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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18-10931

[Filed November 5, 2019]

SECURITIES AND EXCHANGE COMMISSION, Plaintiff - Appellee	)
v.	)
TEAM RESOURCES INCORPORATED; FOSSIL ENERGY CORPORATION; KEVIN A. BOYLES, Defendants - Appellants	)

Appeals from the United States District Court for the Northern District of Texas

Before KING, HIGGINSON, and DUNCAN, Circuit Judges.

STUART KYLE DUNCAN, Circuit Judge:

The Securities and Exchange Commission ("SEC") filed an enforcement action against Kevin Boyles and two companies he created, Team Resources and Fossil Energy, because it believed Boyles was scamming investors. While the case was pending, the Supreme

Court decided *Kokesh v. SEC*, in which it held that disgorgement in SEC proceedings is a "penalty" under 28 U.S.C. § 2462 and therefore subject to a five-year statute of limitations. 137 S. Ct. 1635, 1643 (2017). We must decide whether *Kokesh* necessarily overruled our established precedent recognizing district courts' authority to order disgorgement in SEC enforcement proceedings. *See*, *e.g.*, *SEC v. Blatt*, 583 F.2d 1325, 1335 (5th Cir. 1978). It did not. We recognize that the Supreme Court has recently agreed to review a Ninth Circuit decision addressing whether district courts have disgorgement authority after *Kokesh*. *See SEC v. Liu*, 754 F. App'x 505 (9th Cir. 2018) (unpublished), *cert. granted sub nom. Liu v. SEC*, --- S. Ct. ---, 2019 WL 5659111 (U.S. Nov. 1, 2019) (No. 18-1501). Nonetheless, "we have traditionally held that even when the Supreme Court has granted certiorari in a relevant case, we will continue to follow binding precedent." *United States v. Islas-Saucedo*, 903 F.3d 512, 521 (5th Cir. 2018) (citing *Wicker v. McCotter*, 798 F.2d 155, 158 (5th Cir. 1986)). We therefore affirm the district court's disgorgement order as well as its other decisions challenged here.

I.

The SEC alleged the following facts to which Boyles, Team Resources, and Fossil Energy (collectively, "Appellants") stipulated for the limited purpose of the disgorgement order under review here. In 2008 Boyles formed Team Resources Incorporated to be the managing general partner for multiple oil and gas limited partnerships. Boyles used Team Resources to buy oil and gas leases, which he then placed in limited

partnerships managed by Team Resources. Through various limited partnerships managed by both Team Resources and Fossil Energy (a company Boyles created later), Boyles raised money from 475 investors to the tune of $33 million. Boyles and his salespeople—none of whom was registered as a securities broker as required by law—promised sky-high returns on investment.

Things did not work out that way. The oil and gas leases were not commercially viable—a fact the SEC alleges Boyles knew beforehand. Investment returns were bad or non-existent. Yet Boyles painted a positive picture for investors instead of disclosing the dismal reality. All the while, the salespeople collected commissions ranging from 15% to 25% (a detail not disclosed to investors). In the end, the investors lost all or most of their money.

The SEC then sued Boyle, Team Resources, and Fossil Energy.[1] Settlement was almost instantaneous. Appellants neither admitted nor denied the allegations of the complaint but agreed that the court would enter a permanent injunction against them enjoining any future violations of securities laws. Appellants also agreed "that the Court shall order disgorgement of ill-gotten gains, with prejudgment interest thereon." The agreements provided that "[i]n connection with the Commission's motion for disgorgement and/or civil penalties, the parties may take discovery, including discovery from appropriate non-parties." The district

[1] The complaint also named other defendants, but they are not parties to this appeal.

court entered the agreements, required Appellants to "pay disgorgement of ill-gotten gains," and stated that it would determine the amounts of that disgorgement "upon motion of the Commission."

In February 2017, the SEC moved for remedies and final judgment, asking for disgorgement in the amount of $30,494,037. Appellants responded that the five-year statute of limitations in 28 U.S.C. § 2462 barred the SEC from seeking the disgorgement amount it requested. They also contended that the SEC's disgorgement calculation failed to account for legitimate business expenses and generally failed to distinguish lawfully obtained funds from those that were ill-gotten.

While the SEC's motion was pending, the Supreme Court held in *Kokesh v. SEC* that disgorgement in SEC enforcement proceedings is a "penalty" under § 2462 and therefore subject to a five-year statute of limitations. 137 S. Ct. at 1643. In response, the SEC amended its motion in this case and reduced the amount of disgorgement sought to $15,508,280 to reflect the five-year limit. Appellants again attacked the disgorgement amount, but this time they also argued that, after *Kokesh*, district courts no longer have authority to order disgorgement in SEC proceedings. Appellants also stated that they would "contend at a hearing" that various expenses must be deducted from the disgorgement amount and asserted that they "should have an opportunity in discovery, in advance of a hearing," to test the SEC's calculation. Appellants did not, however, actually move for a hearing, and one was never held.

The district court granted the SEC's motion in part. Appellants were ordered to disgorge $15,508,280. Noting that *Kokesh* itself had expressly stated that "[n]othing in [its] opinion should be interpreted as an opinion on whether courts possess authority to order disgorgement in SEC enforcement proceedings," 137 S. Ct. at 1642 n.3, the district court rejected Appellants' argument that it could not order disgorgement. It also rejected Appellants' challenges to the amount of disgorgement and declined to deduct any money as a legitimate business expense because the "overwhelming weight of authority hold[s] that securities law violators may not offset their disgorgement liability with business expenses." *SEC v. Kahlon*, 873 F.3d 500, 509 (5th Cir. 2017) (per curiam) (alteration in original) (quoting *SEC v. United Energy Partners, Inc.*, 88 F. App'x 744, 746 (5th Cir. 2004)). This appeal followed. We have jurisdiction pursuant to 28 U.S.C. § 1291.

II.

Whether the district court had authority to order disgorgement is a legal question reviewed *de novo*. *SEC v. AMX Int'l, Inc.*, 7 F.3d 71, 73 (5th Cir. 1993). We review the court's decision to order disgorgement for abuse of discretion. *Kahlon*, 873 F.3d at 504. An abuse of discretion standard also applies to the court's decision not to order discovery or hold an evidentiary hearing. *United States ex rel. Taylor-Vick v. Smith*, 513 F.3d 228, 232 (5th Cir. 2008); *Leedo Cabinetry v. James Sales & Distrib., Inc.*, 157 F.3d 410, 414 (5th Cir. 1998).

III.

Appellants argue that, by finding disgorgement a "penalty" under § 2462, *Kokesh* necessarily also decided that disgorgement is not an equitable remedy courts may impose in SEC enforcement proceedings. We disagree. *Kokesh* itself expressly declined to address that question, and so our precedent upholding district court authority to order disgorgement controls. Appellants' argument that the district court abused its discretion by not ordering discovery or holding a hearing on disgorgement also fails because the district court implemented the terms of the parties' settlement agreement and Appellants failed to request a hearing or initiate any discovery.

