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United States District Court,
E.D. New York.
SECURITIES and EXCHANGE COMMISSION,
Plaintiff,
v.
CHINA ENERGY SAVINGS TECHNOLOGY, INC., New Solomon Consultants, Chiu Wing Chiu, Lai Fun Sim a/k/a Stella Sim, Sun Li, Jun Tang Zhao, Defendants,
and
Amicorp Development Limited, Essence City Limited, Precise Power Holdings Limited, Yan Hong Zhao, Ai Qun Zhong, Tung Tsang, Relief Defendants.

No. 06-CV-6402 (ADS)(AKT).
March 28, 2008.

Securities and Exchange Commission, by: Alan M. Lieberman, Esq., Patrick Feeney, Esq., of Counsel, Washington, DC, for the Plaintiff.

Bressler, Amery & Ross, by: David J. Libowsky, Esq., of Counsel, New York, NY, for the Relief Defendants.

No Appearance for Defendant **China Energy Savings** Technology, Inc., New Solomon Consultants, Chiu Wing Chiu, Lai Fun Sim a/k/a Stella Sim, Sun Li, and Jun Tang Zhao.

ORDER

SPATT, District Judge.

***1** The Securities and Exchange Commission ("SEC") commenced this action against **China Energy Savings** Technology, Inc. ("China Energy"), New Solomon Consultants, Chiu Wing Chiu, Lai Fun Sim a/k/a Stella Sim, Sun Li, and Jun Tang Zhao (collectively, the "Defendants"), Amicorp Development Limited, Essence City Limited, Precise Power Holdings Limited, Yan Hong Zhao, Ai Qun Zhong, and Tung Tsang (collectively, the "Relief Defendants") alleging violations of: (1) Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78j(b), and Rule 10b-5 of the regulations, 17 C.F.R. § 240.10b-5; and (2) Sections 5(a) and 5(c) of the Securities Act of 1933 ("Securities Act"), 15 U.S.C. §§ 77e(a), (c). Defendants China Energy, New Solomon, Chiu, Sim, Li, and J. Zhao have defaulted in this action.

On April 20, 2007, a default judgment was entered against the Defendants **China Energy Savings** Technology, Inc., New Solomon Consultants, Chiu Wing Chiu, Lai Fun Sim a/k/a Stella Sim, Sun Li, and Jun Tang Zhao. This matter was referred to United States Magistrate Judge A. Kathleen Tomlinson for a Report and Recommendation ("Report") to determine the amount of damages, including reasonable attorneys fees and costs, and the plaintiff's request for a permanent injunction.

On March 13, 2008, Judge Tomlinson issued a Report, recommending that the Court enter judgment as follows:

> (1) Defendants China Energy, New Solomon, Chiu Wing Chiu, Lai Fun Sim a/k/a Stella Sim, Sun Li, and Jun Tang Zhao be permanently restrained and enjoined from violating, directly or indirectly, Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder, by using any means or instrumentality of interestate commerce, or of the mails, or of any facility of any national securities exchange, in connection with the purchase or sale of any security **(a)** to employ any device, scheme, or artifice to defraud; **(b)** to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or **(c)** to engage in any act, practice, or course of business which operated or would operate as a fraud or deceit upon any person;

(2) Defendants should further be restrained and enjoined from violating Section 5 of the Securities Act by, directly, or indirectly, in the absence of any applicable exemption: **(a)** Unless a registration statement is in effect as to a security, making use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; **(b)** Unless a registration statement is in effect as a security, carrying or causing to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale; or **(c)** Making use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statements has been filed with the Commission as to such security, or while the registration statement is the subject of a refusal order or stop order (prior to the effective date of the registration statement) any public proceeding or examination under Section 8 of the Securities Act;

***2** (3) Prohibiting each of Defendants Chiu Wing Chiu, Lai Fun Sim a/k/a Stella Sim, Sun Li, and Jun Tang Zhao from acting as an officer or director of any issuer that has a class of securities registered pursuant to Section 12 of the Exchange Act or that is required to file reports pursuant to Section 15(d) of the Exchange Act;

(4) Denying Plainitiff's request for a Penny Stock Bar, without prejudice and with a right to renew this application upon presentation of proper evidentiary support;

(5) Requiring Defendants to disgorge $29,665,625.28;

(6) Awarding $3,652,554.34 for prejudgment interest;

(7) Imposing joint and several liability on Defendants; and

(8) Assessing civil penalties of $1million against Defendants

Chiu and Sim, and $75,000 against Defendants Li and J. Zhao.

Pursuant to Judge Tomlinson's Report, any written objections were due on or before March 24, 2008. To date, there have been no objections filed to the Report. In reviewing a report and recommendation, a court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(C). "To accept the report and recommendation of a magistrate, to which no timely objection has been made, a district court need only satisfy itself that there is no clear error on the face of the record." *Wilds v. United Parcel Serv.*, 262 F.Supp.2d 163, 169 (S.D.N.Y.2003) (citing *Nelson v. Smith*, 618 F.Supp. 1186, 1189 (S.D.N.Y.1985)); *see also Pizarro v. Bartlett*, 776 F.Supp. 815, 817 (S.D.N.Y.1991).

The Court has reviewed the thoughtful analysis of Judge Tomlinson's Report and totally agrees with its findings in full. There being no objection to Judge Tomlinson's Report, it is hereby:

ORDERED, that Judge Tomlinson's Report and Recommendation is adopted in its entirety; and it is further

ORDERED, that the Securities and Exchange Commission shall submit to this Court a Proposed Form of Order in accordance with Judge Tomlinson's Report and Recommendation within fourteen days of the date of this Order, and it is further

ORDERED, that the Securities and Exchange Commission shall serve a copy of this Order upon all Defendants; and it is further

ORDERED, that the Clerk of the Court is directed to note the judgment and terminate the mo-

tion for permanent injunction.

SO ORDERED.

REPORT AND RECOMMENDATION

A. KATHLEEN TOMLINSON, United States Magistrate Judge.

This matter, arising under the Securities Act of 1933 and the Securities Exchange Act of 1934, has been referred to me by District Judge Spatt for the purpose of conducting an inquest and issuing a Report and Recommendation as to damages and other relief sought by Plaintiff. My recommendations with respect to the relief requested by Plaintiff are set forth below.

