UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

| Case No. | **CV 18-3991-DMG (AFMx)** | Date | March 5, 2019 |
|---|---|---|---|
| Title | ***Commodity Futures Trading Commission v. Jin Choi, et al.*** | Page | 1 of 14 |

Present: The Honorable DOLLY M. GEE, UNITED STATES DISTRICT JUDGE

| KANE TIEN | NOT REPORTED |
|---|---|
| Deputy Clerk | Court Reporter |
| Attorneys Present for Plaintiff(s) None Present | Attorneys Present for Defendant(s) None Present |

**Proceedings: IN CHAMBERS—ORDER GRANTING PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT [27] AND DENYING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION [9]**

Before the Court is Plaintiff U.S. Commodity Futures Trading Commission's ("Plaintiff" or "Commission" or "CFTC") Motion for Preliminary Injunction ("MPI") [Doc. # 9], and Motion for Default Judgment, Permanent Injunction, Civil Monetary Penalty and Other Equitable Relief ("MDJ") [Doc. # 27] against Defendants Jin Choi, Apuro Holdings, Ltd. (d/b/a ApuroFX) (together, "Apuro"), and JCI Holdings USA (d/b/a JCI Trading Group, LLC) (together, "JCI") (collectively, "Defendants").

Having reviewed the pleadings, moving papers, and supporting evidence, the Court GRANTS Plaintiff's Motion for Default Judgment and DENIES AS MOOT the Motion for Preliminary Injunction.

## I. BACKGROUND

### A. Procedural History

On May 14, 2018, Plaintiff filed this civil action against Defendants for alleged violations of the Commodity Exchange Act (the, "Act"), *see* 7 U.S.C. § 1 *et seq*. [Doc. # 1.][1] Defendant Choi was served on May 24, 2018 at his residence. [Doc. # 16.] Defendants Apuro and JCI were both served on May 24, 2018 by serving their authorized agent, Defendant Choi. [Doc. ## 17–18.]

Defendants were required to answer by June 14, 2018, however, they have failed to do so. [Doc. # 6.] Therefore, on June 15, 2018, Plaintiff filed an application for the Clerk to enter

[1] On May 17, 2018, before effecting service of the summons and Complaint, Plaintiff moved for a preliminary injunction. [Doc. # 9.] For the reasons discussed *infra*, the MPI will be denied as moot because the MDJ will be granted and a permanent injunction will be entered.

default against all Defendants. [Doc. # 20.] On June 19, 2018, the Clerk entered default. [Doc. # 21.] Subsequently, Plaintiff filed the instant MDJ, seeking default judgment against Defendants for four claims arising under the Act and its implementing regulations. [Doc. ## 27, 27-1.] In support of its MDJ, Plaintiff filed the following documents:

- Declaration of George H. Malas, dated May 17, 2018 ("Malas Decl. I") [Doc. # 9-3]; and

- Declaration of George H. Malas, dated July 20, 2018 ("Malas Decl. II") [Doc. # 27-2] and accompanying Exhibits 1–4 [Doc. ## 27-3 – 27-8]; and

- Declaration of Danielle Karst ("Karst Decl.") [Doc. # 27-9] and accompanying Exhibits 1–2 [Doc. ## 27-10 – 27-11].

To date, Defendants have not made an appearance or opposed the MDJ.

**B. Factual Background**

The Complaint alleges that from January 2014 to the present, Defendant Choi (individually and as principal and agent of Defendants Apuro and JCI) fraudulently solicited and accepted at least $1,145,672.00 from 14 individuals (*i.e.*, investment clients) for the purported purpose of trading off-exchange leveraged or margined retail foreign currency exchange ("forex") contracts on their behalf. Compl. at ¶¶ 1–2, 23; Malas Decl. I at ¶ 5(d); *see also* Notice of Errata [Doc. # 30] at 2. In fact, Defendant "Choi created and operates a number of business entities that he uses to perpetuate his fraud, including [Defendants] Apuro and JCI." Compl. at ¶ 2.

