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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

14 SHIGE TAKIGUCHI, FUMI NONAKA,) 2:13-cv-01183-HDM-VCF
15 MITSUAKI TAKITA, TATSURO SAKAI,)
16 SHIZUKO ISHIMORI, YUKO NAKAMURA,)
17 MASAAKI MORIYA, HATSUNE HATANO,) ORDER
18 AND HIDENAO TAKAMA, Individually)
and on Behalf of All Others)
19 Similarly Situated,)
20 Plaintiffs,)
21 vs.)
22 MRI INTERNATIONAL, INC., EDWIN J)
FUJINAGA, JUNZO SUZUKI, PAUL)
23 MUSASHI SUZUKI, LVT, INC., dba)
STERLING ESCROW, and DOES 1-500,)
24 Defendants.)

24 Plaintiffs, on behalf of a class of about 8,700 mostly
25 Japanese investors, initiated this action against defendants MRI
26 International ("MRI"), Edwin Fujinaga ("Fujinaga"), Junzo Suzuki,
27 Paul Suzuki, and LVT, Inc. dba Sterling Escrow ("Sterling") on July
28 5, 2013, asserting several claims in connection with the collapse

1 of an alleged Ponzi scheme. Since that time, ten additional
2 parties have been added to the case, including Keiko Suzuki.

3 The operative complaint - the Fifth Amended Complaint (ECF No.
4 481) - asserts twelve causes of action: (1) violation of § 10(b) of
5 the Securities Exchange Act of 1934, 15 U.S.C. § 78j and Rule
6 10b-5, 17 C.F.R. § 240.10B-5, against Fujinaga, Junzo Suzuki, Paul
7 Suzuki, and Keiko Suzuki; (2) violation of § 20(a) of the Exchange
8 Act of 1934, 15 U.S.C. § 77t against Fujinaga, Junzo Suzuki, Paul
9 Suzuki, and Keiko Suzuki; (3) violation of § 12(a)(1) of the
10 Securities Act of 1933, 15 U.S.C. § 77l against MRI, Fujinaga,
11 Junzo Suzuki, Paul Suzuki, and Keiko Suzuki; (4) violation of § 15
12 of the Securities Act of 1933, 15 U.S.C. § 77o against Fujinaga,
13 Junzo Suzuki, Paul Suzuki, and Keiko Suzuki; (5) intentional fraud
14 against MRI, Fujinaga, Junzo Suzuki, Paul Suzuki, and Keiko Suzuki;
15 (6) unjust enrichment against all defendants; (7) breach of
16 fiduciary duty against MRI, Fujinaga, Junzo Suzuki, Paul Suzuki,
17 Keiko Suzuki, and Sterling; (8) aiding and abetting fraud against
18 Sterling; (9) breach of contract against MRI; (10) action for
19 accounting against MRI, Fujinaga, Junzo Suzuki, Paul Suzuki, Keiko
20 Suzuki, and Sterling; (11) constructive trust against all
21 defendants; and (12) constructive fraudulent transfer against all
22 defendants but MRI.

23 On March 21, 2016, the court granted the plaintiffs' motion
24 for class certification. Plaintiffs thereafter provided the
25 required notice to the class members. Trial in this matter is
26 currently scheduled to begin on August 1, 2017. The deadline for
27 filing motions for summary judgment as to the original defendants
28 expired on November 1, 2016.

1 Currently before the court are the plaintiffs' motions for
2 partial summary judgment against defendants (1) Paul Suzuki (ECF
3 No. 520); (2) Junzo Suzuki (ECF No. 529); and (3) MRI and Fujinaga
4 ECF No. 530) (hereinafter collectively "defendants"). Defendants
5 have opposed (ECF Nos. 566, 563 & 559), and plaintiffs have replied
6 (ECF Nos. 581, 577 & 580). In addition, the plaintiffs have filed
7 separate statements of fact, to which the defendants have responded
8 and plaintiffs have replied, and plaintiffs and defendants have
9 noted various evidentiary objections.

