \$5,857,503.00, plus prejudgment and post-judgment interest, to the Receiver for distribution to the P&F Common Enterprise investors. v. 1, pt. 1, p. 1533. The court based the restitution amount on “the amount of funds that the P&F Common Enterprise investors deposited into bank accounts controlled by Defendant Lee as a result of the course of illegal conduct alleged in the Complaint, less the amount of identified funds paid to investors.” v. 1, pt. 1, p. 1534.

At the relief trial, the CFTC and ODS presented evidence showing that \$9,215,235.45 from persons identified as investors was deposited into the P&F Common Enterprise bank accounts, while \$3,357,732.10 was disbursed from the same bank accounts to persons identified as investors. *supp. v. 1*, p. 19. The difference between the two figures is \$5,857,503.00 – the same amount ordered as restitution. This figure also represents the amount that Lee, Prestige and Federated wrongfully gained by their misrepresentations. Lee was not present at the relief trial and he did not present any evidence to refute the CFTC’s and ODS’s evidence. The district court’s order for Lee, jointly and severally with Prestige and Federated, to pay restitution in the amount of \$5,857,503.00 was within the court’s discretion.

d. The district court acted within its discretion in imposing a civil monetary penalty against Lee.

Under 7 U.S.C. § 13a-1(d)(1) and 17 C.F.R. § 143.8, the district court was authorized to impose a civil monetary penalty for violations of the CEA and CFTC regulations in the amount of not more than the greater of (i) triple the monetary gain to each person for the violation or (ii) \$120,000 for violations committed between October 23, 2000 and October 22, 2004, \$130,000 for violations committed between October 22, 2004 and October 22, 2008, and/or \$140,000 for

violations committed on or after October 23, 2008.¹¹ 17 C.F.R. § 143.8(a)(1)(i)-(iv); v. 1, pt. 1, p. 1529.

The district court found the imposition of a substantial civil monetary penalty against Lee appropriate due to the egregious nature of Lee's violations of the CEA and its implementing regulations. v. 1, pt. 1, p. 1530. Applying the proper legal standard, the district court ordered Lee to pay a civil monetary penalty in the amount of \$7.2 million plus post-judgment interest, to the CFTC. v. 1, pt. 1, p. 1534. The district court stated that this amount reflects three times Lee's direct, personal monetary gain of approximately \$2.4 million. At the relief trial, the CFTC and ODS presented unchallenged evidence showing that Lee withdrew over \$2.4 million from the P&F Common Enterprise bank accounts and used the funds for the benefit of himself and his family. v. 1, pt. 1, p. 1534; supp. v. 1, p. 19. The district court's order for Lee's \$7.2 million civil monetary penalty was within the court's discretion and, therefore, this Court should affirm the district court's imposition of civil monetary penalties.

- e. The district court properly ordered Relief Defendants to disgorge assets where there was substantial evidence that Relief Defendants have no legitimate claim to the assets.**

¹¹ For violations occurring between November 27, 1996 and October 22, 2000, penalties may be (i) triple the monetary gain to each person for the violation, or (ii) \$110,000 for violations.

i. The Relief Defendants have no legitimate interest in the P&F Common Enterprise assets.

Relief defendants are persons not accused of any wrongdoing who (1) have received ill-gotten funds; and (2) do not have a legitimate claim to those funds. *SEC v. Cavanagh*, 155 F.3d 129, 136 (2d Cir. 1998), *citing SEC v. Colello*, 139 F.3d 674, 677 (9th Cir. 1998). A relief defendant is joined to an action to aid in full relief without having to assert subject matter jurisdiction over the person or entity because he has no ownership in the property interest being litigated. *CFTC v. Kimberlynn Creek Ranch*, 276 F.3d 187, 191 (4th Cir. 2002); *see also SEC v. Cherif*, 933 F.2d 403, 414 (7th Cir. 1991) (a relief defendant is joined as a means of facilitating collection, no subject matter jurisdiction needs to be asserted since the relief defendant does not have any ownership interest but merely possession of the funds that are at the center of the controversy). “[A] claimed ownership interest must not only be recognized in law; it must also be valid in fact. Otherwise, individuals and institutions holding funds on behalf of wrongdoers would be able to avoid disgorgement (and keep the funds for themselves) simply by stating a claim of ownership, however specious.” *Kimberlynn Creek*, 276 F.3d at 192.

