No. 18A_____

IN THE
SUPREME COURT OF THE UNITED STATES

CHARLES C. LIU AND XIN WANG A/K/A LISA WANG,
Applicants,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MICHAEL K. KELLOGG
Counsel of Record
KELLOGG, HANSEN, TODD, FIGEL
& FREDERICK, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(mkellogg@kellogghansen.com)

Counsel for Applicants

March 22, 2019

PARTIES TO THE PROCEEDINGS BELOW

Applicants Charles C. Liu and Xin Wang a/k/a Lisa Wang were defendants in the district court proceedings and appellants in the court of appeals proceedings.

Respondent Securities and Exchange Commission was the plaintiff in the district court proceedings and the appellee in the court of appeals proceedings.

Beverly Proton Center, LLC f/k/a Los Angeles County Proton Therapy, LLC; Pacific Proton EB 5 Fund, LLC; and Pacific Proton Therapy Regional Center, LLC were defendants in the district court proceedings but did not participate in the court of appeals proceedings.

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable Elena Kagan, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit:

Pursuant to 28 U.S.C. § 2101(c) and Rules 13.5, 22, and 30.3 of the Rules of this Court, applicants Charles C. Liu and Xin Wang a/k/a Lisa Wang respectfully request a 58-day extension of time, up to and including May 31, 2019, within which to file a petition for a writ of certiorari to review the judgment of the Ninth Circuit.

The Ninth Circuit entered its judgment on October 25, 2018, and denied a petition for rehearing on January 3, 2019. The court's unpublished opinion (which is available at 2018 WL 5308171) and its order denying rehearing are attached hereto as Exhibits A and B. The petition would be due on April 3, 2019, and this application is made at least 10 days before that date. This Court's jurisdiction would be invoked under 28 U.S.C. § 1254(1).

This case involves an important issue regarding the statutory limits that Congress has placed on the U.S. Securities and Exchange Commission ("SEC"). In particular, the case presents the question whether the SEC, as part of its authority to seek "equitable" relief under 15 U.S.C. § 78u(d), can obtain disgorgement of revenues from a civil defendant. The Ninth Circuit, relying on its "longstanding precedent on this subject," 2018 WL 5308171, at *3, concluded here that the SEC possesses such authority. That ruling meant that the defendants would be required to disgorge more than $26,000,000 (all the money they raised from investors, minus a small amount left over and available for return). *See id.*

In *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), this Court, while expressly reserving the issue presented here, *see id.* at 1642 n.3, analyzed a closely related matter in a manner inconsistent with the Ninth Circuit's conclusion. *Kokesh* held that disgorgement in an SEC civil action does not merely prevent "unjust enrichment"; rather, it is a "penalty," thus triggering the statutory limitations period for SEC proceedings. *Id.* at 1645. As the Court explained, SEC "disgorgement . . . bears all the hallmarks of a penalty: It is imposed as a consequence of violating a public law and it is intended to deter, not to compensate." *Id.* at 1644.

This case thus squarely raises the significant question whether, applying the analysis in *Kokesh*, disgorgement qualifies as "equitable relief" under 15 U.S.C. § 78u(d). Indeed, the Ninth Circuit panel decided it was bound by prior precedent *not* because *Kokesh*'s analysis was consistent with prior Ninth Circuit law, but, rather, because the Court had not "reach[ed] this issue" and thus the Ninth Circuit panel was bound by existing circuit precedent. 2018 WL 5308171, at *3.

In contrast to the Ninth Circuit, at least one other court of appeals has reconsidered the scope of equitable relief in light of *Kokesh*. The D.C. Circuit concluded that *Kokesh* may have stripped the SEC's ability to bar a broker-dealer from membership in a professional organization and remanded the question to the SEC to determine in the first instance whether the lifetime ban was a penalty or a remedy. *See Saad v. SEC*, 873 F.3d 297, 304 (D.C. Cir. 2017). In that case, then-Judge Kavanaugh wrote separately to explain that remand was necessary in light of *Kokesh*, which "overturned a line of cases . . . that had concluded that disgorgement was remedial and not punitive." *Id.* at 305 (Kavanaugh, J., concurring). He argued

that characterizing such sanctions as penal instead of remedial would force the SEC to justify them instead of "wav[ing] the 'remedial card'" that leads to an "arbitrary system of . . . sanctions." *Id.* at 306.