A.

In *Kokesh v. SEC*, the Supreme Court held that disgorgement constitutes a "penalty" for purposes of 28 U.S.C. § 2462 and that disgorgement actions must therefore commence within five years of the accrual of the cause of action. 137 S. Ct. at 1639. The defendant in *Kokesh* was accused of misappropriating nearly $35 million from various companies between 1995 and 2009. *Id.* at 1641. A jury found the defendant violated applicable securities laws. *Id.* The district court recognized that § 2462's limitations period barred any penalties for misappropriation more than five years before the SEC filed its complaint, but held that § 2462 did not apply because disgorgement is not a "penalty" under the statute. *Id.* The Tenth Circuit affirmed.

In reversing the Tenth Circuit, the Supreme Court cited its decision in *Huntington v. Attrill*, 146 U.S. 657

(1892), which defined "penalty" as a "punishment, whether corporal or pecuniary, imposed and enforced by the State, for a crime or offen[s]e against its laws." *Kokesh*, 137 S. Ct. at 1642 (alteration in original). Applying that definition, the Court reasoned that disgorgement is ordered by courts for violations committed against the United States and that it is imposed for punitive purposes. *Id.* at 1643. Thus, the Court concluded, disgorgement qualifies as a "penalty" under § 2462.

Yet *Kokesh* cabined its own reach: "Nothing in this opinion," the Court stated, "should be interpreted as an opinion on whether courts possess authority to order disgorgement in SEC enforcement proceedings or on whether courts have properly applied disgorgement principles in this context." *Id.* at 1642 n.3. "The *sole* question presented in this case," the Court continued, "is whether disgorgement, as applied in SEC enforcement actions, is subject to § 2462's limitations period." *Id.* (emphasis added).

Despite this clear statement, Appellants contend that *Kokesh* implicitly did what it explicitly said it did not do. The thrust of their argument is that *Kokesh*, by deciding that disgorgement constitutes a penalty under § 2462, necessarily decided that disgorgement is no longer an equitable remedy. Since "[f]ederal courts are courts of limited jurisdiction[,]" and only have "power authorized by Constitution and statute," *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 378 (1994), the authority to order a disgorgement penalty must come from a statutory source. Yet the statutes governing civil enforcement actions do not explicitly

authorize disgorgement even though they authorize civil monetary penalties. *See* 15 U.S.C. §§ 77t(d); 78u(d)(3). And the Penny Stock Reform Act, which does authorize disgorgement, only does so for administrative proceedings. *See* 15 U.S.C. § 77h-1(e); *see also id.* § 78u-2(e). Thus, Appellants contend, the district court lacked authority to order disgorgement in this civil enforcement action.

We are not persuaded *Kokesh* decided that much. *Kokesh* decided only the issue before it—"whether § 2462 applies to claims for disgorgement imposed as a sanction for violating a federal securities law." 137 S. Ct. at 1639. The Court's discussion, while examining whether disgorgement is properly classified as a "penalty" in the context of that single statute, did not purport to decide that disgorgement can never be classified as equitable in any context. To the contrary, *Kokesh* expressly disavowed that it was addressing "whether courts possess authority to order disgorgement in SEC enforcement proceedings." 137 S. Ct. at 1642 n.3.[2] We are thus not convinced that *Kokesh*

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[2] Appellants assert that the relevant footnote in *Kokesh* "is . . . reasonably understood to be the Supreme Court's recognition that it was only tasked with deciding whether disgorgement in securities-enforcement actions was a civil penalty, and that it would, as it often does, save for another day a question not then before it." Pet. Br. at 21–22. We agree. But that only underscores the point that *Kokesh* does not unequivocally overturn district courts' authority to order disgorgement in SEC enforcement cases. Appellants further assert that "[t]here would be no logical reason for the Supreme Court's comment if it believed that courts *have* been properly applying the disgorgement penalty." *Id.* (emphasis in original). We disagree. The fact that Appellants cite *Kokesh* for the proposition that courts lack authority to order disgorgement

quietly revolutionized SEC enforcement proceedings while at the same time explicitly stating it was not doing so. Our conclusion mirrors those reached by our sister circuits when facing this issue. *See SEC v. de Maison*, --- F. App'x ---, 2019 WL 4127328 (2d Cir. Aug. 30, 2019) (unpublished); *Liu*, 754 F. App'x 505.[3] Furthermore, our circuit's rule of orderliness prohibits one panel from overturning a previous panel's decision "absent an intervening change in the law, such as by a statutory amendment, or the Supreme Court, or our *en banc* court." *Mercado v. Lynch*, 823 F.3d 276, 279 (5th Cir. 2016) (quoting *Jacobs v. Nat'l Drug Intelligence Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008)) (italics in original). Supreme Court decisions do not overturn inferior-court decisions with a wink and a nudge. Even if a Supreme Court decision bears on an issue, "the . . . decision must be more than merely illuminating" and must "unequivocally direct[ ]" the overruling of the prior decision. *Martin v. Medtronic, Inc.*, 254 F.3d 573, 577 (5th Cir. 2001) (quoting *United States v. Zuniga-Salinas*, 945 F.2d 1302, 1306 (5th Cir. 1991)). Anything less does not authorize panel to overrule panel. *Id.*

Kokesh may be "illuminating" on a court's authority to order disgorgement in this setting, but it does not "unequivocally" direct us to overrule our prior cases

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illustrates exactly why the Supreme Court included footnote 3. Moreover, the footnote does not state that the Court doubts that district courts lack authority; it states only that the Court was not deciding the question.

[3] As already noted, the Supreme Court granted certiorari in *Liu* on November 1, 2019.

upholding that authority.[4] Since at least 1978 we have recognized that a "trial court act[s] properly within its equitable powers in ordering [a defendant] to disgorge the profits that he obtained by fraud." *Blatt*, 583 F.2d at 1335. Numerous other cases have proceeded on the assumption that such authority exists. *See*, *e.g.*, *Kahlon*, 873 F.3d at 509; *AMX, Int'l.*, 7 F.3d 71; *SEC v. Huffman*, 996 F.2d 800 (5th Cir. 1993). In short, the principle that district courts may order disgorgement in SEC enforcement proceedings is well established in our circuit. We are therefore bound, as a panel, to follow that precedent absent an intervening change in the law. *Mercado*, 823 F.3d at 279.

