UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
100 F STREET, N.E.
WASHINGTON, D.C. 20549

OFFICE OF THE
GENERAL COUNSEL

DANIEL STAROSELSKY
(202) 551-5774
STAROSELSKYD@SEC.GOV

August 18, 2023

VIA ECF

David J. Smith, Clerk of Court
United States Court of Appeals for the Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, GA 30303

Re: *SEC v. Spartan Securities Group, Ltd.* (No. 22-13129)
FRAP 28(j) letter

Dear Mr. Smith:

I write on behalf of the Securities and Exchange Commission, appellee, to advise the Court of two relevant decisions that issued after briefing was completed in this appeal.

1. *SEC v. Ahmed*, 72 F.4th 379 (2d Cir. 2023) (Attachment A), held that:

- Securities Exchange Act Section 21(d)(7), 15 U.S.C. 78u(d)(7), authorizes equitable disgorgement, *Ahmed*, 72 F.4th at 395-96; and

- the limitations period in Exchange Act Section 21(d)(8), 15 U.S.C. 78u(d)(8), applies to cases that were pending when that provision was enacted, *Ahmed*, 72 F.4th at 400-02.

Ahmed supports the Commission's arguments that disgorgement under Section 21(d)(7) is equitable and that the district court properly applied the governing limitations period. SEC Br. 42, n.8; SEC Br. 54.

2. *SEC v. O'Brien*, __ F. Supp. 3d __, 2023 WL 3645205, at *13 (S.D.N.Y. 2023), *appeal pending* (2d Cir. 23-1071) (Attachment B), ordered disgorged funds to be distributed to the Treasury where it was "enormously difficult, if not impossible, to identify all those harmed by [the defendant's]

activity and to disburse the disgorgement funds to those investors." *O'Brien* supports the Commission's argument that the district court acted within its discretion in ordering disgorged funds to be disbursed to the Treasury because distribution to investors is concededly infeasible. SEC Br. 35-46.

Respectfully submitted,

MICHAEL A. CONLEY
Solicitor

/s/ Daniel Staroselsky
DANIEL STAROSELSKY
Senior Appellate Counsel

MICHAEL J. KELLY
Appellate Counsel

Securities & Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-9040
(202) 551-5774 (Staroselsky)
StaroselskyD@sec.gov

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

SEC v. Spartan, No. 22-13129

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1-1, Appellee Securities and Exchange Commission submits this Certificate of Interested Persons and Corporate Disclosure Statement listing all persons and entities with an interest in the outcome of this action:

1. Aristocrat (ASCC), microcap issuer involved in charged conduct

2. Barbero, Megan, attorney for the Commission

3. Changing Technologies (CHGT), microcap issuer involved in charged conduct

4. Conley, Michael A., attorney for the Commission

5. Court Document Services, Inc. n/k/a ChinAmerica Andy Movie Entertainment Media Co. (CAME), microcap issuer involved in charged conduct

6. Covington, Hon. Virginia M. Hernandez, District Court Judge

7. Dhillon Law Group, Inc., defendants-appellants counsel's law firm

8. Dilley, Carl E., defendant-appellant

9. Dinello Restaurant Ventures, Inc., n/k/a AF Ocean Investment Management Company (AFAN), microcap issuer involved in charged conduct

10. Eldred, Micah J., defendant-appellant

11. Envoy Group, Corp. (BLGI), microcap issuer involved in charged conduct

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT (cont'd)

SEC v. Spartan, No. 22-13129

12. E-Waste Corp. n/k/a EZ Raider Co. (EZRG), microcap issuer involved in charged conduct

13. Fernandez, Wilfredo, attorney for the Commission

14. First Independence Corp. n/k/a Codesmart Holdings, Inc. (ITEN), microcap issuer involved in charged conduct

15. First Social Networx, Corp. n/k/a Rebel Group, Inc. (MOXG), microcap issuer involved in charged conduct

16. First Titan n/k/a GlobeStar Therapeutics Corp. (RSTC), microcap issuer involved in charged conduct

17. First Xeris, microcap issuer involved in charged conduct

18. Global Group. n/k/a Tyme Technologies, Inc. (TYME), microcap issuer involved in charged conduct

19. Grilli, Peter J., mediator

20. Island Capital Management, defendant-appellant

21. Johnson, Alise M., attorney for the Commission

22. Kelly, Michael J., attorney for the Commission

23. Kids Germ n/k/a Topaz Resources, Inc. (TOPZ), microcap issuer involved in charged conduct

24. Kruckenberg, Caleb, attorney for the defendants

25. Morales-Christiansen, Anna P., attorney for the defendants

26. Nestor, Christine, attorney for the Commission

27. Neutra Corp. (NTPR), microcap issuer involved in charged conduct

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT (cont'd)

SEC v. Spartan, No. 22-13129

28. New Civil Liberties Alliance, legal organization representing defendants-appellants

29. Obscene Jeans n/k/a MyGo Games Holding Co. (OBJE), microcap issuer involved in charged conduct

30. On the Move n/k/a Artificial Intelligence Technology Solutions (AITX), microcap issuer involved in charged conduct

31. Pacific Legal Foundation, legal organization representing defendants-appellants

32. PurpleReal.com, Corp., microcap issuer involved in charged conduct

33. Rainbow Coral Corp. (RBCC), microcap issuer involved in charged conduct

34. Rollins, Kara M., attorney for the defendants-appellants

35. Sarelson, Matthew S., attorney for the defendants

36. Spartan Securities Group, Ltd., defendant-appellant

37. Staroselsky, Daniel, attorney for the Commission

38. Sum, Alice K., attorney for the Commission

39. Top to Bottom Pressure Washing, Inc. n/k/a Ibex Advanced Mortgage Technology, Inc. (IBXM), microcap issuer involved in charged conduct

40. Tuite, Hon. Christopher P., Magistrate Judge

41. U.S., Securities and Exchange Commission, plaintiff-appellee

42. Ulmer & Berne LLP, defendant counsel's law firm

43. Vecchione, John J., attorney for the defendants-appellants

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT (cont'd)

SEC v. Spartan, No. 22-13129

44. VonderHeide, Heidi E., attorney for the defendants-appellants

45. Quality Wallbeds, Inc. n/k/a Horrison Resources Inc. (SLPC), microcap issuer involved in charged conduct

46. Wolper, Alan M., attorney for the defendants

CERTIFICATE OF COMPLIANCE

I certify that this letter complies with Fed. R. App. P. 28(j) because the letter contains 210 words.

/s/ Daniel Staroselsky
Daniel Staroselsky
Attorney for Appellee,
Securities and Exchange Commission

August 18, 2023

CERTIFICATE OF SERVICE

I certify that on August 18, 2023, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Eleventh Circuit by using the Court's CM/ECF system. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Daniel Staroselsky
Daniel Staroselsky
Attorney for Appellee,
Securities and Exchange Commission

ATTACHMENT A

72 F.4th 379
United States Court of Appeals, Second Circuit.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION, Plaintiff-Appellee,

v.

Iftikar A. AHMED, Shalini Ahmed, I.I. 1, a minor child, by and through his next friends Iftikar and Shalini Ahmed, his parents, I.I. 2, a minor child, by and through his next friends Iftikar and Shalini Ahmed, his parents, I.I. 3, a minor child, by and through his next friends Iftikar and Shalini Ahmed, his parents, I-Cubed Domains, LLC, Shalini Ahmed 2014 Grantor Retained Annuity Trust, DIYA Holdings, LLC, DIYA Real Holdings, LLC, Defendants-Appellants,

v.

Jed Horwitt, Receiver-Appellee.*

* The Clerk of Court is respectfully directed to amend the caption accordingly.

Nos. 21-1686, 21-1712
|
August Term 2022
|
Argued: January 18, 2023
|
Decided: June 28, 2023

Synopsis

Background: Securities and Exchange Commission (SEC) brought enforcement action against investment manager and relief defendants, which were his wife, his minor sons, and companies allegedly held in defendants' names or for their benefit, for violations of Securities Exchange Act of 1934, Securities Act of 1933, and Investment Advisers Act of 1940. The United States District Court for the District of Connecticut, Janet Bond Arterton, J., granted SEC's motion for preliminary injunction freezing total of $118.3 million. After denying manager's requests for discovery and funds to hire counsel, the District Court, 308 F.Supp.3d 628, entered summary judgment in favor of SEC, awarding relief including disgorgement, then appointed receiver and authorized receiver to liquidate frozen assets, but stayed distribution pending appeal. Defendants appealed, and the Court of Appeals granted SEC's motion for remand. On remand, the District Court, 2021 WL 2471526, increased disgorgement amount to $64,171,646.14, approved receiver's liquidation plan, and denied relief defendants' motion for stay pending appeal. Defendants appealed.

Holdings: The Court of Appeals, Park, Circuit Judge, held that:

[1] order denying discovery was reasonable exercise of trial court's inherent power to enforce protective order;

[2] trial court appropriately estimated net profits of manager's misconduct;

[3] manager was not entitled to offset from disgorgement based on his forfeiture to his employer of his carried interest bonus;

[4] amendments to disgorgement statutes applied retroactively on remand;

[5] retroactive application of amended limitations period for disgorgement did not violate Ex Post Facto Clause;

[6] trial court failed to support disgorgement of consequential gains with adequate findings on whether consequential gains were attributable to manager's misconduct; and

[7] trial court failed to make adequate findings as to whether each asset nominally owned by relief defendants was equitably owned by manager.

Affirmed in part; vacated and remanded in part.

West Headnotes (66)

[1] **Federal Courts** Depositions and discovery

The Court of Appeals reviews discovery orders for abuse of discretion.

[2] **Federal Civil Procedure** Protective orders

District court's order, in action to enforce securities laws, denying investment manager's request for discovery of investigative materials held by Securities and Exchange Commission (SEC) was reasonable exercise of court's inherent power to enforce protective order it had placed over such materials due to their confidential and sensitive nature; court determined it could not enforce protective order because manager, who was facing related criminal charges, had removed himself from its jurisdiction by leaving United States as fugitive, and manager's proposed alternatives, such as monetary sanctions, would not ensure adequate protection of confidential information. Fed. R. Civ. P. 26(c)(1).

[3] **Federal Courts** Inherent powers

Courts invested with the judicial power of the United States have certain inherent authority to protect their proceedings and judgments in the course of discharging their traditional responsibilities.

[4] **Federal Civil Procedure** Depositions and Discovery

Federal Civil Procedure Scope

A district court retains inherent authority to manage discovery, including limiting discovery in interests of justice.

[5] **Action** Persons entitled to sue

Under the fugitive-disentitlement doctrine, a person who is a fugitive from justice may not use the resources of the civil legal system while disregarding its lawful orders in a related criminal action.

[6] **Action** Persons entitled to sue

The fugitive-disentitlement doctrine is rooted in a court's ability to enforce a judgment on review, discourage the felony of escape, encourage voluntary surrenders, and promote the efficient, dignified operation of the courts.

[7] **Securities Regulation** Preliminary Injunction

In action to enforce Securities Act, Securities Exchange Act, and Investment Advisers Act, district court did not abuse its discretion by denying investment manager's motion to unfreeze assets to allow him to hire counsel; district court properly calculated potential disgorgement when freezing assets upon Securities and Exchange Commission's (SEC) motion for preliminary injunction, such that all funds were tainted by manager's misconduct including his diversion of funds his employer intended to invest in third parties, manager had no Sixth Amendment right to counsel in civil enforcement action, and relief defendants, who were manager's family members and companies held in their names, hired able counsel who also represented manager's interests. U.S. Const. Amend. 6; Securities Act of 1933 § 1 et seq., 15 U.S.C.A. § 77a et seq.; Securities Exchange Act of 1934 § 1 et seq., 15 U.S.C.A. § 78a et seq.; 15 U.S.C.A. § 80b-1 et seq.

[8] **Securities Regulation** Preliminary Injunction

A defendant in a Securities and Exchange Commission (SEC) enforcement action has no right to use tainted assets for his legal defense.

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

Disgorgement serves to remedy securities law violations by depriving violators of the fruits of their illegal conduct. Securities Exchange Act of 1934 § 21, 15 U.S.C.A. § 78u(d)(7).

[10] **Federal Courts** Securities regulation

The Court of Appeals reviews disgorgement orders under the Securities Exchange Act for abuse of discretion. Securities Exchange Act of 1934 § 21, 15 U.S.C.A. § 78u(d)(7).

[11] **Federal Courts** Statutes, regulations, and ordinances, questions concerning in general

The Court of Appeals reviews de novo questions of a statute's interpretation and constitutionality.

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

The term “disgorgement” in the Securities Exchange Act, as amended by the William M. Thornberry National Defense Authorization Act for Fiscal Year 2021 (NDAA), refers to equitable disgorgement and its traditional limits as recognized in *Liu v. Securities and Exchange Commission*, 140 S.Ct. 1936; the NDAA expressly added “disgorgement” to the Exchange Act provision authorizing the Securities and Exchange Commission (SEC) to seek remedies including “equitable relief,” not as a superfluity, but as a “belt and suspenders” clarification that equitable disgorgement was one such remedy, and the NDAA's text evinces no intent to strip disgorgement of the limits usually imposed upon it in equity or to supersede *Liu*. Securities Exchange Act of 1934 § 21, 15 U.S.C.A. § 78u(d)(7).

[13] **Equity** Statutory creation of remedy

Statutory references to a remedy grounded in equity must, absent other indication, be deemed to contain the limitations upon its availability that equity typically imposes.

[14] **Statutes** Implied Repeal

There is a strong presumption that statutory repeals by implication are disfavored and that Congress will specifically address preexisting law when it wishes to suspend its normal operations in a later statute.

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

Disgorgement under the Securities Exchange Act must not exceed a wrongdoer's "net profits," that is, the gain made upon any business or investment when both the receipts and payments are taken into account, and is awarded for victims. Securities Exchange Act of 1934 § 21, 15 U.S.C.A. § 78u(d)(7).

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

District court reasonably used difference between prices of corporate director's tainted purchases and sales of other company's shares as basis for approximating net profits from director's failure to disclose conflicts of interest in violation of Investment Advisers Act, for purposes of calculating disgorgement under Securities Exchange Act; director, as member of corporation's board and as investment manager, invested $2 million of corporation's money in company without corporation's knowledge, lied that purchase was mistake, bought company's shares himself but left them in corporation's name, then negotiated other buyer's investment in company in exchange for company redeeming corporation's shares, which buyer did not know were owned by director, who profited over $8 million on sale. Securities Exchange Act of 1934 § 21, 15 U.S.C.A. § 78u(d)(7); Investment Advisers Act of 1940 § 206, 15 U.S.C.A. § 80b-6(3).

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

District court reasonably used difference between price at which limited liability company (LLC), whose founder and sole member was investment manager, purchased third-party company's shares and price at which LLC sold such shares to manager's employer as basis for approximating manager's net profits from violating Investment Advisers Act by failing to disclose his interest in LLC to employer, for purposes of calculating disgorgement under Securities Exchange Act, even if company's growth was not solely due to manager's misconduct and even if employer paid below market price; manager's fraud, which was in failing to disclose conflict of interest rather than misrepresenting price, allowed manager to realize profits upon sale, and manager bore risk of uncertainty as to size of disgorgement. Securities Exchange Act of 1934 § 21, 15 U.S.C.A. § 78u(d)(7); Investment Advisers Act of 1940 § 206, 15 U.S.C.A. § 80b-6(3).

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

A wrongdoer's unlawful action may create illicit benefits for the wrongdoer that are indirect or intangible; to require precise articulation of such rewards in calculating disgorgement amounts under the Securities Exchange Act would allow the wrongdoer to benefit from such uncertainty. Securities Exchange Act of 1934 § 21, 15 U.S.C.A. § 78u(d)(7).

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

Investment manager's "carried interest" bonus, which general partnership agreement with venture-capital firm allowed him to receive based on performance of funds he selected for firm's investment, was not ill-gotten gain from manager's appropriation of firm's funds, nondisclosure of conflicts of interests, and other violations of Securities Act, Securities Exchange Act, and Investment Advisers Act, and thus, manager's forfeiture of carried interest under agreement's "disabling conduct" provisions did not entitle manager to offset from disgorgement award to Securities and Exchange Commission (SEC) in enforcement action; carried interest was expectancy to portion of firm's profits and was contingent on manager's relationship with firm, not derived directly from misconduct. Securities Act of 1933 § 1 et seq., 15 U.S.C.A. § 77a et seq.; Securities Exchange Act of 1934 § 21, 15 U.S.C.A. § 78u(d)(7); Investment Advisers Act of 1940 § 206, 15 U.S.C.A. § 80b-6(3).

[20] **Federal Courts** Appellees; necessity of filing cross-appeal

Under the cross-appeal rule, an appellate court may not alter a judgment to benefit a nonappealing party.

[21] **Federal Courts** Appellees; necessity of filing cross-appeal

The cross-appeal rule is a rule of practice which is not jurisdictional and in appropriate circumstances may be disregarded.

[22] **Federal Courts** Appellees; necessity of filing cross-appeal

Federal Courts Powers, Duties, and Proceedings of Lower Court After Remand

Failure by Securities and Exchange Commission (SEC) to cross-appeal from district court's grant of summary judgment on its claims against investment manager and relief defendants for violations of Securities Act, Securities Exchange Act, and Investment Advisers Act did not, under cross-appeal rule, preclude district court, on remand from Court of Appeals, from recalculating amount of disgorgement award under newly-amended remedies provision of Exchange Act; cross-appeal rule was not jurisdictional, and SEC did not seek to enlarge its rights under original judgment, which cross-appeal rule was meant to prevent, but, rather, asked Court of Appeals to remand for recalculation under amended statute, which was only enacted after deadline to file cross-appeal. Securities Act of 1933 § 1 et seq., 15 U.S.C.A. § 77a et seq.; Securities Exchange Act of 1934 § 21, 15 U.S.C.A. § 78u(d)(7); Investment Advisers Act of 1940 § 206, 15 U.S.C.A. § 80b-6(3).

[23] **Federal Courts** Effect of Changes in Law or Facts

No party to an appeal should be held to a standard that permits consideration of an intervening statute only when issues affected by the statute are already pending on appeal; such a standard would require either anticipation of statutes not yet enacted or the assertion of frivolous grounds in appeals and cross-appeals in the hope that a new statute might affect their resolution favorably.

[24] **Federal Courts** Effect of Changes in Law or Facts

When a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly.

[25] **Federal Courts** Powers, Duties, and Proceedings of Lower Court After Remand

District court's application of disgorgement amendments to Securities Exchange Act and recalculation of disgorgement award, on remand following investment manager's and relief defendants' appeal from its grant of summary judgment in favor of Securities and Exchange Commission (SEC) on claims under Securities Act, Exchange Act, and Investment Advisers Act, did not improperly reopen final judgment; grant of summary judgment was not final while appeals were ongoing. Securities Act of 1933 § 1 et seq., 15 U.S.C.A. § 77a et seq.; Securities Exchange Act of 1934 § 21, 15 U.S.C.A. § 78u(d)(3), (7), (8); Investment Advisers Act of 1940 § 206, 15 U.S.C.A. § 80b-6(3).

[26] **Statutes** Effect on substantive rights

To overcome the presumption against retroactive effect of statutes burdening private rights, a court must ask whether the newly-enacted provision attaches new legal consequences to events completed before its enactment, thereby suggesting clear congressional intent authorizing retroactivity.

[27] **Securities Regulation** Construction and operation in general

Statutory amendments to disgorgement provisions of Securities Exchange Act applied retroactively to Securities and Exchange Commission (SEC) enforcement action against investment manager and relief defendants, on remand for recalculation of disgorgement after amendments were enacted during pendency of defendants' appeal from summary judgment in SEC's favor on claims for violations of Securities Act, Exchange Act, and Investment Advisers Act; Congress explicitly stated that disgorgement amendments "shall apply with respect to any action or proceeding that is pending on, or commenced on or after, the date of enactment," using language which had already been interpreted as commanding retroactivity. Securities Exchange Act of 1934 § 21, 15 U.S.C.A. § 78u(d)(3), (7)-(8).

1 Case that cites this headnote

[28] **Securities Regulation** Construction and operation in general

Pleading filed by Securities and Exchange Commission (SEC), in action to enforce Securities Act, Securities Exchange Act, and Investment Advisers Act against investment manager and relief defendants, did not preclude retroactive application of amendment to Exchange Act's statute of limitations for disgorgement, which expanded limitations period from five to ten years, to district court's recalculation of disgorgement amount on remand, after defendants appealed from summary judgment in SEC's favor; SEC could not have invoked not-yet-existent version of Exchange Act in initial pleading, and SEC brought action in part based on district court's common-law equitable powers rather than relying solely on Exchange Act's disgorgement provision. Securities Act of 1933 § 1 et seq., 15 U.S.C.A. § 77a et seq.; Securities Exchange Act of 1934 § 21, 15 U.S.C.A. § 78u(d)(5), (7), (8); Investment Advisers Act of 1940 § 206, 15 U.S.C.A. § 80b-6(3).