In its order granting the CFTC’s and ODS’s unopposed motion for summary judgment, the district court found that the undisputed evidence established that the

Relief Defendants directly or indirectly received substantial sums of money from the P&F Common Enterprise to which they had no legitimate ownership interest or entitlement. v. 1, pt. 1, p. 1310; v. 1, pt. 1, p. 1527. Lee and the Relief Defendants did not appeal the district court's summary judgment. v. 1, pt. 1, v. 1, p. 1582.

ii. Disgorgement was proper.

The district court has the authority to order disgorgement under the CEA and OUSA. *Brockbank*, 505 F. Supp.2d at 1176 (citing *CFTC v. Skorupskas*, 605 F. Supp. 923 (E.D. Mich. 1985) (“courts have uniformly recognized that the authority granted by [§ 13a-1] permits court[s] to order ..., disgorgement, and restitution.”)); Okla. Stat. tit. 71, § 1-603(B)(2)(c). “District courts have the power to order disgorgement from a relief defendant upon a finding that she (1) is in possession of ill-gotten funds and (2) lacks a legitimate claim to those funds.” *CFTC v. Walsh*, 618 F.3d 218, 225 (2d Cir. 2010) (citing *SEC v. Cavanagh*, 155 F.3d 129, 136 (2d Cir. 1998)); see *SEC v. Antar*, 831 F. Supp. 380, 402-03 (D.N.J. 1993) (holding that nominal [relief] defendants should be ordered to disgorge illegal profits). There should be a relationship between the amount of disgorgement and the amount of ill-gotten gains. See *CFTC v. American Metals Exch. Corp.*, 991 F.2d 71, 79 (3d Cir. 1993).

All of the funds received by the Relief Defendants are directly traceable from the P&F Common Enterprise. Uncontested evidence showed the Relief

Defendants made small deposits into the P&F Common Enterprise but the P&F Common Enterprise made much larger deposits into their accounts. v. 1, pt. 1, doc. 109-22, pp. 4-5, ¶¶ 11-14. Grossman was able to trace almost \$2 million from the P&F Common Enterprise accounts directly to or for the benefit of Sheila, David, and Darren Lee. supp. v. 1, p. 19; v. 1, pt. 4, doc. 109-22, p. 2, ¶ 9(c).

Relief Defendants make much of the fact that Grossman was unable to “identify” the almost \$1.3 million dollars of money in the P&F Common Enterprise accounts and that this money was Lee family money. Darren Lee Br. at 2, David Lee Br. at 2, Sheila Lee Br. at 3. Further, Lee and Relief Defendants misconstrue Grossman’s testimony about these funds. Grossman testified that this money came from “unknown” sources because he was unable to attach a specific investor name to it. supp. v. 1, trans. pp. 28-29. But Grossman was able to identify from which bank and geographical location the money came from that was deposited into the P&F Common Enterprise accounts. supp. v. 1, trans. pp. 28-29. These banks and locations were not connected to the Lees. Despite their contentions that this money is Lee family money, Darren Lee Br. at 2, none of the Relief Defendants provided the court with any authenticated documentary evidence to bolster their claims that the almost \$1.3 million was Lee family money.

Based on its finding that the Relief Defendants received ill-gotten funds to which they have no legitimate claim and the uncontested evidence presented at the

relief trial, the district court ordered Sheila Lee to disgorge the total sum of \$711,845, Darren Lee to disgorge the total sum of \$638,938, and David Lee to disgorge the total sum of \$574,273. *v.* 1, pt. 1, pp. 1527 & 1533. The amounts ordered to be disgorged represent the approximate difference between the amounts deposited by the Relief Defendants and the amounts received by the Relief Defendants. The district court did not abuse its discretion in ordering the Relief Defendants to disgorge the amount of their ill-gotten funds and this Court should affirm the district court's disgorgement order.