The 58-day extension to file a certiorari petition is necessary because undersigned counsel was retained in this matter only last week and needs the additional time to review the record and to prepare the petition and appendix. Counsel also has previously engaged matters, including: (1) a petition for a writ of certiorari in this Court in *Buchwald Capital Advisors LLC, etc. v. Sault Ste. Marie Tribe of Chippewa Indians, et al.* (filed March 18, 2019); (2) travel to Saudi Arabia in April 2019 in connection with discovery-related matters for *In re Terrorist Attacks on September 11, 2001*, 03 MDL 1570 (GBD) (SN) (S.D.N.Y.); and (3) oral argument in the Sixth Circuit in *Buchwald Capital Advisors LLC v. Dimitrios Papas, et al.*, No. 18-1167 (scheduled for May 8, 2019).

For all these reasons, there is good cause for a 58-day extension of time, up to and including May 31, 2019, within which to file a certiorari petition in this case to review the judgment of the Ninth Circuit.

Respectfully submitted,

MICHAEL K. KELLOGG
Counsel of Record
KELLOGG, HANSEN, TODD, FIGEL
& FREDERICK, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(mkellogg@kellogghansen.com)

Counsel for Applicants

March 22, 2019

EXHIBIT A

2018 WL 5308171
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 9th Cir. Rule 36-3.
United States Court of Appeals, Ninth Circuit.

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff-Appellee,
v.
Charles C. LIU, Xin Wang a/k/a Lisa Wang,
Defendants-Appellants,
and
Pacific Proton Therapy Regional Center LLC; et al., Defendants.

No. 17-55849
|
Argued and Submitted October 11, 2018 Pasadena, California
|
October 25, 2018

Synopsis
Background: Securities and Exchange Commission (SEC) brought securities fraud action against purported developer of proton therapy cancer treatment center alleging that developer funneled investor money, which was received through immigrant investor program, to himself, his wife, and marketing companies. The United States District Court for the Central District of California, Cormac J. Carney, J., 262 F.Supp.3d 957, granted SEC summary judgment. Developer appealed.

Holdings: United States Court of Appeals for the Ninth Circuit held that:

[1] shares purchased by foreign investors in immigrant investor program were "securities";

[2] district court properly drew adverse inference supporting scienter to commit securities fraud based on Fifth Amendment privilege; but

[3] even if adverse inference was error, it was harmless; and

[4] disgorgement amount was reasonable, even though there was no offset for business expenses.

Affirmed.

West Headnotes (4)

[1] **Securities Regulation**
Particular interests

Shares purchased by foreign investors in immigrant investor program fund, which was created to purportedly finance development of proton therapy cancer treatment center, constituted "securities" within meaning of Securities Act and Securities Exchange Act, even if investors were motivated in significant part by obtaining lawful permanent entry into United States, where private offering memorandum referred to investments as securities, specified interest rate fund would earn on capital contributions loaned to development project, and described investors' return on investment. Securities Act of 1933 §§ 2, 17, 15 U.S.C.A. §§ 77b(a)(1), 77q(a)(2).

Cases that cite this headnote

[2] **Securities Regulation**
Presumptions and burden of proof
Witnesses
Effect of refusal to answer

District court properly drew adverse inference supporting scienter to commit securities fraud, for purposes of permanent injunction prohibiting developers of proton therapy cancer treatment center from engaging in any further investor solicitation in connection with immigrant investor program, based on defendants' assertion of their Fifth Amendment rights during depositions, where developers refused to testify as to whether they controlled a marketing firm that was paid $3.8 million, and which and only brought in 10 investors, as part of an immigrant

investor program. U.S. Const. Amend. 5; Securities Act of 1933 §§ 2, 17, 15 U.S.C.A. §§ 77b(a)(1), 77q(a)(2).