[29] **Securities Regulation** Construction and operation in general

At time Securities and Exchange Commission (SEC) commenced enforcement action against him under Securities Act, Securities Exchange Act, and Investment Advisers Act, investment manager had no reliance interest in defense that disgorgement under Exchange Act was subject to five-year limitations period, and, thus, no such interest precluded retroactive application of amended version of Exchange Act, which included ten-year limitations period for disgorgement in cases involving scienter, to district court's recalculation of disgorgement amount; decision in *Kokesh v. SEC*, 137 S.Ct. 1635, holding that disgorgement under prior version of Exchange Act was subject to five-year limitations period, had not yet been decided at time SEC filed petition. Securities Act of 1933 § 1 et seq., 15 U.S.C.A. § 77a et seq.; Securities Exchange Act of 1934 § 21, 15 U.S.C.A. § 78u(d)(7), (8); Investment Advisers Act of 1940 § 206, 15 U.S.C.A. § 80b-6(3).

[30] **Constitutional Law** Penal laws in general

Constitutional Law Punishment in general

To violate Ex Post Facto clause, a law must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it, by altering the definition of criminal conduct or increasing the punishment for the crime. U.S. Const. art. 1, § 9, cl. 3.

[31] **Constitutional Law** Penal laws in general

Constitutional Law Punishment in general

At the first step of determining whether a statute violates the Ex Post Facto Clause, the court must ascertain whether the legislature meant the statute to establish civil proceedings; if Congress's intention was to impose punishment, that ends the inquiry. U.S. Const. art. 1, § 9, cl. 3.

[32] **Constitutional Law** Penal laws in general

In ruling on a challenge to a statute under the Ex Post Facto Clause, if the court finds Congress intended to enact a regulatory scheme that is civil and nonpunitive, it must further examine whether the statutory scheme is so punitive either in purpose or effect as to negate that intention to deem it civil. U.S. Const. art. 1, § 9, cl. 3.

[33] **Constitutional Law** Penal laws in general

In ruling on challenges to statutes under the Ex Post Facto Clause, courts typically defer to the legislature's stated intent, and only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty. U.S. Const. art. 1, § 9, cl. 3.

[34] **Constitutional Law** Trade, business, and regulated industries

Securities Regulation Construction and operation in general

Express disgorgement remedy provided in Securities Exchange Act was civil rather than punitive in nature, and, thus, retroactive application of amended version of Exchange Act and ten-year statute of limitations on disgorgement, as remedy for securities violations committed with scienter, to investment manager as remedy for his civil violations of Securities Act, Exchange Act, and Investment Advisers Act did not violate Ex Post Facto Clause; Exchange Act expressly characterized disgorgement as civil, disgorgement under Exchange Act was consistent with bounds of traditional equitable principles, and longer limitations period in cases involving scienter reflected nonpunitive purpose, namely that scienter was element of fraud and fraud was often harder to detect and investigate. U.S. Const. art. 1, § 9, cl. 3; Securities Act of 1933 § 1 et seq., 15 U.S.C.A. § 77a et seq.; Securities Exchange Act of 1934 § 21, 15 U.S.C.A. § 78u(d)(7), (8); Investment Advisers Act of 1940 § 206, 15 U.S.C.A. § 80b-6(3).

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

Securities Regulation Interest

"Supplemental enrichment," as a form of relief typically available in equity and potentially available incident to disgorgement under the Securities Exchange Act, encompasses the opportunity cost or time value of money lost by victims, including interest, rent, and other measures of use value, proceeds, and consequential gains on ill-gotten

assets; it may thus reflect passive gains on ill-gotten funds, without the direct manipulation of a fraudster. Securities Exchange Act of 1934 § 21, 15 U.S.C.A. § 78u(d)(7); Restatement (Third) of Restitution § 53.

[36] **Federal Courts** Securities regulation

The Court of Appeals reviews a district court's choice of remedies in an action to enforce the securities laws for abuse of discretion.

[37] **Federal Courts** Interest

Interest Power to regulate

Interest Discretion in general

The decision whether to grant prejudgment interest and the rate used if such interest is granted are matters confided to the district court's broad discretion, and will not be overturned on appeal absent an abuse of that discretion.

[38] **Interest** Prejudgment Interest in General

In assessing prejudgment-interest awards, a court should consider (1) the need to fully compensate the wronged party for actual damages suffered, (2) considerations of fairness and the relative equities of the award, (3) the remedial purpose of the statute involved, and/or (4) such other general principles as are deemed relevant by the court.

[39] **Interest** Particular cases and issues

Interest Mode of computation in general

Any good faith on the part of investment manager's wife and minor children, who were relief defendants in action that Securities and Exchange Commission (SEC) brought against manager for violations of Securities Act, Securities Exchange Act, and Investment Advisers Act, did not preclude trial court from awarding SEC prejudgment interest accruing during freeze of assets held by wife and children or in their names, as relief incident to its disgorgement award against manager; relief defendants' good faith did not affect propriety or amount of prejudgment interest, which resulted from manager's disgorgement obligation, and trial court's finding that manager committed securities fraud necessarily established manager lacked good faith. Securities Act of 1933 § 1 et seq., 15 U.S.C.A. § 77a et seq.; Securities Exchange Act of 1934 § 21, 15 U.S.C.A. § 78u(d)(5), (7); Investment Advisers Act of 1940 § 206, 15 U.S.C.A. § 80b-6(3).

[40] **Interest** Computation of rate in general

When granting summary judgment to Securities and Exchange Commission (SEC) on its claims against investment manager and relief defendants for violations of Securities Act, Securities Exchange Act, and Investment Advisers Act, and ordering manager and relief defendants to disgorge ill-gotten funds, trial court permissibly awarded prejudgment interest at Internal Revenue Service (IRS) underpayment rate rather than one-year treasury-bill rate; manager held ill-gotten gains at issue before trial court froze his assets in preliminary injunction and had opportunity to use funds, such that IRS underpayment rate, which reflected what it would have cost to borrow funds from government, reasonably approximated benefit that manager derived from funds. Securities Act of 1933 § 1 et seq., 15 U.S.C.A. § 77a et seq.; Securities Exchange Act of 1934 § 21, 15 U.S.C.A. § 78u(d)(7); Investment Advisers Act of 1940 § 206, 15 U.S.C.A. § 80b-6(3).

[41] **Interest** Computation of rate in general

As a basis for an award of prejudgment interest in a securities-enforcement action based on fraudulent conduct, the Internal Revenue Service (IRS) underpayment rate reflects what it would have cost to borrow the money from the government and therefore reasonably approximates one of the benefits the defendant derived from its fraud; this rate thus reflects "use value," or unearned interest that the rightful owner of the funds could have received but for the fraud.

[42] **Implied and Constructive Contracts** Restitution

Consequential gains, which may support an award of restitution under general equitable principles, result from a profitable investment, use, or other disposition of the plaintiff's property, distinct from the transaction by which the defendant was originally enriched.

[43] **Implied and Constructive Contracts** Restitution

One equitable limitation on consequential gains, as a basis for an award of restitution under general equitable principles, is that a conscious wrongdoer is liable for consequential gains that are not unduly remote.

[44] **Implied and Constructive Contracts** Unjust enrichment

Securities Regulation Insiders' Profits, Recovery of

The object of the disgorgement remedy, including in securities-enforcement actions, is to eliminate the possibility of profit from conscious wrongdoing, and this is measured by the net increase in the assets of the wrongdoer, to the extent that this increase is attributable to the underlying wrong. Securities Exchange Act of 1934 § 21, 15 U.S.C.A. § 78u(d)(7).

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

Consequential gains on assets subject to disgorgement under the Securities Exchange Act must not be unduly remote from the fraud. Securities Exchange Act of 1934 § 21, 15 U.S.C.A. § 78u(d)(7).

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

Several factors may guide courts in ordering disgorgement of consequential gains incident to a primary disgorgement award under the Securities Exchange Act, including general considerations of fairness, the nature of the defendant's wrong, the relative extent of his contribution, and the feasibility of separating gains from the contribution traceable to the plaintiff's interest. Securities Exchange Act of 1934 § 21, 15 U.S.C.A. § 78u(d)(7).

[47] **Federal Courts** Need for further evidence, findings, or conclusions

Trial court's orders granting Securities and Exchange Commission (SEC) consequential gains on previously-frozen assets derived from investment manager's violations of Securities Act, Securities Exchange Act, and Investment Advisers Act, as relief incident to disgorgement award against manager and relief defendants, were not supported by adequate analysis and findings on whether consequential gains on such assets were unduly remote from manager's wrongdoing or whether they were attributable to his fraudulent conduct, and, thus, remand for such findings was necessary; orders awarded "actual returns," interest, or gains on assets without limitation. Securities Exchange Act of 1934 § 21, 15 U.S.C.A. § 78u(d)(7).

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

Supplemental enrichment, as relief supplemental to a disgorgement award under the Securities Exchange Act, is governed by restitutionary principles, that is, restoring the status quo, not deterrence of further violations of the securities laws. Securities Exchange Act of 1934 § 21, 15 U.S.C.A. § 78u(d)(7).

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

Securities Regulation Interest

District courts in securities-enforcement actions retain broad discretion as to the appropriate measure of supplemental enrichment incident to a disgorgement award, whether it is a form of profits or interest. Securities Exchange Act of 1934 § 21, 15 U.S.C.A. § 78u(d)(7).

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

Equitable limits on disgorgement differ between assets held by the primary wrongdoer, such as a primary defendant in a securities-enforcement action, and those held by third-party non-wrongdoers, such as relief defendants; as to primary defendants, the amount of disgorgement ordered need only be a reasonable approximation of profits causally connected to the violation. Securities Exchange Act of 1934 § 21, 15 U.S.C.A. § 78u(d)(7).

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

When ordering disgorgement of assets held by a primary defendant in a securities-enforcement action, a district court need not apply equitable tracing rules to identify specific funds in the defendant's possession that are subject to return. Securities Exchange Act of 1934 § 21, 15 U.S.C.A. § 78u(d)(7).

[52] **Fraudulent Conveyances** Personal judgment

A court of equity will wrest property fraudulently acquired, not only from the perpetrator of the fraud, but from his children and his children's children, or from any persons amongst whom he may have parceled out the fruits of his fraud.

[53] **Fraudulent Conveyances** Defenses

Third parties have a bona fide purchase defense to disgorgement of property they acquired from one who obtained it by fraud; according to such a defense, a purchaser for value and without notice acquires the legal interest that the grantor holds and purports to convey, free of equitable interests that a restitution claimant might have asserted against the property in the hands of the grantor.

[54] **Fraudulent Conveyances** Defenses

A bona fide purchase defense to disgorgement of assets that the purchaser acquired from one who acquired them wrongfully is inherently asset-specific, requiring a court to determine whether the purchaser (1) gave value in exchange for an asset in particular and (2) lacked notice as to that asset's true provenance.

[55] **Federal Courts** Securities regulation

In determining whether nominee doctrine allowed district court to order disgorgement of assets, to which relief defendants held title, by treating such assets as being equitably owned by investment manager, who was primary defendant in securities-enforcement action, Court of Appeals was not required to apply state-law version of such doctrine, but, rather, would inform its understanding of doctrine and its equitable limits by looking to practices of state and federal courts, as well as principles and practice of courts of chancery. Securities Exchange Act of 1934 § 21, 15 U.S.C.A. § 78u(d)(7).

[56] **Property** Nominees in general

A "nominee" is one who holds bare legal title to an asset but is not its true equitable owner; such an asset may be disgorged to satisfy a judgment against a third party deemed to be the asset's true equitable owner.

[57] **Federal Courts** Federal Courts

Federal courts are courts of law and equity. U.S. Const. art. 3, § 2, cl. 1.

[58] **Courts** Particular questions or subject matter

Federal Courts Equity and equitable relief in general

Federal Courts Securities regulation

To deduce equitable limits, including the limits of disgorgement in a securities-enforcement action, federal courts may look to the practices of the state and federal courts and the ordinary principles and practice of courts of chancery. Securities Exchange Act of 1934 § 21, 15 U.S.C.A. § 78u(d)(7).

[59] **Equity** Equity regards that as done which ought to be done

Equity looks to the intent, rather than to the form, and is thus able to treat that as done which in good conscience ought to be done.

[60] **Property** Nominees in general

Securities Regulation Insiders' Profits, Recovery of

The nominee theory, as a reflection of background equitable principles, may be used to determine the owner of an asset for disgorgement purposes, including in a securities-enforcement action. Securities Exchange Act of 1934 § 21, 15 U.S.C.A. § 78u(d)(7).

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

If a relief defendant in a securities-enforcement action is deemed a mere nominal owner of an asset that is equitably owned by the primary defendant, the equitable rules governing primary-defendant disgorgement apply to the disgorgement of that asset.

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

Like the bona fide purchase defense, the nominee doctrine, under which an asset equitably owned by the primary defendant in a securities-enforcement action and nominally owned by a relief defendant may be disgorged as an asset belonging to the primary defendant, is necessarily an asset-specific inquiry; the inquiry turns on a third party's behavior toward a particular asset, such as whether the third party controlled, benefited from, and/or transferred a particular asset held in a nominee's name.

[63] Federal Courts Securities regulation

In a securities-enforcement action, the Court of Appeals reviews a district court's exercise of equitable power to fashion a disgorgement remedy for abuse of discretion. Securities Exchange Act of 1934 § 21, 15 U.S.C.A. § 78u(d)(7).

[64] Securities Regulation Presumptions and burden of proof

In securities-enforcement actions, relief defendants carry the burden of proof with respect to affirmative defenses such as bona fide purchase.

[65] Securities Regulation Presumptions and burden of proof

Self-Incrimination Adverse inferences

Courts in civil cases, including securities-enforcement actions, can draw adverse inferences against relief defendants should they invoke their Fifth Amendment privilege not to testify. U.S. Const. Amend. 5.

[66] Securities Regulation Insiders' Profits, Recovery of

District court's order requiring investment manager's wife and other relief defendants to disgorge all assets traceable to manager's violations of Securities Act, Securities Exchange Act, and Investment Advisers Act lacked supporting findings as to whether each specific asset, though nominally owned by a relief defendant, was equitably owned by manager, as necessary to support disgorgement under nominee theory; district court made no specific findings as to some assets or as to adverse inferences that might be drawn from manager's invocation of privilege against self-incrimination and wife's invocation of marital privilege, and as to other assets, rested on findings from preliminary-injunction stage, which had required Securities and Exchange Commission (SEC) to meet lower burden of proof. U.S. Const. Amend. 5; Securities Act of 1933 § 1 et seq., 15 U.S.C.A. § 77a et seq.; Securities Exchange Act of 1934 § 21, 15 U.S.C.A. § 78u(d)(5), (7); Investment Advisers Act of 1940 § 206, 15 U.S.C.A. § 80b-6(3).

***389** On Appeal from the United States District Court for the District of Connecticut

Attorneys and Law Firms

Vincent Levy (Gregory Dubinsky, Andrew C. Indorf, on the brief), Holwell Shuster & Goldberg LLP, New York, NY, for Defendant-Appellant Iftikar A. Ahmed.

Adam G. Unikowsky (Zachary C. Schauf, on the brief), Jenner & Block LLP, Washington, DC, for Defendants-Appellants Shalini Ahmed, I.I. 1, a minor child, by and through his next friends Iftikar and Shalini Ahmed, his parents, I.I. 2, a minor child, by and through his next friends Iftikar and Shalini Ahmed, his parents, I.I. 3, a minor child, by and through his next friends

Iftikar and Shalini Ahmed, his parents, I-Cubed Domains, LLC, Shalini Ahmed 2014 Grantor Retained Annuity Trust, DIYA Holdings, LLC, DIYA Real Holdings, LLC.

Stephen G. Yoder, Senior Litigation Counsel, for Dan M. Berkovitz, General Counsel, and John W. Avery, Deputy Solicitor, Securities and Exchange Commission, Washington, DC, for Plaintiff-Appellee Securities and Exchange Commission.

John L. Cesaroni, Christopher H. Blau, Stephen M. Kindseth, Zeisler & Zeisler, P.C., Bridgeport, CT, for Receiver-Appellee Jed Horwitt.

Before: Walker, Raggi, and Park, Circuit Judges.

Opinion

Park, Circuit Judge:

Defendant Iftikar Ahmed defrauded his former employer and its investors of some $65 million over the span of a decade. His scheme ended in 2015 when he was indicted on unrelated insider-trading charges and a subsequent internal investigation revealed the full breadth of his wrongdoing. The Securities and Exchange Commission ("SEC") brought this civil enforcement action against Ahmed for various violations of the securities laws.

To secure a potential disgorgement judgment, the SEC joined Ahmed's family and related entities as Relief Defendants, and the district court (Arterton, *J.*) froze Ahmed's and the Relief Defendants' assets. Ahmed is currently a fugitive from justice, apparently residing in India, so the district court excluded him from discovery of the SEC's investigative file. Due to a lack of excess frozen funds, the district court also denied Ahmed access to funds to hire counsel. The district court granted the SEC's motion for summary judgment and awarded disgorgement, supplemental enrichment (including prejudgment interest and actual gains), and civil penalties against Ahmed. The district court also adopted the SEC's theory that Ahmed is the equitable owner of assets held in the name of the Relief Defendants as "nominees."

On appeal, Ahmed and the Relief Defendants challenge the district court's judgment and calculation of disgorgement. The Relief Defendants also move to stay the liquidation of frozen assets by the Receiver-Appellee pending resolution of these consolidated appeals. We affirm the district court's (1) exclusion of Ahmed from discovery and denial of his access to frozen funds to hire counsel; (2) calculation of ***390** Ahmed's disgorgement obligation; and (3) retroactive application of the 2021 amendments to the Securities Exchange Act of 1934 to Ahmed's disgorgement obligation. We conclude, however, that the district court (4) failed to assess whether actual gains on the frozen assets were unduly remote from Ahmed's fraud, and (5) should have applied an asset-by-asset approach to determine whether the Relief Defendants are in fact only nominal owners of their frozen assets.

I. BACKGROUND

A. Factual Background

In 2004, Ahmed joined Oak Management Corporation ("Oak"), a venture-capital firm. Ahmed was responsible for identifying and recommending "portfolio companies" in which Oak might invest and negotiating the terms of those investments.

Over the course of a decade, Ahmed stole over $65 million from Oak and ten portfolio companies, identified as Companies A to J in the pleadings, using the same basic scheme in each fraudulent transaction. First, Ahmed opened bank accounts that he personally controlled ostensibly in the name of Oak and its portfolio companies. Second, he used those accounts to divert monies intended for Oak funds and portfolio companies into bank accounts that he and his wife controlled. To cover his tracks, Ahmed submitted fraudulent invoices and contracts to Oak, misrepresenting things like the size of investments, the currency exchange rates applicable to transactions, and the need to make payments to tax authorities or to reimburse legal and other fees. As one example of Ahmed's fraud, in 2013, he negotiated an Oak entity's investment in Company C that was conditioned on

Company C redeeming shares of an entity that, unbeknownst to Oak, was owned by Ahmed. Ahmed pocketed more than $8 million from this particular scheme.[1]

1 This transaction is described more fully in Section II.B.3.a, *infra*.

In April 2015, Ahmed was arrested on criminal charges in an insider-trading case. *See United States v. Kanodia*, No. 15-cr-10131 (D. Mass. Apr. 21, 2015), ECF 19.[2] Following his arrest, Oak conducted an internal investigation, which revealed that ***391** Ahmed had misappropriated approximately $67 million between 2005 and 2015. Oak terminated Ahmed for cause and denied Ahmed "carried interest"—effectively a bonus tied to Oak's performance—based on a provision of its General Partnership Agreement.