In sum, we hold that *Kokesh* did not unequivocally abrogate our circuit precedent that the district court was authorized to order disgorgement against Appellants in this case.[5]

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[4] True, during the *Kokesh* oral argument some members of the Supreme Court questioned the source of courts' authority to order disgorgement in civil enforcement proceedings. *See*, *e.g.*, Oral Argument at 5:00, *Kokesh v. SEC*, 137 S. Ct. 1635 (2017) (No. 16-529), https://www.supremecourt.gov/oral_arguments/audio/2016/16-529. And one scholar has argued that *Kokesh* "cast considerable doubt on the validity of the seemingly well-established disgorgement sanction." Stephen M. Bainbridge, *Kokesh Footnote Three Notwithstanding: The Future of the Disgorgement Penalty in SEC Cases*, 56 Wash. U. J.L. & Pol'y 17 (2018). But neither oral argument questions nor academic literature constitutes an intervening change in the law that would liberate this panel from its obligation to follow circuit precedent.

[5] Because we conclude that Appellants' argument is foreclosed by binding circuit precedent, we need not consider whether the language of the consent agreements in this case prohibits

B.

Appellants next argue that even if the district court had authority to order disgorgement, we should still reverse because the district court (1) did not afford Appellants discovery to which they were entitled under the consent agreements and (2) did not hold an evidentiary hearing on the appropriate amount of disgorgement. Appellants also attack the disgorgement amount itself, contending they are entitled to deduct legitimate business expenses. We disagree with these contentions.

First, the district court did not deprive Appellants of discovery. The court entered the parties' settlement agreements, in which they agreed that "[i]n connection with the [SEC]'s motion for disgorgement and/or civil penalties, the parties may take discovery, including discovery from appropriate non-parties." This was the opposite of "denying" Appellants discovery. By ratifying the settlement agreements, the court authorized the discovery to which the parties agreed. Appellants, however, failed to follow through by seeking any discovery. In opposing the SEC's amended motion for final judgment, Appellants stated that they should "have an opportunity in discovery, in advance of a hearing, to test" the SEC's disgorgement calculation. But from October 5, 2017 to June 4, 2018 (the period between the SEC's amended motion for final judgment and the district court's entry of final judgment),

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Appellants from challenging the fact of disgorgement. *See de Maison*, --- F. App'x - --, 2019 WL 4127328, at *1 n.1.

Appellants made no attempt to seek the discovery they claimed they wanted.

Appellants cite no authority establishing that a district court abuses its discretion in this situation. Discovery in civil litigation is litigant-driven; courts are not required to prod parties into conducting discovery if they do not move the process forward themselves. *Cf. Burns v. Thiokol Chem. Corp.*, 483 F.2d 300, 304 (5th Cir. 1973) ("The discovery provisions of the Federal Rules of Civil Procedure allow *the parties* to develop fully and crystalize concise factual issues for trial.") (emphasis added); *Shelak v. White Motor Co.*, 581 F.2d 1155, 1159 (5th Cir. 1978) ("The rules [governing discovery] are designed to narrow and clarify the issues and to give *the parties* mutual knowledge of all relevant facts.") (emphasis added). Moreover, a "district court's decisions in overseeing the discovery process are entitled to great deference on appeal." *United States v. Mora*, 994 F.2d 1129, 1138 (5th Cir. 1993). Appellants chose not to pursue discovery when it was available and now ask that we overturn the district court judgment because of their inaction. We decline to do so.

Moreover, it is unclear what discovery could have produced here. Appellants assert they wanted discovery showing the SEC's disgorgement estimate was inaccurate because it failed to consider Appellants' legitimate expenses. But as the SEC points out, any information that could have been used to rebut the estimate—*e.g.*, records of any business expenditures—would have already been in Appellants' possession. For this additional reason, we cannot say that the district court abused its discretion by ruling on the SEC's

motion without ordering discovery to take place beforehand.

For similar reasons, the district court did not abuse its discretion by ruling on the SEC's remedies motion without holding an evidentiary hearing. The parties' agreements may have contemplated the possibility of a hearing, but they did not require one. And the parties agreed that the district court could resolve issues in the SEC's disgorgement motion "on the basis of affidavits, declarations, excerpts of sworn deposition or investigative testimony, and documentary evidence." So the court's decision to rule on the SEC's motion without first holding a hearing could not have violated Appellants' rights under the settlement agreements because those agreements did not create a right to a hearing. At best, the agreements established only the possibility of a hearing.

Further, Appellants never moved for a hearing in the nearly eight-month period between the SEC's amended remedies motion and the court's order. In opposing the SEC's amended motion, Appellants stated that they should "have an opportunity in discovery, in advance of a hearing, to test" the disgorgement calculation. But that is not a motion for a hearing. And though Appellants also stated in the same opposition that "a hearing to establish the critical causal connection and refute directly the SEC's conclusory assertions will be necessary," that is also not a formal request for a hearing. The district court thus never denied a request for a hearing because a request was never made. And Appellants agreed that the district court could decide the disgorgement amount based on,

among other things, documentary evidence. That is exactly what happened.

Appellants' reliance on our sister circuit's decision in *SEC v. Smyth*, 420 F.3d 1225 (11th Cir. 2005), is misplaced. In *Smyth*, the defendant requested a hearing, but the district court denied the motion. *Id.* at 1230. Here, Appellants never moved for a hearing, so *Smyth* does not help them. *See SEC v. Aerokinetic Energy Corp.*, 444 F. App'x 382, 385 (11th Cir. 2011) (unpublished) (holding evidentiary hearing not required when not requested and when district court "[decided] the issues raised in the [SEC's] motion on the basis of affidavits, declarations, excerpts of sworn deposition or investigative testimony, and documentary evidence"). We therefore conclude that the district court did not abuse its discretion by ruling on the SEC's motion without holding an evidentiary hearing.

We further conclude that the district court did not abuse its discretion in determining the amount of disgorgement in this case. As we recently observed, "the overwhelming weight of authority holds that securities law violators may not offset their disgorgement liability with business expenses." *Kahlon*, 873 F.3d at 509 (cleaned up); *see also SEC v. JT Wallenbrock & Assocs.*, 440 F.3d 1109, 1115 (9th Cir. 2006) ("[I]t would be unjust to permit the defendants to offset against the investor dollars they received the expenses of running the very business they created to defraud those investors into giving the defendants the money in the first place.").

AFFIRMED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3:15-CV-01045-N

[Filed June 4, 2018]

SECURITIES AND EXCHANGE COMMISSION, Plaintiff,	)
v.	)
TEAM RESOURCES, INC., *et al.*, Defendants.	)

ORDER

This Order addresses Plaintiff the Securities and Exchange Commission's (the "SEC") amended motion for remedies and entry of final judgments [61]. For the reasons set forth below, the Court grants in part and denies in part the motion.

