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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

SECURITIES AND EXCHANGE  
COMMISSION,

Plaintiff,

v.

LAWRENCE "LEE" LOOMIS,

Defendant.

Civ. No. S-10-458 KJM KJN

ORDER

A motion for remedies filed by the Securities and Exchange Commission (SEC) against defendant Lawrence "Lee" Loomis (Loomis) is currently pending before the court. The motion was submitted without argument and the court now GRANTS the motion in part and DENIES it in part.

I. BACKGROUND

On February 23, 2010, the SEC filed a complaint against Loomis, Loomis Wealth Solutions (LWS), LLC, John Hagener, and Lismar Financial Services, LLC (defendants), alleging the defendants had misappropriated approximately \$10 million from investors through the fraudulent sale of interests in the Naras Funds. ECF No. 1 ¶ 1. The complaint is comprised of six claims: (1) violations of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) and Rule 10b-5, 17 C.F.R. § 240.10b-5 against all defendants; (2) violations of Section

1 17(a)(1) of the Securities Act of 1933, 15 U.S.C. § 77q(a) against all defendants; (3) violations of  
2 Sections 17(a)(2) and (3) of the Securities Act, 15 U.S.C. § 77q(a)(2) against all defendants;  
3 (4) violations of Sections 5(a) and 5(c) of the Securities Act, 15 U.S.C. §§ 77e(a) and 77e (c)  
4 against all defendants; (5) violations of Section 206(1) and 206(2) of the Advisers Act, 15 U.S.C.  
5 § 89b-6(a), against Hagener and Lismar; and (6) violations of Section 206(4) of the Advisers Act,  
6 15 U.S.C. § 206(4), 15 U.S.C. § 806b-6(4) against Hagener and Lismar. ECF No. 1.

7 On June 10, 2010, the Clerk of the Court entered defaults as to Lismar and LWS.  
8 ECF No. 16. The court denied the SEC's motion for default judgments without prejudice to a  
9 later renewal. ECF Nos. 23, 25.

10 On May 3, 2011, Hagener filed a motion to stay the case pending resolution of  
11 criminal charges. ECF No. 30. After further proceedings, the court ultimately denied the motion  
12 for a stay on February 24, 2012. ECF No. 52.

13 On February 13, 2013, the SEC filed a motion for summary judgment against  
14 Loomis and Hagener, alleging that Loomis had violated the following provisions of the securities  
15 laws: (1) Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934 (Exchange Act)  
16 and Section 17(a)(1) of the Securities Act of 1933 (Securities Act) by knowingly or recklessly  
17 making material misstatements and omissions to the investors in Naras Secured Funds, LLC  
18 (Naras Fund 1) and Naras Secured Fund #2 (Naras Fund 2) and by knowingly or recklessly  
19 engaging in a fraudulent scheme; (2) Sections 17(a)(2) and (3) of the Securities Act by  
20 negligently making material misstatements and omissions to the Naras Funds 1 and 2 investors  
21 and by negligently engaging in a fraudulent scheme; and (3) Sections 5(a) and 5(c) of the  
22 Securities Act by offering and selling Naras Fund 1 securities and Naras Fund 2 securities in  
23 interstate commerce without first registering the offers and sales with the SEC and without having  
24 an exemption from registration. ECF No. 64 at 2. The motion raised additional claims against  
25 Hagener.

26 On March 5, 2013, defendant filed a motion for an extension of time and  
27 appointment of counsel. ECF No. 73. The court stayed the motion as to Loomis until resolution

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1 of his motion for the expansion of the appointment of his counsel in the criminal case. ECF  
2 No. 70.

3 On March 6, 2013, the SEC and Hagener submitted a stipulation for an injunction  
4 and on March 13, 2013, the SEC filed a notice that Hagener's consent to the injunction resolved  
5 the summary judgment motion as to him. ECF Nos. 69, 71. The court issued the order of  
6 injunction as to Hagener on April 15, 2013. ECF No. 82.

7 On April 1, 2013, counsel appeared on behalf of Loomis and thereafter the parties  
8 stipulated to new dates for hearing on the summary judgment motion. ECF Nos. 79, 81. After  
9 the opposition and reply had been filed on the summary judgment motion, Loomis filed a motion  
10 to stay the motion. ECF Nos. 86, 88. The court denied the requested stay without prejudice on  
11 August 27, 2013.