2 Ahmed has been involved in at least four other cases relating to his conduct at Oak. First, Ahmed and a codefendant were indicted for the aforementioned insider trading, which remains pending against Ahmed given his fugitive status. *See United States v. Kanodia*, No. 15-cr-10131 (D. Mass.). The First Circuit affirmed the conviction of Ahmed's codefendant, *see United States v. Kanodia*, 943 F.3d 499 (1st Cir. 2019), as well as the district court's order of a default judgment of forfeiture on Ahmed's appearance bond, *see United States v. Ahmed*, Nos. 21-1193, 21-1194, 2022 WL 18717740, at *1 (1st Cir. Nov. 1, 2022). Second, the SEC and Ahmed settled a civil enforcement action based on the same insider-trading conduct in 2019, and the district court entered a corresponding consent judgment. *See* Final J. as to Def. Iftikar Ahmed & Relief Def. Rakitfi Holdings, LLC, *SEC v. Kanodia*, No. 15-cv-13042 (D. Mass. July 8, 2019), ECF 198. Third, Ahmed was indicted in a separate fraud and criminal money-laundering prosecution, which remains pending. *See* Indictment, *United States v. Ahmed*, No. 16-cr-10154 (D. Mass. June 1, 2016), ECF 34. Fourth, Oak's former client NMR E-Tailing LLC sued Oak and Ahmed. *See* Decision After Trial on Damages at 3, *NMR E-Tailing LLC v. Oak Inv. Partners*, No. 656450/2017 (N.Y. Sup. Ct. June 21, 2021), ECF 406. Oak and NMR settled, but Ahmed proceeded to trial on damages (with liability established by default) *pro se* and as a fugitive, resulting in a judgment against him for $7.5 million in compensatory damages, $500,000 in punitive damages, and prejudgment interest. *See id.* at 1-3, 11. On appeal, the trial court's judgment was affirmed. *See* Decision and Order, *NMR E-Tailing LLC v. Oak Inv. Partners*, No. 2021-1883 (N.Y. App. Div. 1st Dep't May 25, 2023), ECF 53.

B. Procedural Background

1. *Preliminary Injunction*

On May 6, 2015, the SEC filed a civil complaint against Ahmed, alleging violations of the Securities Exchange Act of 1934, the Securities Act of 1933, and the Investment Advisers Act of 1940. The SEC also named the Relief Defendants[3] as the recipients of ill-gotten gains and joint owners of accounts receiving such gains. To secure a potential judgment, the district court granted a temporary restraining order, freezing $55 million in assets. After the SEC moved for a preliminary injunction to continue the TRO, Ahmed fled the United States and remains a fugitive.

3 The Relief Defendants are Shalini Ahmed (Ahmed's wife), Ahmed's three minor sons, and several companies held in the Ahmeds' names or for their benefit: Iftikar Ali Ahmed Sole Proprietorship; I-Cubed Domains, LLC; Shalini Ahmed 2014 Grantor Retained Annuity Trust; DIYA Holdings, LLC; and DIYA Real Holdings, LLC.

After a two-day hearing, the district court granted a preliminary injunction, freezing approximately $65 million for disgorgement, $9.3 million for potential prejudgment interest, and $44 million for potential civil penalties ($118.3 million in total). We affirmed the order. *See SEC v. I-Cubed Domains, LLC*, 664 F. App'x 53, 55-56 (2d Cir. 2016). The district court later denied Ahmed's request for $6 million from frozen funds to hire counsel. In addition, during discovery, Ahmed requested access to confidential information in the SEC's possession, but the district court denied his request, citing the fugitive-disentitlement doctrine.

2. *Summary Judgment*

Although Ahmed's fugitive status has remained unchanged, the legal landscape has not. Before proceeding to summary judgment, the district court held the case pending the Supreme Court's decision in *Kokesh v. SEC*, 581 U.S. 455, 137 S. Ct. 1635, 198 L.Ed.2d 86 (2017). *Kokesh* held that "[d]isgorgement in the securities-enforcement context is a 'penalty' within the

meaning of [28 U.S.C.] § 2462, and so disgorgement actions must be commenced within five years of the date the claim accrues." *Id.* at 1639. *Kokesh* did not address, however, "whether courts possess authority to order disgorgement in SEC enforcement proceedings." *Id.* at 1642 n.3. After the decision, the parties proceeded to summary judgment, and Ahmed moved once more to modify the asset freeze. The district court bifurcated the case into liability and remedy stages, and applying *Kokesh*'s five-year bar, modified the asset freeze to freeze assets up to $89 million.

At the liability stage, the district court entered summary judgment for the SEC. At the remedies stage, the district court awarded a permanent injunction, $41,920,639 in disgorgement, $21 million in civil penalties, $1,520,953 in prejudgment interest for the period before the asset freeze at the IRS underpayment rate, and "actual returns on the frozen assets" during the pendency of the asset freeze. Special App'x at SPA-98 to -109. The district court rejected Ahmed's argument that *Kokesh* barred disgorgement, and it denied an offset for the "carried interest" that Ahmed forfeited to Oak upon his termination for "Disabling Conduct" within the meaning of his contract with Oak.

***392** The district court also adopted the "nominee" theory as to the assets held in the name of the Relief Defendants. Applying a six-factor test, the district court concluded that these frozen assets were equitably owned by Ahmed and that the Relief Defendants had failed to refute the SEC's supporting evidence. Although the district court permitted liquidation of frozen assets to proceed under the supervision of Receiver-Appellee Jed Horwitt (the "Receiver"), it stayed distribution pending appeal. In a ruling issued in conjunction with an amended final judgment, the district court clarified that the judgment did "not extinguish the SEC's remaining alternative theory of liability against the Relief Defendants" under *SEC v. Cavanagh* (*Cavanagh I*), 155 F.3d 129 (2d Cir. 1998). Special App'x at SPA-162.

3. *Initial Appeal*

After Ahmed filed a notice of appeal, we held the case in abeyance pending the Supreme Court's decision in *Liu v. SEC*, —— U.S. ——, 140 S. Ct. 1936, 207 L.Ed.2d 401 (2020).[4] Although the Exchange Act did not explicitly authorize a "disgorgement" remedy, *Liu* held that disgorgement is a form of "equitable relief" authorized under 15 U.S.C. § 78u(d)(5)—answering the question left open by *Kokesh*. *Liu*, 140 S. Ct. at 1940.

4 Ahmed also moved for the release of funds to pay for counsel. A motions panel of this Court construed Ahmed's motion as seeking *mandamus* relief directing the district court to rule on a similar motion then before it and denied Ahmed's motion as moot after the district court denied the motion.

Shortly after *Liu*, Congress enacted the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 ("NDAA"), Pub. L. No. 116-283, § 6501(a)-(b), 134 Stat. 3388, 4625-26 (codified at 15 U.S.C. § 78u(d)(3), (7)-(8)). The NDAA amended the Exchange Act in three ways relevant here. First, the NDAA explicitly authorized the SEC to pursue disgorgement in civil actions. *See* NDAA § 6501(a), 134 Stat. at 4625-26 (codified at 15 U.S.C. § 78u(d)(7)). Second, the NDAA extended the statute of limitations for "a claim for disgorgement" to "not later than 10 years after the latest date of the violation" for conduct under certain securities laws. *Id.* at 4626 (codified at 15 U.S.C. § 78u(d)(8)). Finally, the NDAA provided that its amendments "shall apply with respect to any action or proceeding that is pending on, or commenced on or after, the date of enactment of this Act." *Id.*

The SEC moved to remand for recalculation of Ahmed's disgorgement obligation under the NDAA. Ahmed opposed, arguing that (1) this Court lacked jurisdiction to remand because the SEC failed to cross-appeal; (2) application of the NDAA would reopen a final judgment; (3) the NDAA lacks a clear retroactivity command, and retroactive application would violate the Ex Post Facto Clause; and (4) the NDAA does not apply to disgorgement under 15 U.S.C. § 78u(d)(5). A motions panel granted the SEC's motion and remanded "for a determination of Appellant's disgorgement obligation consistent with § 6501 of the [NDAA], and, if appropriate, entry of an amended judgment." *SEC v. Ahmed*, Nos. 18-2932, 19-102, 2021 WL 1171712, at *1 (2d Cir. Mar. 11, 2021).

4. *Remand and Liquidation*

On remand, the district court found that the NDAA's ten-year statute of limitations applied and increased the disgorgement amount from $41,920,639 to $64,171,646.14, with $9,755,798.34 in prejudgment interest. The district court also rejected the same arguments Ahmed raised before the motions panel. Ahmed and the Relief Defendants ***393** appealed again, giving rise to this action.

The district court also approved the Receiver's proposed liquidation plan, which was divided into two phases ("First Liquidation Order"). Phase 1 would liquidate non-unique assets, and phase 2 would liquidate unique assets as needed to satisfy the judgment. The district court denied the Relief Defendants' motion for a stay pending appeal. Defendants then appealed the First Liquidation Order, which this Court held in abeyance pending resolution of the merits of this appeal.

Phase 1 ended with $118 million in the receivership estate, which was insufficient to secure the total judgment, then estimated to be in excess of $125 million. The district court approved most of the Receiver's phase 2 plan and rejected the Relief Defendants' motion to stay liquidation of the unique assets pending appeal ("Second Liquidation Order"). Defendants appealed the Second Liquidation Order, with the Relief Defendants moving to stay liquidation of the unique assets. This Court held the appeals of the Second Liquidation Order in abeyance pending our decision in these appeals from the redetermined amended final judgment. While the Relief Defendants' stay motion was pending, the Receiver indicated that he would begin phase 2 by liquidating a MetLife life-insurance policy on December 28, 2022, and listing the Ahmeds' two Park Avenue apartments for sale on May 8, 2023. We granted temporary administrative stays pending our decision on the Relief Defendants' motion for a stay of liquidation.

II. DISCUSSION

Ahmed first argues that summary judgment was improper because he was excluded from discovery and denied access to funds to hire counsel. Ahmed also argues that the district court miscalculated disgorgement by incorrectly approximating net profits and erroneously applying the NDAA. The Relief Defendants raise two additional arguments: first, the district court improperly calculated prejudgment interest and actual gains, and second, it misapplied the "nominee" doctrine. Although we are not persuaded by Ahmed's arguments, we find merit in some of the Relief Defendants' arguments.

A. Summary-Judgment Challenges

Ahmed challenges the district court's summary-judgment order, arguing that the district court erred by limiting his access to discovery and by denying his request to unfreeze assets to hire counsel. Neither argument is persuasive.

1. *Discovery Limitations*

The district court did not abuse its discretion by denying Ahmed extraterritorial access to confidential records in the SEC's possession. Drawing on the fugitive-disentitlement doctrine, the district court reasoned that Ahmed had "removed himself from the jurisdiction of the [district court]," so the district court had "no ability to enforce" an "appropriate protective order limiting his use of the documents produced." Endorsement Order Denying Def.'s Mot. for Full Access to the SEC's Investigative File at 3, *SEC v. Ahmed*, No. 15-cv-675 (D. Conn. Aug. 22, 2016), ECF 286. The district court thus denied Ahmed access to SEC discovery materials. Ahmed argues that this denied him "any practical means of defending himself" in violation of "the adversarial process set forth in the Federal Rules of [Civil] Procedure" and the Due Process Clause. Appellant's Br. at 53, 60-61. We disagree.

[1] Federal Rule of Civil Procedure 26(c)(1) permits a district court to "issue an order to protect a party or person from ***394** annoyance, embarrassment, oppression, or undue burden or expense." *See Degen v. United States*, 517 U.S. 820, 826, 116 S.Ct. 1777, 135 L.Ed.2d 102 (1996) (explaining that district courts have broad authority "to manage discovery in a civil suit, including the power to enter protective orders limiting discovery as the interests of justice require"); *accord Empire Blue Cross & Blue Shield v. Finkelstein*, 111 F.3d 278, 281 (2d Cir. 1997). We review discovery orders for abuse of discretion. *See Lederman v.*

N.Y.C. Dep't of Parks & Recreation, 731 F.3d 199, 202 (2d Cir. 2013); *United States v. Technodyne LLC*, 753 F.3d 368, 378 (2d Cir. 2014).

[2] **[3]** **[4]** The district court's discovery restrictions here were a reasonable exercise of its broad power to enforce protective orders. "Courts invested with the judicial power of the United States have certain inherent authority to protect their proceedings and judgments in the course of discharging their traditional responsibilities." *Degen*, 517 U.S. at 823, 116 S.Ct. 1777. A district court retains "authority to manage discovery," including "limit[ing] discovery in the interests of justice." *Finkelstein*, 111 F.3d at 281; *see also Degen*, 517 U.S. at 827, 116 S.Ct. 1777 ("A federal court has at its disposal an array of means to enforce its orders."). The discovery material at issue was subject to a protective order under Rule 26 based on the confidential and sensitive nature of the documents, and the district court determined that the court could not enforce such an order because Ahmed had removed himself from the court's jurisdiction. The district court's limitation of Ahmed's extraterritorial access to the protected materials thus constituted a reasonable exercise of the court's "inherent authority to protect" its own discovery orders to limit Ahmed's access to civil discovery in light of his status as a fugitive. *Degen*, 517 U.S. at 823, 116 S.Ct. 1777. Ahmed's proposed alternatives, like monetary sanctions, would not ensure the adequate protection of confidential information in this case.

[5] **[6]** We affirm the discovery limitations as a reasonable means of enforcing a protective order, so we do not decide whether the fugitive-disentitlement doctrine might apply in this case consistent with due process.[5] *See Wells Fargo Advisors, LLC v. Sappington*, 884 F.3d 392, 396 n.2 (2d Cir. 2018) ("We are free to affirm on any ground that finds support in the record, even if it was not the ground upon which the trial court relied." (cleaned up)).

5 Under the fugitive-disentitlement doctrine, "a person who is a fugitive from justice may not use the resources of the civil legal system while disregarding its lawful orders in a related criminal action." *United States v. Eng*, 951 F.2d 461, 464 (2d Cir. 1991), *abrogated on other grounds by Degen*, 517 U.S. 820, 116 S.Ct. 1777. A blunt instrument, the fugitive-disentitlement doctrine "forbid[s] *all* participation by the absent claimant." *Degen*, 517 U.S. at 826, 116 S.Ct. 1777 (emphasis added). Although we do not decide whether the doctrine applies here, we note that the purposes underlying it are served by the district court's order. Disentitlement is rooted in a court's ability to enforce a "judgment on review," "discourage[ ] the felony of escape," "encourage[ ] voluntary surrenders," and "promote[ ] the efficient, dignified operation of the courts." *Id.* at 824, 116 S.Ct. 1777 (cleaned up). Ahmed faces several criminal charges, *see supra* note 2, and granting him full access to discovery could further discourage his voluntary return to the United States and grant him an unfair advantage in those proceedings to the extent they are based on the same or related underlying conduct.

2. *Denial of Funds to Hire Counsel*

[7] **[8]** The district court did not abuse its discretion by declining to unfreeze assets for Ahmed to hire counsel. Ahmed argues that the district court "over-froze [his] liquid assets, and thus improperly ***395** deprived him of the ability to use *his money* to hire counsel." Appellant's Br. at 61. For the reasons stated *infra*, the district court properly calculated disgorgement, so it did not abuse its discretion by concluding that there were no frozen funds available for Ahmed to hire counsel.[6] It is well-settled that a defendant has no right to use tainted assets for his legal defense. *See Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 626, 109 S.Ct. 2646, 105 L.Ed.2d 528 (1989) ("A defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney."). Moreover, Ahmed has no constitutional right to counsel in this civil enforcement action. *See United States v. Coven*, 662 F.2d 162, 176 (2d Cir. 1981). In any event, the Relief Defendants have hired able counsel who have also represented Ahmed's interests throughout these proceedings.

6 Our decision to vacate and remand the district court's award of "actual gains" has no bearing on the denial of Ahmed's motion to unfreeze funds for two reasons. First, the "actual gains" calculation is part of the post-judgment liquidation process, whereas Ahmed's motion to unfreeze funds relates to the scope of the preliminary injunction. Second, "actual gains" are calculated based on the growth of disgorged assets regardless of the size of the judgment. So "actual gains" and disgorgement are independent for present purposes.

B. Disgorgement

The district court did not abuse its discretion in calculating disgorgement. First, the district court accurately estimated net profits and reasonably declined to offset Ahmed's forfeited "carried interest." Second, the district court properly gave retroactive effect to the NDAA.

1. *Legal Standard*

[9] **[10]** **[11]** The Exchange Act, as amended, states that "[i]n any action or proceeding brought by the Commission under any provision of the securities laws, the Commission may seek, and any Federal court may order, disgorgement." 15 U.S.C. § 78u(d)(7). "Disgorgement serves to remedy securities law violations by depriving violators of the fruits of their illegal conduct." *SEC v. Contorinis*, 743 F.3d 296, 301 (2d Cir. 2014). We review disgorgement orders for abuse of discretion. *SEC v. Warde*, 151 F.3d 42, 49 (2d Cir. 1998). "We review *de novo* questions of a statute's interpretation and constitutionality." *United States v. Al Kassar*, 660 F.3d 108, 129 (2d Cir. 2011).

2. *Equitable Disgorgement After the NDAA*

[12] As a preliminary matter, the parties assume, and we agree, that *Liu*'s equitable limitations on disgorgement survive the NDAA. In *Liu*, the Supreme Court held that although the Exchange Act did not (at the time) explicitly authorize "disgorgement," "equitable relief" under § 78u(d)(5) includes disgorgement. 140 S. Ct. at 1940. The Court thus held that any disgorgement award must be consistent with traditional principles of equity. *See id.* at 1947. Shortly after *Liu*, Congress enacted the NDAA, which specifically added "disgorgement" as a remedy under § 78u(d)(7) while leaving untouched "equitable relief" available via § 78u(d)(5). We read "disgorgement" in § 78u(d)(7) to refer to equitable disgorgement as recognized in *Liu*.[7]

7 The Fifth Circuit recently held that § 78u(d)(7) "authorize[s] legal 'disgorgement' apart from the equitable 'disgorgement' permitted by *Liu*" and questioned "whether equitable disgorgement ... survived the 2021 Exchange Act amendments." *SEC v. Hallam*, 42 F.4th 316, 341, 343 (5th Cir. 2022). We decline to follow the Fifth Circuit's approach.

***396** **[13]** **[14]** First, § 78u(d)(7) authorizes "disgorgement," which we have long understood to refer to "the chancellor's discretion to prevent unjust enrichment" at equity. *SEC v. Commonwealth Chem. Sec., Inc.*, 574 F.2d 90, 95 (2d Cir. 1978); *see* 15 U.S.C. § 78u(d)(3)(A)(ii) (explaining that the SEC may seek and courts have jurisdiction to "require disgorgement ... of any unjust enrichment by the person who received such unjust enrichment" as a result of violating the Exchange Act). This terminology is "consistent with a remedy rooted in equity, given that 'unjust enrichment' is another term of art—the basis for all restitution, which is often equitable." *Hallam*, 42 F.4th at 340. Indeed, as the Supreme Court has observed, " 'statutory reference[s]' to a remedy grounded in equity 'must, absent other indication, be deemed to contain the limitations upon its availability that equity typically imposes.' " *Liu*, 140 S. Ct. at 1947 (alteration in original) (quoting *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 211 n.1, 122 S.Ct. 708, 151 L.Ed.2d 635 (2002)); *see also Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108, 111 S.Ct. 2166, 115 L.Ed.2d 96 (1991) ("Congress is understood to legislate against a background of common-law adjudicatory principles."). The NDAA's text evinces no intent to contradict *Liu* or to strip disgorgement of "limit[s] established by longstanding principles of equity" in favor of an unbounded "legal" form of disgorgement. *Liu*, 140 S. Ct. at 1947. We thus apply "the strong presumption that repeals by implication are disfavored and that Congress will specifically address preexisting law when it wishes to suspend its normal operations in a later statute." *SEC v. Alpine Sec. Corp.*, 982 F.3d 68, 78 (2d Cir. 2020) (brackets omitted) (quoting *Epic Sys. Corp. v. Lewis*, —— U.S. ——, 138 S. Ct. 1612, 1624, 200 L.Ed.2d 889 (2018)).

Second, reading "disgorgement" under § 78u(d)(7) as equitable disgorgement is consistent with the statutory history. Before the NDAA, "Congress did not define what falls under the umbrella of 'equitable relief,' " so "courts ... had to consider which remedies the SEC may impose as part of its § 78u(d)(5) powers." *Liu*, 140 S. Ct. at 1940. This created some uncertainty about whether, for example, the Exchange Act authorized disgorgement and the applicable statute of limitations. *See, e.g.*, *Kokesh*, 581 U.S. at 461-62 & n.3, 137 S.Ct. 1635. The NDAA then clarified some aspects of this uncertainty. The express addition of "disgorgement" as a remedy specified under § 78u(d)(7) is thus best read, not as superfluity, but as a "belt and suspenders" clarification that equitable disgorgement is available under the Exchange Act. Moreover, the authorization of a ten-year statute

of limitations under § 78u(d)(8)(A)(ii) is best understood as expressly overruling *Kokesh*'s five-year statute of limitations as to certain securities violations. So we conclude that disgorgement under § 78u(d)(7) must comport with traditional equitable limitations as recognized in *Liu*.