I. BACKGROUND

This case arises from Defendants Team Resources, Inc. ("Team Resources"); Fossil Energy Corporation ("Fossil") Kevin A. Boyles; John Olivia (collectively, the "Settlement Defendants") and Michael Eppy's

participation in a fraudulent oil and gas investing scheme. Defendants perpetuated the scheme over the course of approximately five years, resulting in losses of over $33 million from approximately 475 investors. Defendants lured investors by touting unreasonable oil and gas production figures and investment returns. They then distributed misleading status updates that led investors to believe that the oil and gas companies were performing well, when in fact the companies' performance was dismal. In so doing, Defendants received large sales commissions ranging from 25% to 35% that they did not disclose to investors. They also failed to register as securities brokers as required by law.

The SEC and Defendants eventually settled the case. The parties left one issue for later determination by the Court: the amount of monetary relief to be ordered against each Defendant. Defendants also agreed to admit the allegations in the SEC's complaint solely for the purpose of the SEC's motion for remedies. The SEC now moves the Court to order disgorgement, prejudgement interest, and civil monetary penalties against Defendants.

II. THE COURT GRANTS IN PART AND DENIES IN PART THE SEC'S MOTION

A. Defendants are Liable for Disgorgement and Prejudgment Interest

The Court has broad discretion in determining the amount of disgorgement in securities actions. *See, e.g.*, *SEC v. Helms*, 2015 WL 5010298, at *19 (W.D. Tex. Aug. 21, 2015) (citing *SEC v. AMX, Int'l, Inc.*, 7 F.3d

71, 73 (5th Cir. 1993)). The Court also has discretion to award prejudgment interest on these amounts, generally using the Internal Revenue Service's underpayment rate related to income tax arrearages. *Id*.

Defendants are liable for disgorgement equal to "a reasonable approximation of the proceeds causally connected to the wrongdoing." *Id*. (citing *SEC v. Seghers*, 298 F. App'x 319, 336 (5th Cir. 2008)). The disgorgement calculation is constrained by a five-year statute of limitations. *Kokesh v. SEC*, 137 S. Ct. 1635, 1639 (2017). Defendants may not offset their liability with business expenses. *Helms*, 2015 WL 5010298, at *19. They may, however, offset amounts repaid to investors. *SEC v. Evolution Capital Advisors, LLC*, 2013 WL 5670835, *2 (S.D. Tex. Oct. 16, 2013). In calculating disgorgement, any risk of uncertainty "should fall on the wrongdoer whose illegal conduct created that uncertainty." *Helms*, 2015 WL 5010298, at *19 (quoting *SEC v. Patel*, 61 F.3d 137, 140 (2d Cir. 1995)).

After reviewing Defendants' relevant financial records, the SEC claims that Defendants are liable for the following disgorgement and prejudgment interest amounts as a result of their fraudulent scheme:

Defendant	**Disgorgement**	**Prejudgment Interest**
Boyles/Team Resources/Fossil[1]	$15,508,280.13	$2,998,870.71
Olivia	$750,098.69	$149,518.58
Eppy[2]	$671,826.23	$129,912.52

In response, the Settlement Defendants argue that the United States Supreme Court's recent decision in *Kokesh* effectively eliminated courts' authority to create and impose disgorgement penalties. But "*Kokesh* merely held that disgorgement claims are subject to 28 U.S.C. § 2462's five-year statute of limitations." *SEC v. Sample*, 2017 WL 5569873, at *2 (N.D. Tex. Nov. 20, 2017) (citing *Kokesh*, 137 S. Ct. at 1638). Indeed, the *Kokesh* Court itself stated that "[n]othing in [its] opinion should be interpreted as an opinion on whether courts possess authority to order disgorgement in SEC enforcement proceedings or on whether courts have

[1] Boyles is jointly and severally liable for the disgorgement and prejudgment interest owed by Team Resources and Fossil because he owned and controlled those entities. *See Helms*, 2015 WL 5010298, at *19 ("Courts will likely order joint and several liability against defendants as to the disgorgement figure plus interest when 'two or more individuals or entities collaborate or have close relationships in engaging in the illegal conduct.'" (quoting *SEC v. Hughes Capital Corp.*, 124 F.3d 449, 455 (3d Cir. 1997))).

[2] Eppy and the SEC have agreed on a decreased disgorgement amount for which Eppy is liable. *See* Letter to the Court ("Letter") 1 [74]. The disgorgement and prejudgment interest numbers for Eppy reflect those decreased amounts.

properly applied disgorgement principles in this context." 137 S. Ct. at 1642 n.3. The Settlement Defendants cite no case law to the contrary. The Court thus rejects their contention that *Kokesh* impairs its authority to order disgorgement in securities enforcement proceedings.

The Settlement Defendants' remaining arguments are similarly unavailing. First, they claim that the SEC failed to approximate reasonably the amount of proceeds causally connected to their violations. But the SEC conducted an exhaustive review of the Settlement Defendants' financial records and presented to the Court a detailed listing of every single investment related to the fraud at issue. Second, the Settlement Defendants argue that the SEC failed to deduct their legitimate business expenses from its calculations. But the "overwhelming weight of authority hold[s] that securities law violators may not offset their disgorgement liability with business expenses." *SEC v. Kahlon*, 873 F.3d 500, 509 (5th Cir. 2017) (emphasis in original) (quoting *SEC v. United Energy Partners, Inc.*, 88 Fed. App'x 744, 746 (5th Cir. 2004)). Finally, the Settlement Defendants request a jury trial on the disgorgement issue. But they fail to cite any case law in support of their request. The Court thus orders the Settlement Defendants and Eppy to pay disgorgement and prejudgment interest in the amounts set forth above.

B. The Settlement Defendants are Liable for Civil Penalties

In addition to ordering disgorgement and prejudgment interest, the Court may also assess civil

penalties in securities enforcement actions. *See* 15 U.S.C. §§ 77t(d), 78u(d). Such civil penalties exist "to achieve the dual goals of punishment of the individual violator and deterrence of future violations." *SEC v. Kenton Capital, Ltd.*, 69 F. Supp. 2d 1, 17 (D.D.C. 1998) (internal quotation marks omitted). A court may award a maximum penalty of the greater of the gross amount of pecuniary gain or the amount set by statute. *Helms*, 2015 WL 5010298, at *20.

The amount of civil penalties to assess within the permissible statutory range is left to the court's discretion. *See, e.g.*, *SEC v. Kern*, 425 F.3d 143, 153 (2d Cir. 2005). In determining the appropriate penalty, courts 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.

Helms, 2015 WL 5010298, at *21 (quoting *SEC v. Offill*, 2012 WL 1138622, at *3 (N.D. Tex. Apr. 5, 2012)).