Defendants, without first registering with the Commission as Commodity Trading Advisors and/or an Associated Person of a Commodity Trading Advisor, "solicited and continue to solicit clients or prospective clients through investor seminars hosted by [Defendant Choi] in the United States and abroad, social media accounts such as [Instagram and Facebook], and various websites operated by [Defendant Choi], including *www.apuroforex.com* and *www.jcitrading.com*. MDJ at 5 (citing Compl. at ¶¶ 3, 24–25); *see also* Malas Decl. I at ¶¶ 5(e), 7. Defendants "made material misrepresentations in their solicitations, including by misrepresenting that: (1) clients' funds would be used to open trading accounts in their names and to trade forex on their behalf; (2) [Defendant Choi] is a successful and profitable trader who has not experienced any trading losses in more than ten years; (3) annual returns of 20%-50% would be paid to clients on a quarterly basis; and (4) [Defendant Apuro] is registered with the Commission as a futures commission merchant and a member of the National Futures Association." MDJ at 5 (citing Compl. at ¶¶ 4, 23, 26, 35). In addition, Defendants made material omissions by failing to disclose that trading accounts were never opened on behalf of

clients, client funds had been misappropriated, the accounts clients viewed online were "demo" accounts and not actual trading accounts, and Defendants Apuro and JCI were not registered with the Commission as required by federal law. Compl. at ¶¶ 4, 34, 36, 40.

As noted, Defendants misappropriated at least $1,145,672.00 from client funds, and used the misappropriated funds to support Defendant Choi's lavish lifestyle. Compl. at ¶¶ 5, 39. As part of their scheme, "Defendants returned approximately $24,000 to certain clients as withdrawals of principal or as purported 'profits' in the manner of a Ponzi scheme.[2] However, the majority of clients were unable to obtain a return of any of their funds despite their repeated demands to Defendants." MDJ at 7 (citing Compl. at ¶¶ 5, 40–41); *see* Malas Decl. I at ¶¶ 5(j), 45; *see also* Malas Decl. II at ¶¶ 7, 9, 11.

## III.
## LEGAL STANDARD

Federal Rule of Civil Procedure 55(b)(2) provides for entry of default judgment by the Court. Pursuant to Local Rule 55-1, an application to the Court for default judgment must be accompanied by a declaration that conforms to the requirements of Federal Rule of Civil Procedure 55(b) and include the following:

(a) When and against what party the default was entered;
(b) The identification of the pleading to which default was entered;
(c) Whether the defaulting party is an infant or incompetent person, and if so, whether that person is represented by a general guardian, committee, conservator or other representative;
(d) That the service members Civil Relief Act (50 U.S.C. App. § 521) does not apply; and
(e) That notice has been served on the defaulting party, if required by Fed. R. Civ. P. 55(b)(2).

L.R. 55-1 (the, "Procedural Requirements"); *see also* Fed. R. Civ. P. 55(b)(2).

Whether to enter a default judgment is within the sound discretion of the district court. *See Adalbe v. Adalbe*, 616 F.2d 1089, 1092–93 (9th Cir. 1980). In *Eitel v. McCool*, 782 F.2d 1470 (9th Cir. 1986), the Ninth Circuit set forth the following factors in determining whether to grant default judgment:

[2] A "Ponzi scheme" is a "fraudulent investment scheme in which money contributed by later investors generates artificially high dividends or returns for the original investors, whose example attracts even larger investments." *Black's Law Dictionary* (10th ed. 2014). In ordinary operation (and as used herein), "[m]oney from the new investors is used directly to repay or pay interest to earlier investors, usually without any operation or revenue-producing activity other than the continual raising of new funds." *Id.*

> (1) the possibility of prejudice to the plaintiff; (2) the merits of plaintiff's substantive claim; (3) the sufficiency of the complaint; (4) the sum of money at stake in the action; (5) the possibility of a dispute concerning material facts; (6) whether the default was due to excusable neglect; and (7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits.

*Eitel*, 782 F.2d at 1471–72 (the, "*Eitel* Factors").

Upon entry of default, the well-pleaded factual allegations of a complaint are deemed true; however, allegations pertaining to the amount of damages must be proven. *TeleVideo Systems, Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987); *see also Geddes v. United Fin. Grp.*, 559 F.2d 557, 560 (9th Cir. 1977) ("[U]pon default[,] the factual allegations of the complaint, except those relating to the amount of damages, will be taken as true."). A plaintiff is required to provide evidence of his or her damages, and a court may rely only on the declarations submitted by the plaintiff or order a full evidentiary hearing. Fed. R. Civ. P. 55(b)(2); *see also Garden City Boxing Club, Inc. v. Aranda*, 384 F. App'x 688, 689 (9th Cir. June 21, 2010) ("[T]he court was not required to conduct an evidentiary hearing to ascertain damages . . . The record shows that no such hearing was necessary because plaintiff submitted lost profits and other evidence from the illegal broadcast to allow the district court to calculate damages within the applicable statutory limits.") (internal citation omitted).

## IV.
## DISCUSSION

Plaintiff moves for default judgment against Defendants seeking a permanent injunction and order requiring Defendants to pay restitution and civil monetary penalties. MDJ at 25, 27–28. In order to enter default judgment in its favor, Plaintiff must meet the procedural requirements described above and establish that, on balance, the *Eitel* factors weigh in its favor. The Court evaluates these factors below.

### A. Procedural Requirements

Plaintiff has satisfied the requirements for entry of default judgment. Pursuant to Federal Rule of Civil Procedure 55, Plaintiff did not petition for entry of default judgment until after default was entered against Defendants by the Clerk of Court. [Doc. ## 21, 27.] Additionally, Plaintiff's MDJ and the supporting declaration of its counsel sets forth the information required by the Local Rules of this Court. MDJ at 8–9; Karst Decl. at ¶¶ 2–6.

**B. *Eitel* Factors**

**1. Possibility of Prejudice to Plaintiff**

The Commission has demonstrated that it will be prejudiced absent a default judgment. *See* MDJ at 23 ("[F]ailure to enter default judgment would frustrate the important policy goal of protecting the integrity of the commodity futures markets."). The Commission maintains an interest in enforcing the provisions of the Commodities Exchange Act. *See Lawrence v. Commodity Futures Trading Comm'n*, 759 F.2d 767, 776 (9th Cir. 1985) (describing the Commission as "the statutory guardian entrusted with the enforcement of the congressional scheme for safeguarding the public interest in commodity futures markets.") (internal quotation marks and citation omitted). The remedies the Commission seeks further this interest, as they include restitutionary damages for the defrauded investors and an injunction preventing further violations of the Act. Accordingly, this factor favors default judgment.

**2. The Merits of the Substantive Claims and Sufficiency of the Complaint**

The second and third *Eitel* factors—the "sufficiency of the complaint" and "merits of plaintiff's claim"—warrant the entry of default judgment. *See Eitel*, 782 F.2d at 1471–72. The uncontroverted facts, as alleged in Plaintiff's Complaint, establish that Defendants violated provisions of the Act and Commission Regulations, including:

1. Defendants Choi, Apuro, and JCI—Sections 4b(a)(2)(A) and (C), and 4*o*(1)(A) and (B) of the Act, *see* 7 U.S.C. §§ 6b(a)(2)(A) and (C), and 6*o*(1)(A) and (B); and

2. Defendants Apuro and JCI—Sections 2(c)(2)(C)(iii)(I)(bb) and 4m(1) of the Act, *see* 7 U.S.C. §§ 2(c)(2)(C)(iii)(I)(bb) and 6m(1), as well as Commission Regulation 5.3(a)(3)(i), *see* 17 C.F.R. § 5.3(a)(3)(i); and

3. Defendant Choi—Sections 2(c)(2)(C)(iii)(I)(aa) and 4k(3) of the Act, *see* 7 U.S.C. §§ 2(c)(2)(C)(iii)(I)(aa) and 6k(3), as well as Commission Regulation 5.3(a)(3)(ii), *see* 17 C.F.R. § 5.3(a)(3)(ii).

As discussed above, the well-pleaded allegations of the complaint, except those concerning damages are deemed true. *See* Fed. R. Civ. P. 8(b)(6). The Court must assure itself, however, that "the unchallenged facts constitute a legitimate cause of action, since a party in default does not admit mere conclusions of law." *Landstar Ranger, Inc. v. Parth Enters., Inc.*, 725 F. Supp. 2d 916, 919 n.19 (C.D. Cal. 2010). Thus, the Court will next assess the substantive merits of Plaintiff's claims and the sufficiency of its pleadings.

**a. Principal-Agent and Controlling Person Liability**

As an initial matter, the Court addresses principal-agent and controlling person liability. Pursuant to 7 U.S.C. § 13c(b), the Commission seeks to hold Defendant Choi liable for violations of the Act specifically attributed to Defendants Apuro and JCI. MDJ at 14–15; Compl. at ¶¶ 51, 59, 64. Similarly, pursuant to 7 U.S.C. § 2(a)(1)(B), the Commission seeks to hold Defendants Apuro and JCI liable for violations of the Act as attributed to Defendant Choi. MDJ at 15–16; Compl. at ¶¶ 52, 60, 68.

The facts sufficiently demonstrate that Defendant Choi was a principal of both Defendants Apuro and JCI and controlled their financial and business activities. Defendant Choi created both entities, controlled the content on their respective websites, controlled bank accounts associated with each entity, and most importantly "is responsible for developing and disseminating the false and misleading information about his trading experience, as well as Apuro and JCI's services, to clients through Apuro and JCI's solicitation materials." MDJ at 15; *see also* Compl. at ¶¶ 16, 24, 28, 32); Malas Decl. I at ¶¶ 5, 11–13, 17–18, 23, 25, 27, 29, 31, 33–35. Since no other person had control over Defendants Apuro and JCI's activities, it is reasonable to infer that Defendant Choi knowingly induced these Defendants' violations and did not act in good faith. Thus, the Court finds that Defendant Choi is liable for the actions of Defendants Apuro and JCI under 7 U.S.C. § 13c(b).

The facts also demonstrate that Defendant Choi was an officer or employee of Defendants Apuro and JCI and acted within the course and scope of his employment or office when he committed the acts in violation of the Act. *See* Compl. at ¶¶ 24–25 ("Apuro and JCI, through Choi, solicited and continue to solicit actual and prospective clients through, among other things, Apuro and JCI's websites."); Malas Decl. I at ¶ 5(d). Thus, Defendants Apuro and JCI are liable for Defendant Choi's violations of the Act under 7 U.S.C. § 2(a)(1)(B).

**b. Defendants Violated Antifraud Provisions of the Act and Commission Regulations**

The Commission contends that Defendants committed fraud and misappropriated funds in violation of Sections 4b(a)(2)(A) and (C), and 4*o*(1)(A) and (B), of the Act. Compl. at 17–21 (citing 7 U.S.C. §§ 6b(a)(2)(A) and (C), and 6*o*(1)(A) and (B)); *see also* MDJ at 9–18.

Sections 4b(a)(2)(A) and (C) prohibit fraudulent activities "in connection with" commodity futures trading. Specifically, these Sections make it unlawful for any person to cheat or defraud or attempt to cheat or defraud another person, or willfully deceive or attempt to deceive another person by any means in connection with certain off-exchange commodity contracts. *See* 7 U.S.C. §§ 6b(a)(2)(A) and (C). The Commission need only prove three elements to establish its claims of fraud under Sections 4b(a)(2)(A) and (C): (1) the making of a

misrepresentation, misleading statement, or deceptive omission; (2) scienter; and (3) materiality. *U.S. Commodity Futures Trading Comm'n v. Driver*, 877 F. Supp. 2d 968, 977 (C.D. Cal. 2012).

Sections 4*o*(1)(A) and (B) make it unlawful for a commodity trading advisor and its associated persons to engage in fraudulent activities in connection with commodity futures trading. *See* 7 U.S.C. §§ 6*o*(1)(A) and (B). The elements of proof for Section 4*o*(1) overlap with the elements of proof for Section 4b(a). *Driver*, 877 F. Supp. 2d at 978–79 ("The same intentional or reckless misappropriations, misrepresentations, and omissions of material fact violative of Section b of the Act . . . also violate Section 4*o*(1) of the Act"); *CFTC v. Weinberg*, 287 F. Supp. 2d 1100, 1108 (C.D. Cal. 2003) (finding misrepresentations violated both Sections 4b(a) and 4*o*(1)).

**1. Fraud by Material Misrepresentations and Omissions**

First, the uncontroverted facts establish that when soliciting funds from prospective clients, Defendants Apuro and JCI, knowingly or recklessly made misrepresentations and omissions (via text messages, social media, and websites), including but not limited to the following: (1) misrepresenting that clients' funds would be used to open trading accounts in their names and to trade forex on their behalf; (2) misrepresenting that Defendant Choi was a successful and profitable trader who has not experienced any trading losses in more than ten years; (3) misrepresenting that annual returns of 20 to 50 percent would be paid out to clients on a quarterly basis; and (4) misrepresenting that Apuro was a registered futures commission merchant with the Commission and a member of the National Futures Association. *See* MDJ at 11; Compl. at ¶¶ 23, 26, 29, 35–36; *see also* Malas Decl. I at ¶¶ 15–18.

Similarly, the uncontroverted facts establish that Defendant Choi knowingly made material omissions to attract and retain clients, including but not limited to the following: (1) omitting that Defendants never opened any trading accounts in the clients' names, or conducted any trading for that matter; (2) omitting that the purported trading account that clients viewed online were demo accounts and not actual trading accounts; (3) omitting that Defendants misappropriated client funds for their own personal use; (4) omitting that no Defendant was registered with the Commission as required by the Act and Commission Regulations; and (6) omitting that purported profits or withdrawals of principal paid to some clients were in fact the principal deposits of other clients and were not generated by profitable trading activity. MDJ at 11–12; Compl. at ¶¶ 26, 34–36, 39–40; *see also* Malas Decl. I at ¶¶ 5(h)–(i), 11, 45. In the Court's view, Defendants' false statements and failure to inform clients constitute misrepresentations and omissions in violation of the Act. *See Driver*, 877 F. Supp. 2d at 978 (misrepresenting the profitability and amount of trading were violations of the Act).

Second, as for the materiality requirement, "[a] statement [or omission] is material if it is substantially likely that a reasonable investor would consider the matter important in making an

investment decision. Misrepresentations of profit and risk are material." *Driver*, 877 F. Supp. 2d at 977 (citing *CFTC v. R.I. Fitzgerald & Co*., 310 F.3d 1321, 1332–33 (11th Cir. 2002)); *see also CFTC v. Noble Wealth Data Info. Servs., Inc.*, 90 F. Supp. 2d 676, 686 (D. Md. 2000), *aff'd in relevant part, and vacated in part on other grounds,* ("Misrepresentations concerning profit and risk go to the heart of a customer's investment decision and are therefore material as a matter of law."). Here, the uncontroverted facts establish that Defendants' misrepresentations and omissions were material as a reasonable investor would consider them important when deciding to invest. Indeed, Defendants' misrepresentations and omissions caused their clients to invest and remain invested with Defendants.

Third, proof of scienter requires evidence that a defendant committed the alleged wrongful acts intentionally, or "that the representations were made with a reckless disregard for their truth or falsity." *Driver*, 877 F. Supp. 2d at 977; *see also CFTC v. Noble Metals Intern, Inc.*, 67 F.3d 766, 774 (9th Cir. 1995) (holding that scienter is established when defendants act intentionally or with "careless disregard"). The Court finds here that Defendants acted with requisite scienter because Defendant Choi carelessly disregarded the truth while misrepresenting: (1) his trading experience and skill level (no purported losses within the last 10 years), (2) registration satisfaction as a Commodity Trading Advisor and/or Associated Person (with the Commission or National Foreign Exchange Association), and (3) the likelihood of investment profitability (promising returns of 20 to 50 percent). *See* MDJ at 12–13; Compl. at ¶¶ 35–36. In reality, the truth was that forex trading is incredibly risky with no guaranteed returns even with an experienced trader, and in fact, client funds were not used for trading purposes, but rather to fund Defendant Choi's lavish lifestyle. *See* MDJ at 12–13; Malas Decl. I at ¶ 37(b) (analyzing credit card statements which indicated that Defendant Choi shopped extensively in Beverly Hills, California at Gucci, Chanel, and Louis Vuitton).

**2. Fraud by Misappropriation**

Misappropriation of customer funds for personal use or to pay other clients constitutes "willful and blatant" fraud in violation of the antifraud provisions of the Act. *Driver*, 877 F. Supp. 2d at 978 (misappropriating participant funds violated Sections 4b(a)(2)(A) and (C), and 4*o*(1)); *see also Weinberg*, 287 F. Supp. 2d at 1106 (same). Here, Defendants violated Sections 4b(a)(2)(A) and (C), and 4*o*(1) by misappropriating client funds intended for forex trading for their personal benefit, and to make payments to existing clients in a manner akin to a Ponzi scheme. *See* MDJ at 13–14; *see also* Compl. at ¶¶ 39–40.

In conclusion, the Court finds that Defendants violated all of these antifraud provisions of the Act because they made material misrepresentations and omissions with the requisite scienter and they misappropriated client funds.

**c. Defendants Apuro and JCI Failed to Register as Commodity Trading Advisors**

The Commission also correctly asserts that Defendants Apuro and JCI were required to register with the Commission as Commodity Trading Advisors ("CTAs"), but failed to do so.

Section 2(c)(2)(C)(iii)(I)(bb) of the Act, bars persons not registered with the Commission from exercising discretionary trading authority over any account for or on behalf of any person that is not an eligible contract participant (*i.e.*, those investors with less than $10 million in assets or less than $5 million where the purpose of the investment is risk management) in connection with off-exchange forex transactions. 7 U.S.C. § 2(c)(2)(C)(iii)(I)(bb); *see also id.* § 1(a)(18). The Commission enacted a regulation to implement this statute, requiring any forex CTA to register with the Commission. *See* 17 C.F.R. § 5.3(a)(3)(i). Similarly, Section 4m(1) of the Act requires a CTA who uses the mails or instrumentalities of interstate commerce in connection with its CTA business to register with the Commission unless it is exempt from registration. *See* 7 U.S.C. § 6m(1).

Without first being registered with the Commission, Defendants Apuro and JCI improperly obtained written authorization to exercise discretionary trading authority over clients' forex accounts. *See* Compl. at ¶¶ 30–31, 42–44; Malas Decl. I at ¶¶ 5(f), 7. This clearly constitutes a violation of both 7 U.S.C. § 2(c)(2)(C)(iii)(I)(bb) and 17 C.F.R. § 5.3(a)(3)(i). Further, Defendants Apuro and JCI used means of interstate commerce, namely e-mail and the Internet, to solicit actual and prospective clients "to open discretionary accounts engaged in retail, leveraged forex transactions[.]" Compl. at ¶ 43; *see also id.* ¶¶ 25–28; *see* Malas Decl. I. ¶ 5(e). Defendants Apuro and JCI therefore acted as unregistered CTAs in violation of Section 4m(1) of the Act, 7 U.S.C. § 6m(1).

**d. Defendant Choi Failed to Register as an Associated Person of a Commodity Trading Advisor**

The Commission also claims that Defendant Choi was required to register with the Commission as an Associated Person ("AP") of a CTA, but failed to do so. The Court finds that this is true.

Section 2(c)(2)(C)(iii)(I)(aa) of the Act, bars any person not registered with the Commission from soliciting or accepting orders from any non-eligible contract participant in connection with off-exchange forex transactions. 7 U.S.C. § 2(c)(2)(C)(iii)(I)(aa). In fact, Section 4k(3) of the Act, and Commission Regulation 5.3(a)(3)(ii), both prohibit any person from acting as an AP of a CTA without first registering as an AP with the Commission. *See* 7 U.S.C. § 6k(3); *see also* 17 C.F.R. § 5.3(a)(3)(ii). Thus, to be held liable as an AP of a CTA, the Commission must demonstrate that the defendant is a natural person associated with the CTA as

a partner, officer, employee, consultant, or agent in any capacity which involves "[t]he solicitation of a client's or prospective client's discretionary account" or "[t]he supervision of any person or persons so engaged." 7 U.S.C. § 6k(3).

Here, without registering with the Commission as an AP, Defendant Choi solicited and accepted orders from non-eligible contract participants in connection with off-exchange forex transactions. *See* Compl. at ¶¶ 30, 43–44; *see also* Malas Decl. I at ¶¶ 5(d)–(e), 7. Defendant Choi's actions violate 7 U.S.C. § 2(c)(2)(C)(iii)(I)(aa). Likewise, Defendant Choi violated both 7 U.S.C. § 6k(3) and 17 C.F.R. § 5.3(a)(3)(ii) by being associated with alleged CTAs, Defendants Apuro and JCI, as an employee or agent in a capacity which involves the solicitation of a client's or prospective client's discretionary account without first registering as an AP with the Commission. *See* Compl. at ¶¶ 43–44; *see also* Malas Decl. ¶¶ 5(d)–(e). Thus, the Court finds that Defendant Choi acted as an unregistered AP in violation of the Act and Commission Regulations.

Accordingly, having assessed the substantive merits of Plaintiff's claims and the sufficiency of its pleadings, the Court finds that the second and third *Eitel* factors favor the entry of default judgment.

**3. Sum of Money at Stake**

Plaintiff seeks a total monetary judgment of $2,243,344.00—i.e., $1,121,672.00 in restitution and $1,121,672.00 in civil monetary penalties. MDJ at 27–29; *see also* Notice of Errata at 2. In the Court's view, the amount of money at issue is significant, but in line with the penalties provided by the Commodities Exchange Act and the amounts in the Complaint. In evaluating this factor, "the court must consider the amount of money at stake in relation to the seriousness of [the] defendant's conduct." *PepsiCo, Inc. v. Cal. Sec. Cans*, 238 F. Supp. 2d 1172, 1176 (C.D. Cal. 2002). The Court will further address this factor below, in its discussion on Plaintiff's requested relief.

**4. Possibility of Dispute Concerning Material Facts**

Upon entry of default, all well pleaded factual allegations are deemed true—except those pertaining to damages. *TeleVideo*, 826 F.2d at 917. Because Defendants have not appeared in this action or asserted any defenses, there is no possibility of a dispute concerning material facts at this time. Accordingly, this factor favors default judgment.

**5. Whether Default Was Due to Excusable Neglect**

The Court must consider whether failure to answer a plaintiff's claims is due to excusable neglect. *Eitel*, 782 F.2d at 1472. As noted above, Defendants were served on May 24, 2018

[Doc. ## 16–18], and their answers were due on June 14, 2018. *See* Fed. R. Civ. P. 12(a)(1)(A)(i) (requiring a defendant to answer or move against a complaint within 21 days of service). To date, Defendants have not appeared. Thus, the possibility of excusable neglect here is particularly unlikely because Defendants were properly served with the lawsuit and have actual notice of it. *See Landstar Ranger, Inc.*, 725 F. Supp. 2d at 922 (finding default was not due to excusable neglect when defendants were properly served and aware of pending litigation). Accordingly, this factor favors default judgment.