10 Summary judgment shall be granted "if the movant shows that
11 there is no genuine issue as to any material fact and the movant is
12 entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).
13 The burden of demonstrating the absence of a genuine issue of
14 material fact lies with the moving party, and for this purpose, the
15 material lodged by the moving party must be viewed in the light
16 most favorable to the nonmoving party. *Adickes v. S.H. Kress &*
17 *Co.*, 398 U.S. 144, 157 (1970); *Martinez v. City of Los Angeles*, 141
18 F.3d 1373, 1378 (9th Cir. 1998). A material issue of fact is one
19 that affects the outcome of the litigation and requires a trial to
20 resolve the differing versions of the truth. *Lynn v. Sheet Metal*
21 *Workers Int'l Ass'n*, 804 F.2d 1472, 1483 (9th Cir. 1986); *S.E.C. v.*
22 *Seaboard Corp.*, 677 F.2d 1301, 1306 (9th Cir. 1982).

23 Once the moving party presents evidence that would call for
24 judgment as a matter of law at trial if left uncontested, the
25 respondent must show by specific facts the existence of a genuine
26 issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,
27 250 (1986). "[T]here is no issue for trial unless there is
28 sufficient evidence favoring the nonmoving party for a jury to

1 return a verdict for that party. If the evidence is merely
2 colorable, or is not significantly probative, summary judgment may
3 be granted." *Id.* at 249-50 (citations omitted). "A mere scintilla
4 of evidence will not do, for a jury is permitted to draw only those
5 inferences of which the evidence is reasonably susceptible; it may
6 not resort to speculation." *British Airways Bd. v. Boeing Co.*, 585
7 F.2d 946, 952 (9th Cir. 1978).

8 **I. MRI and Edwin Fujinaga**

9 The plaintiffs seek summary judgment on all of the securities
10 claims alleged against MRI and Fujinaga. MRI and Fujinaga argue
11 that plaintiffs have not proven that the underlying transactions
12 were domestic, a necessary condition for their federal securities
13 claims. They further argue that plaintiffs have failed to prove
14 that MRI was a Ponzi scheme and maintain that MRI was in fact a
15 legitimate business.

16 In opposition, plaintiffs principally argue that MRI and
17 Fujinaga's arguments are precluded by the doctrine of collateral
18 estoppel because those issues have already been decided in a case
19 brought by the Securities and Exchange Commission against MRI and
20 Fujinaga.

21 **A. Collateral Estoppel**

22 In September 2013, the Securities and Exchange Commission
23 ("SEC") filed a complaint against MRI and Fujinaga that included a
24 securities fraud claim under § 10(b) and Rule 10b-5. See
25 *Securities & Exch. Comm'n v. Fujinaga*, 2:13-cv-01658-JCM-CWH. On
26 October 3, 2014, the court in that case granted the SEC summary
27 judgment on its claims against MRI and Fujinaga, including the
28 securities fraud claim. That order has been appealed, and the

1 appeal remains pending. Plaintiffs seek application of collateral
2 estoppel against MRI and Fujinaga on the basis of the court's
3 findings in that case.

4 The court has broad discretion to determine when offensive
5 collateral estoppel should apply, and may decline to apply it in
6 cases where it would be unfair to the defendant and where it would
7 not promote judicial economy. *Collins v. D.R. Horton*, 505 F.3d
8 874, 881-82 (9th Cir. 2007). Here, the court's judgment in the
9 related SEC case is on appeal. Should this court rely on
10 collateral estoppel to prevent MRI and Fujinaga from presenting a
11 defense here, a reversal of any or all of the judgment in the SEC
12 case could impact this case and could duplicate and further prolong
13 these proceedings. Moreover, Fujinaga has elected to not invoke
14 the Fifth Amendment in these proceedings and apparently intends to
15 introduce evidence negating an inference of scienter. The court's
16 findings as to scienter in the SEC case was based, in part, on
17 Fujinaga's assertion of his Fifth Amendment rights in that case.
18 (See 2:13-cv-01658-JCM-CWH, Doc. #156 at 14 (Ord. dated Oct. 3,
19 2016)). For these reasons, the plaintiffs' request for summary
20 judgment on all the securities claims against MRI and Fujinaga
21 based on the doctrine of collateral estoppel is **DENIED**.

22 B. Domestic Transaction

23 MRI and Fujinaga's principal argument in opposition to summary
24 judgment is that plaintiffs have failed to prove a necessary
25 element of their securities claims: that the transactions at issue
26 qualified as "domestic transactions" as required by *Morrison v.*
27 *National Australia Bank Ltd.*, 561 U.S. 247, 267 (2010). Plaintiffs
28 respond that the court has already decided this issue in connection

1 with the Suzukis' motion to dismiss.

2 In *Morrison*, the Supreme Court held that § 10(b) and Rule 10b-
3 5 apply only to securities listed on a domestic exchange or to
4 "domestic transactions in other securities." *Morrison v. National*
5 *Australia Bank Ltd.*, 561 U.S. 247, 267 (2010). Some courts have
6 extended *Morrison* to § 12 claims. See *In re Smart Techs., Inc.*
7 *S'holder Litig.*, 295 F.R.D. 50, 56 (S.D.N.Y. 2013). Plaintiffs
8 have not disputed *Morrison*'s application to their § 12(a)(1) claim.

9 The *Morrison* court did not discuss what "domestic purchases
10 and sales" meant. The Second Circuit, however, has held that a
11 transaction is domestic "if irrevocable liability is incurred or
12 title passes within the United States." *Absolute Activist Value*
13 *Master Fund Ltd. v. Ficeto*, 677 F.3d 60, 67 (2d Cir. 2012). "Put
14 another way, these definitions suggest that the 'purchase' and
15 'sale' take place when the parties become bound to effectuate the
16 transaction." *Id.* Irrevocable liability attaches at the time the
17 parties committed to one another, which is where "there was a
18 meeting of the minds." *Id.* at 68. A "sale of securities can
19 [also] be understood to take place at the location in which title
20 is transferred." *Id.* A "sale is ordinarily defined as the
21 transfer of property or title for a price." *Id.* (internal
22 punctuation omitted). "*Morrison* adopted a transactional test,
23 which focuses not upon the place where deception originated, but
24 upon purchases and sales of securities in the United States." *Sec.*
25 & *Exch. Comm'n v. Ficeto*, 2013 WL 1196356, at *2 (C.D. Cal. 2013)
26 (internal punctuation omitted).

27 It is undisputed that MRI did not register its securities in
28 the United States; thus the question is whether irrevocable

1 liability was incurred or title was passed in the United States.
2 While the court has concluded that plaintiffs' complaint
3 sufficiently *alleges* a domestic transaction, that is not the same
4 as holding that plaintiffs have established a domestic transaction
5 with admissible evidence. The fact that plaintiffs have failed to
6 brief or introduce evidence on this issue precludes summary
7 judgment on any of their securities law claims.¹

8 C. Other Issues of Fact

9 In addition to the domestic transaction issue, genuine issues
10 of material fact exist as to the plaintiffs' securities claims
11 against Fujinaga and MRI.

12 In order to prove securities fraud in violation of § 10(b) and
13 Rule 10b-5, the plaintiffs must show: "(1) a material
14 misrepresentation or omission; (2) scienter (i.e., a wrongful state
15 of mind); (3) a connection between the misrepresentation and the
16 purchase or sale of a security; (4) reliance upon the
17 misrepresentation . . . ; (5) economic loss; and (6) loss
18 causation." *Loos v. Immersion Corp.*, 762 F.3d 880, 886-87 (9th
19 Cir. 2014), as amended (Sept. 11, 2014). Genuine issues of
20 material fact exist as to this claim, including but not limited to
21 the defendants' state of mind.

22 Section 12(a)(1) imposes liability for the offer or sale of an

24 ¹ The court notes that plaintiffs' motion cites the undisputed fact
25 that investors wired their money to an escrow account in the United States
26 and that in return investors were sent a "Certificate of Investment." (ECF
27 No. 530 at 9 (Pl. Mot. Summ. J. MRI & Fujinaga at 8)). These two facts
28 alone, however, are not sufficient to conclude that the transactions at
issue were domestic. The plaintiffs' complaint contained far more
allegations supporting the court's conclusion, at the dismissal stage, that
a domestic transaction had been sufficiently alleged. These additional
allegations have not been supported by the plaintiffs with admissible
evidence in connection with their motion for summary judgment.

1 unregistered security in violation of 15 U.S.C. § 77(e). 15 U.S.C.
2 § 771(a)(1). No party has briefed whether the transactions at
3 issue were exempt from § 77(e), 15 U.S.C. § 77d, such that the
4 court can conclude, as a matter of law, that MRI and/or Fujinaga
5 violated § 12(a)(1).