B. Lee and Relief Defendants failed to preserve other arguments raised in their appellate briefs.

Generally, absent extraordinary circumstances, an appellate court will not review an issue that was not properly raised in the district court. *Tele-Communications, Inc. v. Comm'r of the Internal Revenue Serv.*, 104 F.3d 1229, 1232 (10th Cir. 1997). This Court restates this point in its "Notice and Instructions" to *pro se* appellants on Form A-12: "An appeal is not a retrial but rather a review of the proceedings in the district court." (Emphasis own.) Appellant Lee and Relief Defendants used Form A-12 for their appeals in lieu of a formal brief. On these Forms, Appellants briefed three arguments: (1) the district court lacked personal jurisdiction over Lee and Relief Defendants; (2) their due process rights were denied throughout the proceedings in the district court; and (3) the CFTC and ODS did not abide by the discovery rules. Lee Br. at pp. 3-6; Sheila

Lee Br. at pp. 4-6; Darren Lee Br. at pp. 3-6; David Lee Br. at pp. 3-6. For the most part, these arguments do not challenge the district court's factual conclusions that Lee committed fraudulent acts and Relief Defendants possess no legitimate title to the tainted assets they received. In any event, because Appellants failed to raise these arguments before the district court in a timely manner, these arguments are also waived.

1. Lee and Relief Defendants consented to the district court's personal jurisdiction over them; therefore this argument is waived.

Lee and Relief Defendants contend that the district court did not have personal jurisdiction over them as they reside in South Carolina and never went to Oklahoma where the fraudulent solicitations took place. Lee Br. at 6, Sheila Lee Br. at 6, Darren Lee Br. at 6, David Lee Br. at 5. Lee and Relief Defendants waived this argument when they consented to the district court's personal jurisdiction.

All defendants consented to jurisdiction. Lee consented to a preliminary injunction.¹² v. 1, pt. 1, p. 101. And Lee and Relief Defendants filed a joint status report in March 2010, explicitly stating: (1) "At this time, there are no known objections to the Court's jurisdiction", and (2) "The Court has jurisdiction over the

¹² Lee denied the district court's personal jurisdiction in his Answer to the Amended Complaint. v. 1, pt. 3, doc. 109-1, p. 8, ¶¶ 22-24.

subject matter and parties. The chosen venue is proper.” v. 1, pt. 1, p. 545.

Neither Lee nor the Relief Defendants moved the district court to dismiss the CFTC’s or ODS’s enforcement action for lack of jurisdiction. v. 1, pt. 3, docs. 109-5, 109-8, 109-11. A party must challenge the court’s lack of personal jurisdiction in a responsive pleading or motion, or that defense is waived. *Conrad v. Phone Directories Co., Inc.*, 585 F.3d 1376, 1383, fn. 2 (10th Cir. 2009) (a defense listed in Rule 12(b)(2)-(5) is deemed waived if not brought in an initial Rule 12 motion); *Travelers Cas. and Sur. Co. of America v. Unistar Fin. Serv.*, 35 Fed. Appx. 787, 789 (10th Cir. 2002) (both personal jurisdiction and venue are defendant’s privilege that may be lost by waiver or consent), (citing *Leroy v. Great W. United Corp.*, 443 U.S. 173, 180 (1979)).

Because Lee and Relief Defendants consented to jurisdiction and failed to properly raise a Rule 12(b) defense, they cannot now assert that the district court lacked personal jurisdiction over them. This argument is not only untimely, but this Court should consider the argument waived.

2. Lee and Relief Defendants waived their due process claim because they did not timely raise it and Lee consented to the continuation of the SRO.

Lee and Relief Defendants next argue they were denied due process because the district court ordered an asset freeze upon an *ex parte* motion. Lee Br. at 3-4,

Sheila Lee Br. at 4, Darren Lee Br. at 3-4, David Lee Br. at 3-4. Lee and Relief Defendants also waived this argument.

The CEA explicitly authorizes, and grants jurisdiction to, the district court to issue *ex parte* a restraining order freezing assets and prohibiting any person from destroying defendants' records or denying CFTC officials access to defendants records whenever it appears that any person "has engaged, is engaging, or is about to engage in any act or practice constituting a violation of any provision of this Act or any rule, regulation, or order thereunder." 7 U.S.C. § 13a-1(a). Thus, the district court possessed the jurisdiction and authority to issue both the SRO *ex parte* and the amended SRO *ex parte* under 7 U.S.C. § 13a-1. The same provision of the CEA also provides that upon a proper showing, the court may issue a permanent or temporary injunction or restraining order. 7 U.S.C. § 13a-1(b).