**6. Policy Favoring Decision on the Merits**

Generally, default judgments are disfavored because "[c]ases should be decided upon their merits whenever reasonably possible." *Eitel*, 782 F.2d at 1472. "[T]his preference, standing alone, is not dipositive." *PepsiCo, Inc.,* 238 F. Supp. 2d at 1177. Federal Rule of Civil Procedure 55 allows courts to decide a case before the merits are heard when "a decision on the merits [is] impractical, if not impossible." *Id*. Since Defendants have failed to appear, let alone respond to the Commission's Complaint despite having actual notice, a decision on the merits is impossible. Accordingly, this factor favors default judgment.

**C. Requested Relief**

Plaintiff requests a permanent injunction and an order requiring Defendants to pay restitution and civil monetary penalties, including post-judgment interest, on a joint and several basis. MDJ at 26–30. The Court considers Plaintiff's requested relief below.

**1. Permanent Injunction**

The Commission requests that the Court enjoin Defendants from further violating the at-issue Commodities Exchange Act provisions and regulations. MDJ at 25; *see also* Proposed Order Granting Default Judgment [Doc. # 27-12] at ¶ 60(a). In addition, the Commission asks the Court to enjoin Defendants from, among other things, owning or trading commodities, "entering into any transaction involving commodity interests[,]" or "applying for registration or claiming exemption from registration with the CFTC in any capacity[.]" Proposed Order Granting Default Judgment at ¶ 60(a)–(i).

Under Section 6c of the Act, *see* 7 U.S.C. § 13a–1, injunctive relief is appropriate where there is a reasonable likelihood of future violations. *See United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953). In fact, "[o]nce a violation of the Act has been shown, the moving party need only show the existence of some reasonable likelihood of future violations." *CFTC v. Co. Petro Mktg. Grp., Inc.*, 502 F. Supp. 806, 818 (C.D. Cal. 1980), *aff'd*, 680 F.2d 573 (9th Cir. 1982). In determining the propriety of a permanent injunction, the Court may consider the egregiousness of the defendant's actions, the sincerity of the defendant's assurances against

future violations, and "the defendant's recognition of his conduct's wrongfulness[.]" *Driver*, 877 F. Supp. 2d at 982.

Here, the misconduct, as alleged, was neither isolated nor accidental. Defendants engaged in a highly egregious and systematic violation of the Act by fraudulently soliciting and misappropriating investment funds from at least 14 clients over a four-year period. Malas Decl. II at ¶¶ 7–8, 9(a)–(h) (detailing the investors who have not received any money back from Defendants for their investment). Moreover, the Court agrees with Plaintiff that "[r]ather than admit[] their wrongdoing, Defendants took pains to conceal [their] fraud, including by falsely assuring clients that they 'should not worry' and making 'Ponzi' scheme-like payments to certain clients." MDJ at 26; *see* Malas Decl. II at ¶ 11; *see also* Ex. 4 to Malas Decl. II [Doc. # 27-6] at ¶ 16 (Declaration of defrauded investor, Mr. Fahad Siddiqui, stating: "My last contact with Mr. Choi was on or about April 18, 2018, when I met him and his translator for dinner at Yangmani Restaurant in Los Angeles, California. During our dinner meeting, I expressed my concerns to Mr. Choi about my AHL trading account and requested that he return my money. However, Mr. Choi stated that I 'should not worry' and that he has a plan for covering my funds."). Lastly, the Court notes that Defendants fail to recognize the wrongfulness or gravity of their acts, given Defendants' refusal to appear in this action. *See* Karst Decl. at ¶ 8 ("Defendant Choi's whereabouts are unknown. According to information obtained from . . . U.S. Customs and Border Patrol . . . on June 11, 2018, Choi departed the United States from Los Angeles, California . . . for Narita, Japan . . . using [a] one-way plane ticket[.]").

The Court finds that Defendants' wrongful behavior and lack of acceptance of responsibility (*e.g.*, Defendants' attempt to elude detection by paying "Ponzi-scheme like payments to certain clients" and Defendant Choi's wrongful assurance to clients "not to worry" in an effort to not return Defendants' ill-gotten gains) warrant permanent injunctive relief, because they reflect Defendants' lack of respect for the law and demonstrate a reasonable likelihood that they will continue to violate the Act and related regulations unless they are permanently restrained and enjoined. The Court therefore GRANTS Plaintiff's request for a permanent injunction.