3. *Disgorgement Calculation*

The district court properly calculated Ahmed's disgorgement obligation. Ahmed argues that the district court (1) miscalculated "net profits" from two fraudulent transactions involving Company C ("C1" and "C2") and (2) failed to account for the "carried interest" forfeited to Oak upon his termination for "Disabling Conduct." He further argues that any reduction in the district court's disgorgement award should also reduce the district court's civil penalty. We conclude that both arguments are meritless, so we decline to disturb the district court's rulings as to either disgorgement or civil penalties.

***397** a. Net Profits Calculation

[15] The district court did not abuse its discretion in its calculation of net profits. Disgorgement must "not exceed a wrongdoer's net profits and is awarded for victims," *Liu*, 140 S. Ct. at 1940, "that is, the gain made upon any business or investment, when both the receipts and payments are taken into account," *id.* at 1945 (cleaned up). We have held that the "amount of disgorgement ordered need only be a reasonable approximation of profits causally connected to the violation." *SEC v. Fowler*, 6 F.4th 255, 267 (2d Cir. 2021) (cleaned up).

[16] Here, the district court reasonably approximated net profits based on the difference between the sale and purchase prices involved in the tainted Company C transactions. As to C1, Ahmed—in his capacity as a member of BVI Company's board of directors—"personally negotiated" a $2 million investment in Company C without BVI Company's knowledge. When the unapproved investment was uncovered, Ahmed "purposefully lied to his fellow BVI Company directors" that the purchase was a "mistake." Special App'x at SPA-35. Ahmed then bought the shares himself, ostensibly to correct for the "mistake," but left them in the BVI Company's name. Ahmed later negotiated another investment by an Oak entity in Company C that was conditioned on Company C paying nearly $11 million to redeem BVI Company's shares—which, unbeknownst to the Oak entity, were owned by Ahmed. Ahmed profited more than $8 million on the sale.

[17] As to C2, Ahmed had invested in Company C via Relief Defendant I-Cubed Domains, LLC, of which Ahmed was founder and sole member, without disclosure to Oak. Ahmed then pitched Oak on a $7.5 million stock-purchase agreement for I-Cubed's Company C shares without disclosing his personal stake, even going so far as to forge the signature of I-Cubed's former manager on the transaction paperwork to conceal his personal interest. Ahmed's fraud may not have driven Company C's entire growth, but it permitted him to realize profits driven by that growth. So it was a reasonable approximation of net profits to take the difference between "gross sales revenues from the sale of Company C shares" and Ahmed's "initial cost of purchasing the Company C shares." *Id.* at SPA-103; *see Fowler*, 6 F.4th at 267.

Ahmed's arguments to the contrary are unavailing. Ahmed argues that, in calculating net profits, the district court should have credited him an offset based on C1 and C2 because there was no evidence that Oak paid inflated prices as opposed to fair market value. Specifically, as to C1, Ahmed argues that any difference between the purchase and sale prices of Company C stock was based on "an increase in the market price of the shares," not Ahmed's "unlawful activity." Appellant's Br. at 41. As to C2, Ahmed argues that the district court failed to account for the fact that the market value of Company C shares was likely well above the price Oak actually paid.

These arguments fail. Ahmed's misconduct with respect to these transactions was not in misrepresenting the purchase prices but in failing to disclose his conflicts of interest, which violated the Advisers Act. *See* 15 U.S.C. § 80b-6(3). The C1 and C2 transactions were thus entirely tainted, and Ahmed's $14.4 million in profits from the transactions constituted his "net profits from wrongdoing" under *Liu*. *See Contorinis*, 743 F.3d at 301 ("Because disgorgement's underlying purpose is to make

lawbreaking unprofitable for the lawbreaker, it satisfies its design when the lawbreaker returns the fruits of his misdeeds, ***398** regardless of any other ends it may or may not accomplish.").

[18] Moreover, Ahmed bears the risk of uncertainty affecting the size of disgorgement. "A wrongdoer's unlawful action may create illicit benefits for the wrongdoer that are indirect or intangible. ... [T]o require precise articulation of such rewards in calculating disgorgement amounts would allow the wrongdoer to benefit from such uncertainty." *Id.* at 306; *see also Fowler*, 6 F.4th at 267 ("If the disgorgement amount is generally reasonable, any risk of uncertainty about the amount falls on the wrongdoer whose illegal conduct created that uncertainty." (cleaned up)). The fact that Oak, a victim of Ahmed's fraud, might have gotten a "bargain" on the share purchase should not redound to the fraudster's benefit. We thus find no abuse of discretion in the disgorgement calculation.

b. Carried-Interest Offset

Ahmed next argues that the district court should have offset the disgorgement award by the "carried interest" he forfeited to Oak because this forfeiture was "on account of the [unlawful] conduct at issue in this case." Appellant's Br. at 50. We disagree.

[19] Ahmed's General Partnership Agreement with Oak stated that "any Member who is removed by reason of having engaged in Disabling Conduct shall forfeit for no consideration such Member's entire membership interest, Percentage Interest and Capital Account and shall not become, or shall cease to be, as applicable, a Class B member." Special App'x at SPA-120. Part of Ahmed's "membership interest" was a "carried interest" bonus based on "the performance of the Oak Funds." *Id.* at SPA-120 n.24. So Ahmed's forfeited "carried interest" is not an ill-gotten gain from his fraud but rather was his *expectancy* to a portion of Oak's profits conferred by the General Partnership Agreement. But disgorgement does not protect the wrongdoer's expectancy interests; it attempts to "restor[e] the status quo" by "tak[ing] money out of the wrongdoer's hands." *Liu*, 140 S. Ct. at 1943 (cleaned up). Equity does not require an offset for the carried interest, which was contingent on Ahmed's relationship with Oak and was not derived directly from his fraud.

Ahmed's argument to the contrary is unpersuasive. He contends that the Court should follow the approach of *SEC v. Penn*, in which a district court ordered an evidentiary hearing to determine "the value of [the defendant's] forfeited interest in the fund" of his former employer to offset his disgorgement obligation. No. 14-cv-581, 2017 WL 5515855, at *3-4 (S.D.N.Y. Aug. 22, 2017). But in that case, the "SEC d[id] not dispute that Penn's carried interest in the Fund ... could offset his disgorgement obligation," in accordance with the terms of Penn's plea agreement. *Id.* at *4. *Penn* did not conclude that forfeited carried interest generally should offset a disgorgement obligation.[8]

8 Ahmed also requests that the district court on remand offset his disgorgement obligation by the amount of civil judgments obtained against him by his victims. This could be appropriate if Ahmed were to prove that he paid restitution. *See, e.g.*, *SEC v. Palmisano*, 135 F.3d 860, 863-64 (2d Cir. 1998).

We thus affirm the district court's calculation of Ahmed's disgorgement obligation and decline to revisit its calculation of civil penalties.

4. *Application of the NDAA*

The district court did not err by applying the NDAA's expanded statute of limitations to Ahmed's disgorgement obligation. ***399** Ahmed argues that the district court's application of the NDAA was incorrect for four reasons: (1) the SEC failed to cross-appeal; (2) the district court reopened a final judgment; (3) the NDAA does not apply retroactively; and (4) application of the NDAA violates the Ex Post Facto Clause. Although the SEC argues that Ahmed's first three arguments are barred by the law-of-the-case doctrine, we do not decide whether that doctrine applies because all four of Ahmed's arguments are without merit.

a. Cross-Appeal Rule

[20] The SEC's failure to cross-appeal did not prevent the district court from recalculating disgorgement under the NDAA. Under the cross-appeal rule, "an appellate court may not alter a judgment to benefit a nonappealing party." *Greenlaw v. United States*, 554 U.S. 237, 244, 128 S.Ct. 2559, 171 L.Ed.2d 399 (2008). Ahmed argues that the cross-appeal rule is jurisdictional, so the SEC's failure to cross-appeal from the amended final judgment deprived the district court of jurisdiction to enlarge disgorgement under the NDAA. This argument fails.

[21] First, the cross-appeal rule did not deprive the district court of jurisdiction to recalculate disgorgement. It is well-settled that "the requirement of a cross-appeal is a rule of practice which is not jurisdictional and in appropriate circumstances may be disregarded." *Finkielstain v. Seidel*, 857 F.2d 893, 895 (2d Cir. 1988); *accord Texport Oil Co. v. M/V Amolyntos*, 11 F.3d 361, 366 (2d Cir. 1993) (explaining that "there has been some conflict in our Court as to whether the late filing of a notice of cross-appeal is a matter of practice or is a jurisdictional bar" and "adher[ing]" to *Finkielstain*); *see also Carlson v. Principal Fin. Grp.*, 320 F.3d 301, 309 (2d Cir. 2003) (relying on *Finkielstain* and *Texport* and treating the cross-appeal rule as non-jurisdictional); *Clubside, Inc. v. Valentin*, 468 F.3d 144, 162 (2d Cir. 2006) (same).[9]

9 *Swatch Group Management Services Ltd. v. Bloomberg L.P.*, 756 F.3d 73 (2d Cir. 2014), is not to the contrary. There, we characterized as "jurisdictional" only Federal Rule of Appellate Procedure 3(c)(1)(B)'s requirement that a notice of cross-appeal identify the challenged district-court order. *Id.* at 93.

[22] **[23]** Second, the cross-appeal rule is inapplicable to Ahmed's case because the SEC did not seek to "enlarge its rights under the judgment by enlarging the ... scope of equitable relief," *Int'l Ore & Fertilizer Corp. v. SGS Control Servs., Inc.*, 38 F.3d 1279, 1286 (2d Cir. 1994)—*i.e.*, the outcome that the cross-appeal rule forbids—but rather sought to remand the case to present its NDAA arguments to the district court in the first instance. Critically, the SEC could not have presented these arguments in a timely cross-appeal because the NDAA was enacted *after* the deadline to file a cross-appeal had passed. It would make little sense if the cross-appeal rule prevented nonappealing parties from receiving the benefit of intervening retroactive statutes. As this Court explained in *Litton Systems, Inc. v. American Telephone & Telegraph Co.*, 746 F.2d 168 (2d Cir. 1984), albeit under somewhat different circumstances,

> No party to an appeal should be held to a standard that permits consideration of an intervening statute only when issues affected by the statute are already pending on appeal. Such a standard would require either anticipation of statutes not yet enacted or the assertion of frivolous grounds in appeals and cross-appeals in the hope that a new statute might affect their resolution favorably.

***400** *Id.* at 171. We decline to apply the cross-appeal rule in Ahmed's case because it would frustrate congressional intent and judicial economy.

b. Reopening a Final Judgment

[24] Nor would application of the NDAA reopen a final judgment. "When a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 226, 115 S.Ct. 1447, 131 L.Ed.2d 328 (1995). The Supreme Court has taken care to distinguish "judgments from which all appeals have been forgone or completed" and "judgments that remain on appeal." *Id.* at 227, 115 S.Ct. 1447.

[25] Here, the district court's grant of summary judgment is not "final" within the meaning of *Plaut* because appeals are ongoing. *See Miller v. French*, 530 U.S. 327, 347, 120 S.Ct. 2246, 147 L.Ed.2d 326 (2000) ("[W]hen Congress changes the law underlying a judgment awarding ... relief, that relief is no longer enforceable to the extent it is inconsistent with the new law. Although the

remedial injunction ... is a final judgment for purposes of *appeal*, it is not the last word of the judicial department ... [because it] is subject to the continuing supervisory jurisdiction of the court, and therefore may be altered according to subsequent changes in the law." (emphasis added) (cleaned up)). Application of the NDAA thus does not reopen a final judgment.

c. Retroactivity of the NDAA

[26] The district court also did not err by giving retroactive effect to the NDAA's disgorgement amendments. In *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994), the Supreme Court explained that "[s]ince the early days of this Court, we have declined to give retroactive effect to statutes burdening private rights unless Congress had made clear its intent." *Id.* at 270, 114 S.Ct. 1483. To overcome this presumption against retroactivity, a "court must ask whether the new provision attaches new legal consequences to events completed before its enactment," thereby suggesting "clear congressional intent authorizing retroactivity." *Id.* at 269-70, 272, 114 S.Ct. 1483.

[27] The NDAA's disgorgement amendments explicitly apply to cases pending at the time of enactment. Section 6501(b) provides that the NDAA's disgorgement amendments "shall apply with respect to any action or proceeding that is pending on, or commenced on or after, the date of enactment of this Act." Pub. L. No. 116-283, § 6501(b), 134 Stat. 3388, 4626 (2021). The Supreme Court has, in *dicta*, interpreted nearly identical language as a retroactivity command. *See, e.g.*, *Landgraf*, 511 U.S. at 255 & n.8, 256, 114 S.Ct. 1483 (construing the phrase "shall apply to all proceedings pending on or commenced after the date of enactment of this Act" as an "explicit retroactivity command"); *Martin v. Hadix*, 527 U.S. 343, 354-55, 119 S.Ct. 1998, 144 L.Ed.2d 347 (1999) (same). If Congress enacts a provision containing a phrase to which the Supreme Court has previously ascribed a particular meaning, we will presumptively confer that meaning to the provision. *See generally Siebert v. Conservative Party of N.Y. State*, 724 F.2d 334, 337 (2d Cir. 1983) (recounting the "canon of statutory construction that Congress is presumed to be aware of the judicial background against which it legislates"). We thus conclude that the NDAA's disgorgement amendments apply retroactively to Ahmed's case.

***401** **[28]** We are not persuaded by Ahmed's contrary arguments. First, we reject Ahmed's argument that the SEC may not receive the benefit of the ten-year statute of limitations because the SEC initially brought this enforcement action under 15 U.S.C. § 78u(d)(5), not § 78u(d)(7). Section 78u(d)(7) did not exist at the time the SEC filed suit, so it would have been impossible to invoke that provision. In any event, the SEC brought the action "pursuant to the authority conferred upon it by ... 15 U.S.C. § 78u(d)" generally, Second Am. Compl. at 4, *SEC v. Ahmed*, No. 15-cv-675 (D. Conn. Apr. 1, 2016), ECF 208, and, as the district court explained, it "relied on the common law injunctive," *i.e.*, equitable, "power of the district court[ ]," Special App'x at SPA-245. Similarly, the district court itself "did not rely solely on [15 U.S.C. § 78u(d)(5)] to authorize disgorgement in its initial ruling" and instead exercised its inherent equitable power to do so. *Id.*

[29] Second, Ahmed's argument that the NDAA eviscerated his "*vested and adjudicated* limitation defense" is meritless. Appellant's Br. at 33 (emphasis in original). The Supreme Court imposed a five-year statute of limitations on disgorgement in *Kokesh*, 137 S. Ct. 1635, which was decided over two years after the SEC brought this action. So Ahmed could not have had a reliance interest in *Kokesh*'s statute of limitations before the SEC brought this action. We thus interpret the NDAA to contain an effective retroactivity command applicable to Ahmed's case.

d. Ex Post Facto Clause

Finally, the district court's application of the NDAA to Ahmed's disgorgement award did not violate the Ex Post Facto Clause. Ahmed argues that disgorgement under the NDAA is punitive, so retroactive application to his case would run afoul of the Ex Post Facto Clause's guarantee. We are not persuaded.

[30] **[31]** **[32]** **[33]** The Constitution provides, "No ... ex post facto Law shall be passed." U.S. Const. art. I, § 9, cl. 3. "To violate the Ex Post Facto Clause ... a law must be retrospective—that is, it must apply to events occurring before its enactment—and it must disadvantage the offender affected by it, by altering the definition of criminal conduct or increasing the punishment for the crime." *Abed v. Armstrong*, 209 F.3d 63, 66 (2d Cir. 2000) (cleaned up). A two-step framework governs Ex Post Facto Clause challenges. At step one, "[w]e must ascertain whether the legislature meant the statute to establish 'civil' proceedings." *Smith v. Doe*, 538 U.S. 84, 92, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003) (cleaned up). If Congress's intention "was to impose punishment, that ends the inquiry." *Id.* "If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive," we must proceed to step two and "further examine whether the statutory scheme is 'so punitive either in purpose or effect as to negate ... [that] intention' to deem it civil." *Id.* (quoting *Kansas v. Hendricks*, 521 U.S. 346, 361, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997)). But we typically "defer to the legislature's stated intent," and "only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Id.* (cleaned up). That is not this case.

[34] First, in enacting 15 U.S.C. § 78u(d)(7), Congress clearly intended to provide a civil remedy. To determine whether a statutory scheme is civil or criminal, we "ask whether the legislature, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other." *Hudson v. United States*, 522 U.S. 93, 99, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997) ***402** (cleaned up). Disgorgement under § 78u(d) is designated as providing "[c]ivil money penalties," and we have previously characterized "disgorgement" as a civil remedy. 15 U.S.C. § 78u(d)(3); *see Contorinis*, 743 F.3d at 306 ("Disgorgement ... is a civil remedy ... preventing unjust enrichment.").

Second, Ahmed does not provide "the clearest proof" that disgorgement under § 78u(d)(7) is "so punitive either in purpose or effect" as to "transform what has been denominated a civil remedy into a criminal penalty." *Smith*, 538 U.S. at 92, 123 S.Ct. 1140 (cleaned up). Ahmed argues that disgorgement is in practice a criminal penalty because its " 'primary purpose ... is to deter violations of the securities laws,' which is 'inherently punitive' " according to *Kokesh*. Appellant's Br. at 36 (quoting *Kokesh*, 137 S. Ct. at 1643). Ahmed also contends the NDAA is punitive because it has a longer limitations period for violations committed with scienter than for those without.

But Ahmed misreads *Kokesh*. In *Liu*, the Supreme Court recognized that *Kokesh* "expressly declined to pass on the question" of whether "disgorgement is *necessarily* a penalty, and thus not the kind of relief available at equity." *Liu*, 140 S. Ct. at 1946 (emphasis added). The disgorgement award in *Kokesh* was deemed a "penalty" because it "exceed[ed] the bounds of traditional equitable principles" in awarding disgorgement "as a consequence of violating public laws" and to deter the wrongdoer, not to compensate victims. *Id.* at 1941, 1946. But *Kokesh* "ha[d] no bearing on the SEC's ability to conform future requests for a defendant's profits to the limits outlined in common-law cases awarding a wrongdoer's net gains." *Id.* at 1946. In other words, *Liu* approved disgorgement as long as the award conforms to traditional equitable limitations—*i.e.*, "restoring the status quo and ordering the return of that which rightfully belongs to the purchaser or tenant." *Tull v. United States*, 481 U.S. 412, 424, 107 S.Ct. 1831, 95 L.Ed.2d 365 (1987) (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 402, 66 S.Ct. 1086, 90 L.Ed. 1332 (1946)).

Moreover, the longer limitations period for violations committed with scienter does not render disgorgement punitive. The more plausible inference is a nonpunitive one—*i.e.*, scienter is an element of fraud, which may be harder to detect and investigate because fraud is usually committed with deception. *Cf. Merck & Co., Inc. v. Reynolds*, 559 U.S. 633, 644, 130 S.Ct. 1784, 176 L.Ed.2d 582 (2010) ("[I]n the case of fraud, ... a defendant's deceptive conduct may prevent a plaintiff from even *knowing* that he or she has been defrauded."). We thus hold that the district court's application of the NDAA did not violate the Ex Post Facto Clause.[10]

10 Our decision to vacate and remand the actual-gains award, *see infra* Section II.C, does not bear on our Ex Post Facto Clause analysis. The district court did not increase the actual-gains award following the NDAA nor do Defendants raise a related Ex Post Facto Clause challenge.

* * *

In sum, we find no abuse of discretion in the district court's calculation of disgorgement or error in its application of the NDAA.

C. Calculation of Interest and Actual Gains

We affirm the district court's award of prejudgment interest but vacate and remand the award of "actual gains" because it is broader than equity permits.[11]

11 The parties disagree about the calculation of post-judgment interest. In a December 2, 2022 order, the district court took a different approach from what either party argues here. Ahmed appealed from this order, and the appeal was consolidated with other appeals from liquidation, all of which were held in abeyance pending this appeal. As explained *infra*, those appeals are dismissed as moot.

***403** 1. *Legal Standard*

[35] **[36]** The district court's prejudgment-interest and actual-gains awards were incident to disgorgement, so we consider whether they "fall[ ] into those categories of relief that were *typically* available in equity." *Liu*, 140 S. Ct. at 1942 (cleaned up). One such category of relief is "supplemental enrichment," which encompasses the opportunity cost or time value of money lost by victims, including "interest, rent, and other measures of use value, proceeds, and consequential gains" on ill-gotten assets. 2 Restatement (Third) of Restitution and Unjust Enrichment ("Restatement") § 53(1) & cmt. a (Am. L. Inst. 2011); *see* 1 Dan B. Dobbs, Law of Remedies: Damages–Equity–Restitution § 3.6(2), at 342-43 (2d ed. 1993) ("When the defendant is under a duty to pay the plaintiff as damages or otherwise, and during the period of nonpayment the defendant has a legally recognized benefit from use of the money retained, he is under an obligation to make restitution of that benefit to the plaintiff, whether the benefit is measured in profits or interest or some other form of use value."). Supplemental enrichment may thus reflect passive gains on ill-gotten funds, without the direct manipulation of a fraudster. We review a district court's "choice of remedies" for abuse of discretion. *SEC v. Frohling*, 851 F.3d 132, 139 (2d Cir. 2016).