Based on the above factors, substantial penalties against the Settlement Defendants are appropriate in this case. First, the Settlement Defendants' conduct was egregious: they carried out a complex scheme over the course of five years that defrauded approximately

475 investors. Second, the Settlement Defendants acted with a high degree of scienter: they knowingly or recklessly deceived hundreds of investors, sometimes even using aliases while doing so. Third, the Settlement Defendants' conduct created substantial losses of over $15 million to defrauded investors within the five-year limitations period. And fourth, the Settlement Defendants' conduct was recurrent: the Settlement Defendants repeatedly issued false and misleading statements to hundreds of investors throughout the limitations period.

The SEC asserts that it has no current information regarding the fifth factor, the Settlement Defendants' financial condition. And while the Settlement Defendants claim that they plan to present evidence of financial hardship as a mitigating factor at a hearing, they present no such evidence in their response to the SEC's motion for remedies. Nor do they explain why a hearing is necessary to determine the amounts for which they are liable. The fifth factor thus weighs neither for nor against the imposition of civil penalties. But because the other four factors weigh in favor of civil penalties, the Court awards penalties equal to the disgorgement amounts in section II(A) *supra* against each of the Settlement Defendants. Given that the SEC dropped its scienter-based charges against Eppy, Am. Mot. for Remedies 3 n.3 [61], the Court denies the SEC's motion for civil penalties against Eppy.

CONCLUSION

The Court grants in part and denies in part the SEC's motion for remedies. The Court awards disgorgement, prejudgment interest, and civil penalties

against the Settlement Defendants and awards disgorgement and prejudgment interest against Eppy.

Signed June 4, 2018.

/s/ David C. Godbey
David C. Godbey
United States District Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3:15-CV-01045-N

[Filed June 4, 2018]

SECURITIES AND EXCHANGE COMMISSION, Plaintiff,	)
v.	)
TEAM RESOURCES, INC., *et al.*, Defendants.	)

FINAL JUDGMENT

By separate Order of this same date, the Court grants in part and denies in part Plaintiff the Securities and Exchange Commission's (the "SEC") amended motion for remedies against Defendants Team Resources, Inc. ("Team Resources"), Fossil Energy Corporation ("Fossil"), Kevin A. Boyles, John Olivia, and Michael Eppy.

It is therefore ORDERED that Team Resources, Fossil, and Boyles are jointly and severally liable for disgorgement of $15,508,280.13, representing proceeds gained as a result of the conduct alleged in the SEC's complaint (the "Complaint"), together with prejudgment interest thereon in the amount of $2,998,870.71, for a total of $18,507,150.84.

It is further ORDERED that Boyles is individually liable for a civil penalty in the amount of $15,508,280.13 pursuant to section 20(d) of the Securities Act and section 21(d)(3) of the Exchange Act.

It is further ORDERED that Olivia is individually liable for disgorgement of $750,098.69, representing proceeds gained as a result of the conduct alleged in the Complaint, together with prejudgment interest thereon in the amount of $149,518.58, for a total of $899,617.27.

It is further ORDERED that Olivia is individually liable for a civil penalty in the amount of $750,098.69 pursuant to section 20(d) of the Securities Act and section 21(d)(3) of the Exchange Act.

It is further ORDERED that Eppy is individually liable for disgorgement of $671,826.23, representing proceeds gained as a result of the conduct alleged in the Complaint, together with prejudgment interest thereon in the amount of $129,912.52, for a total of $801,738.75.

All relief not expressly granted herein is denied. This is a Final Judgment.

Signed June 4, 2018.

/s/ David C. Godbey
David C. Godbey
United States District Judge

APPENDIX C

15 U.S.C. § 77t. Injunctions and prosecution of offenses

(a) Investigation of violations

Whenever it shall appear to the Commission, either upon complaint or otherwise, that the provisions of this subchapter, or of any rule or regulation prescribed under authority thereof, have been or are about to be violated, it may, in its discretion, either require or permit such person to file with it a statement in writing, under oath, or otherwise, as to all the facts and circumstances concerning the subject matter which it believes to be in the public interest to investigate, and may investigate such facts.

(b) Action for injunction or criminal prosecution in district court

Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this subchapter, or of any rule or regulation prescribed under authority thereof, the Commission may, in its discretion, bring an action in any district court of the United States, or United States court of any Territory, to enjoin such acts or practices, and upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to

the Attorney General who may, in his discretion, institute the necessary criminal proceedings under this subchapter. Any such criminal proceeding may be brought either in the district wherein the transmittal of the prospectus or security complained of begins, or in the district wherein such prospectus or security is received.

(c) Writ of mandamus

Upon application of the Commission, the district courts of the United States and the United States courts of any Territory shall have jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of this subchapter or any order of the Commission made in pursuance thereof.

(d) Money penalties in civil actions

(1) Authority of Commission

Whenever it shall appear to the Commission that any person has violated any provision of this subchapter, the rules or regulations thereunder, or a cease-and-desist order entered by the Commission pursuant to section 77h–1 of this title, other than by committing a violation subject to a penalty pursuant to section 78u–1 of this title, the Commission may bring an action in a United States district court to seek, and the court shall have jurisdiction to impose, upon a proper showing, a civil penalty to be paid by the person who committed such violation.

(2) Amount of penalty

(A) First tier

The amount of the penalty shall be determined by the court in light of the facts and circumstances. For each violation, the amount of the penalty shall not exceed the greater of (i) $5,000 for a natural person or $50,000 for any other person, or (ii) the gross amount of pecuniary gain to such defendant as a result of the violation.

(B) Second tier

Notwithstanding subparagraph (A), the amount of penalty for each such violation shall not exceed the greater of (i) $50,000 for a natural person or $250,000 for any other person, or (ii) the gross amount of pecuniary gain to such defendant as a result of the violation, if the violation described in paragraph (1) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement.

(C) Third tier Notwithstanding subparagraphs (A) and (B), the amount of penalty for each such violation shall not exceed the greater of (i) $100,000 for a natural person or $500,000 for any other person, or (ii) the gross amount of pecuniary gain to such defendant as a result of the violation, if—

(I) the violation described in paragraph (1) involved fraud, deceit, manipulation, or

deliberate or reckless disregard of a regulatory requirement; and

(II) such violation directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons.

(3) Procedures for collection

(A) Payment of penalty to Treasury

A penalty imposed under this section shall be payable into the Treasury of the United States, except as otherwise provided in section 7246 of this title and section 78u–6 of this title.

(B) Collection of penalties

If a person upon whom such a penalty is imposed shall fail to pay such penalty within the time prescribed in the court's order, the Commission may refer the matter to the Attorney General who shall recover such penalty by action in the appropriate United States district court.

(C) Remedy not exclusive

The actions authorized by this subsection may be brought in addition to any other action that the Commission or the Attorney General is entitled to bring.

(D) Jurisdiction and venue

For purposes of section 77v of this title, actions under this section shall be actions to enforce a liability or a duty created by this subchapter.