I. *BACKGROUND*

The Securities and Exchange Commission ("SEC") commenced this action against **China Energy Savings** Technology, Inc. ("China Energy"), New Solomon Consultants ("New Solomon"), Chiu Wing Chiu, Lai Fun Sim a/k/a/ Stella Sim, Sun Li and Jun Tang Zhao (collectively, the "Defendants"), and Amicorp Development Limited ("Amicorp"), Essence City Limited ("Essence City"), Precise Power Holdings Limited ("Precise Power"), Yan Hong Zhao, Ai Qun Zhong, and Tung Tsang (collectively, the "Relief Defendants") alleging violations of: (1) Sections 5(a) and 5(c) of the Securities Act of 1933 ("Securities Act"), 15 U.S.C. §§ 77e(a), (c); and (2) Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5.

***3** As noted by Judge Spatt, "[t]he SEC's claims of securities violations arise out of an alleged 'pump and dump' scheme related to the sale of China Energy stock. The phrase 'pump and dump' refers to a scheme by which someone causes the price of a stock to be artificially inflated, and then sells the stock when its value increases." Memorandum of Decision and Order, Mar. 19, 2007 [DE 53]. As a result, Judge Spatt pointed out, "[t]he purchasers who bought the stock at a high price are typically left with worthless or much lower-valued securities when the price of the stock returns to its actual value." *Id.*

"Where, as here, 'the court determines that defendant is in default, the factual allegations of the complaint, except those relating to the amount of damages, will be taken as true.' " *Chen v. Jenna Lane, Inc.*, 30 F.Supp.2d 622, 623 (S.D.N.Y.1998) (quoting 10A C. Wright, A. Miller & M. Kane, *Federal Practice & Procedure: Civil 3d* § 2688 at 58-59 (3d ed.1998)). The following facts are derived from the SEC's complaint and subsequent filings in support of its motion for entry of default judgment. These facts remain unchallenged. China Energy was formed in August 2004 when a Nevada shell corporation, Rim Holdings, Inc., owned by Defendants Chiu and Sim, was renamed "China Energy." China Energy's business was developing, marketing, distributing and manufacturing energy saving products for use in commercial and industrial settings.

Defendant New Solomon is a British Virgin Island corporation with its principal place of business in Hong Kong. Defendant Chiu Wing Chiu ("Chiu"), a resident of Hong Kong or the People's Republic of China, was the sole officer and director of New Solomon. Defendant Chiu exercised control over New Solomon and China Energy. Defendant Lai Fun Sim a/k/a Stella Sim ("Sim"), is a resident of Hong Kong. Defendant Sim was corporate secretary and a director of China Energy, and the sole officer and director of Eurofaith Holdings, Inc. ("Eurofaith"), a holding company controlled and directed by Defendant Chiu.

Defendant Sun Li is a resident of Hong Kong or the People's Republic of China. Sun Li was the Chief Executive Officer of China Energy and had a controlling interest in New Solomon. Defendant Jun Tang Zhao ("J.Zhao") is a resident of Hong Kong and the president of Relief Defendant Precise Power. Defendant J. Zhao is also alleged to be an employee of China Energy.

Between June 2004 and July 2005, Chiu and

Sim orchestrated China Energy's acquisition of Starway Management Limited ("Starway"). Starway's sole asset was a Chinese company that manufactures and markets energy related products. China Energy purchased this asset worth an estimated $20 million in exchange for 22 million shares of China Energy (then valued at $250 million). According to the SEC, these shares were transferred to entities controlled by Chiu. As a result, Chiu gained control of 65% of China Energy's outstanding common stock.

***4** The SEC alleges that Defendants artificially increased the price of China Energy stock through a series of sham transactions. China Energy's stock price rose from $12 to $28 as a result of these activities. Between November 24 and December 9, 2004, Defendants' trading represented an average 56% of the buy-side volume. During the first ten days of the pump, Defendants' buying activity represented 70% of the volume, and on three days during the period, Defendants accounted for 90% of the buy-side volume. At a time when the price of China Energy stock had risen as a result of Defendants' alleged manipulation, they sold millions of shares of the stock at an artificially inflated price.

The sale of this stock was effectuated in part through the use of brokerage accounts at Capital Growth Financial LLC ("Capital Growth"). The Capital Growth accounts are held in the names of the Relief Defendants, Goalwise and Du Li Qiang, and are alleged to have been used for no other purpose than to facilitate the sale of China Energy stock. The SEC identifies the accounts of Goalwise and Du Li Qiang as accounts under the control of Defendants and seeks disgorgement of the proceeds of sales effectuated through those accounts as well as the accounts held in the names of the Relief Defendants.[FN1]

FN1. The SEC has also moved for a preliminarily injunction freezing certain assets in the custody of the Relief Defendants.

Relief Defendants Amicorp, Essence City, and Precise Power are British Virgin Island companies located in Hong Kong. Amicorp opened a brokerage account at Capital Growth in January 2006. The account documents designate Relief Defendant A. Zhong as the sole officer of Amicorp. The mailing address on the Amicorp account is the same address as New Solomon and China Energy. Relief Defendant Essence City opened an account at Capital Growth in September 2005. The account designates Relief Defendant Tung Tsang as the sole officer and director and its mailing address is a residential address in Appleichau used by Defendant Chiu. In December 2005, Precise Power opened a Capital Growth account, designating Defendant J. Zhao as the sole officer of Precise Power. The mailing address of Precise Power is a residential address used by Defendant Chiu and is the same address as is listed for Essence City.

Relief Defendant Yan Hong Zhao is a resident of Hong Kong or the People's Republic of China. Relief Defendants Ai Qun Zhong and Tung Tsang are residents of Hong Kong. Relief Defendant Yan Hong Zhao was an employee and director of China Energy. Defendants used the Y. Zhao account at Capital Growth in furtherance of the scheme to defraud. Relief Dendants Ai Qun Zhong and Tung Tsang were Defendant Chiu's nominees.