Lee waived his right to be heard on the SRO by consenting to the preliminary injunction, which included a continuation of the SRO. v. 1, pt. 1, pp. 101-105. Appellant Lee cannot now challenge the *ex parte* imposition of the SRO by claiming that he was denied due process. This argument is untimely and the Court should consider it waived.

Even if Lee had not waived his due process claim, the Court should find that Lee was afforded due process in connection with the *ex parte* issuance of the SRO. The district court afforded him the opportunity to oppose a preliminary injunction

in writing and scheduled a show cause hearing on whether a preliminary injunction should issue two weeks after the issuance of the SRO. v. 1, pt. 1, p. 100. Rather than attend the hearing, Lee chose to consent to the entry of the preliminary injunction.

Likewise, the Relief Defendants waived their due process claim regarding the *ex parte* entry of the amended SRO. The Relief Defendants filed oppositions to the amended SRO and motions to stay the receivership but never raised a due process argument until after the entry of the summary judgment and relief order. v. 1, pt. 1, pp. 504-510, 523-530, 568-574. The district court afforded Relief Defendants a hearing on their motions to stay the receivership but they failed to appear. v. 1, pt. 1, p. 833. The Relief Defendants' due process argument is untimely and should be considered waived.

3. Because Lee and Relief Defendants failed to ask the district court to compel discovery responses, their discovery argument is waived.

The Lees claim that the district court erred in not ordering the CFTC and ODS to provide additional discovery responses. Lee Br. at p. 4-6, Sheila Lee Br. at p. 4-6, Darren Lee Br. at 4-6, David Lee Br. at p. 4-6. This argument was not timely raised before the district court and is therefore waived.

Rule 37 of the Federal Rules of Civil Procedure does not specify a time period within which a party should bring a motion to compel discovery. The

courts, however, have made it clear that a party must move to compel discovery responses in a timely manner and not wait until the last minute to do so.

Continental Indus., Inc. v. Integrated Logistics Solutions, LLC, 211 F.R.D. 442, 444 (N.D. Okla. 2002). In other words, a “party cannot ignore available discovery remedies for months and then, on the eve of trial, move the court for an order compelling production.” *Buttler v. Benson*, 193 F.R.D. 664, 666 (D. Colo. 2000); *Nortel Networks Ltd. v. SMC Electronics*, 2007 WL 1959281 at *1 (W.D. Okla. 2007) (once the responding party registers a timely objection to the discovery requests, the responsibility is on the requester to move to compel production or responses); *DesRosiers v. Moran*, 949 F.2d 15, 22 n. 8 (1st Cir. 1991) (failure to pursue a timely discovery remedy may be construed as a waiver of any discovery violation).

Neither Appellant Lee nor Relief Defendants timely challenged the discovery process. At best, only Relief Defendant Darren Lee expressed dissatisfaction with the CFTC’s discovery responses when he asked to postpone the relief trial five days before the scheduled start date, based on perceived discovery shortcomings. v. 1, pt. 1, pp. 1336-1403; v. 1, pt. 1, p. 2. The district court rejected the request. In doing so, the court highlighted that Darren Lee gave no indication that he intended to move to compel discovery. The court also pointed out that the discovery period had expired. v. 1, pt. 1, pp. 1404-1405.

Because Lee and Relief Defendants did not properly raise their alleged discovery-violation arguments before the district court, there is no record upon which this Court could consider whether a violation occurred.¹³ As such, this argument is not properly before this Court, and should therefore be deemed waived.

STATEMENT OF COUNSEL AS TO ORAL ARGUMENT

The CFTC and ODS respectfully suggest that oral argument would not materially aid the Court in this matter.

CONCLUSION

Lee and Relief Defendants waived the arguments they raised on appeal. Even if the Court decides to review the merits of Lee's and Relief Defendants' arguments, it should find that their arguments are without merit and affirm the district court's judgment and order in its entirety.

¹³ If Lee and the Relief Defendants had properly raised their alleged discovery-violation arguments before the district court, the record would show that only Relief Defendant Darren Lee propounded discovery requests on the CFTC and ODS and that his discovery requests were answered appropriately and within the 30 day time period proscribed by Fed. R. Civ. P. 33(b)(2), Fed. R. Civ. P. 34(b)(2)(A) and Fed. R. Civ. P. 36(a)(3).