6 Sections 15 and 20(a) impose liability on control persons for
7 a primary violation of the securities laws - in this case, §
8 12(a)(1) and § 10(b). Because questions of fact remain as to the
9 primary violations, summary judgment cannot be granted on the
10 control person claims.

11 **II. Paul Suzuki**

12 Plaintiffs seek summary judgment on their first cause of
13 action against Paul Suzuki, securities fraud in violation of §
14 10(b) and Rule 10b-5. The court concludes that genuine issues of
15 material fact exist as to several of the elements of this claim,
16 including but not limited to the connection between statements
17 attributable to Paul Suzuki and the plaintiffs' purchase of MRI
18 securities, and Paul Suzuki's state of mind. Accordingly, the
19 plaintiffs' motion for partial summary judgment against Paul Suzuki
20 is denied.

21 **III. Junzo Suzuki**

22 Plaintiffs seek summary judgment on their claims of
23 constructive fraudulent transfer and unjust enrichment against
24 Junzo Suzuki.

25 A. Constructive Fraudulent Transfer

26 Under Nevada Revised Statutes § 112.180, constructive
27 fraudulent transfer as to a creditor occurs when a debtor makes a
28 transfer or incurs an obligation

1 [w]ithout receiving a reasonably equivalent value in
2 exchange for the transfer or obligation, and the debtor:
3 (1) [w]as engaged or was about to engage in a business or
4 a transaction for which the remaining assets of the
5 debtor were unreasonably small in relation to the
business or transaction; or (2) [i]ntended to incur, or
believed or reasonably should have believed that the
debtor would incur, debts beyond his or her ability to
pay as they became due.

6 Nev. Rev. Stat. § 112.180(1)(b). Plaintiffs' claim is based on the
7 alleged fact that MRI operated as a Ponzi scheme, and thus when
8 Junzo Suzuki received commissions over the class period, MRI was
9 transferring him money without having sufficient assets to pay back
10 its creditors, the plaintiffs.

11 Junzo Suzuki argues that plaintiffs have not established that
12 MRI was a Ponzi scheme and for that reason alone summary judgment
13 must be denied. Further, he asserts, a question of fact exists as
14 to whether he gave reasonably equivalent value in exchange for the
15 commissions he received from MRI.

16 At a minimum, there are questions of fact as to the extent and
17 timing of the alleged Ponzi scheme in this case, which pertains to
18 whether and when MRI was unable to repay its debts to plaintiffs at
19 the time of each transfer to Junzo Suzuki. Summary judgment is
20 denied as to the constructive fraudulent transfer claim against
21 Junzo Suzuki.

22 B. Unjust Enrichment

23 Unjust enrichment is "the result or effect of a failure to
24 make restitution of, or for, property or benefits received under
25 such circumstances as to give rise to a legal or equitable
26 obligation to account therefor." *Leasepartners Corp. v. Robert L.*
27 *Brooks Trust Dated Nov. 12, 1975*, 942 P.2d 182, 187 (Nev. 1997).
28 The elements are:

- (1) a benefit conferred on the defendant by the plaintiff;
- (2) appreciation by the defendant of such benefit; and
- (3) an acceptance and retention by the defendant of such benefit under circumstances such that it would be inequitable for him to retain the benefit without payment of the value thereof.

6 *Unionamerica Mortg. & Equity Trust v. McDonald*, 626 P.2d 1272, 1273
7 (Nev. 1981).

8 Junzo Suzuki argues that plaintiffs can prevail on this claim
9 only if they show the existence of a Ponzi scheme; plaintiffs
10 disagree that this is a necessary condition to prevail. Whether and
11 to what extent Junzo Suzuki is liable for unjust enrichment should
12 be decided after all the facts are disclosed at trial.

13 Accordingly, the plaintiffs' motion for summary judgment on their
14 claim of unjust enrichment against Junzo Suzuki is denied.

15 || IV. Conclusion

16 In accordance with the foregoing, the plaintiffs' motions for
17 summary judgment (ECF Nos. 520, 529 & 530) are hereby **DENIED**. The
18 parties' evidentiary objections are **DENIED WITHOUT PREJUDICE** to
19 renew at trial.

20 || IT IS SO ORDERED.

21 DATED: This 27th day of February, 2017.

Howard D. McKibben

UNITED STATES DISTRICT JUDGE