Goalwise is a British Virgin Island entity that was formed in May 2004. Defendants Sim and Chiu exercised control over and directed the activities of Goalwise and Chiu had trading authority over a Goalwise brokerage account maintained at KGI Asia. *See* Ex. 71A In Support Of The Commission's Requests for Preliminary and Permanent Injunctions and Other Relief. The mailing address provided on the Capital Growth account form is the same address used by China Energy, New Solomon and Eurofaith in Hong Kong. *See* Amended Proposed Findings Of Fact And Conclusions Of Law In Support Of Plaintiff's Application For A Permanent Injunction, Digorgement and Other Relief ("Amended Proposed Findings") at ¶ 15.

***5** Du Li Qiang is a nominee of Defendants

and Defendants Chiu and Sim exercised control over the issuance and disposition of China Energy stock in Qiang's account. Du Li Qiang opened an account at Capital Growth in September 2005 and 226,120 shares were deposited into the account. These shares were issued to Du Li Qiang by Eurofaith. *See* Amended Proposed Findings at ¶ 4.

On February 15, 2006, the NASD suspended trading in China Energy stock. At that time, market capitalization of China Energy was approximately $170 million. On May 18, 2006, China Energy filed a Form 8-K with the SEC announcing the mass resignation of its officers and directors. Since that time, China Energy disconnected its phone lines and all mail has been returned as undeliverable.

Defendants were served with the Complaint on December 20, 2006 [DE 13]. Defendants did not answer or otherwise respond to the Complaint and Judge Spatt entered the default on April 20, 2007. The matter was then referred to me to conduct an inquest on damages.

On August 9, 2007, a hearing was held on the issue of damages in connection with the default judgment against Defendants China Energy, New Solomon, Chiu Wing Chiu, Lai Fun Sim a/k/a Stella Sim, Sun Li and Jun Tang Zhao. At that hearing, I raised an issue with respect to the SEC's prejudgment interest calculations. Specifically, I questioned the SEC's request for prejudgment interest on the full amount requested as disgorgement for the entire period in question, without any relationship to when the purportedly illegal sales were made. In response, the SEC recalculated prejudgment interest by calculating a separate prejudgment interest figure for each of the Capital Growth accounts of New Solomon, Lai Fun Sim, Essence City, Amicorp, Precise Power and Yan Hong Zhao. In the recalculation, the prejudgment interest period begins in the quarter the particular account began selling China Energy stock.

Following the hearing, the SEC also provided supplemental documentation supporting its request for default judgment and requesting disgorgement of additional amounts, together with prejudgment interest thereon. In addition to the sums originally requested, the SEC seeks disgorgement of $973,408.32 relating to sales of China Energy stock through an account in the name of Du Li Qiang, $805,914.79 relating to sales of China Energy stock through an account in the name of Goalwise and $20,116,858.52 relating to the market value of China Energy shares converted to “street name” and possibly distributed to the investing public.

The SEC seeks a default judgment (1) to permanently restrain these Defendants from violation of Section 5 of the Securities Act and Section 10(b) of the Exchange Act; (2) barring any of the individual defaulting Defendants from acting as an officer or director of any registered company and barring them from participating in an offering of penny stock or engaging in activities with any broker dealer for purposes of issuing, trading or inducing or attempting to induce the purchase or sale of any penny stock; (3) holding Defendants jointly and severally liable for disgorgement of $50,755,892.04, together with prejudgment interest of $5,998,676.84, for a total of $56,754,532.88; and (4) imposing of a civil penalty in an amount to be determined by the Court.

II. *Argument*

A. *Default Judgment*

***6** Defendants' default amounts to an admission of liability. Therefore, all of the well-pleaded allegations in Plaintiff's complaint pertaining to liability are deemed true. *See Greyhound Exhibitgroup, Inc. v. E.L. U.L. Realty Corp.*, 973 F.2d 155, 158 (2d Cir.1992), *cert. denied*, 506 U.S. 1080, 113 S.Ct. 1049, 122 L.Ed.2d 357 (1993). Plaintiff, however, must prove damages before the entry of a final default judgment. *See Credit Lyonnais Securities, Inc. v. Alcantara*, 183 F.3d 151, 155 (2d Cir.1999); *Au Bon Pain Corp. v. Artect, Inc.* ., 653 F.2d 61, 65 (2d Cir.1981). The district court must conduct an inquiry to ascertain the amount of dam-

ages with reasonable certainty. *See Transatlantic Marine Claims Agency, Inc. v. Ace Shipping Corp.*, 109 F.3d 105, 108 (2d Cir.1997). Plaintiff submitted documentation in support of its damages request and a hearing was held on August 9, 2007. In response to the Court's questioning during that hearing, Plaintiff has provided the Court with supplemental support for its damages request.

As discussed above, the Complaint alleges that

> the Individual Defendants initiated an elaborate series of transactions designed to enable Chiu and others associated with Chiu to (a) acquire tens of millions of shares of a public company; (b) manipulate its stock price through fraudulent devices including materially misleading press releases and public filings, insider stock transactions, and share give aways; and (c) sell shares at artificially inflated prices. Through straw parties and nominees Chiu, Sim and J. Zhao concealed Chiu's conduct and self-dealing.

Compl. ¶ 19. The Complaint charges Defendants with fraud in connection with the market manipulation in violation of Section 10(b) of the Exchange Act. Compl. ¶¶ 43-44.

Defendants are also charged with violating Sections 5(a) and 5(c) of the Securities Act by selling unregistered securities. Compl. ¶ 47. According to the SEC, Defendants filed false and misleading forms with the SEC which gave Chiu and entities controlled by him access to additional shares of China Energy stock, which were then traded in furtherance of the pump and dump scheme. A Form S-8 filed with the SEC indicated that 700,000 shares of China Energy stock were issued to employees and consultants of China Energy who provided *bona fide* services to China Energy. There is an exemption to the registration requirements of the Securities Act for shares issued as compensation for services rendered and not for capital-raising purposes and, thus, these shares were issued without a registration statement. These shares, however, were in fact distributed to entities and individuals controlled by Chiu, including 150,000 shares to J. Zhao, 140,000 shares to Y. Zhao and 230,000 shares to an entity controlled by Chiu. These entities and individuals did not provide a *bona fide* service to China Energy. The Complaint alleges the shares were issued in furtherance of the scheme to gain listing of China Energy stock on the Nasdaq National Market System(“NMD”). In order to qualify for listing, China Energy would need to demonstrate it had more than 400 shareholders, each owning at least 100 shares. Compl. ¶¶ 23-28.