12 On September 3, 2013, the court granted the SEC's motion for summary judgment  
13 on the following grounds: (1) Loomis violated Rule 10b-5 and Section 17(a)(1) by informing  
14 investors that the Naras loan funds were secured by second mortgages, that the investments were  
15 highly liquid and had a twelve percent rate of return; (2) Loomis engaged in a scheme to defraud  
16 in violation of Rule 10b-5, subparts (a) and (c), and Section 17(a), subparts (1) and (3), by  
17 misrepresenting the solvency of the Naras Funds while accepting money from new investors to  
18 use as payments to older investors; and Loomis violated Sections 5(a) and 5(c) of the Securities  
19 Act by offering unregistered securities for sale.

20 On March 11, 2014, the SEC filed a motion for remedies against Loomis. ECF  
21 No. 108. Defendant's untimely opposition was filed on April 3 and the SEC's reply was filed on  
22 April 4, 2013. ECF Nos. 112, 113.

## 23 II. ANALYSIS

24 The SEC seeks three remedies: a permanent injunction against further securities  
25 violations by Loomis; disgorgement of \$11,695,840 raised from Naras investors plus prejudgment  
26 interest of \$2,575,426 for a total of \$14,271,426; and monetary penalties of \$273,000. ECF No.  
27 108-1.

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1 Defendant concedes he is subject to a permanent injunction based on the court's  
2 ruling on summary judgment and his continued invocation of his right to remain silent. He argues  
3 disgorgement is improper because he no longer has the money, either because it was used to fund  
4 his other business entities or was forfeited by the order in *United States v. Approximately*  
5 *\$133,803.53 in U.S. Currency*, Civ. No. S-09-461 TLN, and because the evidence on summary  
6 judgment was insufficient to show that all Naras investors were defrauded. Finally, he claims  
7 imposing a civil penalty would penalize his invocation of the right to remain silent and would  
8 constitute an excessive fine in violation of the Eighth Amendment. He cites no case authority for  
9 any of his arguments.

10 In reply, the SEC says disgorgement is appropriate even though Loomis does not  
11 have any of the money and that in its summary judgment order, the court found Loomis had  
12 consistently made material misrepresentations to investors. It also argues the proposed civil  
13 penalty is not constitutionally excessive.

#### 14 A. The Injunction

15 Under both 15 U.S.C. §§ 77t(b) and 78u(b), the SEC may seek a permanent  
16 injunction against a person who has violated securities laws; it bears the burden of showing “a  
17 reasonable likelihood of future violations of the securities laws . . . .” *SEC v. Fehn*, 97 F. 3d  
18 1276, 1295 (9th Cir. 1996) (quoting *SEC v. Murphy*, 626 F. 2d 633, 655 (9th Cir. 1980)). In  
19 evaluating the likelihood of future violations, the court must consider:

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

24 *Id.* at 1295-96 (quoting *Murphy*, 626 F.2d at 655). This court has discretion to grant or deny the  
25 request for injunctive relief. *SEC v. Goldfield Deep Mines Co. of Nev.*, 758 F.2d 459, 465 (9th  
26 Cir. 1985); *SEC v. Alpha Telcom, Inc.*, 187 F. Supp. 2d 1250, 1262 (D. Or. 2002), *affirmed by*  
27 *SEC v. Rubera*, 350 F.3d 1084 (9th Cir. 2003).

1           As noted in the order on summary judgment, Loomis solicited over \$11 million  
2 from investors from March 2007 through August 2008, representing that the investments were  
3 secured by second mortgages even though he was aware they were not. ECF No. 97 at 9-10. He  
4 also told investors there was a guaranteed rate of return and their investments could be redeemed  
5 quickly. *Id.* at 12-13. Loomis thus acted with a high degree of scienter over a period of time,  
6 factors favoring the issuance of the injunction. *See, e.g. SEC v. Abellan*, 674 F. Supp. 2d 1213,  
7 1220-21 (W.D. Wash. 2009) (finding defendant acted with high degree of scienter when he side-  
8 stepped registration requirements in order to manipulate demand, deceived the public and caused  
9 tangible financial losses); *SEC v. Cross Fin. Servs.*, 908 F. Supp. 718, 720, 734 (C.D. Cal. 1995)  
10 (defendants acted with high degree of scienter in telling investors they would use funds to engage  
11 in factoring accounts receivable, that the annual returns would be between 15 and 20 percent, and  
12 the investments were low risk when in fact they did not factor any accounts; their knowing  
13 orchestration of and participation in the scheme shows high degree of scienter).