Respectfully submitted,

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Dated: May 27, 2011

**CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY
REDACTIONS**

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Tenth Circuit Rule 32, the attached answering brief complies with the type volume limitation of Rule 32(a)(7)(B) in that it contains 10,272 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

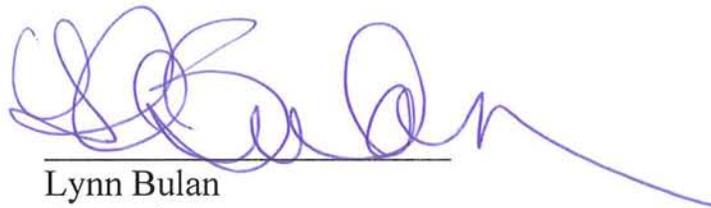
This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) because this brief was prepared in proportionally spaced typeface using Microsoft Word 2007 with 14 point Times New Roman style type.

This brief and the electronic PDF version of the brief are identical.

I have scanned this brief for viruses and no viruses were detected. I used Symantec Anti-virus, version 11.0.6100.645.

In addition, I certify all required privacy redactions have been made.

Dated: May 27, 2011



Lynn Bulan
Counsel
Commodity Futures Trading Commission

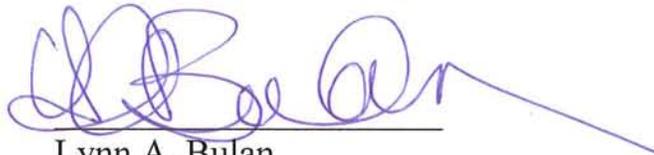
CERTIFICATE OF SERVICE

I hereby certify that an original and two copies of the foregoing Appellees' Brief was served by ECF and overnight express service on May 27, 2011 on the following:

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Sheila Lee
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**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA**

**U.S. COMMODITY FUTURES)
TRADING COMMISSION and)
OKLAHOMA DEPARTMENT OF)
SECURITIES ex rel. IRVING L. FAUGHT,)**

Plaintiffs,)

v.)

CASE NO CIV-09-1284-R

**PRESTIGE VENTURES CORP.,)
Panamanian corporation, FEDERATED)
MANAGEMENT GROUP, INC.,)
a Texas corporation, KENNETH WAYNE)
LEE, an individual, and SIMON YANG)
a/k/a XIAO YANG a/k/a SIMON CHEN),)
an individual,)**

Defendants; and)

**SHEILA M. LEE, an individual,)
DAVID A. LEE, an individual, and)
DARREN LEE, an individual,)**

Relief Defendants.)

ORDER

On November 8, 2010, this matter came to trial before this Court on the issues of sanctions and penalties to be ordered against Defendants and Relief Defendants. Plaintiffs U.S. Commodity Futures Trading Commission (the “Commission”) and Oklahoma Department of Securities (“ODS”) appeared by its counsel; and Defendant Simon Yang appeared pro se. The Receiver, Stephen J. Moriarty (“Receiver”), appeared in person.

Defendant Kenneth Wayne Lee and Relief Defendants David A. Lee, Darren Lee, and Sheila M. Lee did not appear.

On October 27, 2010, the Court granted Plaintiffs' Motion for Summary Judgment, finding Defendants liable for violations of the Commodity Exchange Act ("Act"), 7 U.S.C. §§ 1 et seq. (2006), Commission Regulations ("Regulations"), 17 C.F.R. §§ 1.1 et seq. (2009), and the Oklahoma Uniform Securities Act of 2004 ("OUSA"), Okla. Stat. tit. 71, §§ 1-101 through 1-701 (Supp. 2009). (Doc. No. 120). The Court further found that Relief Defendants Sheila Lee, David Lee, and Darren Lee directly or indirectly received substantial sums of money to which they had no legitimate ownership interest or entitlement from Defendants Prestige Ventures Corp. ("Prestige") and Federated Management Group, Inc. ("Federated") (hereinafter referred to collectively as the "Prestige Enterprise"). Having considered the submissions by the Plaintiff and Defendant Yang at the trial, the Court hereby finds as follows.

FINDINGS OF FACT

1. The Prestige Enterprise received at least \$10,656,921 from investors between March 5, 2003 and November 30, 2009 (the "Relevant Time Period").
- 2.. The Prestige Enterprise returned \$3,357,732 to investors during the Relevant Time Period.
3. The Prestige Enterprise received \$469,507 in investments from Simon Yang and disbursed \$133,500 to him during the Relevant Time Period.