***7** Once the shares were distributed, China Energy issued a press release announcing it had applied for listing on the NMD. *See* Amended Proposed Findings at ¶ 25. Defendants failed to inform the investing public that China Energy's shareholder base was not the result of genuine economic interest in China Energy and that the 400 plus shareholders were not *bona fide* investors for value. *Id.* Defendants. through the use of straw parties and nominees, transferred shares of China Energy stock, sold shares of China Energy stock and distributed the proceeds of those sales to Defendants. *See* Amended Proposed Findings at ¶ at 27.

1. *Permanent Injunction*

The SEC seeks an order (1) enjoining Defendants from future violations of Section 5 of the Securities Act and Section 10(b) of the Exchange Act; (2) enjoining Defendants Chiu, Sim, Li and J. Zhao from acting as an officer and/or director of any issuer that has a class of securities registered pursuant to Section 12 of the Exchange Act or that is required to file reports pursuant to Section 15(d) of the Exchange Act (“Officer and Director Bar”); and (3) enjoining Defendants Chiu, Sim, Li and J. Zhao from participating in an offering of penny stock, including engaging in activities with a broker, dealer, or issuer for purposes of issuing, trading, or inducing or attempting to induce the purchase or sale of any penny stock (“Penny Stock Bar”).

A. *Enjoining Future Violations Of The Securities Laws*

The district court has the authority to issue a

permanent injunction restraining future violations of the securities laws pursuant to Section 20(b) of the Securities Act and Section 21(d) of the Exchange Act. *See SEC v. Bonastia*, 614 F.2d 908, 912 (3d Cir.1980); *SEC v. Opulentica*, 479 F.Supp.2d 319, 329 (S.D.N.Y.2007). "The Supreme Court has viewed injunctive relief as necessary in these actions for the basic protection of the investing public." *Bonastia*, 614 F.2d at 913. To obtain injunctive relief pursuant to these statutes, the SEC is not required to show irreparable harm or the inadequacy of other remedies. *See SEC v. Managment Dynamics, Inc.*, 515 F.2d 801, 808 (2d Cir.1975); *SEC v. Marker*, 427 F.Supp.2d 583, 590 (M.D.N.C.2006). Rather, "[i]njunctive relief is appropriate when there is a 'realistic likelihood of recurrence' of the violations." *SEC v. Softpoint, Inc.*, 958 F.Supp. 846, 867 (S.D.N.Y.1997) (quoting *SEC v. Commonwealth Chem. Secs., Inc.*, 574 F.2d 90, 99-100 (2d Cir.1978)).

Several factors are to be considered in determining the probability of future violations: "(1) the degree of scienter involved, (2) the isolated or recurring nature of the fraudulent activity, (3) the defendant's appreciation of his wrongdoing, and (4) the defendant's opportunities to commit future violations." *Softpoint*, 958 F.Supp. at 867, *see also Bonastia*, 614 F.2d at 912; *SEC v. Universal Major Indus. Corp.*, 546 F.2d 1044, 1048 (2d Cir.1976) (citations omitted), *cert. denied*, *Homans v. SEC*, 434 U.S. 834, 98 S.Ct. 120, 54 L.Ed.2d 95 (1977). "Essentially, a court makes a prediction of the likelihood of future violations based on an assessment of the totality of the circumstances surrounding the particular defendant and the past violations that were committed." *Bonastia*, 614 F.2d at 912.

***8** Each of these factors is easily satisfied here. Where the alleged misconduct involves "systematic wrongdoing" rather than an isolated incident, the likelihood of future violations is greater. *SEC v. Sekhri*, No. 98 Civ. 2320, 2002 WL 31100823, at *15 (S.D.N.Y. July 22, 2002) (finding a greater likelihood of future violations where defendant's illegal conduct was "founded on systematic wrongdoing," not an isolated incident). The Complaint in this action details an elaborate premeditated scheme spanning several continents, involving scores of players, consisting of multiple violations and continuing for close to two years. Even after the NASD had halted trading in China Energy stock, New Solomon, at the direction of Defendant Chiu, filed a Form 144 to sell another 2.9 million shares of China Energy into the market. At the time of the filing, Defendant Chiu had been contacted by the SEC concerning his activities with respect to China Energy but had not responded to any of the SEC's inquiries. In addition, the Court has been provided with evidence of Defendant Chiu's and Sim's likely participation in another IPO transaction involving a U.S. shell corporation.

Further, where, as here, a party has failed to appear, that party fails to recognize his wrongdoing and provide assurances against further violations. In such circumstances, an injunction is appropriate. *See, e.g.*, *SEC v. Marker*, 427 F.Supp.2d 583, 591 (M.D.N.C.2006); *SEC v. Lawbaugh*, 359 F.Supp.2d 418, 425 (D.Md.2005); *SEC v. Abacus Intern'l Holding Corp.*, No, C 99-02191, 2001 WL 940913 (N.D.Cal. Aug.16, 2001).

Thus, I respectfully recommend to Judge Spatt that Defendants China Energy, New Solomon, Chiu Wing Chiu, Lai Fun Sim a/k/a/ Stella Sim, Sun Li, and Jun Tang Zhao be permanently restrained and enjoined from violating, directly or indirectly, Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder, by using any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, in connection with the purchase or sale of any security (a) to employ any device, scheme, or artifice to defraud; (b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or (c) to engage in any act, practice, or course of business which operates

or would operate as a fraud or deceit upon any person.

Defendants should further be restrained and enjoined from violating Section 5 of the Securities Act by, directly or indirectly, in the absence of any applicable exemption: (a) Unless a registration statement is in effect as to a security, making use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; (b) Unless a registration statement is in effect as to a security, carrying or causing to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale; or (c) Making use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed with the Commission as to such security, or while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under Section 8 of the Securities Act.

B. *Officer and Director Bar*

***9** In addition to permanent injunctive relief with respect to future violation of the federal securities laws, the SEC is also seeking an Officer and Director Bar as to Defendants Chiu, Sim, Li and J. Zhao. The district court has the authority to impose an Officer and Director Bar. *See* 15 U.S.C. § 77t(e). This section authorizes the court to bar a defendant from serving as "an officer or director of a publicly-trade company, because of 'substantial unfitness' to hold such a position. *SEC v. Universal Express,* 475 F.Supp.2d 412, 429 (S.D.N.Y.2007) (quoting *SEC v. Patel,* 61 F.3d 137, 141 (2d Cir.1995)).

There are additional factors to be considered before imposing the Officer and Director Bar requested by the SEC. In considering the imposition of an Officer and Director Bar, the Court must consider: "(1) the 'egregiousness' of the underlying securities law 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." *Patel,* 61 F.3d at 141.

In the instant case, since the allegations of the Complaint are accepted as true, the violation involved fraud and deceit. The violation also resulted in substantial losses given the requested disgorgement amount of over $ 50 million. Each of Defendants Chiu, Sim, Li and J. Zhao served as an officer and/or director of one or more of the entities involved in the perpetration of this fraud and acted with scienter. Accordingly, I respectfully recommend to Judge Spatt that an order be entered prohibiting each of Defendants Chiu Wing Chiu, Lai Fun Sim a/k/a Stella Sim, Sun Li, and Jun Tang Zhao from acting as an officer or director of any issuer that has a class of securities registered pursuant to Section 12 of the Exchange Act or that is required to file reports pursuant to Section 15(d) of the Exchange Act.

C. *Penny Stock Bar*

The SEC is also seeking a Penny Stock Bar as to Defendants Chiu, Sim, Li and J. Zhao. The district court in injunctive proceedings is authorized by statute to order a Penny Stock Bar "against any person participating in, or, at the time of the alleged misconduct, who was participating in, an offering of penny stock." 15 U.S.C. § 77t(g). Pursuant to the Penny Stock Bar, the "court may prohibit that person from participating in an offering of penny stock conditionally or unconditionally, and permanently or for such period of time as the court shall determine." 15 U.S.C. § 77t(g). A person who was participating in an offering of penny stock "includes any person engaging in activities with a broker, dealer, or issuer for purposes of issuing, trading, or inducing or attempting to induce the purchase or sale of, any penny stock." 15 U.S.C. § 77t(g)(2). "The

standard for imposing [a penny stock] bar essentially mirrors that for imposing an officer-or-director bar." *Universal Exp., Inc.*, 475 F.Supp.2d at 429.

***10** Penny stocks are "low-priced, highly speculative stocks generally sold in the over-the-counter ... market and generally not listed on an exchange." *Koch v. S.E.C.*, 177 F.3d 784, 785 n. 1 (9th Cir.1999) (citation omitted). Pursuant to 17 CFR § 240.3a51-1, a penny stock must have a value less than $5 at the time of the violation. China Energy shares traded as high as $28 per share during the period of the alleged wrongdoing and, when the Nasdaq halted trading in February 2006, the stock was trading at around $6 per share. The SEC has provided no citations or authority for its request to issue a Penny Stock Bar where the share price of the stock in question was at all relevant times above $5 per share. Thus, on the facts as presented to me, I respectfully recommend to Judge Spatt that the SEC's request for a Penny Stock Bar as to Defendants Chiu, Sim, Li and J. Zhao be denied, without prejudice, and with a right to renew this application upon presentation of proper evidentiary support.

2. *Disgorgement*

With respect to disgorgement, the SEC has requested a total of $50,755,892.04 from six different accounts identified by the SEC as accounts controlled by Defendants. This amount is alleged to be the aggregate proceeds received by Defendants in connection with the illegal sale of China Energy stock.

"Once the district court has found federal securities law violations, it has broad equitable power to fashion appropriate remedies, including ordering that culpable defendants disgorge their profits." *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1474 (2d Cir.1996), *cert. denied*, 522 U.S. 812, 118 S.Ct. 57, 139 L.Ed.2d 21 (1997); *see also SEC v. Lorin*, 76 F.3d 458, 462 (2d Cir.1996) (district court "must be given wide latitude in these matters") (quoting *Patel*, 61 F.3d at 140). "The primary purpose of disgorgement as a remedy for violation of the securities laws is to deprive violators of their ill-gotten gains, thereby effectuating the deterrence objectives of those laws." *First Jersey Sec.*, 101 F.3d at 1474 (citation omitted); *see also SEC v. Cavanagh*, 445 F.3d 105, 117 (2d Cir.2006) ("disgorgement has been used by the SEC and courts to prevent wrongdoers from unjustly enriching themselves"); *SEC v. Commonwealth Chem. Sec., Inc.*, 574 F.2d 90, 102 (2d Cir.1978) ("[T]he primary purpose of disgorgement is not to compensate investors. Unlike damages, it is a method of forcing a defendant to give up the amount by which he was unjustly enriched"). "The effective enforcement of the federal securities laws requires that the SEC be able to make violations unprofitable. The deterrent effect of an SEC enforcement action would be greatly undermined if securities law violators were not required to disgorge illicit profits." *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1104 (2d Cir.1972).

"The district court has broad discretion not only in determining whether or not to order disgorgement but also in calculating the amount to be disgorged." *First Jersey Sec., Inc.*, 101 F.3d at 1474-75; *see also SEC v. Posner*, 16 F.3d 520, 522 (2d Cir.1994) (upholding district court disgorgement order since "[t]he [district] court has broad discretion to tailor the sanction to the wrongful conduct involved"); *SEC v. Robinson*, No. 00 Civ. 7452, 2002 WL 1552049 at *7 (S.D.N.Y. July 16, 2002). The disgorged amount must be " 'causally connected to the violation,' " but it need not be figured with exactitude. *First Jersey Sec., Inc.*, 101 F.3d at 1475 (quoting *Patel*, 61 F.3d at 139); *Robinson*, 2002 WL 1552049 at *7; *SEC v. McCaskey*, 98 Civ. 6153, 2002 WL 850001 at *4 (S.D.N.Y. Mar.26, 2002). "Where disgorgement calculations cannot be exact, 'any risk of uncertainty ... should fall on the wrongdoer whose illegal conduct created that uncertainty.' " *Lorin*, 76 F.3d at 462 (quoting *Patel*, 61 F.3d at 140); *see also SEC v. Haligannis*, 470 F.Supp.2d 373, 384 (S.D.N.Y.2007).

***11** "Thus, once the Commission shows the existence of a fraudulent scheme in violation of federal securities laws, the burden shifts to the defendant to 'demonstrat[e] that he received less than the full amount allegedly misappropriated and sought to be disgorged.' " *SEC v. Rosenfeld,* No. 97 Civ. 1467, 2001 WL 118612 at *2 (S.D.N .Y. Jan. 9, 2001) (quoting *SEC v. Benson,* 657 F.Supp. 1122, 1133 (S.D.N.Y.1987)); *SEC v. Grossman,* 87 Civ. 1031, 1997 WL 231167 at *8 (S.D.N.Y. May 6, 1997) ("The SEC bears the burden of persuasion that its proposed disgorgement figure reasonably approximates the amount of unjust enrichment.... [O]nce the SEC has established that the proposed amount is reasonable, the burden shifts to the defendant to demonstrate that the amount requested is not a reasonable approximation of the unlawfully obtained profits."), *aff'd, in part, vacated in part,* 173 F.3d 846 (2d Cir.1999); *SEC v. First City Financial Corp., Ltd.,* 890 F.2d 1215, 1232 (D.C.Cir.1989). On a default motion, the court can accept the SEC's position on the proper disgorgement amount. *See SEC v. Pierce,* No. 95 Civ. 8215, 1998 WL 259926 (S.D.N.Y. May 21, 1998). "In the case of a patently fraudulent stock offering ... it is appropriate to order disgorgement of the entire (gross) proceeds received in connection with the offering." *Robinson,* 2002 WL 1552049 at *9 (citing *Manor Nursing Ctrs., Inc.,* 458 F.2d at 1104).

The SEC has requested total disgorgement of $50,755,892.04 representing what the SEC claims are ill-gotten gains obtained through the Defendants' sale of China Energy stock. The SEC's request is comprised of the following components:

• $28,859,710.41, in proceeds derived by Defendants from sales of China Energy stock through the Capital Growth accounts of Amicorp, Essence City, Precise Power, Yan Hong Zhao, New Solomon, and Lai Fun Sim for the period October 18, 2004 through February 15, 2006. Accepting the allegations of the Complaint as true, and based upon (i) the account records and other documentation supporting this amount that have been provided to the Court as Ex. H to the Apr. 4, 2007 Declaration of Patrick L. Feeney; and (ii) Exhs. 1-53 of the Exhibits In Support of the Commission's Requests For Preliminary and Permanent Injunctions, Disgorgement and Other Relief, I am respectfully recommending to Judge Spatt that an Order be entered requiring disgorgement of $28,859,710.41;

• $805,914.79 in proceeds derived by Defendants from sales of China Energy stock through the Capital Growth account of Goalwise in December 2004. The account records for this transaction were provided to the Court as Ex. 84 In Support Of The Commission's Requests for Preliminary and Permanent Injunctions and Other Relief. The SEC has provided support for its conclusion that this account is controlled by Defendants, including a mailing address that matches mailing addresses for other entities controlled by Chiu and a statement indicating that Chiu had trading authority over the account. I am respectfully recommending to Judge Spatt that an Order be entered requiring disgorgement of $805,914.79;

***12** • $973,408.32 in proceeds derived by Defendants from sales of China Energy stock through the Capital Growth account of Du Li Qiang in November 2005. The account records supporting this amount were provided to the Court as Ex. A to the Amended Declaration Of Patrick L. Feeney In Support Of The Commission's Request For A Permanent Injunction, Disgorgement and Other Relief. Plaintiff has provided the account statements for the Du Li Qiang Account showing the sale of China Energy stock. However, the SEC has provided no further evidentiary support for its general conclusion that Du Li Qiang was "controlled" by Chiu and Sim. Keeping in mind that the disgorged amount must be "causally connected to the violation," *First Jersey Sec. Inc.,* 101 F.3d at 1475, this conclusory allegation, without more, is insufficient to tie the proceeds from the sale of China Energy stock in this account to Defendants' scheme. In light of these cir-

cumstances, I am respectfully recommending to Judge Spatt that the SEC's request for disgorgement of this amount be denied, without prejudice, and with the right to renew this specific request upon presentation of proper evidentiary support; and

• $20,116,858.52 in proceeds derived from the sale of China Energy stock issued by Eurofaith in August 2004 and November 2004 and converted to "street name" in or about September 2005. With respect to this request for disgorgement, the SEC states only that "Plaintiff *has reason to believe* that many of the above-mentioned shares were in fact sold. The market value of these shares was approximately $20,116,858.52 at the close of trading on February 15, 2006." Amended Declaration Of Patrick L. Feeney In Support Of The Commision's Request For A Permanent Injunction, Disgorgement And Other Relief at ¶ 5c (emphasis supplied). No account statements or trade tickets are provided. Nor has testimony been offered to support this request. Indeed, the SEC amended its request for disgorgement to include this amount after the August 2007 hearing. Absent evidence of an actual sale of *any* of the aforementioned shares of China Energy, the Court cannot conclude that *all* 2,949,686 shares were sold prior to the halt of trading. Accordingly, I am respectfully recommending to Judge Spatt that the SEC's request for disgorgement of this amount be denied, without prejudice, and with the right to renew this specific request upon presentation of proper evidentiary support.

Accordingly, I am respectfully recommending to Judge Spatt that an order be entered requiring Defendants to disgorge $29,665,625.28.

3. *Prejudgment Interest*

The SEC has also requested an award of prejudgment interest on the amount disgorged. The decision whether to order prejudgment interest, like the decision to grant disgorgement and in what amount, is left to the district court's "broad discretion." *First Jersey Sec.*, 101 F.3d at 1476. "[R]equiring the payment of interest prevents a defendant from obtaining the benefit of 'what amounts to an interest free loan procured as a result of illegal activity.' " *Grossman*, 1997 WL 231167 at *11 (quoting *SEC v. Moran*, 944 F.Supp. 286, 295 (S.D.N.Y.1996)).

***13** In deciding whether an award of prejudgment interest is warranted, a court should consider '(i) the need to fully compensate the wronged party for actual damages suffered, (ii) considerations of fairness and the relative equities of the award, (iii) the remedial purpose of the statute involved, and/or (iv) such other general principles as are deemed relevant by the court.' In an enforcement action brought by a regulatory agency, the remedial purpose of the statute takes on special importance.

First Jersey Sec., 101 F.3d at 1476 (citations omitted); *Robinson*, 2002 WL 1552049 at *10. In light of this remedial purpose, an award of interest is appropriate here. *See Grossman*, 1997 WL 231167 at *11 ("In determining the appropriateness of an interest award, courts rely heavily on the level of the defendant's culpability.").

Prejudgment interest is generally calculated by using the Internal Revenue Service ("IRS") rates for underpayment of taxes under 17 U.S.C. § 201.600(b). *See, e.g.*, *Robinson*, 2002 WL 1552049 at *10. In this case, the SEC has determined the amount of prejudgment interest to be $5,998,676.84. This amount was reached by applying the IRS rate, which fluctuated between 5% and 8%, during the time period between November 1, 2004 and July 31, 2007, to the sale proceeds maintained in each of the subject accounts. *See* Exhs. B and C to Amended Declaration Of Patrick L. Feeney In Support Of The Commission's Request For A Permanent Injunction, Disgorgement and Other Relief.

The SEC has requested prejudgment interest of $5,998,676.84. This figure is derived in the following manner:

• Prejudgment interest of $3,521,435.78, relating to $28,859,710.41, in proceeds derived by Defendants from sales of China Energy stock through the Capital Growth accounts of Amicorp, Essence City, Precise Power, Yan Hong Zhao, New Solomon, and Lai Fun Sim;

• Prejudgment interest of $159,037.56, relating to $805,914.79 in proceeds derived by Defendants from sales of China Energy stock through the Capital Growth account of Goalwise;

• Prejudgment interest of $131,118.56, relating to $973,408.32 in proceeds derived by Defendants from sales of China Energy stock through the Capital Growth account of Du Li Qiang. Disgorgement of this amount has not been recommended and therefore prejudgment interest is not appropriate at this time; and

• Prejudgment interest of $2,187,048.94, relating to $20,116,858.52 in proceeds derived from the sale of China Energy stock issued by Eurofaith in August 2004 and November 2004. Disgorgement of this amount has not been recommended and therefore prejudgment interest is not appropriate at this time.

The SEC has provided adequate support for its request of prejudgment interest on the sale proceeds the Court has recommended be disgorged. The award of prejudgment interest is justified by the conduct alleged and, therefore, I am recommending to Judge Spatt that an order be entered awarding $3,652,554.34 for prejudgment interest.

4. *Joint And Several Liability*

***14** The SEC requests that the Court impose joint and several liability on the Defendants for disgorgement and prejudgment interest because they collaborated in the same flagrant pattern of violations. "Courts have held that joint-and-several liability is appropriate in securities cases when two or more individuals or entities collaborate or have close relationships in engaging in the illegal conduct." *SEC v. Hughes Capital Corp.*, 124 F.3d 449, 455 (3d Cir.1997) (citing *First Jersey Sec.*, 101 F.3d at 1475); *SEC v. Sekhri*, 2002 WL 31100823 at *17 (citing cases).

"The burden is on the tortfeasor to establish that the liability is capable of apportionment, ... and the district court has broad discretion in subjecting the offending parties on a joint-and-several basis to the disgorgement order." *Hughes Capital*, 124 F.3d at 455 (citing *First Jersey Sec.*, 101 F.3d at 1475). As the court explained in *Hughes Capital:*

> Imposing the burden upon the defendant of proving the propriety of the apportionment of the disgorgement amount in securities cases is appropriate and reasonable. Although in some cases, a court may be able easily to identify the recipient of ill-gotten profits and apportionment is practical, that is not usually the case. Generally, apportionment is difficult or even practically impossible because defendants have engaged in complex and heavily disguised transactions.

Id.; see also CFTC v. American Bd., 803 F.2d 1242, 1252 (2d Cir.1986). It is often the case that, as here, defendants move funds through various accounts to avoid detection, use straw men or nominees to hold securities, "or intentionally fail to keep accurate records and refuse to cooperate with investigators in identifying the illegal profits." *Hughes Capital*, 124 F.2d at 455. Thus, "the risk of uncertainty should fall on the wrongdoer whose illegal conduct created that uncertainty." *First City Financial Corp.*, 890 F.2d at 1232.

Defendants have not refuted the SEC's allegations as to the relationship between them. Therefore, I am recommending to Judge Spatt that the Court impose joint and several liability on Defendants.

5. *Civil Penalties*

The SEC additionally seeks the imposition of civil penalties against Defendants, pursuant to the Securities Enforcement Remedies and Penny Stock Reform Act of 1990 ("Reform Act"), Section 20(g)

of the Securities Act and Section 21(d)(3) of the Exchange Act. The SEC seeks the imposition of a third tier penalty-the strictest permitted under the statute. In support of its request, the SEC claims that "Defendants' fraudulent actions caused millions of dollars in investor losses as China Energy's stock price fell from $28 in December 2004 ... to $6.81 on February 15, 2006. Shortly thereafter, rather than answer Nasdaq's questions concerning its listing application, the company announced all of its officers and directors had resigned." Memorandum Of Law In Support Of Plaintiff's Application For Entry Of Final Judgment By Default at 11-12. The SEC has not requested a specific amount but rather leaves that determination to the Court's discretion.

***15** Civil penalties were enacted by Congress "to achieve the dual goals of punishment of the individual violator and deterrence of future violations." *Moran*, 944 F.Supp. at 296. The legislative history of Section 21(d) specifically indicates that such penalties are necessary:

> Disgorgement merely requires the return of wrongfully obtained profits; it does not result in any actual economic penalty or act as a financial disincentive to engage in securities fraud.... [A]uthority to seek or impose substantial monetary penalties, in addition to the disgorgement of profits, is necessary for the deterrence of securities law violations that otherwise may provide great financial returns to the violator.

H.R.Rep. No. 101-616, at 48 (1990). The "civil penalty is to be determined by the Court 'in light of the facts and circumstances' of the particular case." *Kenton Capital, Ltd.*, 69 F.Supp.2d 1, 17 (D.D.C.1998) (quoting 15 U.S.C. § 78u(d)(3)).

The Reform Act establishes three tiers of penalties. A first tier penalty is a minimum penalty appropriate for any violation of the federal securities laws. If, however, the violation "involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement," second tier penalties should apply. *See SEC v. Platforms Wireless Int'l Corp.*, No. 04 CV 2105, 2007 WL 1238707 (S.D.Cal. Apr. 25, 2007). If the violation, in addition to second tier factors, "resulted in substantial losses or created significant losses to other persons," third tier penalties are most appropriate. *See id.* The third tier penalty is not to exceed the greater of $120,000 or the gross pecuniary gain to the defendant as a result of the violation. 15 U.S.C. § 77t(d)(2)(C); 15 U.S.C. § 78u(d)(3)(B)(iii); 17 C.F.R. § 201.1002 (inflationary adjustment raising maximum penalty to $120,000). The court should consider the following factors when making its determination with respect to the imposition of civil penalties and the amount to be awarded:

> (1) the egregiousness of the defendant's conduct; (2) the degree of the defendant's scienter; (3) whether the defendant's conduct created substantial losses or the risk of substantial losses to other persons; (4) whether the defendant's conduct was isolated or recurrent; and (5) whether the penalty should be reduced due to the defendant's demonstrated current and future financial condition.

SEC v. Haligiannis, 470 F.Supp.2d 373, 386 (S.D.N.Y.2007) (citing *SEC v. Coates*, 137 F.Supp.2d 413, 429 (S.D.N.Y.2001)); *SEC v. Opulentica, LLC*, 479 F.Supp.2d 310 (S.D.N.Y.2007).

In the instant case, since the allegations of the Complaint are accepted as true, the violations were not isolated in nature and involved fraud and deceit. The violations also resulted in substantial losses given the disgorgement amount of $24 million. With respect to Defendants Chiu and Sim, I agree with the SEC's request that the imposition of third tier penalties is appropriate. Chiu and Sim are alleged to have orchestrated the entire scheme and wore multiple hats at multiple entities over the course of the two-year period in question. The violations of the securities laws were certainly egregious and involved the highest degree of scienter. Given the facts of the scheme effectuated here and the strong likelihood of recurrence, a civil penalty of $1,000,000 is reasonable and appropriate and

should be assessed against Defendants Chiu and Sim. *See SEC v. Cavanagh*, No. 98 Civ. 1818, 2004 WL 1495818 (S.D.N.Y. July 16, 2004) (SEC sought imposition of penalty equal to total loss to investors of over $15 million, court assessed civil penalty of $1 million against each defendant), *aff'd*, 445 F.3d 105 (2d Cir.2006).

***16** The analysis is somewhat different with respect to Defendants Li and J. Zhao. While both of these Defendants are alleged to have held positions of power at various entities involved in the scheme, neither of them is alleged to have had any control over any of the other entities or any direct involvement with the orchestration of the plan. Accordingly, the penalties assessed as to these two Defendants should be somewhat lower. After surveying the relevant case law, I have concluded that a penalty of $75,000 is reasonable and warranted and should be assessed against Defendants Li and J. Zhao. *See, e.g.*, *Haligiannis*, 470 F.Supp.2d at 386 (penalty of $15 million assessed); *SEC v. Pittsford Capital Income Partners*, No. 06 Civ 6353, 2007 WL 2455124 (W.D.N.Y. Aug.23, 2007) (penalty of $75,000 assessed where disgorgement amount was $11 million); *SEC v. Platforms Wireless Int'l*, 2007 WL 1238707 (penalties of $40,000 and $80,000 assessed on disgorgement amounts of $701,236 and $105,657, respectively); *SEC v. Lawbaugh*, 359 F.Supp2d 418 (D.Md.2005) (penalties of $120,000 awarded on disgorgement amount of $4 million).

Accordingly, I am respectfully recommending to Judge Spatt that of third tier penalties of $1 million be imposed against Defendants Chiu and Sim and third tier penalties of $75,000 be imposed against Defendants Li and J. Zhao.

III. *CONCLUSION*

For the reasons set forth above, I am respectfully recommending that Judge Spatt enter default judgment as follows:

• Defendants China Energy, New Solomon, Chiu Wing Chiu, Lai Fun Sim a/k/a/ Stella Sim, Sun Li, and Jun Tang Zhao be permanently restrained and enjoined from violating, directly or indirectly, Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder, by using any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, in connection with the purchase or sale of any security (a) to employ any device, scheme, or artifice to defraud; (b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or (c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

• Defendants should further be restrained and enjoined from violating Section 5 of the Securities Act by, directly or indirectly, in the absence of any applicable exemption: (a) Unless a registration statement is in effect as to a security, making use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; (b) Unless a registration statement is in effect as to a security, carrying or causing to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale; or (c) Making use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed with the Commission as to such security, or while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under Section 8 of the Securities Act;

***17** • prohibiting each of Defendants Chiu Wing Chiu, Lai Fun Sim a/k/a Stella Sim, Sun Li, and

Jun Tang Zhao from acting as an officer or director of any issuer that has a class of securities registered pursuant to Section 12 of the Exchange Act or that is required to file reports pursuant to Section 15(d) of the Exchange Act;

• denying Plaintiff's request for a Penny Stock Bar, without prejudice and with a right to renew this application upon presentation of proper evidentiary support;

• requiring Defendants to disgorge $29,665,625.28;

• awarding $3,652,554.34 for prejudgment interest;

• imposing joint and several liability on Defendants; and

• assessing civil penalties of $1 million against Defendants Chiu and Sim and $75,000 against Defendants Li and J. Zhao.

It is my recommendation that once this Report and Recommendation has been considered by Judge Spatt the SEC be required to submit a Proposed Form of Order reflecting the terms hereof.

Any objections to this Report and Recommendation must be filed with the Clerk of the Court within 10 days of service and failure to file objections within this period waives the right to appeal. *See* 28 U.S.C. § 636(b)(1)(c) (2006); Fed.R.Civ.P. 72, 6(a) and 6(e); *Beverly v. Walker,* 118 F.3d 900, 901 (2d Cir.), *cert. denied,* 522 U.S. 883, 118 S.Ct. 211, 139 L.Ed.2d 147 (1997); *Savoie v. Merchants Bank,* 84 F.3d 52, 60 (2d Cir.1996). Therefore, the parties are directed to file any written objections to this Report and Recommendation with Judge Spatt not later than 10 days from the date of this Order.

SO ORDERED.

E.D.N.Y.,2008.
S.E.C. v. China Energy Sav. Technology, Inc.
Slip Copy, 2008 WL 6572372 (E.D.N.Y.)

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