14           Loomis has never acknowledged that his actions were wrong, expressed any  
15 remorse, or suggested that he will not engage in future violations, as he relies on his Fifth  
16 Amendment right to remain silent. Because the court is not able to evaluate whether Loomis's  
17 current attitude suggests future violation, these factors favor an injunction, but only slightly in  
18 light of Loomis's Fifth Amendment rights.

19           Loomis is currently detained and facing charges of mail and wire fraud carrying  
20 substantial penalties; the case is set for trial on October 6, 2014. *United States v. Lee Loomis*,  
21 Cr. No. S-12-315 JAM, ECF Nos. 103, 117. Nevertheless courts have enjoined people from  
22 future securities violations despite imprisonment. *See, e.g., SEC v. Bravata*, \_\_\_ F. Supp. 2d \_\_\_,  
23 2014 WL 897348, at \*21 (E.D. Mich. Mar. 6, 2014) (entering permanent injunction based on the  
24 fact that defendants "likely will have a chance to commit future violations when released from  
25 prison"); *SEC v. Lion Capital Mgmt., LLC*, No. C 12-05116 WHA, 2013 WL 5945081, at \*3  
26 (N.D. Cal. Nov. 1, 2013) (entering a permanent injunction even though the defendant was serving  
27 a sentence and would likely be deported upon release); *SEC v. Zafar*, No. 06-CV-1578  
28 (JG)(MDG), 2009 WL 129492, at \*6 (E.D.N.Y. Jan. 20, 2009) (enjoining person who was then

1 serving a sentence even though there was no indication he would return to a profession conducive  
2 to securities fraud); *SEC v. Musella*, 578 F. Supp. 425, 445 (S.D.N.Y. 1984) (“[T]he inquiry goes  
3 to predilection rather than immediate probability.”). As Loomis’s ultimate sentence, if any, has  
4 not been determined, this factor favors the injunction.

5 Based on consideration of the relevant factors, the court finds the SEC has borne  
6 its burden of justifying the entry of a permanent injunction.

#### 7 B. Disgorgement and Prejudgment Interest

8 “[A] district court has broad equity powers to order disgorgement of ill-gotten  
9 gains obtained through the violation of the securities laws. Disgorgement is designed to deprive a  
10 wrongdoer of unjust enrichment, and to deter others from violating securities laws by making  
11 violations unprofitable.” *SEC v. Platform Wireless Int’l Corp.*, 617 F.3d 1072, 1096 (9th Cir.  
12 2010) (quoting *SEC v. First Pac. Bancorp.*, 142 F.3d 1186, 1191 (9th Cir. 1998)). The SEC bears  
13 the burden of showing the causal relationship between the wrongdoing and the funds, *SEC v. One  
14 or More Unknown Traders*, 853 F. Supp. 2d 79, 83 (D.D.C. 2012), and of showing that the  
15 disgorgement figure “‘reasonably approximates the amount of unjust enrichment.’” *Platform  
16 Wireless*, 617 F.3d at 1096 (quoting *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1232 (D.C. Cir.  
17 1989)). A court may order disgorgement even if the violator “‘is no longer in possession of such  
18 funds due to subsequent, unsuccessful investments or other forms of discretionary spending.’”  
19 *SEC v. JT Wallenbrock & Assocs.*, 440 F.3d 1109, 1115-16 (9th Cir. 2006) (quoting *SEC v.  
20 Thomas James Assocs.*, 738 F. Supp. 88, 95 (W.D.N.Y. 1990)). Moreover, when parties  
21 “unlawfully received money from investors by distributing unregistered securities . . . . [t]his was  
22 the rough equivalent of receiving an ‘interest free loan’ from investors,” and so “[t]he proper  
23 measurement of the benefit of the ‘loan’ is the interest rate the defendants would have otherwise  
24 paid to finance their business operations with a comparable, unsecured loan.” *Platform Wireless*,  
25 617 F.3d at 1099.