4. The Prestige Enterprise received \$17,108 from Sheila Lee and disbursed \$728,953 to or for the benefit of Sheila Lee during the Relevant Time Period.

5. The Prestige Enterprise received \$190 from David Lee and disbursed \$574,464 to or for the benefit of David Lee during the Relevant Time Period.

6. The Prestige Enterprise received \$15,162 from Darren Lee and disbursed \$654,101 to or for the benefit of Darren Lee during the Relevant Time Period.

7. Kenneth Lee and Sheila Lee's residence, having a legal description of Lot 30, Phase 2A, Berkleigh at Parkwest, Mt. Pleasant, Charleston County, South Carolina, street address 1660 Jorrington Street, Mt. Pleasant, South Carolina ("Kenneth and Sheila Lee Residence"), was purchased with funds received by the Prestige Enterprise from investors and is an asset of the Prestige Enterprise.

8. Darren Lee's residence, having a legal description of Lot 165, Tract J, Phase II, Palmetto Hall at Dunes West, Mt. Pleasant, Charleston County, South Carolina, street address 2676 Palmetto Hall Boulevard, Mt. Pleasant, South Carolina ("Darren Lee Residence"), was purchased with funds received by the Prestige Enterprise from investors and is an asset of the Prestige Enterprise.

9. A boat (2004 Edgewater 175 cc, Boat registration number 1016BR, Hull number DMA03840H304) registered to David Lee and Darren Lee, along with an engine (2004 Yamaha F115, #68VL1018414, Engine serial number MAA0712198) and trailer (2004 Trailer, AA6515-17, #40ZBA1712Z3P101627) (hereinafter collectively referred to as the

“Edgewater Boat”), were purchased with funds received by the Prestige Enterprise from investors and are assets of the Prestige Enterprise.

CONCLUSIONS OF LAW

1. Section 6c(d)(1) of the Act, and Regulation 143.8, provide that the Commission may seek, and a District Court of the United States shall have jurisdiction to impose, a civil monetary penalty for violations of the Act and Regulations in the amount of not more than the greater of I) triple the monetary gain to each person for the violation, or ii) \$110,000 for violations committed between November 27, 1996 and October 22, 2000, \$120,000 for violations committed between October 23, 2000 and October 22, 2004, \$130,000 for violations committed between October 22, 2004, and/or \$140,000 for violations committed on or after October 23, 2008.

2. Upon a proper showing, this Court may enter a permanent injunction to enforce compliance with the Act and any rule, regulation or order thereunder. 7 U.S.C. § 13a-1.

In order to be entitled to injunctive relief, [the CFTC must] show a reasonable likelihood that [a defendant] would violate the Act in the future. The factors to be considered are “the egregiousness of the defendant’s actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant’s assurances against future violations, the defendant’s recognition of the wrongful nature of his conduct, and the likelihood that the defendant’s occupation will present opportunities for future violations.”

CFTC v. Risk Capital Trading Group, Inc., 452 F.Supp.2d 1229, 1247 (N.D.Ga. 2006)(quoting *SEC v. Ginsburg*, 362 F.3d 1292, 1304 (11th Cir. 2004))(citation and quotation omitted).

3. The Court finds that in light of Defendants' prior conduct, notably Defendant Lee's prior conviction for fraud-related activities, Defendants defrauded investors out of millions of dollars, which were whittled away to thousands, yet continue to refuse to acknowledge in any manner their misdeeds, that there is a reasonable likelihood that Defendants will violate the Act in the future. For this reason, and for the reasons set forth in the Court's order granting Plaintiffs summary judgment, permanent injunctive relief is warranted.

4. "[T]he Court has the authority to award 'ancillary equitable relief,' including restitution." The purpose of restitution is to "restore the status quo and order [] the return of that which rightfully belongs to" the investors. *Commodity Futures Trading Com'n v. Brockbank*, 505 F.Supp.2d 1169, 1175 (D.Utah 2007).

5. The Court finds restitution is an appropriate remedy for Defendants, as more fully set out below.

6. Imposition of a substantial civil monetary penalty is appropriate in this case because certain Defendants' violations of the Act and Regulations were egregious.