(4) Special provisions relating to a violation of a cease-and-desist order

In an action to enforce a cease-and-desist order entered by the Commission pursuant to section 77h–1 of this title, each separate violation of such order shall be a separate offense, except that in the case of a violation through a continuing failure to comply with such an order, each day of the failure to comply with the order shall be deemed a separate offense.

(e) Authority of court to prohibit persons from serving as officers and directors

In any proceeding under subsection (b), the court may prohibit, conditionally or unconditionally, and permanently or for such period of time as it shall determine, any person who violated section 77q(a)(1) of this title from acting as an officer or director of any issuer that has a class of securities registered pursuant to section 78l of this title or that is required to file reports pursuant to section 78o(d) of this title if the person's conduct demonstrates unfitness to serve as an officer or director of any such issuer.

(f) Prohibition of attorneys' fees paid from Commission disgorgement funds

Except as otherwise ordered by the court upon motion by the Commission, or, in the case of an administrative

action, as otherwise ordered by the Commission, funds disgorged as the result of an action brought by the Commission in Federal court, or as a result of any Commission administrative action, shall not be distributed as payment for attorneys' fees or expenses incurred by private parties seeking distribution of the disgorged funds.

(g) Authority of a court to prohibit persons from participating in an offering of penny stock

(1) In general

In any proceeding under subsection (a) against any person participating in, or, at the time of the alleged misconduct, who was participating in, an offering of penny stock, the court may prohibit that person from participating in an offering of penny stock, conditionally or unconditionally, and permanently or for such period of time as the court shall determine.

(2) Definition

For purposes of this subsection, the term "person participating in an offering of penny stock" includes any person engaging in activities with a broker, dealer, or issuer for purposes of issuing, trading, or inducing or attempting to induce the purchase or sale of, any penny stock. The Commission may, by rule or regulation, define such term to include other activities, and may, by rule, regulation, or order, exempt any person or class of persons, in whole or in part, conditionally or unconditionally, from inclusion in such term.

15 U.S.C. § 77v. Jurisdiction of offenses and suits

(a) Federal and State courts; venue; service of process; review; removal; costs

The district courts of the United States and the United States courts of any Territory shall have jurisdiction of offenses and violations under this subchapter and under the rules and regulations promulgated by the Commission in respect thereto, and, concurrent with State and Territorial courts, except as provided in section 77p of this title with respect to covered class actions, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. In any action or proceeding instituted by the Commission under this subchapter in a United States district court for any judicial district, a subpoena issued to compel the attendance of a witness or the production of documents or tangible things (or both) at a hearing or trial may be served at any place within the United States. Rule 45(c)(3)(A)(ii) of the Federal Rules of Civil Procedure shall not apply to a subpoena issued under the preceding sentence. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291, 1292, and 1294 of title 28. Except as provided in section 77p(c) of this title, no case arising under this subchapter and brought in any State

court of competent jurisdiction shall be removed to any court of the United States. No costs shall be assessed for or against the Commission in any proceeding under this subchapter brought by or against it in the Supreme Court or such other courts.

(b) Contumacy or refusal to obey subpena; contempt

In case of contumacy or refusal to obey a subpena issued to any person, any of the said United States courts, within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides, upon application by the Commission may issue to such person an order requiring such person to appear before the Commission, or one of its examiners designated by it, there to produce documentary evidence if so ordered, or there to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

(c) Extraterritorial jurisdiction The district courts of the United States and the United States courts of any Territory shall have jurisdiction of an action or proceeding brought or instituted by the Commission or the United States alleging a violation of section 77q(a) of this title involving—

> (1) conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or

(2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.

15 U.S.C. § 78u. Investigations and actions

(a) Authority and discretion of Commission to investigate violations

(1) The Commission may, in its discretion, make such investigations as it deems necessary to determine whether any person has violated, is violating, or is about to violate any provision of this chapter, the rules or regulations thereunder, the rules of a national securities exchange or registered securities association of which such person is a member or a person associated, or, as to any act or practice, or omission to act, while associated with a member, formerly associated with a member, the rules of a registered clearing agency in which such person is a participant, or, as to any act or practice, or omission to act, while a participant, was a participant, the rules of the Public Company Accounting Oversight Board, of which such person is a registered public accounting firm, a person associated with such a firm, or, as to any act, practice, or omission to act, while associated with such firm, a person formerly associated with such a firm, or the rules of the Municipal Securities Rulemaking Board, and may require or permit any person to file with it a statement in writing, under oath or otherwise as the Commission shall determine, as to all the facts and circumstances concerning the matter to be investigated. The Commission is authorized in its discretion, to publish information concerning any such violations, and to investigate any facts, conditions, practices, or matters which it may deem necessary or proper to

aid in the enforcement of such provisions, in the prescribing of rules and regulations under this chapter, or in securing information to serve as a basis for recommending further legislation concerning the matters to which this chapter relates.

(2) On request from a foreign securities authority, the Commission may provide assistance in accordance with this paragraph if the requesting authority states that the requesting authority is conducting an investigation which it deems necessary to determine whether any person has violated, is violating, or is about to violate any laws or rules relating to securities matters that the requesting authority administers or enforces. The Commission may, in its discretion, conduct such investigation as the Commission deems necessary to collect information and evidence pertinent to the request for assistance. Such assistance may be provided without regard to whether the facts stated in the request would also constitute a violation of the laws of the United States. In deciding whether to provide such assistance, the Commission shall consider whether (A) the requesting authority has agreed to provide reciprocal assistance in securities matters to the Commission; and (B) compliance with the request would prejudice the public interest of the United States.

(b) Attendance of witnesses; production of records

For the purpose of any such investigation, or any other proceeding under this chapter, any member of the Commission or any officer designated by it is

empowered to administer oaths and affirmations, subpena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other records which the Commission deems relevant or material to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in the United States or any State at any designated place of hearing.

(c) Judicial enforcement of investigative power of Commission; refusal to obey subpena; criminal sanctions

In case of contumacy by, or refusal to obey a subpena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, and other records. And such court may issue an order requiring such person to appear before the Commission or member or officer designated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found. Any person who shall, without just cause, fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence,

memoranda, and other records, if in his power so to do, in obedience to the subpena of the Commission, shall be guilty of a misdemeanor and, upon conviction, shall be subject to a fine of not more than $1,000 or to imprisonment for a term of not more than one year, or both.