26 The SEC has presented the declaration of forensic accountant Caroline Van Alst,  
27 who reviewed records of the Naras I and II Funds as well as of other entities that received funds  
28 from the Naras Funds. Decl. of Caroline Van Alst, ECF No. 108-2 ¶¶ 1, 6. Van Alst concluded

1 that the primary source of cash in the Naras Funds was investor cash and the primary use of that  
2 cash was transfers to and on behalf of Loomis entities, such as LWS for real estate purchasing  
3 activity, or to Hagener and Lismar. *Id.* ¶ 9. The thirty investors in Naras I, excluding Lismar,  
4 provided \$1,303,083.97 and the eighty-one investors in Naras II, again excluding Lismar,  
5 provided \$10,392,756.33.

6 Documents from Loomis’s outside accounting and auditing firm Francis, Scinto &  
7 Graziano, LLP, show that Loomis controlled a number of entities in addition to LWS: Advantage  
8 Financial Group, Advantage Financial Partners, LLC-East, Advantage Financial Partners, LLC-  
9 West, Nationwide Lending Group, Shasta Equity Exchange, AFG Information Technologies,  
10 G&L Real Estate Group, JP Realty Group, LLC and Advantage Plan Plus. *Id.* ¶ 11. Van Alst  
11 determined that through “loans” and transfers from the two Naras Funds to Loomis entities, there  
12 was a total cash disbursement of \$8,003,827.30. *Id.* ¶ 13. Van Alst says the money transferred  
13 from the Naras Funds to the various Loomis entities was used to pay operating expenses. *Id.*  
14 ¶ 15. This is borne out by evidence submitted in connection with the SEC’s motion for summary  
15 judgment. Karen White, the former controller of Advantage Financial Partners-West, averred  
16 when she did not have sufficient cash to pay AFP’s bills, Loomis would direct her or another  
17 employee to ask Hagener to transfer money from the Naras Funds to the impecunious Loomis  
18 entities. Decl. of Karen White, ECF No. 64-19 ¶¶ 2, 4. She rarely transferred money back to the  
19 Naras Funds as interest payments on the “loans.” *Id.* ¶ 7.

20 In *JT Wallenbrock*, the defendants raised money from investors through the  
21 fraudulent sale of unregistered promissory notes and first deposited it in one of the group’s  
22 business checking accounts. 440 F.3d at 1111-12. From the funds so deposited, they paid  
23 investors “returns” to maintain the illusion they were investing the money as promised; used  
24 some of it to cover their operating expenses and personal expenses; and invested some of the  
25 money to fund numerous start-up companies. *Id.* at 1112. The district court ordered

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1 disgorgement of the entire proceeds of the scheme, less the money paid to investors, plus  
2 prejudgment interest. *Id.* at 1113. The Ninth Circuit affirmed, noting that

3 [t]he essence of the defendants' scheme was to obtain investors'  
4 money under false pretenses in order to fund the defendants'  
5 business ventures. Rather than put their own money at risk, the  
6 defendants benefitted from the use of investors' money to spend at  
7 defendants' discretion—whether to cover operating expenses,  
invest in start-up companies, pay personal expenses or pay fake  
returns to investors to perpetrate the fraud. . . . Given these  
circumstances, all 253.2 million obtained from investors was an ill-  
gotten gain that unjustly enriched the defendants.

8 *Id.* at 1114. In this case, as well, the court found Loomis profited from the sale of unregistered  
9 securities and from material misrepresentations about the security and profitability of the  
10 investments, made to all investors, not just the four who submitted declarations in support of  
11 summary judgment. ECF No. 97 at 9-16. Loomis similarly profited from the use of the  
12 investors' money and so should be directed to disgorge those funds, along with the interest he  
13 avoided by using those funds as an interest-free loan. *See SEC v. Abacus Int'l Holding Corp.*,  
14 No. C 99-02191, 2001 WL 940913, at \*5 (N.D. Cal. Aug. 16, 2001) (“In assessing whether to  
15 order prejudgment interest, the Court may consider the degree of personal wrongdoing on the part  
16 of the defendant.”).

17 Nevertheless, in connection with its motion for summary judgment, the SEC  
18 presented evidence, that in traditional-Ponzi-scheme-fashion, Loomis and Hagener did use some  
19 new investors' payments to pay fake returns to earlier investors. Decl. of Caroline Van Alst, ECF  
20 No. 64-18 ¶¶ 16-17 & Exs. C & D. In exercising its equitable powers to “deprive a wrongdoer of  
21 unjust enrichment,” *Platform Wireless*, 617 F.3d at 1096, the court declines to order disgorgement  
22 of that portion of investors' funds Loomis used to pay lulling “returns” to other investors. The  
23 SEC is thus directed to provide updated figures, showing how much of the \$11,695,840 raised  
24 from Naras investors was returned to other Naras investors and to calculate the prejudgment  
25 interest based on that figure.

### 26 C. Civil Penalties

27 The securities laws provide for civil monetary penalties in three tiers. A court may  
28 impose third tier penalties when the violations “involved fraud, deceit, manipulation, or deliberate



1 or reckless disregard of a regulatory requirement [and] such violation directly or indirectly  
2 resulted in substantial losses . . . .” 15 U.S.C. § 78u(d)(3)(C); *see also* 15 U.S.C. § 77t(d)(2)(C).  
3 A third-tier penalty “shall not exceed the greater amount of \$110,000 for a natural person . . . or  
4 the gross amount of pecuniary gain to such defendant as a result of the violation . . . .” *Id.* For  
5 violations occurring after February 15, 2005 and before February 25, 2009, the maximum third  
6 tier penalty for an individual is \$130,000. *Bravata*, 2014 WL 897348, at \*22 . In addition, the  
7 maximum penalty at the first tier, for violations not involving scienter, is \$6500. 15 U.S.C. §  
8 77t(d)(2)(A); 17 C.F.R. § 201.1004. The SEC asks the court to impose a \$130,000 penalty for  
9 Loomis’s violation of Section 10(b), a separate \$130,000 penalty for violation of Section 17(a),  
10 and two \$6,500 penalties for his violations of Sections 5(a) and 5(c), for a total of \$273,000.

11 A district court has discretion to impose civil penalties for securities violations.  
12 *SEC v. Pentagon Capital Mgmt. PLC*, 725 F.3d 279, 287 (2d Cir. 2013). Courts in the Ninth  
13 Circuit sometimes consider the *Fehn* factors in deciding whether a civil penalty is appropriate.  
14 *See SEC v. Wilde*, No. SACV 11–0315 DOC(AJWx), 2012 WL 6621747, at \*16 (C.D. Cal  
15 Dec. 17, 2012) (citing *Fehn*, 97 F.3d at 1295-96). The court may also consider “other sanctions  
16 the defendant faces, whether criminal or civil.” *SEC v. Church Extension of the Church of God,*  
17 *Inc.*, 429 F. Supp. 2d 1045, 1051 (S.D. Ind. 2005); *but see SEC v. Henke*, 275 F. Supp. 2d 1075,  
18 1086 (N.D. Cal. 2003), *affirmed by* 130 F. App’x 173 (9th Cir. 2005) (unpublished) (imposing  
19 civil penalties even though defendant had paid restitution following a guilty plea).

20 As noted above, Loomis acted with a high degree of scienter, soliciting over \$11  
21 million in investments, which he used largely to fund his other businesses. Nevertheless, he is  
22 facing criminal charges carrying the potential of a substantial term of imprisonment, large fines,  
23 and restitution. In addition, money from LWS is subject to forfeiture in *United States v.*  
24 *Approximately \$133,803.53 in U.S. Currency*, Civ. No. S-09-461 TLN EFB. Given the  
25 magnitude of other civil and criminal penalties Loomis faces, the court declines to impose a civil  
26 penalty. Accordingly, it does not reach the question whether the imposition of a fine would  
27 violate the Eighth Amendment.

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IT IS THEREFORE ORDERED that within fourteen days of the date of this order, the SEC submit a proposed final judgment against Loomis, incorporating the permanent injunction, the amount of disgorgement discussed above and the appropriate prejudgment interest, and reflecting that no civil penalties are imposed.

DATED: April 23, 2014.

  
UNITED STATES DISTRICT JUDGE