THEREFORE, IT IS ORDERED THAT:

The Defendants and all persons insofar as they are acting in the capacity of their agents, servants, employees, successors, assigns, and attorneys, and all persons insofar as they are acting in active concert or participation with them who receive actual notice of such order by personal service or otherwise, shall each be permanently restrained, enjoined and prohibited from directly or indirectly:

1. engaging in conduct in violation of Sections 4k(2), 4m(1), 4o(1), 6(c) and 9(a)(3) of the Act, 7 U.S.C. §§ 6k(2), 6m(1), 6o(1), 9(c) and 13(a)(3) (2006), Sections 4b(1)(A)-(C) of the Act as amended by the CRA, to be codified at 7 U.S.C. §§ 6b(1)(A)-(C), Regulations 4.20(a)(1) and (b) and 4.21(a)(1) and (b), 17 C.F.R. §§ 4.20(a)(1) and (b) and 4.21(a)(1) and (b) (2009), and Sections 1-301, 1-402, and 1-501 of the OUSA;
2. trading on, or subject to the rules of, any registered entity (as that term is defined in Section 1a(29) of the Act, 7 U.S.C. § 1a(29)(2006));
3. entering into any transactions involving commodity futures, options on commodity futures, commodity options (as that term is defined in Regulation 32.1(b)(1), 17 C.F.R. § 32.1(b)(1) (2009)) (“commodity options”), and/or foreign currency (as described in Sections 2(c)(2)(B) and 2(c)(2)(C)(I) of the Act as amended by the CRA, to be codified at 7 U.S.C. §§ 2(c)(2)(B) and 2(c)(2)(C)(I)) (“forex contracts”) for their own personal account or for any account in which they have a direct or indirect interest;
4. having any commodity futures, options on commodity futures, commodity options, and/or forex contracts traded on their behalf;
5. controlling or directing the trading for or on behalf of any other person or entity, whether by power of attorney or otherwise, in any account involving commodity futures, options on commodity futures, commodity options, and/or forex contracts;
6. soliciting, receiving, or accepting any funds from any person for the purpose of purchasing or selling any commodity futures, options on commodity futures, commodity options, and/or forex contracts;

7. applying for registration or claiming exemption from registration with the Commission in any capacity, and engaging in any activity requiring such registration or exemption from registration with the Commission, except as provided for in Regulation 4.14(a)(9), 17 C.F.R. § 4.14(a)(9) (2009);

8. acting as a principal (as that term is defined in Regulation 3.1(a), 17 C.F.R. § 3.1(a) (2009)), agent or any other officer or employee of any person registered, exempted from registration or required to be registered with the Commission, except as provided for in Regulation 4.14(a)(9), 17 C.F.R. § 4.14(a)(9) (2009);

9. transacting business in and/or from the state of Oklahoma as an issuer, issuer agent, broker-dealer, broker-dealer agent, investment adviser and investment adviser representative, as those terms are defined by Section 1-102 of the OUSA;

10. transferring, selling, alienating, liquidating, encumbering, pledging, leasing, loaning, assigning, concealing, dissipating, destroying, converting, or otherwise disposing of any asset subject to this Order or any other asset of the Prestige Enterprise, except as provided in this Order; and

11. interfering with the Receiver's performance of his duties including, but not limited to, the acquisition and liquidation of assets of the Prestige Enterprise.

IT IS FURTHER ORDERED THAT:

1. The Receiver is hereby authorized to take possession of, market and sell the Kenneth and Sheila Lee Residence, the Darren Lee Residence and the Edgewater Boat. Receiver is hereby authorized to take all actions necessary to close such sales including, but

not limited to, (a) retention of real estate professionals, brokers and/or auctioneers, (b) execution of a deed, bill of sale or other conveyance document and (c) payment of a reasonable real estate commission and/or auctioneer fee.

2. Kenneth Lee, Sheila Lee, and any other occupant(s) of the Kenneth and Sheila Lee Residence, shall vacate the Kenneth and Sheila Lee Residence within twenty (20) days of the date of entry of this Order.

3. Having previously concluded that the relief Defendants, Sheila Lee, Darren Lee and David Lee were in possession of ill-gotten funds to which they lacked a legitimate claim, the Court orders:

a. Sheila Lee shall disgorge the total sum of \$711,845.

b. Darren Lee shall disgorge the total sum of \$638,938.

c. David Lee shall disgorge the total sum of \$574,273.