2. *Prejudgment Interest*

The district court did not abuse its discretion by awarding prejudgment interest at the IRS underpayment rate for the period before the asset freeze. The Relief Defendants argue that prejudgment interest was inappropriate because they did not act wrongfully or know of Ahmed's wrongful actions and, even if appropriate, the IRS underpayment rate was punitive and thus contrary to traditional equitable principles. The SEC counters that the Relief Defendants' alleged good faith is irrelevant to prejudgment interest on *Ahmed*'s disgorgement obligation. Moreover, the Relief Defendants present no evidence that the IRS underpayment rate would overcompensate Ahmed's victims and thus be punitive. We agree with the SEC.

[37] **[38]** "The decision whether to grant prejudgment interest and the rate used if such interest is granted are matters confided to the district court's broad discretion, and will not be overturned on appeal absent an abuse of that discretion." *Endico Potatoes, Inc. v. CIT Grp./Factoring, Inc.*, 67 F.3d 1063, 1071-72 (2d Cir. 1995) (cleaned up). In assessing prejudgment-interest awards, a court should consider "(i) the need to fully compensate the wronged party for actual damages suffered, (ii) considerations of fairness and the relative equities of the award, (iii) the remedial purpose of the statute involved, and/or (iv) such other general principles as are deemed relevant by the court." *Wickham Contracting Co. v. Loc. Union No. 3, Int'l Bhd. of Elec. Workers, AFL-CIO*, 955 F.2d 831, 834 (2d Cir. 1992).

[39] The district court did not abuse its discretion by awarding prejudgment interest at the IRS underpayment rate. First, the good faith of the Relief Defendants is immaterial because a prejudgment award concerns the amount that Ahmed, the primary defendant, must disgorge. *Cf. Morales v. Freund*, 163 F.3d 763, 767 (2d Cir. 1999) (upholding the decision not to award ***404** prejudgment interest when the "district court suggested that the defendants, though liable, might well have acted in good faith"). *See generally CFTC v. Walsh*, 618 F.3d 218, 225 (2d Cir. 2010) ("A relief defendant is a person who holds the subject matter of the litigation in a subordinate or possessory capacity ... [and] may be joined in a securities enforcement action to aid the recovery of relief." (cleaned up)). The district court found that Ahmed committed securities fraud, so there is no question that he lacked good faith. Even though, as explained *infra*, relief-defendant liability may be inappropriate as against a particular asset, that does not bear on the propriety or size of prejudgment interest against the primary defendant. *See SEC v. Miller*, 808

F.3d 623, 635 (2d Cir. 2015) ("Equitable relief against a third-party non-wrongdoer may be entered where such an individual (1) has received ill-gotten funds; and (2) does not have a legitimate claim to those funds." (cleaned up)).

[40] **[41]** Second, the district court did not abuse its discretion by awarding prejudgment interest at the IRS underpayment rate. That rate "reflects what it would have cost to borrow the money from the government and therefore reasonably approximates one of the benefits the defendant derived from its fraud." *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1476 (2d Cir. 1996) (affirming use of the IRS underpayment rate). This rate thus reflects "use value," or unearned interest that the rightful owner of the funds could have received but for the fraud. In *First Jersey*, we squarely rejected the argument that the district court should have applied the one-year treasury-bill rate—*i.e.*, "the rate at which one lends money to the government rather than borrows money from it"—because "defendants have had the use of the money." *Id.* at 1476-77. Here, Ahmed held the ill-gotten gains before the asset freeze, so the IRS underpayment rate was appropriate.[12] We thus affirm the district court's award of prejudgment interest.

12 The Relief Defendants have not put forth any evidence that the investment return from the Oak funds was less than the IRS underpayment rate. Their concerns about overcompensation are thus unfounded or, at the very least, premature before distribution. *See* 2 Restatement § 53(1) ("[Supplemental] [e]nrichment ... may be presumed in the case of a recipient who is enriched by misconduct.").

3. *Actual Gains*

We vacate and remand the district court's award of actual gains because it failed to account for traditional equitable limitations. The parties dispute the proper equity analog for actual gains. On one hand, the Relief Defendants argue that we should look to constructive trust, which requires that gains come from assets traceable to the fraud. On the other hand, the SEC argues that the proper equity analog is "accounting" or "accounting for profits," forms of restitution by money judgment.

Both constructive trust and accounting may be appropriate analogs for a primary disgorgement award, but neither is helpful here. Our review is limited to the scope of actual gains on disgorged assets—*i.e.*, "supplemental or collateral benefits derived by the recipient from an initial transaction with the claimant." 2 Restatement § 53 cmt. a; *see* 1 Dobbs, Law of Remedies, *supra* at 31, § 4.5(3), at 637 ("[I]f a consequential benefit measure is justified, it need not be pursued under either a trust or an accounting theory.").

[42] The most appropriate equity analog for the actual-gains award here appears to be "consequential gains." Consequential ***405** gains "result from a profitable investment, use, or other disposition of the [plaintiff's] property, distinct from the transaction by which the defendant was originally enriched." 2 Restatement § 53 cmt. d; *see also* 1 Dobbs, Law of Remedies, *supra* at 31, § 4.5(3), at 637 ("In the case of restitution, courts can take the measure of *consequential benefits*, not the value of the thing itself but the value it produces in the hands of defendant." (emphasis in original)).

[43] **[44]** **[45]** **[46]** One equitable limitation on consequential gains is that a "conscious wrongdoer" is liable for "consequential gains that are not unduly remote." 2 Restatement § 53(3). As the Restatement commentary suggests, "[t]he object of the disgorgement remedy—to eliminate the possibility of profit from conscious wrongdoing"—is measured by the "net increase in the assets of the wrongdoer, to the extent that this increase is *attributable* to the underlying wrong." *Id.* § 51 cmt. e (emphasis added). And treatises confirm:

> Even the willful wrongdoer should not be made to give up that which is his own; the principle is disgorgement, not plunder. ... [S]ome apportionment must be made between those profits attributable to the plaintiff's property and those earned by the defendant's efforts and investment, limiting the plaintiff to the profits *fairly attributable to his share*.

1 Dobbs, Law of Remedies, *supra* at 31, § 4.5(3), at 642 (emphasis added). So consequential gains on assets subject to disgorgement must not be unduly remote from the fraud.[13]

13 The Restatement provides "scant guidance on how to determine wealth legally attributable to a wrong for purposes of disgorgement" and remoteness. Mark P. Gergen, *Causation in Disgorgement*, 92 B.U. L. Rev. 827, 827 (2012); *see also* George E. Palmer, Law of Restitution § 2.13 (3d ed. 2023) (noting a "recurring problem[ ] in the law of restitution" is calculating "the defendant's gain [that] is

the product not solely of the plaintiff's interest but also of contributions made by the defendant"). But several factors may guide courts awarding consequential gains, including "general considerations of fairness, ... the nature of the defendant's wrong, the relative extent of his contribution, and the feasibility of separating [gains] from the contribution traceable to the plaintiff's interest." Palmer, Law of Restitution, *supra*, § 2.13; *see* 1 Dobbs, Law of Remedies, *supra* at 31, § 4.5(3), at 646 (providing factors governing "[r]ecovery of the defendant's consequential gains").

[47] Here, the district court did not consider whether consequential gains on frozen assets were unduly remote from Ahmed's fraud. Its September 6, 2018 ruling simply awarded "actual returns on the frozen assets" without elaboration or limitation based on Ahmed's profitable uses of the frozen assets. Special App'x at SPA-106.[14] And its December 14, 2018 ruling, which sought to clarify the previous ruling, again imposed no limitation on actual gains and instead ordered disgorgement of "any actual interest accrued or gains earned on the frozen assets used to satisfy that disgorgement amount." *Id.* at SPA-151. Indeed, at oral argument, the SEC conceded that these 2018 orders failed to address any equitable limitation on actual gains. Moreover, the district court's September 4, ***406** 2019 ruling on Ahmed's motion to alter the judgment merely clarified that (1) "interest or gains are owed only on the frozen assets used to satisfy the disgorgement amount"; and (2) "interest or gains should be calculated by determining the actual interest accrued or gains earned and not by using the checking account interest rate." *Id.* at SPA-207 (cleaned up). After this Court remanded for the district court to recalculate Ahmed's disgorgement obligation under the NDAA, the district court stated it would award "any interest or gains accrued on disgorged frozen assets from the date of the [district court's] freeze order," again without restriction. *Id.* at SPA-251. The district court should have ensured that consequential gains on frozen assets were not unduly remote from Ahmed's wrongdoing or, in other words, were attributable to the fraud.

14 District courts have discretion in awarding supplemental enrichment, which could include "actual returns on the frozen assets." Special App'x at SPA-106. We have previously limited the availability of prejudgment interest during the period of an asset freeze when the defendant has "been denied the use of those assets." *SEC v. Razmilovic*, 738 F.3d 14, 36 (2d Cir. 2013). But it may be appropriate for a district court to award an alternative measure of supplemental enrichment, such as a fixed interest rate that approximates "fair compensation to the person wronged" within the equitable limits set forth in *Liu*. 140 S. Ct. at 1943.

We disagree with the SEC's argument that the district court's award of actual gains is authorized by *SEC v. Razmilovic*, 738 F.3d 14 (2d Cir. 2013). In *Razmilovic*, we held that prejudgment interest was inappropriate during the period of an asset freeze because "the defendant has already, for that period, been denied the use of those assets." *Id.* at 36. In passing, we also noted, "[i]n such a case, after a final order of disgorgement, the funds previously frozen would presumably be turned over to the government in complete or partial satisfaction of the disgorgement order, along with any interest that has accrued on them during the freeze period." *Id.* We do not read *Razmilovic* to give the district court blanket permission to award actual gains without limitations. Rather, under *Liu*, any such award must be consistent with equity, and the use of the word "presumably" in *Razmilovic* suggests that its discussion of supplemental enrichment (*i.e.*, "interest that has accrued") was *dicta*. *Id.*

The Relief Defendants argue that our decision in *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082 (2d Cir. 1972), bars the award of actual gains. This, too, is inapposite. The district court in *Manor Nursing* ordered disgorgement of "proceeds received in connection" with the defendants' fraud and "profits and income earned on such proceeds." *Id.* at 1104 (emphasis omitted). We affirmed disgorgement of "proceeds" as "a proper exercise of the district court's equity powers" but vacated the district court's award "of profits and income earned on the proceeds" as "a penalty assessment." *Id.* We reasoned that an award of "profits" would "arbitrarily requir[e] those [defendants] who invested wisely to refund substantially more than other [defendants]." *Id.* at 1104-05. The "only plausible justification" for disgorgement of "profits and income" was "the deterrent force," but we found the district court's orders of injunctive relief and disgorgement of "proceeds" were "sufficient deterrence to further violations" of the federal securities laws. *Id.* at 1104. Instead of "profits and income," we ordered "interest [on the proceeds] at the New York legal rate from the date [defendants] received the proceeds." *Id.* at 1105.

[48] **[49]** But any suggestion in *Manor Nursing* that consequential gains are generally impermissible is in tension with *Liu*. Under *Liu*, if supplemental enrichment is consistent with traditional principles of equity, it is not a "penalty." Supplemental enrichment is governed by restitutionary principles—*i.e.*, "restor[ing] the status quo," *Liu*, 140 S. Ct. at 1943 (internal quotation marks omitted)—not deterrence of "further violations" of the securities laws, *Manor Nursing*, 458 F.2d at 1104. Moreover, district courts retain broad discretion as to the appropriate measure of supplemental enrichment, whether it is a form of profits

or interest. *See, e.g.*, 1 ***407** Dobbs, Law of Remedies, *supra* at 31, § 3.6(2), at 343 ("The profits of the fiduciary in this [disgorgement] example represent one measure of use value of the money. It is capable of earning interest and it is capable of earning profits. In this kind of case the plaintiff is entitled to the profits measure if he prefers.").

We thus remand for the district court to reassess actual gains in light of *Liu*. On remand, the district court retains discretion over the appropriate measure of supplemental enrichment. *Liu* offers general guideposts for equitable relief: namely, wrongdoers should (1) be deprived of their net profits from unlawful activity; and (2) "not be punished by paying more than a fair compensation to the person wronged." 140 S. Ct. at 1942-43 (cleaned up). If the district court reimposes an actual-gains award on disgorged assets, it should ensure that consequential gains on the frozen assets are not "unduly remote." *See supra* note 13. The district court may also elect a different measure of supplemental enrichment consistent with "fair compensation," such as a fixed-interest rate for the period of the asset freeze.[15]

15 The parties dispute the district court's method of calculating actual gains, but we decline to reach this issue given our vacatur of the actual-gains award.

D. Nominee Doctrine

Finally, the district court's analysis in support of its conclusion that the Relief Defendants are merely nominal owners of all the frozen assets held in their names was inadequate. The Relief Defendants argue that the district court should have applied an asset-by-asset approach to the nominee theory and the SEC failed to satisfy its burden of proving that the Relief Defendants were mere nominees of Ahmed as to each asset when they held legal title to, controlled, and received benefits from those assets. The SEC argues that the district court correctly characterized the "nominee" doctrine, did not shift the burden of persuasion to the Relief Defendants, and could not have applied an asset-by-asset approach because the Relief Defendants failed to meet their burden to produce evidence of their legitimate ownership of each of the disputed assets. Furthermore, if the Court remands, the SEC seeks permission to pursue alternative theories of recovery, including under *Cavanagh I*, 155 F.3d 129.

1. *Legal Standard*

[50] **[51]** Equitable limits on disgorgement differ between assets held by the primary wrongdoer (*i.e.*, Ahmed) and those held by third-party non-wrongdoers (*i.e.*, Relief Defendants). *See Miller*, 808 F.3d at 635. As to primary defendants, "[t]he amount of disgorgement ordered need only be a reasonable approximation of profits causally connected to the violation." *Razmilovic*, 738 F.3d at 31 (cleaned up). District courts need not "apply equitable tracing rules to identify specific funds in the defendant's possession that are subject to return." *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 373 (2d Cir. 2011); *see, e.g.*, *Contorinis*, 743 F.3d at 303 (explaining, in the context of an insider-trading violation, "the insider would unquestionably be liable to disgorge the profit ... whether the insider trader has put his profits into a bank account, dissipated them on transient pleasures, or given them away to others"). So the district court is not required to "trace" ill-gotten gains to specific assets in Ahmed's possession —any of his own assets may be liquidated to satisfy his disgorgement obligation.[16]

16 Since *Liu*, this Court has affirmed the lack of a tracing requirement as to primary-defendant disgorgement. *See, e.g.*, *SEC v. de Maison*, No. 18-2564, 2021 WL 5936385, at *2 (2d Cir. Dec. 16, 2021).

***408** **[52]** **[53]** **[54]** For relief defendants, however, equity imposes different rules. "A court of equity will wrest property fraudulently acquired, not only from the perpetrator of the fraud, but ... from his children and his children's children, or, as elsewhere said, from any persons amongst whom he may have parceled out the fruits of his fraud." 3 John Norton Pomeroy, Equity Jurisprudence § 918, at 601 (5th ed. 1994) (cleaned up). But third parties, like the Relief Defendants, have a bona fide purchase defense according to which "[a] purchaser for value and without notice acquires the legal interest that the grantor holds and purports to convey, free of equitable interests that a restitution claimant might have asserted against the property in the hands of the grantor." 2 Restatement § 66; *see also id.* § 58(2) ("A claimant entitled to restitution from property or its traceable product may assert the same rights against any subsequent transferee who is not a bona fide purchaser ... or bona fide payee.").

A bona fide purchase defense is inherently asset specific, requiring a court to determine whether a third party (1) gave value in exchange for an asset in particular and (2) lacked notice as to that asset's true provenance.

In *Cavanagh I*, we recognized third-party liability in a securities-enforcement action when a relief defendant "(1) has received ill-gotten funds; and (2) does not have a legitimate claim to those funds." 155 F.3d at 136. Although *Cavanagh I* was decided in the asset-freeze context, it is based on the same background principles of equity, including the bona fide purchase rule. *See* Palmer, Law of Restitution, *supra* at 36 n.13, § 19.7 ("Courts are generally agreed that an innocent person who obtains a benefit through the wrongful act of a third person will be required to make restitution to the one at whose expense the benefit was obtained, unless, in addition to his innocence, the recipient is protected because he gave value."). So relief-defendant liability under *Cavanagh I* applies to disgorgement.[17]

17 Several sister circuits also have continued to recognize relief-defendant liability after *Liu*. *See, e.g.*, *SEC v. Berkeley Healthcare Dynamics, LLC*, No. 20-16754, 2022 WL 42807, at *2 (9th Cir. Jan. 5, 2022); *SEC v. Camarco*, No. 19-1486, 2021 WL 5985058, at *13-17 (10th Cir. Dec. 16, 2021).

[55] **[56]** **[57]** **[58]** **[59]** **[60]** **[61]** **[62]** **[63]** But equity also recognizes a third way: the so-called "nominee" theory. A "nominee" holds bare legal title to an asset but is not its true equitable owner. Such an asset may be disgorged to satisfy a judgment against a third party deemed to be the asset's true equitable owner.[18] This doctrine reflects the principle that "equity looks to the intent, rather than to the form," and is thus "able to treat that as done which in good conscience ought to be done." 2 Pomeroy, Equity Jurisprudence, *supra* at 41, §§ 363, 378, at 8, 41 (emphasis omitted). "Equity's advantage in fashioning restitutionary remedies was ... sidestepping title problems .... to act against the person rather than against the property." 1 Dobbs, Law of Remedies, *supra* at 31, § 4.3(1), at 587. The principle undergirding the nominee theory has been widely applied. *See, e.g.*, *Nat'l Bank v. Case*, 99 U.S. 628, 632, 25 L.Ed. 448 (1878) ("A transfer for the mere purpose of avoiding his liability to the company or its creditors ***409** is fraudulent and void, and he remains still liable. ... [I]f, in fact, the transferee is a mere tool or nominee of the transferrer, so that, as between themselves, there has been no real transfer, ... the transfer will be held for nought." (cleaned up)); *Higgins v. Smith*, 308 U.S. 473, 475, 60 S.Ct. 355, 84 L.Ed. 406 (1940) ("[T]he jury was instructed to find whether these sales by the taxpayer ... were actual transfers of property ... or whether they were to be regarded as simply 'a transfer by Mr. Smith's left hand, being his individual hand, into his right hand, being his corporate hand, so that in truth and fact there was no transfer at all.' "). We thus agree with the district court that the nominee theory, as a reflection of background equitable principles, may be used to determine the owner of an asset for disgorgement purposes. If a relief defendant is deemed a mere nominal owner of an asset that is equitably owned by the primary defendant, the equitable rules governing primary-defendant disgorgement apply. Like the bona fide purchase defense, the nominee doctrine is necessarily an asset-specific inquiry. The inquiry turns on a third party's behavior toward a *particular* asset, such as whether the third party controlled, benefitted from, and/or transferred a particular asset held in a nominee's name. We review a district court's exercise of equitable power to fashion a disgorgement remedy for abuse of discretion. *Frohling*, 851 F.3d at 139.

18 Relief Defendants argue that state law governs the "nominee" doctrine. We disagree. Federal courts are courts of law and equity, *see* U.S. Const. art. III, § 2, cl. 1, and to deduce equitable limits, we may look to the practices of the state and federal courts and "the ordinary principles and practice of courts of chancery." *Liu*, 140 S. Ct. at 1950 (cleaned up).

2. *Application*

[64] **[65]** The district court's application of the nominee doctrine was inadequate as to most of the assets in question because it failed to determine whether the SEC proved that these particular assets (or groups of similar assets) were held by the Relief Defendants as mere nominees of Ahmed. The district court invoked a six-factor nominee test but did not apply it on an asset-by-asset basis. Instead, it deemed the Relief Defendants nominal owners of a large swathe of assets without finding that Ahmed is in fact the equitable owner. This erroneously shifted the burden to the Relief Defendants to show that Ahmed is *not* the equitable owner of assets to which the Relief Defendants hold legal title.[19] *See* Dan B. Dobbs & Caprice L. Roberts, Law of Remedies: Damages–Equity–Restitution § 4.4(3), at 446 (3d ed. 2018) ("The law of unjust enrichment places the burden of production on the party seeking disgorgement.").