Cases that cite this headnote

[3] **Federal Courts**
Verdict, findings, and conclusions

Even if district court imposing permanent injunction improperly drew adverse inference of scienter to commit securities fraud based on defendants' assertion of their Fifth Amendment rights during deposition when they refused to testify as to whether they controlled a marketing firm that was paid $3.8 million, and which only brought in 10 investors, as part of an immigrant investor program, error was harmless, since inference was corroborated by other evidence tending to show defendants had organized and controlled the project, and had misappropriated most of the money raised, paying $12.9 million to marketing firms to solicit new investors, and paying themselves approximately $8.2 million in salaries, although there was no mention of such exorbitant salaries in private offering memorandum. U.S. Const. Amend. 5; Securities Act of 1933 §§ 2, 17, 15 U.S.C.A. §§ 77b(a)(1), 77q(a)(2).

Cases that cite this headnote

[4] **Securities Regulation**
Insiders' Profits, Recovery of

Disgorgement in amount of total funds raised from foreign investors through fraudulent immigrant investors program in connection with purported development of proton therapy cancer treatment center was reasonable, since offsetting disgorgement by amount in corporate accounts on date before temporary restraining order (TRO) was issued ignored asset transfers that occurred between such date and date of TRO, and purported developers of project did not have any legitimate business expenses to offset, given that long-standing nature of scheme to defraud investors was demonstrated by fact that contracts with foreign marketers and significant portion of developers' exorbitant compensation were set at inception of project.

Cases that cite this headnote

Attorneys and Law Firms

Jeffrey Alan Berger, Attorney, Kerry Dingle, Attorney, Securities & Exchange Commission, Washington, DC, Jacob A. Regenstreif, Attorney, SEC - Securities and Exchange Commission, Los Angeles, CA, for Plaintiff-Appellee

Herve Gouraige, Esquire, Attorney, Sills Cummis & Gross P. C., Newark, NJ, for Defendants-Appellants

Appeal from the United States District Court for the Central District of California Cormac J. Carney, District Judge, Presiding, D.C. No. 8:16-cv-00974-CJC-AGR

Before: WATFORD and OWENS, Circuit Judges, and PRESNELL,* District Judge.

MEMORANDUM**

***1** Charles Liu ("Liu") and his wife, Xin Wang ("Wang"), appeal the district court's entry of summary judgment in favor of the SEC, finding that the couple violated Section 17(a)(2) of the Securities Act of 1933. Liu and Wang raised approximately $27 million from Chinese investors under the EB-5 Immigrant Investor Program (the "EB-5 Program"), which is administered by United States Citizenship and Immigration Services and which allows foreign citizens to obtain visas in exchange for investments in job-creating projects in the United States.

The Appellants' project involved selling membership interests in an LLC, which would then lend the proceeds of those sales to a second LLC; the second LLC was supposed to use the lent funds to construct and operate a cancer treatment center in California. Each investor was required to put up a $500,000 "Capital Contribution" and a $45,000 "Administrative Fee." According to the Private Offering Memorandum (henceforth, the "POM") provided

to investors, the Capital Contribution would be used for construction costs, equipment purchases, and other items needed to build and operate the cancer treatment center, while the Administrative Fee would be used to pay "legal, accounting and administration expenses" related to the offering. Moreover, "[o]ffering expenses, commissions, and fees incurred in connection with [the] [o]ffering" would be paid only from the Administrative Fee, not from the Capital Contribution. The district court found that the Appellants misappropriated most of the money raised, paying $12.9 million to marketing firms to solicit new investors, and paying themselves approximately $8.2 million in salaries, although there was no mention of such exorbitant salaries in the POM.[1] Despite these expenditures, the Appellants never even obtained the required permits to break ground for the cancer center.

In granting summary judgment, the district court ordered disgorgement of the entire amount that had been raised from investors, imposed civil penalties equal to the $8.2 million the Appellants had personally received from the project, and permanently enjoined the Appellants from future solicitation of EB-5 Program investors.

We have jurisdiction under 28 U.S.C. § 1291. A grant of summary judgment is reviewed *de novo*. *Padfield v. AIG Life Ins. Co.*, 290 F.3d 1121, 1124 (9th Cir. 2002). We affirm.