4. Darren Lee, David Lee, and any other occupant(s) of the Darren Lee Residence shall vacate the Darren Lee Residence within twenty (20) days from the date of entry of this Order.

5. Prestige, Federated, and Kenneth Lee shall, jointly and severally, pay restitution totaling \$5,857,503.00 (plus prejudgment and post-judgment interest¹) to the Receiver for distribution to the Prestige Enterprise investors. This restitution obligation

¹ Prejudgment interest is a matter of discretion for the Court, and is based on the wrongful deprivation of an aggrieved party of its money, including deprivation of the opportunity to earn a return on that money. *See SEC v. Hasho*, 784 F.Supp. 1059, 1112 (S.D.N.Y. 1992). The Court concludes that given the blatant nature of the fraud and the widespread abuse of investors' money by Defendants, that prejudgment interest is appropriate.

represents the amount of funds that the Prestige Enterprise investors deposited into bank accounts controlled by Defendant Lee as a result of the course of illegal conduct alleged in the Complaint, less the amount of identified funds paid to investors. The amount to be paid to each investor shall be determined by the Court after recommendation by the Receiver.

6. Prestige and Federated shall, jointly and severally, pay a civil monetary penalty in the amount of \$18.2 million to the Commission, plus post-judgment interest, within ten (15) days of the date of the entry of this Order. This represents \$130,000 times the 140 known investors. Should Defendants Prestige and Federated not satisfy their civil monetary penalty obligation within fifteen (15) days of the date of entry of this Order, post judgment interest shall accrue on the obligation beginning on the date of entry of this Order and shall be determined by using the Treasury Bill rate prevailing on the date of entry of this Order pursuant to 28 U.S.C. § 1961.

7. Kenneth Lee shall pay a civil monetary penalty in the amount of \$7.2 million to the Commission, reflecting three times his direct, personal monetary gain of approximately \$2.4 million, plus post-judgment interest, within fifteen (15) days of the date of the entry of this Order. Should Kenneth Lee not satisfy his civil monetary penalty obligation within fifteen (15) days of the date of entry of this Order, post judgment interest shall accrue on the obligation beginning on the date of entry of this Order and shall be determined by using the Treasury Bill rate prevailing on the date of entry of this Order pursuant to 28 U.S.C. § 1961.

8. Simon Yang shall pay restitution totaling \$133,000 (plus prejudgment and post-judgment interest) to the Receiver for distribution to the Prestige Enterprise investors.

The amount reflects the amount paid to Simon Yang by Defendants during the relevant time period. The amount to be paid to each investor shall be determined by the Court after recommendation by the Receiver.

9. The Court finds that in view of the prior order of restitution set forth herein and disgorgement remedies already imposed and his inability to pay a civil fine, that no civil fine will be imposed as to Defendant Yang.

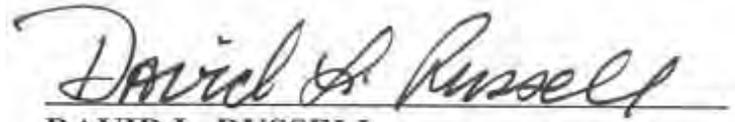
10. Simon Yang is precluded from making a claim for restitution or any return of funds or payment from Prestige, Federated, Kenneth Lee, the Receiver and/or the Receivership.

11 All payments by Defendants pursuant to this Order shall first be applied to satisfaction of the restitution obligations. After satisfaction of the restitution obligations, Defendants' payments pursuant to this Order shall be applied to satisfy the civil monetary penalty obligations.

12. Stephen J. Moriarty, as Receiver, is hereby authorized, empowered and directed to take all necessary and appropriate acts to carry out and implement this Order in accordance with its terms without further order of the Court. This includes, but is not limited to, the acquisition and liquidation of the assets of the Prestige Enterprise. Receiver shall make a report to the Court on all asset sales and will deposit the proceeds from such sales in a segregated account pending further Order of this Court.

13. After the termination of the Receivership, any restitution payment that is made shall be made in accordance with the terms of the order terminating the Receivership and/or discharging the Receiver.

IT IS SO ORDERED this 29th day of November, 2010.



DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE