UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 11th day of June, two thousand eighteen.

United States Securities and Exchange Commission,

Plaintiff-Appellee,

Fractal Fund Management, Ltd., Fractal P Holding, Ltd., Rowberrow Trading Corp.,

Intervenor - Plaintiffs,

v.

Francisco Illarramendi,

Defendant - Appellant,

v.

Michael Kenwood Capital Management, LLC, Michael Kenwood Asset Management, LLC, MK Energy and Infrastructure, LLC, MKEI Solar, LP, Highview Point Partners, LLC, Highview Point LP, Highview Point Offshore, LTD., Highview Point Master Fund, LTD.,

Defendants,

John J. Carney, Esq.,

Receiver-Appellee.

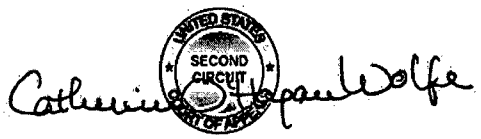
ORDER

Docket Nos: 17-1506 (Lead)
17-1893 (Con)
17-2551 (Con)

Appellant, Francisco Illarramendi, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



17-1506 (L), 17-1893 (Con), 17-2551 (Con)
SEC v. Illarramendi

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 20th day of April, two thousand eighteen.

PRESENT: BARRINGTON D. PARKER,
REENA RAGGI,
DEBRA ANN LIVINGSTON,
Circuit Judges.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,
Plaintiff-Appellee,

FRACTAL FUND MANAGEMENT, LTD., FRACTAL P HOLDING, LTD., ROWBERROW TRADING CORP.,
Intervenors-Plaintiffs,

v.

FRANCISCO ILLARRAMENDI,
Defendant-Appellant,

v.

MICHAEL KENWOOD CAPITAL MANAGEMENT, LLC, MICHAEL KENWOOD ASSET MANAGEMENT, LLC, MK ENERGY AND INFRASTRUCTURE, LLC, MKEI SOLAR,

No. 17-1506-cv (L),
No. 17-1893-cv (CON),
No. 17-2551-cv (CON)

LP, HIGHVIEW POINT PARTNERS, LLC, HIGHVIEW POINT LP, HIGHVIEW POINT OFFSHORE, LTD., HIGHVIEW POINT MASTER FUND, LTD.,

Defendants,

JOHN J. CARNEY, ESQ.,

Receiver-Appellee.

FOR DEFENDANT-APPELLANT:	Francisco Illarramendi, *pro se*, Fairton, New Jersey.
FOR PLAINTIFF-APPELLEE:	Robert B. Stebbins, General Counsel, John W. Avery, Deputy Solicitor, Sarah R. Prins, Senior Attorney, Securities and Exchange Commission, Washington, D.C.
FOR RECEIVER-APPELLEE:	Jonathan B. New, Amy E. Vanderwal, Baker & Hostetler LLP, New York, New York.

Appeal from a judgment and order of the United States District Court for the District of Connecticut (Janet Bond Arterton, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment entered on May 24, 2017, is AFFIRMED as modified, and the order entered on July 20, 2017, is AFFIRMED.

Defendant Francisco Illarramendi, proceeding *pro se*, appeals from an award of summary judgment in favor of the United States Securities and Exchange Commission ("SEC") and an order denying his motion to modify a temporary restraining order ("TRO") freezing his assets. In this enforcement action, the SEC charged Illarramendi with violations of Sections 206(1), (2), and (4) of the Investment Advisers Act of 1940 ("Advisers Act"), *see* 15 U.S.C. § 80b-6(1), (2), (4), and Rule 206(4)-8 thereunder, for

running a five-year-long Ponzi scheme that caused hundreds of millions of dollars of losses to investors. After a TRO hearing at which Illarramendi testified, the district court granted the SEC's motion to freeze his assets as well as those of several financial advising entities run by Illarramendi, and appointed a receiver ("Receiver") to handle claims against the frozen assets. Meanwhile, Illarramendi was criminally prosecuted for five felony offenses, including a violation of Section 206 of the Advisers Act. He pleaded guilty to all counts, and later appealed only his sentence, which this court summarily affirmed. *See United States v. Illarramendi*, 677 F. App'x 30 (2d Cir. 2017); *United States v. Illarramendi*, 642 F. App'x 64 (2d Cir. 2016).

In awarding summary judgment to the SEC, the district court determined that Illarramendi's inculpatory testimony at the TRO hearing, as well as his guilty plea in the criminal proceeding, established his liability for the Advisers Act violations charged in this civil case, and that Illarramendi failed to adduce evidence raising any issue of material fact, including any issue pertaining to his affirmative defense of duress. The court ordered disgorgement in the amount of $25,844,834, which represented the fraudulent gains as calculated in the criminal proceeding.[1] The court subsequently denied Illarramendi's motion to modify the TRO to release funds so that he could retain counsel to pursue his 28 U.S.C. § 2255 collateral challenge to his conviction. These consolidated appeals follow.

[1] The district court also imposed a permanent injunction and civil penalties. Because Illarramendi fails adequately to address these rulings in his appellate brief, we deem any challenge to them forfeited. *See LoSacco v. City of Middletown*, 71 F.3d 88, 92–93 (2d Cir. 1995).

We assume the parties' familiarity with the underlying facts and record of prior proceedings, which we reference only as necessary to explain our decisions to affirm the summary judgment as modified and to affirm the order.

1. Summary Judgment

On *de novo* review of an award of summary judgment, *see Garcia v. Hartford Police Dep't*, 706 F.3d 120, 126 (2d Cir. 2013), we will affirm only if the record, viewed most favorably to the non-moving party, shows "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(a); *see Garcia v. Hartford Police Dep't*, 706 F.3d at 127. To survive a summary judgment motion, the non-movant must point to more than "'mere speculation or conjecture as to the true nature of the facts'" because "'conclusory allegations or denials . . . cannot by themselves create a genuine issue of material fact where none would otherwise exist.'" *Hicks v. Baines*, 593 F.3d 159, 166 (2d Cir. 2010) (quoting *Fletcher v. Atex, Inc.*, 68 F.3d 1451, 1456 (2d Cir. 1995)).

In challenging summary judgment here, Illarramendi argues that the district court erred in ruling that his guilty plea in the related criminal case collaterally estopped him from denying liability for identical Advisers Act violations in the civil case, because he was then pursuing a collateral challenge to his conviction, *see* 28 U.S.C. § 2255, on the ground that the asset freeze in the civil proceeding had denied him counsel of his choice in violation of constitutional rights recognized by the Supreme Court in *Luis v. United States*, 136 S. Ct. 1083 (2016). We need not here decide how, if at all, *Luis* applies to a party

who was always represented by retained counsel in the criminal proceeding and who never moved in the criminal case for any assets to be unfrozen. The law is well-established that a criminal conviction collaterally estops a litigant from challenging in a subsequent civil action issues decided in that prosecution. *See United States v. Podell*, 572 F.2d 31, 35 (2d Cir. 1978); *accord United States v. U.S. Currency in the Amount of $119,984.00*, 304 F.3d 165, 172 (2d Cir. 2002). Moreover, because "the pendency of an appeal from a conviction does not deprive a judgment of its preclusive effect," *United States v. 303 W. 116th St., New York, New York*, 901 F.2d 288, 292 (2d Cir. 1990); *see Coleman v. Tollefson*, 135 S. Ct. 1759, 1764 (2015), the same conclusion necessarily applies to a collateral challenge after affirmance of the conviction on appeal.

Insofar as Illarramendi argues that the deprivation of counsel of choice deprived him of a full and fair opportunity to litigate his criminal case, as required for collateral estoppel, *see CBF Industria de Gusa S/A v. AMCI Holdings, Inc.*, 850 F.3d 58, 77 (2d Cir. 2017), he bears the burden of demonstrating such a deprivation, *see Proctor v. LeClaire*, 715 F.3d 402, 414 (2d Cir. 2013), which he fails to carry here. Notwithstanding Illarramendi's vague and conclusory allegations of ineffective assistance of counsel at the time of his plea, *see Hicks v. Baines*, 593 F.3d at 166 (conclusory allegations or denials "cannot by themselves create a genuine issue of material fact"), nothing in the summary judgment record indicates that, had Illarramendi been represented by different retained counsel, he would not have pleaded guilty. To the contrary, at his plea allocution, Illarramendi stated, under oath, that he was satisfied with counsel's representation. *See*

Adames v. United States, 171 F.3d 728, 732 (2d Cir. 1999) ("A criminal defendant's self-inculpatory statements made under oath at his plea allocution carry a strong presumption of verity and are generally treated as conclusive in the face of the defendant's later attempt to contradict them." (internal citations and quotation marks omitted)).

In any event, in granting summary judgment, the district court determined that Illarramendi's civil liability was established not only by his guilty plea, but also by his independent inculpatory sworn admissions at the TRO hearing. Insofar as Illarramendi now repudiates his TRO admissions, arguing that they were the result of "a layman's misunderstanding" of the applicable law, Appellant Br. 10, his argument fails because, whatever his understanding of the law, the *facts* he admitted established the elements of the claimed Advisers Act violations, *see United States v. Tagliaferri*, 820 F.3d 568, 573 (2d Cir. 2016) (discussing elements of Section 206 claim). Moreover, belated and unsworn repudiations cannot undermine prior sworn testimony so as to raise a triable issue of fact. *See Moll v. Telesector Res. Grp., Inc.*, 760 F.3d 198, 205 (2d Cir. 2014) ("[F]actual issues that a party creates by filing an affidavit crafted to oppose a summary judgment motion that contradicts that party's prior testimony are not 'genuine' issues for trial.").

Illarramendi argues, nevertheless, that he presented sufficient evidence of duress to survive summary judgment, and, in any event, the district court should have provided him an alternate forum in which to present evidence without fear of retaliation. This argument fails because Illarramendi's vague assertions that he feared reprisal from Petróleos de

Venezuela, S.A. ("PDVSA") were insufficient to create a triable issue of fact. *See Salahuddin v. Goord*, 467 F.3d 263, 272–73 (2d Cir. 2006). Further, his factually unsupported claim that extortionate activities compelled his Advisers Act violations is inconsistent with his repeated claims of PDVSA fraud during the claims process.

Accordingly, we conclude that summary judgment was correctly awarded to the SEC.

2. Disgorgement

We review Illarramendi's challenges to the disgorgement award for abuse of discretion. *See SEC v. First Jersey Sec. Inc.*, 101 F.3d 1450, 1474–76 (2d Cir. 1996); *see also SEC v. Frohling*, 851 F.3d 132, 138–39 (2d Cir. 2016). In attempting to show abuse, Illarramendi asserts that PDVSA submitted a fraudulent claim to the Receiver, without which there would have been enough funds to cover all other claims and, therefore, his remuneration was somehow appropriate. Even assuming PDVSA's claim was fraudulent, Illarramendi's belated argument that no loss therefore ensued is unsupported by the evidence and is insufficient, in any event, to overcome his own prior sworn testimony admitting that he received "inflated" management fees based on "fictitious" asset gains. Supp. App'x 28–29.

Illarramendi does not otherwise take issue with the district court's use of his gains as calculated in his criminal case to determine the disgorgement amount. He argues only that disgorgement must be revisited in light of *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), because some of the conduct at issue occurred outside of the statute of limitations. The

SEC agrees and, based on the data used by the court at Illarramendi's criminal proceeding, concedes that the ordered disgorgement should be reduced to $25,466,299.[2] Accordingly, we order modification of the judgment in that single respect.

3. Modification to Asset Freeze Order

We review for abuse of discretion the district court's denial of Illarramendi's motion to modify the TRO to unfreeze certain of his assets. *See Smith v. SEC*, 653 F.3d 121, 127 (2d Cir. 2011). Illarramendi relies on *Luis v. United States*, 136 S. Ct. 1083 (2016), to argue abuse, maintaining that the denial violated his constitutional right to counsel of choice to challenge his criminal conviction. The argument fails because, by contrast to *Luis*, where the government's interest in "pretrial" frozen assets was still "contingent," *id.* at 1088, 1093 (holding "pretrial restraint of legitimate, untainted assets needed to retain counsel of choice violates the Sixth Amendment"), Illarramendi stands convicted and subject to a $370,482,716.54 restitution order. Thus, his frozen assets are no longer "free and clear." *Id.* at 1092. In any event, the Sixth Amendment right to counsel, including the right to counsel of choice, does not apply in a habeas proceeding. *See Harris v. United States*, 367 F.3d 74, 77 (2d Cir. 2004). Moreover, in Illarramendi's habeas proceeding, the district court offered to appoint counsel under the Criminal Justice Act, *see* 18 U.S.C.

[2] To the extent Illarramendi suggests that the entire action should be dismissed based on the statute of limitations, he has waived this argument by failing to raise it as an affirmative defense in either his answer or on summary judgment. *See, e.g., Litton Indus., Inc. v. Lehman Bros. Kuhn Loeb Inc.*, 967 F.2d 742, 751–52 (2d Cir. 1992). In any event, the argument fails on the merits. *See Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1969 (2014).

§ 3006A, if Illarramendi could not in fact afford to retain counsel. In light of these circumstances and the controlling law, we identify no abuse of discretion in the district court's denial of Illarramendi's motion to modify the TRO to unfreeze assets.

We have considered Illarramendi's remaining arguments and conclude that they are without merit. Accordingly, we MODIFY the district court's summary judgment to reduce ordered disgorgement to the amount of $25,466,299, and, as thus modified, we AFFIRM that judgment as well as the district court's order of July 20, 2017.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

SECURITIES AND EXCHANGE COMMISSION, *Plaintiff,* *v.* FRANCISCO ILLARRAMENDI, *et al.*, *Defendants.*	Civil No. 3:11-cv-78 (JBA) July 20, 2017

RULING ON MOTION FOR MODIFICATION OF TEMPORARY RESTRAINING ORDER

On August 12, 2016, Defendant Francisco Illarramendi moved [Doc. # 1022] for partial modification of the Court's temporary restraining order requesting release of $100,000.00, from the frozen assets "to pay for Counsel of Choice in the Criminal Matter" and noting that the requested amount "is subject to increase through future requests depending on the course of proceedings." (Mot. for Modification ¶ 30.)[1] Both the SEC ("SEC Opp'n") [Doc. # 1038] and the Receiver ("Receiver Opp'n") [Doc. # 1039] oppose the Motion. For the reasons set forth below, the Motion is DENIED.

[1] On April 13, 2017, the Court granted the SEC's motion for summary judgment in this action, finding on the basis of Mr. Illarramendi's admissions as well as on the collateral estoppel effect of his guilty plea that he had concealed an initial trading loss from investors, raised funds from new investors to both pay off old investors and make new investments in hopes of earning money sufficient to make up for the initial loss, and then misled investors about how their money was being invested in violation of Sections 206(1), (2), and (4) of the Investment Advisers Act. (*See* Ruling on Motion for Summary Judgment [Doc. # 1062] at 17.) That Ruling permanently enjoined Mr. Illarramendi from future violation of those sections of the Advisers Act and ordered him to disgorge his gains of $25,844,834.00 and to pay a penalty of $1,000,000.00. (*Id.* at 27.)

I. Background

On January 14, 2011, the SEC moved [Doc. # 2] for entry of a temporary restraining order and order freezing assets against all Defendants. Mr. Illarramendi, represented by counsel from the law firm of Bingham McCutchen LLP and subsequently by counsel from the law firm of Gleason & Koatz LLP, opposed [Doc. # 20] the Motion and requested through counsel that, should the asset freeze order be entered, the Court carve-out funds for living expenses and attorneys' fees. The Court denied Mr. Illarramendi's request without prejudice and informed him that he may renew the motion with more detail regarding the nature and scope of the expenses and attorneys' fees. Mr. Illarramendi did not renew this request for approximately a year. The Court entered the TRO freezing Mr. Illarramendi's assets on January 28, 2011 [Doc. # 36] and entered the preliminary injunction on February 3, 2011 [Doc. # 67].