The Appellants seek reversal of the summary judgment order on numerous grounds. They first contend that the limited-partnership interests they sold were not "securities" within the meaning of Section 17(a)(2)[2] because the investors were primarily interested in obtaining visas, not profits. Section 2(a)(1) of the Securities Act of 1933, 15 U.S.C. § 77b(a)(1), defines the term "security" to include, inter alia, "investment contracts." The basic test for distinguishing transactions involving investment contracts from other commercial dealings is "whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others." *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 852, 95 S.Ct. 2051, 44 L.Ed.2d 621 (1975) (quoting *SEC v. W.J. Howey Co.*, 328 U.S. 293, 301, 66 S.Ct. 1100, 90 L.Ed. 1244 (1946)).

***2** [1]Even if it was not their primary motivation, the investors here were promised a chance to earn a profit. The POM provided that if the cancer center project succeeded, after five years the second LLC would repay its loan with interest "at the rate of 0.25% per annum," and these funds would be distributed to investors. This promise is enough to establish that investors had some expectation of receiving profits, as required under *Forman*.[3] In addition, Liu hired American securities lawyers to draft the POM under his supervision, and that document repeatedly refers to the investments at issue as "securities." For example, the first page of the POM refers to them by that term five times. *See Forman*, 421 U.S. at 850-51, 95 S.Ct. 2051 ("There may be occasions when the use of a traditional name such as 'stocks' or 'bonds' will lead a purchaser justifiably to assume that the federal securities laws apply.").

The Appellants' second complaint is that the district court improperly drew adverse inferences based on the assertion of their Fifth Amendment rights during their depositions. A district court's decision to draw an adverse inference from a party's invocation in a civil case of the Fifth Amendment privilege against self-incrimination is reviewed for abuse of discretion. *Nationwide Life Ins. Co. v. Richards*, 541 F.3d 903, 909 (9th Cir. 2008).

[2]Appellants complain of two such inferences: an inference that they controlled a marketing firm that was paid $3.8 million and only brought in 10 investors, and an inference that the Appellants acted with a high degree of scienter, justifying a permanent injunction against future solicitation of EB-5 Program investors. *See Aaron v. Securities and Exchange Commission*, 446 U.S. 680, 701, 100 S.Ct. 1945, 64 L.Ed.2d 611 (1980) (holding that degree of intentional wrongdoing evident in a defendant's past conduct is an "important factor" to consider when SEC seeks permanent injunction). Courts have discretion to draw adverse inferences based on the assertion of a Fifth Amendment privilege in a civil case, so long as there is a substantial need for the information, there is not another less burdensome way of obtaining that information, and there is corroborating evidence to support the fact under inquiry. *Richards*, 541 F.3d at 912.

[3]The district court did not rely on the inference regarding control of the marketing firm to support any conclusion in its summary judgment order. Thus, even assuming *arguendo* that the district court erred in drawing that inference, the error was harmless. As for the inference regarding scienter, the district court needed that information to determine whether an injunction was warranted, and the Appellants do not point to any other source from which the district court could have obtained it. The inference was corroborated by several items of evidence tending to show that, among other things, the Appellants organized and controlled the project and that, at its outset, they entered contracts with marketers that would require payments in excess of the sums raised by way of the Administrative Fee, thereby violating the promises of the POM. In addition, the district court noted

that the $8.2 million the Appellants paid themselves was far in excess of the $2.2 million raised in Administration Fees, thereby necessarily putting in their own pockets money that should only have been spent to construct and operate the cancer center. The district court did not abuse its discretion in drawing the inference that the Appellants acted with scienter.

***3** The Appellants also argue that American securities laws do not apply to their actions because there is no evidence that they made sales or offers to sell within the United States. However, the Appellants did not raise this extraterritoriality argument before the district court, and it has therefore been waived. *See, e.g.*, *In re Mercury Interactive Corp. Sec. Litig*, 618 F.3d 988, 992 (9th Cir. 2010) ("Although no bright line rule exists to determine whether a matter has been properly raised below, an issue will generally be deemed waived on appeal if the argument was not raised sufficiently for the trial court to rule on it.") (internal quotations omitted).