19 We note, however, that relief defendants carry the burden of proof with respect to affirmative defenses such as bona fide purchase. *See CFTC v. Kimberlynn Creek Ranch, Inc.*, 276 F.3d 187, 192 n.5 (4th Cir. 2002). We also note that courts in civil cases can draw adverse inferences against relief defendants should they invoke their Fifth Amendment privilege not to testify. *See SEC v. Colello*, 139 F.3d 674, 677-78 (9th Cir. 1998).

[66] Specifically, the district court's analysis regarding the Iftikar A. Ahmed Family Trust, MetLife Policy (which was owned by the Iftikar A. Ahmed Family Trust), and Fidelity x7540 account was sufficient because the district court weighed the SEC's evidence and considered the Relief Defendants' counter-evidence as to each asset and made findings on the record. But as to other assets, the district court's analysis was insufficient. For many of the disputed assets, the district court simply rejected the Relief Defendants' request for an asset-by-asset approach by noting that the Relief Defendants "made this same argument before the Second Circuit and it was soundly rejected." Special App'x at SPA-110 (citing *I-Cubed*, 664 F. App'x at 56-57). But *I-Cubed* concerned the asset freeze, which required "a lesser showing than is necessary for other forms of equitable relief," ***410** like disgorgement. *I-Cubed*, 664 F. App'x at 55. Moreover, for certain assets, such as the contents of the safety deposit box and the Ahmeds' two Park Avenue apartments, the district court made findings only at the preliminary-injunction stage. And the district court was silent as to other assets, such as Shalini Ahmed's earrings and designer handbags, but it nevertheless authorized disgorgement of those assets.

As a result, the district court erroneously shifted the burden to the Relief Defendants to present evidence that they were the true owners of these assets. But the burden remained with the SEC to prove that Ahmed was the true owner of each asset (or group of similar assets), and the district court should have made specific findings accordingly. Furthermore, the district court discussed Ahmed's invocation of his Fifth Amendment right against self-incrimination and Shalini Ahmed's invocation of her marital privilege but failed to discuss what, if any, adverse inference should be drawn.

So, with the exception of the district court's findings that Ahmed is the equitable owner of the Iftikar A. Ahmed Family Trust, MetLife Policy, and Fidelity x7540 account, we vacate and remand the district court's disgorgement order as to the Relief Defendants' assets. On remand, the SEC, as the party seeking disgorgement, must prove that the Relief Defendants are nominees for each asset or class of assets.[20] If the district court finds that an asset is nominally owned by one of the Relief Defendants (and actually owned by Ahmed), it may be disgorged. If the district court finds that an asset is not nominally owned by one of the Relief Defendants, then the district court may consider whether an alternative theory of relief-defendant liability permits disgorgement of the asset. For example, the district court may apply *Cavanagh I* liability or a joint-ownership theory.[21] Moreover, consistent with the burden of proof, the district court should state on the record what, if any, adverse inferences it draws from the Relief Defendants' failure to testify if the SEC offers that evidence.

20 We agree with the Relief Defendants' suggestion at argument that "in some cases assets can be grouped if the same analysis applies to multiple assets" or "[c]lasses of assets." Oral Arg. Tr. at 12-13.

21 The parties dispute whether the district court's joint-ownership analysis was *dicta* or an alternative holding. The record is unclear, and the district court is best positioned to clarify on remand.

III. CONCLUSION

We conclude that the district court (1) reasonably excluded Ahmed from parts of discovery and denied him access to frozen funds to hire counsel; (2) accurately calculated disgorgement by approximating the "net profits" of Ahmed's fraud; and (3) properly gave retroactive effect to the NDAA's disgorgement amendments. But applying traditional principles of equity under *Liu*, we also conclude that (4) the district court's award of actual gains exceeded equitable limitations by failing to ensure that no unduly remote consequential gains are awarded; and (5) the "nominee" doctrine—though well-established in equity and applicable to disgorgement—must be applied on an asset-by-asset basis. For the foregoing reasons, we affirm in part and vacate and remand in part the district court's judgment.

Our vacatur of the actual-gains award and application of the nominee doctrine affects the scope of the district court's liquidation orders. In a separate order, we thus *sua sponte* dismiss as moot Defendants' appeals from those orders, 22-135, ***411** 22-184, 22-3077, 22-3148. We also deny as moot Relief Defendants' motions for a stay of liquidation, and all stays are vacated.

All Citations

72 F.4th 379, Fed. Sec. L. Rep. P 101,626

End of Document

ATTACHMENT B

2023 WL 3645205
Only the Westlaw citation is currently available.
United States District Court, S.D. New York.

SECURITIES AND EXCHANGE COMMISSION, Plaintiff,

v.

James David O'BRIEN, Defendant.

21cv9575 (DLC)

|

Signed May 25, 2023

Synopsis

Background: Securities and Exchange Commission (SEC) brought securities fraud action against securities trader, alleging that he engaged in ongoing market manipulation scheme involving coordinated trading events, in violation of the Securities Act's antifraud provision, § 10(b), Rule 10b-5, and Securities Exchange Act's section governing manipulation of security prices. After the parties reached a partial settlement that resolved non-monetary relief sought in the case and consent judgment was entered, SEC filed motion for monetary relief in the form of disgorgement, prejudgment interest, and civil penalties.

Holdings: The District Court, Denise L. Cote, Senior District Judge, held that:

[1] trader was liable for market manipulation;

[2] disgorgement of securities trader's ill-gotten profits in amount of $5,197,322 was appropriate;

[3] award of prejudgment interest in amount of $367,291.36 was appropriate;

[4] disbursement of disgorgement award to the Treasury, rather than wronged investors, was appropriate; and

[5] civil penalty in amount of $10,315,065 was warranted.

Motion granted.

West Headnotes (26)

[1] Securities Regulation Manipulative, Deceptive or Fraudulent Conduct

Violation of § 10(b) and Rule 10b-5 may be premised on a defendant's use of a fraudulent device, with scienter, in connection with the purchase or sale of securities. Securities Exchange Act of 1934 § 10, 15 U.S.C.A. § 78j(b); 17 C.F.R. § 240.10b-5.

[2] **Securities Regulation** Fraud on the market; price manipulation

Term "manipulative," in context of claim for market manipulation, in violation of § 10(b) and Rule 10b-5, refers generally to practices, such as wash sales, matched orders, or rigged prices, that are intended to mislead investors by artificially affecting market activity, and connotes intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting price of securities. Securities Exchange Act of 1934 § 10, 15 U.S.C.A. § 78j(b).

[3] **Securities Regulation** Fraud on the market; price manipulation

Trading that is engineered to stimulate supply or demand and that tricks investors into trading based on mistaken beliefs about market may constitute manipulative activity, in violation of § 10(b) and Rule 10b-5, if alleged manipulator injected inaccurate information into marketplace or created false impression of supply and demand for security for purpose of artificially depressing or inflating price of security. Securities Exchange Act of 1934 § 10, 15 U.S.C.A. § 78j(b); 17 C.F.R. § 240.10b-5.

[4] **Securities Regulation** Fraud on the market; price manipulation

Whether market activity artificially affects a security's price, as will support claim for market manipulation, in violation of § 10(b) and Rule 10b-5, generally depends on whether the transaction or series of transactions sends a false pricing signal to the market or otherwise distorts estimates of the underlying economic value of the securities traded. Securities Exchange Act of 1934 § 10, 15 U.S.C.A. § 78j(b); 17 C.F.R. § 240.10b-5.

[5] **Securities Regulation** Scienter, Intent, Knowledge, Negligence or Recklessness

The scienter required to prove a violation of § 10(b) and Rule 10b-5 may be established through a showing of reckless disregard for the truth, that is, conduct which is highly unreasonable and which represents an extreme departure from the standards of ordinary care. Securities Exchange Act of 1934 § 10, 15 U.S.C.A. § 78j(b); 17 C.F.R. § 240.10b-5.

[6] **Securities Regulation** Scienter, Intent, Knowledge, Negligence or Recklessness

Mere negligence is not a sufficiently culpable state of mind to support a claim for securities fraud or market manipulation in violation of § 10(b) and Rule 10b-5. Securities Exchange Act of 1934 § 10, 15 U.S.C.A. § 78j(b); 17 C.F.R. § 240.10b-5.

[7] **Securities Regulation** Weight and Sufficiency

Proof of scienter under § 10(b) and Rule 10b-5 need not be direct, but may be a matter of inference from circumstantial evidence. Securities Exchange Act of 1934 § 10, 15 U.S.C.A. § 78j(b); 17 C.F.R. § 240.10b-5.

[8] **Securities Regulation** Fraudulent Statements, Omissions or Conduct

Requirements for a violation of anti-fraud provision of Securities Act apply only to a sale of securities but in other respects are the same as Section 10(b) and Rule 10b–5. Securities Act of 1933 § 17, 15 U.S.C.A. § 77q; Securities Exchange Act of 1934 § 10, 15 U.S.C.A. § 78j(b); 17 C.F.R. § 240.10b-5.

[9] **Securities Regulation** Fraud on the market; price manipulation

Securities Exchange Act section prohibiting manipulation of security prices does not proscribe all market transactions that raise or lower the price of a security; rather, its purpose is to outlaw every device used to persuade the public that activity in a security is the reflection of a genuine demand instead of a mirage. Securities Exchange Act of 1934 § 9, 15 U.S.C.A. § 78i(a)(2).

[10] **Securities Regulation** Scienter, Intent, Knowledge, Negligence or Recklessness

Proof of a violation of Securities Exchange Act section prohibiting manipulation of security prices requires evidence of manipulative motive and willfulness, which are normally inferred from the circumstances of the case. Securities Exchange Act of 1934 § 9, 15 U.S.C.A. § 78i(a)(2).

[11] **Securities Regulation** Fraud on the market; price manipulation

Securities trader was liable for market manipulation, in violation of the Securities Act's antifraud provision, § 10(b), Rule 10b-5, and Securities Exchange Act's section governing manipulation of security prices; securities trader engaged in an ongoing manipulative scheme to inflate and decrease artificially the prices of securities through roughly 18,000 coordinated trading events, misleadingly simulated buy or sell interest in various securities, which impacted the price of those securities, and intended to induce other investors to purchase or sell securities at prices that had been artificially adjusted by his activity. Securities Exchange Act of 1934 §§ 9, 10, 15 U.S.C.A. §§ 78i(a)(2), 78j(b); Securities Act of 1933 § 17, 15 U.S.C.A. § 77q; 17 C.F.R. § 240.10b-5.

[12] **Securities Regulation** Scienter, Intent, Knowledge, Negligence or Recklessness

Securities trader who engaged in roughly 18,000 coordinated trading events acted with the intent to defraud and with a manipulative motive, and thus was liable for market manipulation, in violation of the Securities Act's antifraud provision, § 10(b), Rule 10b-5, and Securities Exchange Act's section governing manipulation of security prices; securities trader was warned multiple times by brokerage firms that his activity was suspicious and could constitute a serious violation of securities laws, when multiple firms closed trader's accounts after reviewing his activity, he shifted his coordinated trading to other accounts at other firms, and trader continued to engage in the same manipulative trading behavior even after SEC's investigation of him began. Securities Exchange Act of 1934 §§ 9, 10, 15 U.S.C.A. §§ 78i(a)(2), 78j(b); Securities Act of 1933 § 17, 15 U.S.C.A. § 77q; 17 C.F.R. § 240.10b-5.

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

Once the district court has found federal securities law violations, it has broad equitable power to fashion appropriate remedies, including ordering that culpable defendants disgorge their profits.

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

Disgorgement is a remedy in a Securities and Exchange Commission (SEC) civil enforcement action tethered to a wrongdoer's net unlawful profits. Securities Exchange Act of 1934 § 21, 15 U.S.C.A. § 78u(d)(7).

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

The amount of disgorgement ordered in a Securities and Exchange Commission (SEC) civil enforcement action may not exceed the gains made upon any business or investment, when both the receipts and payments are taken into the account. Securities Exchange Act of 1934 § 21, 15 U.S.C.A. § 78u(d)(7).

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

The district court has broad discretion not only in determining whether or not to order disgorgement in a Securities and Exchange Commission (SEC) civil enforcement action but also in calculating the amount to be disgorged. Securities Exchange Act of 1934 § 21, 15 U.S.C.A. § 78u(d)(7).

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

Under two-step framework for calculating equitable monetary relief or disgorgement in a Securities and Exchange Commission (SEC) civil enforcement action, SEC must first show that its calculations are reasonable approximation of amount of defendant's unjust gains, and then defendant may show that those figures are inaccurate. Securities Exchange Act of 1934 § 21, 15 U.S.C.A. § 78u(d)(7).

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

If the disgorgement amount is generally reasonable, in a Securities and Exchange Commission (SEC) civil enforcement action, any risk of uncertainty about the amount falls on the wrongdoer whose illegal conduct created that uncertainty. Securities Exchange Act of 1934 § 21, 15 U.S.C.A. § 78u(d)(7).

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

Disgorgement of securities trader's ill-gotten profits in amount of $5,197,322 was appropriate upon finding that trader engaged in market manipulation, in violation of the Securities Act's antifraud provision, Securities Exchange Act's section governing manipulation of security prices, § 10(b), and Rule 10b-5, in Securities and Exchange Commission's (SEC) civil enforcement action; SEC showed reasonable approximation of funds to be disgorged that took into account 19,308 coordinate trading events, which resulted in profits of $6,065,680, from which trader's estimated commissions and fees were subtracted, and trader did not provide any data showing SEC's approximation was inaccurate. Securities Exchange Act of 1934 §§ 9, 10, 21, 15 U.S.C.A. §§ 78i(a)(2), 78j(b), 78u(d)(7); Securities Act of 1933 § 17, 15 U.S.C.A. § 77q; 17 C.F.R. § 240.10b-5.

[20] **Interest** Particular cases and issues

Since the primary purpose of disgorgement as a remedy for violation of the securities laws is to deprive violators of their ill-gotten gains, district courts may award prejudgment interest on the disgorgement amount for the period during which a defendant had the use of his illegal profits.

[21] **Interest** Computation of rate in general

In determining whether to award prejudgment interest at a particular rate, a district court should consider (1) the need to fully compensate the wronged party for actual damages suffered, (2) fairness and the relative equities of the award, (3) the remedial purpose of the statute involved, and/or (4) such other general principles as are deemed relevant by the court.

[22] **Interest** Computation of rate in general

Interest Particular cases and issues

Securities trader was liable for prejudgment interest on $5,197,322 award of disgorgement of ill-gotten profits from market manipulation, in violation of the Securities Act's antifraud provision, Securities Exchange Act's section governing manipulation of security prices, § 10(b), and Rule 10b-5, at Internal Revenue Service (IRS) underpayment rate, calculated using the time period during which trader was alleged to have engaged in thousands of coordinated trading events, which amounted to $367,291.36, since trader had use of his ill-gotten gains for several years. Securities Exchange Act of 1934 §§ 9, 10, 21, 15 U.S.C.A. §§ 78i(a)(2), 78j(b), 78u(d)(7); Securities Act of 1933 § 17, 15 U.S.C.A. § 77q; 26 U.S.C.A. § 6621(a)(2); 17 C.F.R. § 240.10b-5.

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

Disbursement of $5,197,322 award of disgorgement of ill-gotten profits from securities trader's market manipulation to the Treasury, rather than wronged investors, was appropriate, in Securities and Exchange Commission's (SEC) civil enforcement action against trader for violation of the Securities Act's antifraud provision, Securities Exchange Act's section governing manipulation of security prices, § 10(b), and Rule 10b-5; trader's scheme involved over 18,000 coordinated trading events, many of which were executed in a matter of seconds, and all of the investors who traded the relevant securities during one of the coordinated trading events and were harmed by trader's activity as a result would be enormously difficult, if not impossible, to identify. Securities Exchange Act of 1934 §§ 9, 10, 21, 15 U.S.C.A. §§ 78i(a)(2), 78j(b), 78u(d)(5), 78u(d)(7); Securities Act of 1933 § 17, 15 U.S.C.A. § 77q; 17 C.F.R. § 240.10b-5.

[24] **Securities Regulation** Relief granted in general

Securities trader's manipulative trading scheme merited a Tier III civil penalty in the amount of $10,315,065, which was the gross amount trader earned for the entire scheme for the period alleged in Securities and Exchange Commission's (SEC) securities fraud complaint; trader's scheme, which lasted multiple years and continued after he was alerted to the SEC investigation, was complex, required careful planning to execute, and consisted of over 18,000 discrete events of coordinated trading, trader acted to conceal the coordinated trading by using multiple accounts at different firms, disregarded the warnings of several brokerage firms, and obfuscated their attempts to understand his trading methods, and trader's scheme caused substantial losses to investors. Securities Act of 1933 §§ 17, 20, 15 U.S.C.A. §§ 77q, 77t(d)(2); Securities Exchange Act of 1934 §§ 9, 10, 21, 15 U.S.C.A. §§ 78i(a)(2), 78j(b), 78u(d)(3); 17 C.F.R. § 240.10b-5.

[25] **Securities Regulation** Relief granted in general

Courts have discretion to determine appropriate amount of civil penalty for violation of securities laws in light of facts and circumstances of the case. Securities Act of 1933 § 20, 15 U.S.C.A. § 77t(d)(2); Securities Exchange Act of 1934 § 21, 15 U.S.C.A. § 78u(d)(3).

[26] **Securities Regulation** Relief granted in general

In determining the appropriate amount of a civil penalty to be imposed for securities law violations, courts often consider: (1) the egregiousness of the defendant's conduct; (2) the degree of the defendant's scienter; (3) whether the defendant's conduct created substantial losses or the risk of substantial losses to other persons; (4) whether the defendant's conduct was isolated or recurrent; and (5) whether the penalty should be reduced due to the defendant's

demonstrated current and future financial condition. Securities Exchange Act of 1934 § 21, 15 U.S.C.A. § 78u(d)(3); Securities Act of 1933 § 20, 15 U.S.C.A. § 77t(d)(2).

Attorneys and Law Firms

For plaintiff Securities and Exchange Commission: Bennett Ellenbogen, Paul G. Gizzi, Chevon N. Walker, Richard R. Best, Securities and Exchange Commission, New York Regional Office, 100 Pearl Street, Suite 20-100, New York, NY 10004.

For defendant James David O'Brien: John M. Hanamirian, Esq., Hanamirian Law Firm, 40 E. Main Street, Moorestown, NJ 08057.

OPINION AND ORDER

DENISE COTE, District Judge:

***1** The Securities and Exchange Commission ("SEC") brings this securities fraud action against James David O'Brien, alleging that O'Brien engaged in a multimillion-dollar market manipulation scheme. On February 3, 2023, the parties settled with respect to injunctive relief and stipulated that any claim for monetary relief would be determined by the Court on a motion by the SEC. The SEC filed its motion for monetary relief on March 17. Based on the hearing held on May 19, and for the following reasons, the SEC's motion for monetary relief is largely granted.

Background

Before analyzing the appropriate amount of monetary relief, the background of this case is described. The first section outlines O'Brien's manipulation scheme, as articulated in the complaint.[1] The second section explains the evidence relevant to monetary relief that was submitted in connection with this motion. The third section describes the procedural history in the case.

1 As explained below, the parties agreed that for the purposes of this motion, the factual allegations in the complaint are taken as true, except with respect to the quantum of disgorgement.

I. Allegations in the Complaint

A. O'Brien's Scheme

Between September 17, 2015 and at least October 29, 2020, O'Brien, a securities trader, engaged in an ongoing market manipulation scheme involving what the complaint calls "coordinated trading events." The complaint defines a coordinated trading event as follows:

- Two or more accounts trade and hold positions in the same exchange-traded stock, on the same day, and during the same period of time;
- The event starts when the first account trades and ends when all the involved accounts close out their positions (or when the trading day ends);
- At least one of the accounts behaves as a winner account -- an account that has an average transaction size greater than or equal to 1,000 shares; and

- At least one of the involved accounts behaves as a helper account -- an account that has an average transaction size of less than 500 shares and is held at a different brokerage firm than the winner account.

O'Brien engaged in a manipulative scheme in which he used the helper accounts to affect artificially the price of various stocks to the benefit of the winner accounts. In doing so, O'Brien acted with the intent to induce other market participants to fill orders at the artificially inflated or deflated prices.

According to the complaint, O'Brien executed over 18,000 coordinated trading events in eighteen accounts at fourteen different brokerage firms. For some of these events, O'Brien would start by placing several sell orders for a certain stock in the helper accounts. This would create the false appearance of sell interest in the stock, which would artificially decrease the stock's price. Then, O'Brien would acquire larger positions in the same stock in the winner accounts at the artificially deflated price. Once the winner accounts finished buying the stock, O'Brien often cancelled remaining open helper account sell orders.