(d) Injunction proceedings; authority of court to prohibit persons from serving as officers and directors; money penalties in civil actions

(1) Whenever it shall appear to the Commission that any person is engaged or is about to engage in acts or practices constituting a violation of any provision of this chapter, the rules or regulations thereunder, the rules of a national securities exchange or registered securities association of which such person is a member or a person associated with a member, the rules of a registered clearing agency in which such person is a participant, the rules of the Public Company Accounting Oversight Board, of which such person is a registered public accounting firm or a person associated with such a firm, or the rules of the Municipal Securities Rulemaking Board, it may in its discretion bring an action in the proper district court of the United States, the United States District Court for the District of Columbia, or the United States courts of any territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. The Commission may transmit such evidence as

may be available concerning such acts or practices as may constitute a violation of any provision of this chapter or the rules or regulations thereunder to the Attorney General, who may, in his discretion, institute the necessary criminal proceedings under this chapter.

(2) Authority of Court To Prohibit Persons From Serving as Officers and Directors.—

In any proceeding under paragraph (1) of this subsection, the court may prohibit, conditionally or unconditionally, and permanently or for such period of time as it shall determine, any person who violated section 78j(b) of this title or the rules or regulations thereunder from acting as an officer or director of any issuer that has a class of securities registered pursuant to section 78l of this title or that is required to file reports pursuant to section 78o(d) of this title if the person's conduct demonstrates unfitness to serve as an officer or director of any such issuer.

(3) Money Penalties in Civil Actions.—

(A) Authority of commission.—

Whenever it shall appear to the Commission that any person has violated any provision of this chapter, the rules or regulations thereunder, or a cease-and-desist order entered by the Commission pursuant to section 78u–3 of this title, other than by committing a violation subject to a penalty pursuant to section 78u–1 of this title, the Commission may bring an action in a United States district court to seek, and the

court shall have jurisdiction to impose, upon a proper showing, a civil penalty to be paid by the person who committed such violation.

(B) Amount of penalty.—

(i) First tier.—

The amount of the penalty shall be determined by the court in light of the facts and circumstances. For each violation, the amount of the penalty shall not exceed the greater of (I) $5,000 for a natural person or $50,000 for any other person, or (II) the gross amount of pecuniary gain to such defendant as a result of the violation.

(ii) Second tier.—

Notwithstanding clause (i), the amount of penalty for each such violation shall not exceed the greater of (I) $50,000 for a natural person or $250,000 for any other person, or (II) the gross amount of pecuniary gain to such defendant as a result of the violation, if the violation described in subparagraph (A) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement.

(iii) Third tier.—Notwithstanding clauses (i) and (ii), the amount of penalty for each such violation shall not exceed the greater of (I) $100,000 for a natural person or $500,000 for any other person, or (II) the gross amount

of pecuniary gain to such defendant as a result of the violation, if—

(aa) the violation described in subparagraph (A) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; and

(bb) such violation directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons.

(C) Procedures for collection.—

(i) Payment of penalty to treasury.—

A penalty imposed under this section shall be payable into the Treasury of the United States, except as otherwise provided in section 7246 of this title and section 78u–6 of this title.

(ii) Collection of penalties.—

If a person upon whom such a penalty is imposed shall fail to pay such penalty within the time prescribed in the court's order, the Commission may refer the matter to the Attorney General who shall recover such penalty by action in the appropriate United States district court.

(iii) Remedy not exclusive.—

The actions authorized by this paragraph may be brought in addition to any other action that the Commission or the Attorney General is entitled to bring.

(iv) Jurisdiction and venue.—

For purposes of section 78aa of this title, actions under this paragraph shall be actions to enforce a liability or a duty created by this chapter.

(D) Special provisions relating to a violation of a cease-and-desist order.—

In an action to enforce a cease-and-desist order entered by the Commission pursuant to section 78u–3 of this title, each separate violation of such order shall be a separate offense, except that in the case of a violation through a continuing failure to comply with the order, each day of the failure to comply shall be deemed a separate offense.

(4) Prohibition of attorneys' fees paid from commission disgorgement funds.—

Except as otherwise ordered by the court upon motion by the Commission, or, in the case of an administrative action, as otherwise ordered by the Commission, funds disgorged as the result of an action brought by the Commission in Federal court, or as a result of any Commission administrative action, shall not be distributed as payment for

attorneys' fees or expenses incurred by private parties seeking distribution of the disgorged funds.

(5) Equitable Relief.—

In any action or proceeding brought or instituted by the Commission under any provision of the securities laws, the Commission may seek, and any Federal court may grant, any equitable relief that may be appropriate or necessary for the benefit of investors.

(6) Authority of a court to prohibit persons from participating in an offering of penny stock.—

(A) In general.—

In any proceeding under paragraph (1) against any person participating in, or, at the time of the alleged misconduct who was participating in, an offering of penny stock, the court may prohibit that person from participating in an offering of penny stock, conditionally or unconditionally, and permanently or for such period of time as the court shall determine.

(B) Definition.—

For purposes of this paragraph, the term "person participating in an offering of penny stock" includes any person engaging in activities with a broker, dealer, or issuer for purposes of issuing, trading, or inducing or attempting to induce the purchase or sale of, any penny stock. The Commission may, by rule or regulation, define such term to include other activities, and

may, by rule, regulation, or order, exempt any person or class of persons, in whole or in part, conditionally or unconditionally, from inclusion in such term.

(e) Mandamus

Upon application of the Commission the district courts of the United States and the United States courts of any territory or other place subject to the jurisdiction of the United States shall have jurisdiction to issue writs of mandamus, injunctions, and orders commanding (1) any person to comply with the provisions of this chapter, the rules, regulations, and orders thereunder, the rules of a national securities exchange or registered securities association of which such person is a member or person associated with a member, the rules of a registered clearing agency in which such person is a participant, the rules of the Public Company Accounting Oversight Board, of which such person is a registered public accounting firm or a person associated with such a firm, the rules of the Municipal Securities Rulemaking Board, or any undertaking contained in a registration statement as provided in subsection (d) of section 78o of this title, (2) any national securities exchange or registered securities association to enforce compliance by its members and persons associated with its members with the provisions of this chapter, the rules, regulations, and orders thereunder, and the rules of such exchange or association, or (3) any registered clearing agency to enforce compliance by its participants with the provisions of the rules of such clearing agency.

(f) Rules of self-regulatory organizations or Board

Notwithstanding any other provision of this chapter, the Commission shall not bring any action pursuant to subsection (d) or (e) of this section against any person for violation of, or to command compliance with, the rules of a self-regulatory organization or the Public Company Accounting Oversight Board unless it appears to the Commission that (1) such self-regulatory organization or the Public Company Accounting Oversight Board is unable or unwilling to take appropriate action against such person in the public interest and for the protection of investors, or (2) such action is otherwise necessary or appropriate in the public interest or for the protection of investors.

(g) Consolidation of actions; consent of Commission

Notwithstanding the provisions of section 1407(a) of title 28, or any other provision of law, no action for equitable relief instituted by the Commission pursuant to the securities laws shall be consolidated or coordinated with other actions not brought by the Commission, even though such other actions may involve common questions of fact, unless such consolidation is consented to by the Commission.