**2. Restitution**

Plaintiff seeks $1,121,672.00 in restitution, which reflects the $1,145,672.00 in total funds solicited minus $24,000.00. MDJ at 27–28; Notice of Errata at 2; Malas Decl. II at ¶¶ 2, 7.[3] This restitution amount reflects the net amount of investment funds deposited into Defendants' accounts during the relevant period decreased by the amount returned. This is a proper measure of restitution under the Act since "the amount of restitution should be calculated

[3] The Court corrects Plaintiff's mathematical error. *See* Notice of Errata at 2 (calculating $1,145,672–$24,000 = $1,121,516).

as the difference between what the defendants obtained and the amount customers received back." *Driver*, 877 F.Supp.2d at 981; *see also Porter v. Warner Holding Co*., 328 U.S. 395, 402 (1946) (stating that restitution restores the status quo by returning to the purchaser the price of unlawfully sold goods). Accordingly, the Court GRANTS Plaintiff's request for restitution in the amount of $1,121,672.00, plus post-judgment interest. Post-judgment interest after the date of this Order until restitution is paid in full shall be paid at the post-judgment interest rate set forth in 28 U.S.C. § 1961.

**3. Civil Monetary Penalties**

Section 6(c) of the Act, 7 U.S.C. § 13a-1(d)(1), and Regulation 143.8(a)(4)(ii)(B), 17 C.F.R. § 143.8(a)(4)(ii)(B), authorize the Commission to seek, and the Court to impose, a civil monetary penalty of triple Defendants' monetary gain from each violation of the Act, or $140,000.00 for each violation committed between October 23, 2012 and November 1, 2015, and $177,501.00 for each violation committed on or after November 2, 2015. In determining the appropriate amount of civil monetary penalties, courts take a variety of factors into account, including the gravity of the offense and the amount sufficient to act as a deterrent, *see CFTC v. Trade Tech Institute, Inc*., 2012 WL 13008332, at *5 (C.D. Cal. June 19, 2012) (citing *Miller v. CFTC*, 197 F.3d 1227, 1236 (9th Cir. 1999)), as well as any aggravating or mitigating circumstances, *see CFTC v. Wilshire Inv. Mgmt. Corp*., 531 F.3d 1339, 1346 (11th Cir. 2008). Moreover, Courts routinely award significant civil monetary penalties in cases involving fraud. *See*, *e.g.*, *Driver*, 877 F. Supp. 2d at 982 (ordering a civil monetary payment of triple the amount of funds fraudulently solicited that were used "for Ponzi redemptions and personal expenses."); *Weinberg*, 287 F. Supp. 2d at 1110 (awarding "triple the amount that Defendant stole from investors"); *CFTC v. Rolando*, 589 F. Supp. 2d 159, 174 (D. Conn. 2008) ("obtaining customer funds and then hiding [defendant's] true conduct from his customers were serious violations of the Act . . . that strike at the very core of the Act's regulatory system," requiring "a substantial civil penalty" of three times the funds solicited).

Here, the Commission requests an order from this Court requiring Defendants to pay a civil monetary payment of $1,121,672.00 on a joint and several basis, reflecting one times Defendants' net gains from the fraud ($1,145,672.00 in total funds solicited—less $24,000.00 in "Ponzi scheme-like payments" = $1,121,672.00 x 1 = $1,121,672.00), plus post-judgment interest thereon. The Court finds that Defendants' conduct warrants the imposition of a significant monetary penalty. Defendant Choi, through Defendants Apuro and JCI, committed repeated violations of the core antifraud provisions of the Act that caused significant monetary losses to clients. *See* Malas Decl. II at ¶¶ 9(a)–(h) (stating that victims reported losing their entire inheritance, funds for a new home down payment, and retirement savings, through Defendants' scheme). In fraudulently soliciting $1,121,672.00 in client funds, Defendant Choi spent hundreds of thousands of dollars of his victims' money on personal expenses, specifically to fund a luxury lifestyle. *See* Malas Decl. I at ¶ 45 ("Choi spent an exorbitant amount of money,

well above what he took in from clients, to pay his personal expenses. These expenses included $215,000 for the purchase and lease of luxury automobiles; $426,983.43 on purchases made at high-end retailers mostly located in Beverly Hills, California; $20,848.58 for travel to Las Vegas, Nevada for gambling and luxury hotel stays; and $606,831.12 in cash withdrawals.").

Given Defendants' egregious conduct, the Court believes that a civil monetary penalty reflecting one times the funds Defendants fraudulently solicited is proper to deter future fraudulent schemes in violation of the Act. Accordingly, the Court GRANTS Plaintiff's request for a civil monetary payment in the amount of $1,121,672.00, plus post-judgment interest. Post-judgment interest after the date of this Order until the penalty is paid in full shall be paid at the post-judgment interest rate set forth in 28 U.S.C. § 1961.

## V.
## CONCLUSION

In light of the foregoing, the Court **GRANTS** the Motion for Default Judgment and **DENIES AS MOOT** the Motion for Preliminary Injunction. The Court shall enter judgment in favor of Plaintiff consistent with this Order.

**IT IS SO ORDERED.**