***2** For other coordinated trading events, O'Brien began by acquiring a position in a stock in the winner accounts. Then, he would place a series of smaller buy orders for the same stock in the helper accounts to artificially increase the stock price. O'Brien would then liquidate the winner account positions at the inflated price and cancel remaining open buy orders in the helper account.

O'Brien aimed to generate profits for the winner accounts that were greater than the losses in the helper accounts. Through his actions, O'Brien intended to induce market participants to sell to and purchase from the winner accounts at prices that were artificially impacted by the helper accounts.

O'Brien's most active period of coordinated trading events occurred between mid-September 2015 and December 2016. During this time, he engaged in 11,738 coordinated trading events using ten accounts at eight brokerage firms. About 75% of O'Brien's coordinated trading events during this time resulted in net profits. Even deducting the net-unprofitable coordinated trading events, O'Brien still obtained an overall net gain during this period.

O'Brien then reduced his coordinated trading, but he continued executing the events through at least October 2020. From January 2017 to October 2020, he engaged in over 6,300 coordinated trading events using at least nine accounts at seven brokerage firms. Roughly 74% of the events during this time were net profitable, and, even deducting the events that led to net losses, O'Brien still obtained an overall net gain during this period, as well.

B. O'Brien's Interactions with Brokerage Firms and the SEC

O'Brien attempted to hide his coordinated trading activity by executing the winner and helper trades in accounts held at different brokerage firms. Nonetheless, several of the firms O'Brien used for his scheme identified his activity as potentially manipulative trading and sent warnings to him that explained relevant concepts of prohibited manipulation. For example, in October 2015, one firm identified an apparent “wash trade” by O'Brien and explained to him that manipulative trading practices involve any trades that have the purpose of “[c]reating or inducing a false, misleading, or artificial appearance of activity in the security” or “setting a price that does not reflect the true state of the market in the security.” These kinds of warnings also informed O'Brien that manipulative trading practices are serious violations of exchange trading rules that could result in regulatory penalties.

In March 2016, a different firm contacted O'Brien about potential “layering” in his account. The firm explained to O'Brien that layering

> involves the placement of multiple, non-bona fide, limit orders on one side of the market at various price levels ... to create the appearance of a change in the levels of supply and demand, thereby artificially moving the price. An order is then executed on the opposite side of the market at the artificially created price, and the non-bona fide orders are immediately canceled.

The firm stated that layering was a manipulative trading practice.

At least one firm also asked O'Brien directly whether he engaged in coordinated trading. Specifically, in March 2019, a representative of one firm emailed O'Brien as follows:

> [T]rading activity in National General Hlgs (NGHC) on March 20, 20129 [sic] where your account appeared to submit multiple sell orders [in less than a minute] that appeared to contribute to the market quote narrowing from 24.31/24.77 to 24.26/24/34. In addition, we noted your account submitting buy orders over [a period of approximately 30 seconds] that appeared to contribute to the market quote moving from 24.11/24.53 to 24.36/24.49. Please provide a written explanation regarding your investment strategy and rational [sic] for order placement NGHC. Do you coordinate your trading with other accounts or individuals outside of [this firm]?

***3** (Emphasis added.) Roughly three weeks later, O'Brien responded to the email generally, but did not answer whether he coordinated his trading. Thus, the firm representative responded, "Would you please confirm the below question? Do you coordinate your trading with other accounts or individuals outside of [this firm]?" To this, O'Brien responded misleadingly, "I don't coordinate with other individuals .... I mostly trade off of Upgrades or recommendations on CNBC." O'Brien did not mention that he was coordinating trades with other accounts he held at other firms.

The accounts that O'Brien used for coordinated trading events were often closed by brokerage firms. When this happened, O'Brien would open new accounts at other firms in his or his wife's name to continue the coordinated trading scheme. For example, in October 2015, a few weeks after sending O'Brien the warning described above regarding wash trades, the firm closed his account. After the account was closed, O'Brien increased his usage of a different account at a different firm. Then, in the following months, he opened new accounts at two other firms and used those accounts to continue his coordinated trading events.

O'Brien never disclosed his coordinated trading when brokerage firms asked about his trading activity. For example, one firm's compliance department asked the firm's branch manager to contact O'Brien to discuss his trading activity. The firm told the branch manager:

> We'd like you to ask [O'Brien] how he chooses which stocks to trade; i.e., does he go by fundamental analysis, technical analysis, focus on specific sectors/industries, etc.? Also, please ask him if he is using a 3rd party service (aside from what the firm provides) such as a website or automated trading software. As I said on the phone, this is somewhat time sensitive. Hopefully, you are able to get in touch with him and will not have to resort to leaving a message, telling him his internet access will be set to View Only until he returns your call.

The branch manager later reported back saying that O'Brien had told him that he "[l]ooks primarily at momentum stuff, buys when it falls 30/40 cents, likes to try to catch a bounce. Likes to stay in the same stocks he knows. Says he doesn't use software. 'Trades the news'. Not actively scanning." In fact, however, 99% of the gains O'Brien earned in his accounts with that firm were attributable to coordinated trading. That is, rather than just "looking at momentum" and "trying to catch a bounce," O'Brien was creating the momentum and the bounce through coordinated trading events. Roughly two weeks after the communications between this firm and O'Brien, the firm closed his accounts.

Finally, O'Brien continued to engage in coordinated trading even after learning that the SEC was investigating him. The SEC subpoenaed O'Brien in May 2018 relating to his trading activity. He provided a proffer to the SEC and criminal authorities in August 2018. In May 2019, the SEC subpoenaed him a second time to provide testimony. O'Brien refused to appear for testimony, and thus in October 2019, the SEC filed a subpoena enforcement proceeding. He was ordered to testify in December 2019. SEC v. O'Brien, 19 Misc. 468, 2019 WL 7207485, at *4 (S.D.N.Y. Dec. 27, 2019).[2] Despite these ongoing proceedings, O'Brien continued to engage in coordinated trading through at least October 2020.

2 O'Brien appealed the order requiring him to testify. That appeal was denied on January 11, 2021. SEC v. O'Brien, 842 F. App'x 652, 655 (2d Cir. 2021).

II. Evidence Submitted Regarding Calculation of Monetary Relief

A. The SEC's Submissions

***4** In connection with its motion for monetary relief, the SEC submitted several evidentiary materials relevant to calculating monetary relief. Chief among these was an expert report (the "Orlov Report") from SEC Financial Economist Dr. Evgeny Orlov.

In the Orlov Report, Dr. Orlov explains that he analyzed O'Brien's stock trading activity to identify instances of coordinated trading and calculate profits associated with such trading. Dr. Orlov analyzed trade blotter data from 19 brokerage firms.[3] Based on this data, Dr. Orlov concluded that O'Brien engaged in 19,308 coordinated trading events[4] between December 2015 and May 2021.[5]

3 Dr. Orlov originally received data from 22 firms, but, after eliminating the repetitive data, analyzed data from only 19.

4 Although Dr. Orlov opines that the definition of "coordinated trading event" used in the complaint is an appropriate description of the kind of trading activity engaged in by O'Brien, the definition he used in his report is slightly different than that used in the complaint. According to Dr. Orlov, the minor variations resulted in a slightly more conservative analysis because: (1) Dr. Orlov analyzed only coordinated trading events that ended on the same day that they began; and (2) he required coordinated trading events to include at least one instance where (i) the direction of the transactions in the helper account was opposite the direction of the immediately following winner account transactions, and (ii) the winner account transactions did not lag the helper transactions by more than 30 seconds.

5 The time period used in the Orlov Report is slightly longer than that used in the complaint because the trade blotter data analyzed by Dr. Orlov included trade data beyond October 2020. O'Brien testified that he engaged in the same kinds of coordinated trading behavior both before 2015 and after 2020.

The Orlov Report includes a detailed analysis of three specific coordinated trading events. The Orlov Report also includes analysis on the profitability of O'Brien's coordinated trading activity. Dr. Orlov concluded that of the 19,308 events he identified, 14,275 or 73.9% resulted in positive net profits totaling roughly $10.4 million. The remaining events resulted in negative net returns totaling $4.3 million. His activity resulted in an overall net gain of roughly $6,116 million.

Finally, the Orlov Report includes Dr. Orlov's analysis of whether coordinated trading events were unusually profitable for O'Brien relative to his other trading activity. Dr. Orlov found that O'Brien spent $11.28 billion to purchase shares in coordinated trading events from December 2015 to May 2021. During the same period, O'Brien spent $17.533 billion to purchase shares in all of his trading activity, including both coordinated trading and non-coordinated trading. Thus, 64.3% of the overall dollar amount spent to purchase stocks from December 2015 to May 2021 was spent on coordinated trading events.

By contrast, however, Dr. Orlov concluded that profits from coordinated trading events accounted for 95.4% of O'Brien's overall profits during that period. Dr. Orlov arrived at that percentage by comparing O'Brien's overall profits from December 2015 to May 2021 -- $6.413 million -- to his profits from coordinated trading events during the same time -- $6.116 million.

***5** Dr. Orlov also prepared an amended expert report (the "Amended Orlov Report") dated September 16, 2022. In the Amended Orlov Report, Dr. Orlov explained that he analyzed additional trade blotter data from two other brokerage firms that he received after submitting his initial report. He concluded that this data had only a minimal effect on his initial results and therefore none of his opinions in the original report changed. The Amended Orlov Report also provided certain responses to opinions offered by O'Brien's proffered expert, Michael Dorsey. This section of the Amended Orlov Report is primarily relevant to O'Brien's liability and so is not summarized in this Opinion, which addresses the appropriate amount of monetary relief.

In connection with the instant motion, Dr. Orlov submitted a declaration (the "Orlov Declaration"). The Orlov Declaration incorporates his prior two reports and provides additional analysis directed at the relief requested by the SEC in its motion for monetary relief. Specifically, because his reports did not account for trade commissions and fees in the net profit calculations, the Orlov Declaration includes analysis of these factors.

To calculate commissions, Dr. Orlov aggregated the commissions corresponding to coordinated trading events for six (out of eighteen total) brokerage firms that provided information on trade commissions in their blotter data. The commissions from these six firms totaled $162,199. Dr. Orlov then used blotter data from the same firms to estimate the monthly commission rate for each month by dividing the total monthly commissions across the six firms by the number of shares purchased or sold across the six firms in the same month. For the remaining twelve firms without data on commissions, Dr. Orlov multiplied the estimated monthly commission rate by the number of traded shares that were associated with coordinated trading events. Based on this, Dr. Orlov concluded that the total estimated commissions across the twelve brokerage firms that did not submit commission data is $476,539.

To calculate the SEC fees that O'Brien may have paid to firms for sales of securities associated with coordinated trading events in the relevant time, Dr. Orlov used the published historical rates for SEC fees applicable at the time of each event. This calculation yielded $229,620 in fees. Dr. Orlov then aggregated his calculations for the fees, the commissions paid on the six firms that provided commission data, and the estimated commissions from the twelve firms that did not provide commission data. This resulted in a total amount of commissions and fees of $868,358.

After calculating the total commissions and fees, Dr. Orlov calculated the final net profits on coordinate trading events from December 2015 to May 2021. Subtracting $868,358 from $6,111,757, Dr. Orlov determined O'Brien's total net profits to be $5,243,399. This is the disgorgement amount that the SEC seeks.

Finally, because, as explained above, the period originally examined by Dr. Orlov was slightly longer than that identified in the complaint, Dr. Orlov also calculated O'Brien's total net profits from December 2015 to October 2020 to reflect the shorter time frame of the complaint. Dr. Orlov concluded that during this period, O'Brien earned a total net gain on coordinated trading events of $6,065,680. Subtracting the same calculation of $868,358 in commissions and fees[6] would yield a total net profit of $5,197,322.

6 Dr. Orlov did not present a different calculation of commissions and fees for the shorter period.

In addition to the materials from Dr. Orlov, the SEC also submitted a declaration from Stephen Johnson, a supervisory staff accountant at the SEC. Johnson calculated prejudgment interest on the SEC's proposed disgorgement amount of $5,243,399 of $370,547.59. After oral argument, the SEC submitted another declaration from Johnson that calculated prejudgment interest on an award of $6,065,680, which represented O'Brien's net gains during the period alleged in the complaint but did not account for commissions and fees paid by O'Brien. Finally, the SEC submitted a declaration from attorney Bennett Ellenbogen, noting that the SEC had requested that O'Brien return a sworn statement of financial condition ("SFS") if he planned to argue that the Court should consider his financial condition in deciding this motion. The declaration from Ellenbogen explained that O'Brien never provided an SFS.

B. O'Brien's Submissions

***6** O'Brien also submitted evidentiary materials in his opposition to the SEC's motion. These consist primarily of an affidavit and declaration from O'Brien himself. The vast majority of the affidavit and declaration is devoted to O'Brien contending that his activities were not illegal, refuting the complaint's interpretation of O'Brien's trading activity, suggesting that the SEC has conducted a "witch hunt" to find him liable for securities fraud, and arguing that only two trades should be considered in analyzing the appropriate amount of disgorgement. Only a handful of paragraphs are relevant to the calculation of disgorgement. These paragraphs are substantially the same in the declaration and the affidavit and contend the disgorgement should be in the amount of $110,909.03.

In these paragraphs, O'Brien opines that he "should not be ordered to disgorge more than 14.3% of the net profit [he] may have made from September 2015 through October 2020." To arrive at 14.3%, O'Brien first notes that the Orlov Report concluded that 64.3% of the dollar amount O'Brien spent to purchase securities from December 2015 to May 2021 was spent on coordinated trading events. He then contends, "If I wore a blindfold and picked stocks and trades on a random basis, I would have been

correct half of the time without any price discovery." (O'Brien uses the term price discovery to refer to the activity that the SEC terms coordinated trading.) O'Brien thus appears to contend that 14.3% is a proper multiplier by subtracting 50% from 64.3%, although he provides no analysis as to why that is an appropriate calculation.

To arrive at a net profit figure, O'Brien starts by identifying a total short-term capital gain of $4,475,871 on his tax returns from 2015 to 2020. This figure understates his profits from his coordinated trading, however, since those profits would have been reduced by his losses in the remainder of his trading. O'Brien then subtracts from this number the short-term capital gain tax rate of 30%. O'Brien calculates a further reduction for certain specific profits because he contends that trading at one firm, Vanguard, "did not and could not" occur within 30 seconds (as required by Dr. Orlov's conceptualization of coordinated trading). Finally, O'Brien subtracts commissions and fees purportedly calculated using the SEC's method. Notably, O'Brien estimates the commissions and fees based on the full $4,475,871, rather than the adjusted amount after the Vanguard trades and taxes were deducted. After subtracting all of these amounts, O'Brien arrives at a "new net profit amount" of $1,551,175.35.

Then, O'Brien purports to apply the multiplier he calculated earlier to this $1,551,175.35 amount. Almost incomprehensibly, O'Brien states:

> [A]pplying a 50% rate for O'Brien under the theory that he would have been successful in trading at least half of the time without employing any methodology, a disgorgement amount of $110,909.03 ($1,551,175.35 divided by 2 and then multiplied by 14.3%) is the maximum that could be imposed, if any.

Of course, $110,909.03 is not 50% of $1,551,175.35, nor is it 14.3% of that number. Instead, it is 7.15% of $1,551,175.35.

To summarize, to the extent that O'Brien's statements on disgorgement can properly be termed "analysis," that analysis is as follows. Start by assuming (without any support) that in a but-for scenario, O'Brien would have been successful in his trading activity 50% of the time. Then, subtract 50% from 64.3% even though the 64.3% represents not the profits earned on O'Brien's trades in the relevant time, but rather the proportion of funds O'Brien spent on coordinated trading activity. Take that 14.3% and arbitrarily divide it by two to yield 7.15%. Then, apply that 7.15% multiplier to a net profit amount that is determined by using the short-term capital gains on O'Brien's tax returns (again without meaningful explanation for why that is an appropriate reference point) and applying almost $3 million in reductions that are summarily justified. Using this method, O'Brien contends that the maximum permissible disgorgement amount is $110,909.03.

III. Procedural History

***7** The SEC filed this action on November 18, 2021, asserting three claims: (1) violations of §§ 17(a)(1) and (3) of the Securities Act of 1933 (the "Securities Act"), 15 U.S.C. §§ 77q(a)(1), (3); (2) violations of § 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78j(b), and Rules 10b-5(a) and (c) thereunder, 17 C.F.R. §§ 240.10b-5(a), (c); and (3) violations of Exchange Act § 9(a)(2), 15 U.S.C. § 78i(a)(2). O'Brien timely filed an answer to the complaint on February 4, 2022.

On November 3, after discovery, O'Brien filed a motion for summary judgment. The following day, the plaintiff filed a cross motion for summary judgment. On January 6, 2023, both motions were denied, and trial was set to commence on March 13.

On February 3, the parties filed a letter noting that they had reached a partial settlement that would resolve the non-monetary relief sought in the case. The letter included a proposed partial consent judgment (the "Judgment"), the defendant's written consent to that Judgment (the "Consent"), and a stipulation. Also on February 3, the Court entered the Judgment. The Judgment ordered, in pertinent part that

> [u]pon motion of the Commission, the Court shall determine whether it is appropriate to order disgorgement of ill-gotten gains and/or a civil penalty pursuant to Section 20(D) of the Securities Act [15 U.S.C. § 77t(d)] and Section 21(d)(3) of the Exchange Act [15 U.S.C. § 78u(d)(3)] and, if so, the amount(s) of the disgorgement and/or civil penalty. If disgorgement is ordered, Defendant shall pay prejudgment interest thereon, calculated from June 1, 2021, based on the rate of interest used by the Internal Revenue Service for the underpayment of federal income tax as set forth in 26 U.S.C. § 6621(a)(2).

> In connection with the Commission's motion for disgorgement and/or civil penalties, for and at any hearing held on such a motion: (a) Defendant will be precluded from arguing that he did not violate the federal securities laws as alleged in the Complaint; (b) Defendant may not challenge the validity of the Consent or this Judgment; (c) solely for the purposes of such motion, the allegations of the Complaint shall be accepted as and deemed true by the Court except with respect to the quantum of disgorgement, i.e., net profits; and (d) the Court may determine the issues raised in the motion on the basis of affidavits, declarations, excerpts of sworn deposition or investigative testimony, the sworn testimony of the Defendant before the Court (subject to cross-examination by the Plaintiff) and documentary evidence, without regard to the standards for summary judgment contained in Rule 56(c) of the Federal Rules of Civil Procedure.

(Emphases added.)

The Consent provided, inter alia, that the Defendant "waives the entry of findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure" and "waives the right, if any, to a jury trial and to appeal from the entry of the Judgment." In the Consent, the defendant also agreed that he

> (i) will not take any action or make or permit to be made any public statement denying, directly or indirectly, any allegation in the complaint or creating the impression that the complaint is without factual basis; (ii) will not make or permit to be made any public statement to the effect that Defendant does not admit the allegations of the complaint, or that this Consent contains no admission of the allegations, without also stating that the Defendant does not deny the allegations; [and] (iii) upon the filing of this Consent, Defendant hereby withdraws any papers filed in this action to the extent that they deny any allegation in the complaint.

***8** (Emphases added.) The Consent is "incorporated into the Judgement with the same force and effect as if fully set forth therein."

On March 17, the SEC filed a motion for monetary relief in the form of disgorgement, prejudgment interest, and civil penalties. On March 29, the defendant submitted a letter indicating his intent to offer his own testimony. Accordingly, pursuant to this Court's individual practices for non-jury trials, the defendant was ordered to file an affidavit containing his direct testimony and the plaintiff was ordered to indicate, subsequent to the filing of the affidavit, whether it intended to cross examine the defendant.

On April 6, the defendant filed his papers in opposition to the motion for monetary relief, including an affidavit containing his direct testimony. On April 11, the SEC moved to strike almost all of the direct testimony as in violation of the Consent. The Court advised the parties that it intended to enforce the defendant's February 3 Consent, but denied the motion to strike on April 18. That same day, the SEC indicated its intent to cross examine the defendant.

The defendant appeared for cross examination on May 19. After the defendant's testimony, both parties presented oral argument on the motion for monetary relief.

Discussion

I. Disgorgement

A. Liability

O'Brien's liability under the relevant provisions of the securities laws is addressed first. The complaint brings market manipulation claims against O'Brien under §§ 9(a)(2) and 10(b) of the Exchange Act and Rules 10b-5(a) and (c) promulgated thereunder, as well as claims under §§ 17(a)(1) and (3) of the Securities Act.

[1] Section 10(b) of the Exchange Act states:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange --

...

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j(b) (emphasis added). Rule 10b-5, in turn, provides in pertinent part:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

...