On March 7, 2011, a criminal information against Mr. Illarramendi was unsealed. [Case No. 11-cr-41 (SRU); Doc. # 3.] Mr. Illarramendi, represented by counsel from Gleason & Koatz LLP, waived indictment and pleaded guilty that same day. [Case No. 11-cr-41 (SRU); Docs. ## 4, 9.] As set forth in the order granting the Receiver's second motion for contempt sanctions in the civil case [Doc. # 762], Mr. Illarramendi paid $65,000 for counsel in the criminal matter using funds he falsely represented to be a loan from Rodolfo Carlstein-Reyes when in fact it was a portion of $235,000.00 that Mr. Illarramendi had impermissibly transferred to a real estate investment company controlled by Mr. Carlstein-Reyes prior to the asset freeze. As such, these funds should have been subject to the freeze but were instead used to pay for counsel. The Court found that

> Defendant's noncompliance with this Court's orders is established from bank records evidencing the improper transfers, and the sworn affidavit from Carlstein-Reyes, which unambiguously contradicts Defendant's sworn representation that the $150,000 was a personal loan.

(Contempt Ruling [Doc. # 762] at 7.)

Mr. Illarramendi, again through counsel, renewed his request for a carve-out for attorneys' fees on September 25, 2011 [Doc. # 591], and the Court again denied this motion without prejudice in a ruling from the bench, again noting that Mr. Illarramendi provided no detail in his request for $800,000.00 and that the Court therefore had no basis for determining its reasonableness.

Mr. Illarramendi's instant Motion reflects his belief, however, that the preliminary injunction's freeze of his assets impaired his pre-trial Sixth Amendment Rights by making it impossible for him to afford his counsel of choice although he was represented by retained counsel during all of the pre-plea proceedings in his criminal matter. (Mot. for Modification ¶ 50.)

Mr. Illarramendi was sentenced on February 6, 2015 [Case No. 11-cr-41 (SRU); Doc. # 167], which he timely appealed [Case No. 11-cr-41 (SRU); Doc. # 200.] During the pendency of this appeal, Judge Underhill ordered restitution [Case No. 11-cr-41 (SRU); Doc. # 198], which Mr. Illarramendi also appealed [Case No. 11-cr-41 (SRU); Doc. # 200].

The Second Circuit's mandate affirming the sentence issued on May 11, 2016 [Case No. 11-cr-41 (SRU); Doc. # 202], roughly three months before Defendant filed the instant Motion for a carve-out to pay for attorneys' fees. With regard to the appeal of the restitution order, Mr. Illarramendi moved for appointment of CJA counsel on January 19, 2016, who was subsequently appointed. CJA counsel then filed the opening brief in the appeal on July 13, 2016, one month before Mr. Illarramendi moved for release of attorneys' fees. With one appeal complete and CJA counsel in the other, Mr. Illarramendi was not without legal representation during his criminal proceedings at the time this motion was filed.

II. Discussion

A district court has authority in a securities fraud case to grant ancillary relief in the form of orders appointing a receiver or temporarily freezing assets. *See S.E.C. v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1103, 1105 (2d Cir. 1972); *see also S.E.C. v. Unifund SAL*, 910 F.2d 1028, 1041 (2d Cir. 1990). The purpose of such relief is to facilitate enforcement of any disgorgement remedy that might be ordered in the event a violation is established at trial. In considering the scope and propriety of such relief, the court should assess whether it is in the allegedly defrauded investors' interests. *See Manor Nursing*, 458 F.2d at 1105; *see also S.E.C. v. Coates*, No. 94 CIV. 5361 (KMW), 1994 WL 455558, at *1 (S.D.N.Y. Aug. 23, 1994) (denying defendant's motion for release of funds for living expenses and attorneys' fees). In cases where the receivership entities are ongoing concerns that require cash to operate, the court must balance the necessity to freeze assets to prevent dissipation against the possible deleterious effects of such a freeze. *Manor Nursing*, 458 F. 2d at 1086.

Defendant advances one core argument in his motion for release of frozen assets to pay attorneys' fees in his criminal matter, which argument also forms the core of his pending habeas petition: Mr. Illarramendi claims that his criminal conviction is "vitiated" by the Supreme Court's decision in *Luis v. United States*, 578 U.S. __, 136 S. Ct. 1083 (2016), in which a plurality of the Supreme Court held that a criminal defendant "has a Sixth Amendment right to use her own 'innocent' property to pay a reasonable fee for the assistance of counsel." *Id.* at 1096 (2016) (plurality opinion).

With respect to the Defendant's habeas petition, Judge Underhill entered the following order on June 20, 2017: "Illarramendi's petition raises complex legal issues that would likely benefit from the assistance of counsel. If Illarramendi would like to receive such assistance, but cannot

afford to hire counsel, he should file a motion to appoint counsel within 30 days from the date of this Order." (Order [Case No. 16-cv-1853, Doc. # 14].)

Since the Second Circuit's mandates affirming both Mr. Illarramendi's sentence and the order of restitution have mooted his motion for release of monies for fees for those proceedings and since Judge Underhill offered to appoint CJA counsel for Mr. Illarramendi for representation in his habeas petition, Defendant shows no need to modify the asset freeze order entered in this action to retain legal representation instead of accepting Judge Underhill's offer of appointment of counsel and certainly no need which outweighs the interest in protecting assets for distribution to defrauded investors.

III. Conclusion

For the foregoing reasons, Mr. Illarramendi's Motion for Modification is DENIED.

IT IS SO ORDERED.

/s/

Janet Bond Arterton, U.S.D.J.

Dated at New Haven, Connecticut this 20th day of July, 2017.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

SEC,
Plaintiff,

v. Civil No. 3:11cv78 (JBA)

Illarramendi,
Defendant.

FINAL JUDGMENT AS TO DEFENDANT FRANCISCO A. ILLARRAMENDI

The Securities and Exchange Commission ("Commission") filed a Motion for Summary Judgment which Defendant Francisco A. Illarramendi ("Illarramendi") opposed. The Court granted the Commission's motion on April 13, 2017 [Doc. # 1062] and hereby orders:

1. Defendant is permanently restrained and enjoined from violating, directly or indirectly, Section 206(1) of the Investment Advisers Act of 1940 (the "Advisers Act") [15 U.S.C. § 80b-6(1)], by, while acting as an investment adviser, using the mails or any means or instrumentality of interstate commerce, directly or indirectly, to employ any device, scheme, or artifice to defraud his clients or prospective clients. As provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing also binds the following who receive actual notice of this Final Judgment by personal service or otherwise: (a) Defendant's officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Defendant or with anyone described in (a);

2. Defendant is permanently restrained and enjoined from violating, directly or indirectly, Section 206(2) of the Advisers Act [15 U.S.C. § 80b-6(2)], by, while acting as an investment adviser, using the mails or any means or instrumentality of interstate commerce, directly or indirectly, and engaging in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon his clients or prospective clients. As provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing also binds the following who receive actual notice of this Final Judgment by personal service or otherwise: (a) Defendant's officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Defendant or with anyone described in (a);

3. Defendant is permanently restrained and enjoined from violating, directly or indirectly, Section 206(4) of the Advisers Act [15 U.S.C. § 80b-6(4)] or Rule 206(4)-8 thereunder [17 C.F.R. §275.206(4)-8], by, while acting as an investment adviser to a pooled investment vehicle, using the mails or any means or instrumentality of interstate commerce, directly or indirectly, and

(a) making any untrue statement of a material fact or omitting to state a material fact necessary to make the statements made, in light of the circumstances under which they were made, not misleading to an investor or prospective investor in the pooled investment vehicle; or

(b) engaging in any act, practice, or course of business which is fraudulent,

deceptive or manipulative as to an investor or prospective investor in the pooled investment vehicle.

As provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing also binds the following who receive actual notice of this Final Judgment by personal service or otherwise: (a) Defendant's officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Defendant or with anyone described in (a); and,

4. Defendant is liable for disgorgement of $25,844,834, and a civil penalty in the amount of $1,000,000 pursuant to Section 209 of the Advisers Act [15 U.S.C. §80b-9]. Defendant shall satisfy this obligation by paying $26,844,834 to the Securities and Exchange Commission. Defendant may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request. Payment may also be made directly from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm. Defendant may also pay by certified check, bank cashier's check, or United States postal money order payable to the Securities and Exchange Commission, which shall be delivered or mailed to

Enterprise Services Center
Accounts Receivable Branch
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

and shall be accompanied by a letter identifying: the case caption, civil action number, and name of this Court, Illarramendi as a defendant in this action, and specification that payment is made

pursuant to this Final Judgment.

The Commission may propose a plan to distribute the Fund subject to the Court's approval. Such a plan may provide that the Fund shall be distributed pursuant to the Fair Fund provisions of Section 308(a) of the Sarbanes-Oxley Act of 2002, and may provide that the Fund shall be turned over to the Receiver to distribute pursuant to the terms of the court-approved Distribution Plan (Docket No. 905-1); Order Granting the Receiver's Motion for Approval of Distribution Plan and Initial Distribution (Docket No. 941). This Court retains jurisdiction over the administration of any distribution of the Fund.

This Court further retains jurisdiction of this matter for the purposes of enforcing the terms of this Final Judgment.

There being no just reason for delay, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the Clerk is ordered to enter this Final Judgment forthwith and without further notice.

IT IS SO ORDERED.

/s/_____
JANET BOND ARTERTON, U.S.D.J.

Dated at New Haven, Connecticut this 24th day of May 2017.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

SECURITIES AND EXCHANGE COMMISSION, *Plaintiff,* *v.* FRANCISCO ILLARRAMENDI, *et al.*, *Defendants.*	Civil No. 3:11-cv-78 (JBA) April 13, 2017

RULING ON DEFENDANT'S MOTION TO STAY JUDGMENT ON PENDING MOTIONS

Defendant Francisco Illarramendi moves [Doc. # 1049] the Court to stay judgment on all pending motions, arguing that "the [Securities and Exchange Commission's ("SEC")] Motion for Summary Judgment] is based, almost exclusively, on the collateral estoppel effects" of his criminal conviction and that "there have been no trial proceedings in this civil case that would independently support granting the [Motion] . . . ." (Mot. to Stay [Doc. # 1049] ¶ 6.) He further argues that a successful appeal of the restitution order would "render moot[ ]" the SEC's request for disgorgement. (*Id.* ¶ 7.)

The SEC opposes [Doc. # 1051] the Motion, arguing that Mr. Illarramendi overlooks one of the two grounds on which it moved for summary judgment. In addition to resting on the preclusive effect of Mr. Illarramendi's criminal conviction for investment adviser fraud, the SEC independently grounded its motion on "Illarramendi's sworn testimony before this Court[, which] establishes his liability for those same Advisers Act violations." (Opposition [Doc. # 1051] at 4.) The SEC asserts that even if Mr. Illarramendi were to prevail on his habeas petition, "independent grounds would remain to support any final judgment against him." (*Id.*)

Because the Court has concluded that Mr. Illarramendi's sworn testimony in this case is sufficient to decide the SEC's motion for summary judgment (*see* Ruling on Plaintiff's Motion for Summary Judgment [Doc. # 1062]), Mr. Illarramendi's motion is DENIED.

IT IS SO ORDERED.

/s/

Janet Bond Arterton, U.S.D.J.

Dated at New Haven, Connecticut this 13th day of April 2017.