[4]Finally, the Appellants contend that the district court's order that they disgorge $26,733,018.81 – the total amount they raised from their investors ($26,967,918) less the amount left over and available to be returned ($234,899.19) – was erroneous. The court reviews a district court's imposition of equitable remedies, including injunctive relief, disgorgement, and penalties, for abuse of discretion. *SEC v. Goldfield Deep Mines Co.*, 758 F.2d 459, 465 (9th Cir. 1985); *SEC v. JT Wallenbrock & Assocs.*, 440 F.3d 1109, 1113 (9th Cir. 2006).

Relying on *Kokesh v. SEC*, ––– U.S. ––––, 137 S.Ct. 1635, 198 L.Ed.2d 86 (2017), the Appellants argue that the district court lacked the power to order disgorgement in this amount. But *Kokesh* expressly refused to reach this issue, *id.* at 1642 n.3, so that case is not "clearly irreconcilable" with our longstanding precedent on this subject. *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc). They also contend that, in setting the amount to be disgorged, the district court did not give them credit for amounts they characterize as legitimate business expenses, such as rent payments and deposits paid to equipment manufacturers. But the proper amount of disgorgement in a scheme such as this one is the entire amount raised less the money paid back to the investors. *JT Wallenbrock & Assocs.*, 440 F.3d at 1114 (stating that it would be "unjust to permit the defendants to offset against the investor dollars they received the expenses of running the very business they created to defraud those investors into giving the defendants the money in the first place").[4]

The district court also imposed civil penalties equal to the undisputed amounts each of the Appellants directly received from the project – $6,714,580 for Liu and $1,538,000 for Wang. As with the disgorgement order, the Appellants argue that their "legitimate business expenses" should have been deducted from these amounts. The Securities Act provides that violations involving "fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement" and that "directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons" may be punished by imposition of penalties up to "the gross amount of pecuniary gain" to each defendant. 15 U.S.C. § 77t(d)(2)(C). The Appellants do not challenge the district court's characterization of their violations as meeting both of these requirements, and we find no abuse of discretion by the district court in imposing civil penalties equal to the undisputed amount of each defendant's gross pecuniary gain.

***4 AFFIRMED.**

All Citations

--- Fed.Appx. ----, 2018 WL 5308171, Fed. Sec. L. Rep. P 100,295

Footnotes

* The Honorable Gregory A. Presnell, United States District Judge for the Middle District of Florida, sitting by designation.

** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

1 As set forth in the POM, the manager of the first LLC was entitled to a management fee of 3 percent of the funds raised, or approximately $800,000 in total.

2 Section 17(a)(2) of the Securities Act of 1933, 15 U.S.C. § 77q(a)(2), makes it unlawful for any person in the offer or sale of any "securities" to obtain "money or property by means of any untrue statement of a material fact or any omission 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."

3 Counsel for the Appellants also argued that the investments were not securities because the potential rate of return was lower than the expected rate of inflation. The Appellants do not cite any authority requiring that an investment's potential return exceed projected inflation rates. Such a standard would be unworkable and is not required by *Forman.*

4 To justify setting this disgorgement amount, the district court noted that the contracts with the overseas marketers and a significant portion of Liu's compensation – both of which would necessarily require tapping into the funds set aside for construction and operation of the cancer center – were set at the inception of the project; the district court described this as "extensive evidence of a thorough, long-standing scheme to defraud investors."

EXHIBIT B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JAN 3 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

v.

CHARLES C. LIU and XIN WANG, AKA Lisa Wang,

Defendants-Appellants,

and

PACIFIC PROTON THERAPY REGIONAL CENTER LLC; et al.,

Defendants.

No. 17-55849

D.C. No.
8:16-cv-00974-CJC-AGR
Central District of California,
Santa Ana

ORDER

Before: WATFORD and OWENS, Circuit Judges, and PRESNELL,* District Judge.

The panel unanimously votes to deny the petition for panel rehearing. Judges Watford and Owens vote to deny the petition for rehearing en banc, and Judge Presnell so recommends. The full court has been advised of the petition for rehearing en banc, and no judge requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for panel rehearing and rehearing en banc, filed December 7, 2018, is DENIED.

* The Honorable Gregory A. Presnell, United States District Judge for the Middle District of Florida, sitting by designation.