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5 (emphases added). A violation of § 10(b) and Rule 10b-5 may be premised on a defendant's use of a fraudulent device, with scienter, in connection with the purchase or sale of securities. SEC v. Pentagon Cap. Mgmt. PLC, 725 F.3d 279, 285 (2d Cir. 2013).

[2] **[3]** **[4]** Section 10(b) prohibits "manipulative acts." Set Cap. LLC v. Credit Suisse Grp. AG, 996 F.3d 64, 76 (2d Cir. 2021) (citation omitted). In the context of the securities laws, the term manipulative

***9** refers generally to practices, such as wash sales, matched orders, or rigged prices, that are intended to mislead investors by artificially affecting market activity, and connotes intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities.

Id. (citation omitted). Trading that is "engineered to stimulate" supply or demand and that tricks investors into trading based on mistaken beliefs about the market may constitute manipulative activity if the alleged manipulator "injected inaccurate information into the marketplace or created a false impression of supply and demand for a security for the purpose of artificially depressing or inflating the price of the security." ATSI Commc'ns, Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 101 (2d Cir. 2007) (citation omitted). Whether activity artificially affects a security's price generally depends on "whether the transaction or series of transactions sends a false pricing signal to the market or otherwise distorts estimates of the underlying economic value of the securities traded." Set Cap. LLC, 996 F.3d at 76 (citation omitted).

[5] **[6]** **[7]** Liability under § 10(b) and Rule 10b-5 also requires proof of scienter, which the Supreme Court has defined as an "intent to deceive, manipulate or defraud" or "knowing or intentional misconduct." Ernst & Ernst v. Hochfelder, 425 U.S. 185, 194 n.12, 197, 96 S.Ct. 1375, 47 L.Ed.2d 668 (1976). The requisite scienter "may be established through a showing of reckless disregard for the truth, that is, conduct which is highly unreasonable and which represents an extreme departure from the standards of ordinary care." SEC v. Sourlis, 851 F.3d 139, 144 (2d Cir. 2016) (citation omitted). Mere negligence, however, is insufficient. SEC v. Obus, 693 F.3d 276, 286 (2d Cir. 2012). Proof of scienter "need not be direct, but may be a matter of inference from circumstantial evidence." Valicenti Advisory Servs., Inc. v. SEC, 198 F.3d 62, 65 (2d Cir. 1999) (citation omitted).

[8] Section 17(a) of the Securities Act is similar to § 10(b) of the Exchange Act and Rule 10b-5. Section 17(a) provides:

It shall be unlawful for any person in the offer or sale of any securities (including security-based swaps) or any security-based swap agreement ... by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly --

(1) to employ any device, scheme, or artifice to defraud; or

...

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

15 U.S.C. § 77q (emphases added). The requirements for a violation of § 17(a) apply only to a sale of securities, but, to the extent relevant here, are otherwise "the same as Section 10(b) and Rule 10b-5." Pentagon Cap. Mgmt. PLC, 725 F.3d at 285.

[9] **[10]** Finally, § 9(a)(2) of the Exchange Act provides:

It shall be unlawful for any person, directly or indirectly, by the use of the mails or any means or instrumentality of interstate commerce, or of any facility of any national securities exchange, or for any member of a national securities exchange --

...

(2) To effect, alone or with 1 or more other persons, a series of transactions in any security registered on a national securities exchange, any security not so registered, or in connection with any security-based swap or security-based swap agreement with respect to such security creating actual or apparent active trading in such security, or raising or depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others.

***10** 15 U.S.C. § 78i(a)(2) (emphases added). Section 9(a)(2) does not proscribe all market transactions that raise or lower the price of a security. Chris-Craft Indus., Inc. v. Piper Aircraft Corp., 480 F.2d 341, 383 (2d Cir. 1973). Rather, its purpose is to "outlaw every device used to persuade the public that activity in a security is the reflection of a genuine demand instead of a mirage." Crane Co. v. Westinghouse Air Brake Co., 419 F.2d 787, 794 (2d Cir. 1969) (citation omitted). Proof of a violation of § 9(a)(2) requires evidence of "manipulative motive and willfulness," which are normally inferred from the circumstances of the case. Id.

[11] Taking the allegations in the complaint as true, the SEC has shown that O'Brien violated §§ 9(a)(2) and 10(b) of the Exchange Act, and Rule 10b-5 thereunder, as well as § 17(a) of the Securities Act. O'Brien engaged in an ongoing manipulative scheme to inflate and decrease artificially the prices of securities through coordinated trading events. Using these events, O'Brien misleadingly simulated buy or sell interest in various securities, which impacted the price of those securities. O'Brien intended to use his coordinated trading events to induce other investors to purchase or sell securities at prices that had been artificially adjusted by his activity.

[12] Additionally, O'Brien acted with the intent to defraud and with a manipulative motive. O'Brien designed and executed a complex manipulative trading scheme. O'Brien was warned multiple times by brokerage firms that his activity was suspicious and could constitute a serious violation of the securities laws. When one firm questioned him outright about whether he coordinated trading, he misleadingly avoided the question. Indeed, he never disclosed to any firm that he engaged in coordinated trading. When multiple firms closed his accounts after reviewing his activity, O'Brien shifted his coordinated trading to other accounts at other firms. And, even after the SEC's investigation of O'Brien began, he continued to engage in the same manipulative trading behavior. Thus, there is ample support in the factual allegations of the complaint to show that O'Brien violated the securities as alleged.

In utter disregard of his agreement in the Judgment not to argue that he did not violate the securities laws, O'Brien now presents various arguments that his actions were not unlawful. Even if O'Brien were permitted under the Judgment to make such arguments, the arguments are meritless. O'Brien first takes issue with the complaint's use of the term "coordinated trading events," arguing that the SEC has invented the term and that the events are not a securities violation. Contrary to O'Brien's contentions, the term is irrelevant. What matters is that O'Brien's trading activity -- whatever one calls it -- artificially inflated or depressed the prices of securities and was designed to induce investors to sell and purchase securities at artificially impacted prices. This, coupled with O'Brien's scienter, is sufficient to show a violation of the securities laws at issue.

O'Brien also argues that he did not act with the requisite scienter. He notes that he "testified on multiple occasions" that he did not intend "to induce anyone to do anything." He also contends that the notices he received from brokerage firms about his trading before the firms closed his accounts did not sufficiently alert him to any suspicious trading activity and that he "likely" did not see the notices. But there are sufficient factual allegations in the complaint that, taken as true, show that O'Brien acted with the requisite intent. The manipulation scheme was complex and required a concerted effort to design and execute. In addition to the letters from the firms, O'Brien never disclosed his coordinated trading activity to brokerage firms, even when one firm inquired about his strategy in general and another firm asked him directly if he coordinated his trades. Moreover, O'Brien placed the helper and winner accounts at different firms to help obscure his coordinated activity. Additionally, O'Brien continued to engage in the same activity after several firms closed his accounts and the SEC commenced its investigation.[7]

7 At oral argument on the motion, defense counsel suggested that the allegations in the complaint that directly stated that defendant acted with the relevant scienter were legal conclusions and thus should not be taken as true. As explained above, however, the allegations extend far beyond mere legal conclusions as to defendant's scienter and instead include significant circumstantial evidence of his state of mind.

***11** Finally, O'Brien argues that because the complaint contains only two detailed examples of coordinated trading events, those are the only events that may support a violation. But the examples in the complaint are exactly that -- examples. That is, although the complaint contains factual allegations indicating that O'Brien engaged in several thousand coordinated trading events, it provides a detailed analysis of two such events. The fact that only two events are explained in detail is not sufficient reason to disregard factual allegations -- which O'Brien agreed to accept as true for the purposes of this motion -- indicating that O'Brien engaged in roughly 18,000 coordinated trading events. Thus, O'Brien is liable under the securities laws, and his arguments to the contrary (even setting aside that he agreed in the Judgment not to present them) are without merit. The magnitude of O'Brien's scheme informs the decisions reached below.

B. Disgorgement Amount

[13] **[14]** **[15]** **[16]** O'Brien shall disgorge $5,197,322. "Once the district court has found federal securities law violations, it has broad equitable power to fashion appropriate remedies, including ordering that culpable defendants disgorge their profits." SEC v. Razmilovic, 738 F.3d 14, 31 (2d Cir. 2013) (citation omitted). Disgorgement is "a remedy tethered to a wrongdoer's net unlawful profits." Liu v. SEC, —— U.S. ——, 140 S. Ct. 1936, 1943, 207 L.Ed.2d 401 (2020). The amount of disgorgement ordered may not "exceed the gains made upon any business or investment, when both the receipts and payments are taken into the account." Id. at 1949-50 (citation omitted). "The district court has broad discretion not only in determining whether or not to order disgorgement but also in calculating the amount to be disgorged." SEC v. Contorinis, 743 F.3d 296, 301 (2d Cir. 2014) (citation omitted).

[17] **[18]** The Second Circuit applies a two-step framework for calculating equitable monetary relief. A plaintiff must first show that its calculations are a "reasonable approximation" of the amount of a defendant's unjust gains, and then the defendant may show that those figures are inaccurate. Razmilovic, 738 F.3d at 31-32. "If the disgorgement amount is generally reasonable, any risk of uncertainty about the amount falls on the wrongdoer whose illegal conduct created that uncertainty." SEC v. Fowler, 6 F.4th 255, 267 (2d Cir. 2021) (citation omitted).

[19] The calculations of Dr. Orlov for the period of trading alleged in the complaint represent a conservative approximation of the amount of O'Brien's unjust gains. Dr. Orlov analyzed several thousand coordinated trading events, which formed the substance of O'Brien's scheme, and determined that, for the period alleged in the complaint, O'Brien received profits of $6,065,680.[8] Subtracting Dr. Orlov's estimate of commissions and fees yields a net amount of $5,197,322.

8 Although the SEC contends that disgorgement of a larger amount, based on a slightly larger period, is warranted, the parties agreed to decide this motion on the basis of the facts alleged in the complaint. Accordingly, coordinated trading events that may have occurred beyond the time identified in the complaint are not included here.

The SEC having established a reasonable approximation of the net profits from the scheme, the burden shifts to O'Brien to show that the figure is inaccurate. O'Brien's arguments with respect to the disgorgement amount all fail. First, O'Brien contends that disgorgement should be calculated with reference to amounts identified in his tax returns as his total short-term capital gains. But he does not explain why these figures are an appropriate measure of his unlawful gains. According to Dr. Orlov, O'Brien's unlawful trading activity was unusually profitable for O'Brien relative to his other trading. Thus, the total amounts recorded as short-term capital gains on O'Brien's tax returns have likely been reduced by losses incurred in other trading, which would underestimate the gains from his coordinated trading events.

***12** Similarly, O'Brien argues that the total amount of his net profits should be reduced by the tax rate applicable to his short-term capital gains, since he has already paid those funds to the Treasury. This argument, too, fails. O'Brien offers no authority suggesting that tax payments are relevant to the disgorgement analysis.[9]

9 At the hearing on this motion, the defendant suggested that the Supreme Court's decision in Liu justified deducting his personal income taxes. But Liu requires only that courts "deduct legitimate expenses before ordering disgorgement under § 78u(d)(5)." Liu, 140 S. Ct. at 1950. The SEC's proposed disgorgement amount accounts for legitimate expenses in the form of commissions and fees paid by O'Brien. Nothing in Liu states or suggests that personal income taxes must be deducted from the disgorgement amount.

O'Brien also proposes deducting amounts representing the trades in his Vanguard account. According to O'Brien, it took over 30 seconds for Vanguard to process the trades in the account, which means that those trades could not have happened quickly enough to meet Dr. Orlov's definition of coordinated trading. This misconstrues Dr. Orlov's definition of the term. Dr. Orlov's definition required that each coordinated trading event include at least one instance where O'Brien placed a winner account order that did not lag a connected helper account transaction by more than 30 seconds. He did not, however, require that all the coordinated transactions be processed by the brokerage firms within 30 seconds. O'Brien acknowledged at the hearing that it was possible for him to place orders for trading through his Vanguard account within 30 seconds. Thus, O'Brien has presented no basis to conclude that the Vanguard transactions should be excluded.

Finally, O'Brien's remaining arguments that certain amounts should be deducted from the disgorgement calculation also fail as they lack any support. His contention, for example, that in a but-for world he would have succeeded in his trading 50% of the time is not justified with any analysis or evidence. Likewise, his use of that assumption to try to justify awarding only 7.15% of the total amount of his flawed calculation of his net profits is mystifying. Accordingly, O'Brien's arguments are without merit, and it is appropriate to order disgorgement in the amount of $5,197,322.

II. Prejudgment Interest

[20] **[21]** "Since the primary purpose of disgorgement as a remedy for violation of the securities laws is to deprive violators of their ill-gotten gains," district courts may "award prejudgment interest on the disgorgement amount for the period during which a defendant had the use of his illegal profits." Razmilovic, 738 F.3d at 36 (citation omitted). In determining whether to award prejudgment interest, a district court should consider

> (i) the need to fully compensate the wronged party for actual damages suffered, (ii) fairness and the relative equities of the award, (iii) the remedial purpose of the statute involved, and/or (iv) such other general principles as are deemed relevant by the court.

Frommert v. Conkright, 913 F.3d 101, 109 (2d Cir. 2019) (citation omitted). These same factors also inform a court's decision to use a particular interest rate, "which must not result in over-compensation to the plaintiff." Id. (citation omitted). Here, the parties agreed that, in connection with the instant motion, they would calculate any prejudgment interest using "the rate of interest used by the Internal Revenue Service for the underpayment of federal income tax as set forth in 26 U.S.C. § 6621(a)(2)."

***13** **[22]** The parties' agreed-upon interest rate shall be applied. Prejudgment interest is appropriate in this case because O'Brien had use of his ill-gotten gains for several years and thus failing to award such interest would not adequately address the remedial purpose of the disgorgement award.

The SEC originally calculated prejudgment interest of roughly $370,547. This number was based on a disgorgement amount of $5,243,399, which was calculated based on a period of coordinated trading that extended beyond the period alleged in the complaint. At oral argument, the Court requested that the SEC provide an updated calculation based on an award calculated solely using the period alleged in the complaint. In response, the SEC filed a new calculation, but that calculation did not account for any deductions reflecting commissions and fees paid by O'Brien. Accordingly, neither of the SEC's calculations is appropriate.

O'Brien does not take issue with the method the SEC used to calculate prejudgment interest, however, nor with the time period used to determine that interest. Thus, the same method and period will be applied to the correct disgorgement amount of $5,197,322. Applying the SEC's method for calculating interest over the same period to a violation amount of $5,197,322 yields prejudgment interest of $367,291.36. Prejudgment interest in that amount is awarded.

A. Payment to the Treasury

[23] Disgorgement may be ordered under 15 U.S.C. § 78u(d)(5), which authorizes "any equitable relief that may be appropriate or necessary for the benefit of investors." See Liu, 140 S. Ct. at 1942-43. Because § 78u(d)(5) is limited to relief that is "appropriate or necessary for the benefit of investors," the SEC must, in general, "return a defendant's gains to wronged investors for their benefit." Liu, 140 S. Ct. at 1948. It is an open question, however, whether depositing disgorgement funds with the Treasury is justified under § 21(d)(5) "where it is infeasible to distribute the collected funds to investors." Id. Courts have held, post-Liu, that disgorgement may still be ordered even if funds need to be sent to the Treasury because it is infeasible to return funds to individual investors. See, e.g., SEC v. Bronson, 602 F. Supp. 3d 599, 618 (S.D.N.Y. 2022) (collecting cases).

Additionally, after Liu, Congress enacted amendments to the relevant portion of the Exchange Act, suggesting that courts have greater discretion to order disgorged funds to be deposited with the Treasury. Specifically, in 2021, Congress modified the Exchange Act to add § 78u(d)(7). See William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, 134 Stat. 3388, 4626. That section provides that "[i]n any action or proceeding brought by the Commission under any provision of the securities laws, the Commission may seek, and any Federal court may order, disgorgement." Unlike the provision authorizing equitable relief, which was addressed in Liu, § 78u(d)(7) does not include language requiring any relief to be "for the benefit of investors."

Disbursement to the Treasury is appropriate in this case. O'Brien's scheme involved over 18,000 coordinated trading events, many of which were executed in a matter of seconds. The investors harmed by O'Brien's activity include those who traded the relevant securities during one of the coordinated trading events. The SEC contends, understandably, that it would be enormously difficult, if not impossible, to identify all those harmed by O'Brien's activity and to disburse the disgorgement funds to those investors. Finally, O'Brien does not dispute that disbursement to the Treasury is appropriate.

III. Civil Penalties

***14** **[24]** A civil penalty of $10,315,065 is imposed. 15 U.S.C. §§ 77t(d)(2) and 78u(d)(3) allow a court to impose a civil penalty for "each violation" of the securities laws. Those sections provide for three tiers of civil penalties, the most serious of which are Tier III penalties. Fowler, 6 F.4th at 264. Tier III penalties may be imposed "for each ... violation" that involved "fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement," and "directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons." 15 U.S.C. §§ 77t(d)(2)(C); 78u(d)(3)(b)(iii). The maximum Tier III penalty is the greater of "the gross amount of pecuniary gain to [the] defendant as a result of the violation" or a maximum statutory amount that is adjusted for inflation. Id. §§ 77t(d)(2)(C); 78u(d)(3)(b)(iii); Fowler, 6 F.4th at

264. The current statutory maximum penalty for Tier III penalties for natural persons is $223,229 per violation. See Adjustments to Civil Monetary Penalty Amounts, SEC Release Nos. 33-11143, 34-96605, 2023 WL 1290981, at *2 (Jan. 6, 2023).

The term "violation" is undefined in the statute. Courts have held that each violative trade in an overall scheme may constitute a separate violation. See, e.g., Pentagon Cap. Mgmt. PLC, 725 F.3d at 288 n.7 (2d Cir. 2013). Similarly, courts have defined separate violations by the separate victims of a defendant's scheme. See, e.g., Fowler, 6 F.4th at 264-65.

[25] **[26]** Courts have discretion to determine the appropriate amount of a civil penalty "in light of the facts and circumstances." SEC v. Rajaratnam, 918 F.3d 36, 44 (2d Cir. 2019) (citation omitted). Courts often consider several factors in making this determination, including:

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

Fowler, 6 F.4th at 266 (citation omitted).

O'Brien's manipulative trading scheme merits a Tier III civil penalty. The scheme involved fraud, deceit, and manipulation and, at the very least, created a significant risk of substantial losses for investors.

A penalty of $10,315,065 falls within the maximum amount permissible under the relevant statutes. $10,315,065 represents the gross amount O'Brien earned for the entire scheme for the period alleged in the complaint. Thus, even assuming that the scheme constituted only a single violation, the "gross pecuniary gain" from that violation represents $10,315,065.

Considering the factors relevant to the determination of civil penalties, awarding the full amount of the defendant's gross pecuniary gain is appropriate. O'Brien's conduct was egregious. His scheme was complex, required careful planning to execute, and consisted of over 18,000 discrete events of coordinated trading. Likewise, the facts showing O'Brien's scienter are palpable. For example, as explained further above, O'Brien acted to conceal the coordinated trading by using multiple accounts at different firms, disregarded the warnings of several brokerage firms, and obfuscated their attempts to understand his trading methods. O'Brien's scheme also caused substantial losses to investors as he manipulated the prices of securities in several thousand coordinated trading events. Similarly, far from an isolated lapse in judgment, O'Brien's unlawful activity was recurring; the scheme lasted multiple years and even continued after O'Brien was alerted to the SEC's investigation. Even after entering a Consent Judgment which precluded him from arguing that he did not violate the law as alleged in the SEC's complaint, he used the opportunity presented by the process to assess disgorgement and penalties to deny that he had engaged in any violation. Finally, O'Brien has made no showing that his financial condition warrants reducing the penalty. Thus, all the factors point towards imposing a penalty equal to O'Brien's gross pecuniary gain of $10,315,065.

***15** To the extent it may be relevant, an award of $10,315,065 is not disproportionate to the amount of disgorgement. It is a fraction of the amount permitted if the maximum fine were calculated per violation. That calculation would amount to fine of over $4.014 billion.

O'Brien's arguments that the civil penalty should be lower largely repeat his arguments regarding his liability and the appropriate amount of disgorgement. For the reasons identified above, those arguments are meritless.

Conclusion

The SEC's motion for monetary relief is largely granted. O'Brien shall disgorge $5,197,322, plus prejudgment interest of $367,291.36. Separately, civil penalties in the amount of $10,315,065 are imposed. An Order accompanying this Opinion sets a schedule for filing a proposed final judgment in this action.

All Citations

--- F.Supp.3d ----, 2023 WL 3645205

End of Document