(h) Access to records

(1) The Right to Financial Privacy Act of 1978 [12 U.S.C. 3401 et seq.] shall apply with respect to the Commission, except as otherwise provided in this subsection.

(2) Notwithstanding section 1105 or 1107 of the Right to Financial Privacy Act of 1978 [12 U.S.C.

3405 or 3407], the Commission may have access to and obtain copies of, or the information contained in financial records of a customer from a financial institution without prior notice to the customer upon an ex parte showing to an appropriate United States district court that the Commission seeks such financial records pursuant to a subpena issued in conformity with the requirements of section 19(b) of the Securities Act of 1933, section 21(b) of the Securities Exchange Act of 1934 [15 U.S.C. 78u(b)], section 42(b) of the Investment Company Act of 1940 [15 U.S.C. 80a–41(b)], or section 209(b) of the Investment Advisers Act of 1940 [15 U.S.C. 80b–9(b)], and that the Commission has reason to believe that—

(A) delay in obtaining access to such financial records, or the required notice, will result in—

(i) flight from prosecution;

(ii) destruction of or tampering with evidence;

(iii) transfer of assets or records outside the territorial limits of the United States;

(iv) improper conversion of investor assets; or

(v) impeding the ability of the Commission to identify or trace the source or disposition of funds involved in any securities transaction;

(B) such financial records are necessary to identify or trace the record or beneficial ownership interest in any security;

(C) the acts, practices or course of conduct under investigation involve—

(i) the dissemination of materially false or misleading information concerning any security, issuer, or market, or the failure to make disclosures required under the securities laws, which remain uncorrected; or

(ii) a financial loss to investors or other persons protected under the securities laws which remains substantially uncompensated; or

(D) the acts, practices or course of conduct under investigation—

(i) involve significant financial speculation in securities; or

(ii) endanger the stability of any financial or investment intermediary.

(3) Any application under paragraph (2) for a delay in notice shall be made with reasonable specificity.

(4)

(A) Upon a showing described in paragraph (2), the presiding judge or magistrate judge shall enter an ex parte order granting the requested delay for a period not to exceed ninety days and an order prohibiting the financial institution involved from disclosing that records have been obtained or that a request for records has been made.

(B) Extensions of the period of delay of notice provided in subparagraph (A) of up to ninety days each may be granted by the court upon application, but only in accordance with this subsection or section 1109(a), (b)(1), or (b)(2) of the Right to Financial Privacy Act of 1978 [12 U.S.C. 3409(a), (b)(1), or (b)(2)].

(C) Upon expiration of the period of delay of notification ordered under subparagraph (A) or (B), the customer shall be served with or mailed a copy of the subpena insofar as it applies to the customer together with the following notice which shall describe with reasonable specificity the nature of the investigation for which the Commission sought the financial records:

"Records or information concerning your transactions which are held by the financial institution named in the attached subpena were supplied to the Securities and Exchange Commission on (date). Notification was withheld pursuant to a determination by the (title of court so ordering) under section 21(h) of the Securities Exchange Act of 1934 that (state reason). The purpose of the investigation or official proceeding was (state purpose)."

(5) Upon application by the Commission, all proceedings pursuant to paragraphs (2) and (4) shall be held in camera and the records thereof sealed until expiration of the period of delay or such other date as the presiding judge or magistrate judge may permit.

(6) Repealed. Pub. L. 114–113, div. O, title VII, § 708, Dec. 18, 2015, 129 Stat. 3030.

(7)

(A) Following the expiration of the period of delay of notification ordered by the court pursuant to paragraph (4) of this subsection, the customer may, upon motion, reopen the proceeding in the district court which issued the order. If the presiding judge or magistrate judge finds that the movant is the customer to whom the records obtained by the Commission pertain, and that the Commission has obtained financial records or information contained therein in violation of this subsection, other than paragraph (1), it may order that the customer be granted civil penalties against the Commission in an amount equal to the sum of—

(i) $100 without regard to the volume of records involved;

(ii) any out-of-pocket damages sustained by the customer as a direct result of the disclosure; and

(iii) if the violation is found to have been willful, intentional, and without good faith, such punitive damages as the court may allow, together with the costs of the action and reasonable attorney's fees as determined by the court.

(B) Upon a finding that the Commission has obtained financial records or information

contained therein in violation of this subsection, other than paragraph (1), the court, in its discretion, may also or in the alternative issue injunctive relief to require the Commission to comply with this subsection with respect to any subpena which the Commission issues in the future for financial records of such customer for purposes of the same investigation.

(C) Whenever the court determines that the Commission has failed to comply with this subsection, other than paragraph (1), and the court finds that the circumstances raise questions of whether an officer or employee of the Commission acted in a willful and intentional manner and without good faith with respect to the violation, the Office of Personnel Management shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the agent or employee who was primarily responsible for the violation. After investigating and considering the evidence submitted, the Office of Personnel Management shall submit its findings and recommendations to the Commission and shall send copies of the findings and recommendations to the officer or employee or his representative. The Commission shall take the corrective action that the Office of Personnel Management recommends.

(8) The relief described in paragraphs (7) and (10) shall be the only remedies or sanctions available to a customer for a violation of this subsection, other

than paragraph (1), and nothing herein or in the Right to Financial Privacy Act of 1978 [12 U.S.C. 3401 et seq.] shall be deemed to prohibit the use in any investigation or proceeding of financial records, or the information contained therein, obtained by a subpena issued by the Commission. In the case of an unsuccessful action under paragraph (7), the court shall award the costs of the action and attorney's fees to the Commission if the presiding judge or magistrate judge finds that the customer's claims were made in bad faith.

(9)

(A) The Commission may transfer financial records or the information contained therein to any government authority if the Commission proceeds as a transferring agency in accordance with section 1112 of the Right to Financial Privacy Act of 1978 [12 U.S.C. 3412], except that the customer notice required under section 1112(b) or (c) of such Act [12 U.S.C. 3412(b) or (c)] may be delayed upon a showing by the Commission, in accordance with the procedure set forth in paragraphs (4) and (5), that one or more of subparagraphs (A) through (D) of paragraph (2) apply.

(B) The Commission may, without notice to the customer pursuant to section 1112 or the Right to Financial Privacy Act of 1978 [12 U.S.C. 3412], transfer financial records or the information contained therein to a State securities agency or to the Department of Justice. Financial records or information

transferred by the Commission to the Department of Justice or to a State securities agency pursuant to the provisions of this subparagraph may be disclosed or used only in an administrative, civil, or criminal action or investigation by the Department of Justice or the State securities agency which arises out of or relates to the acts, practices, or courses of conduct investigated by the Commission, except that if the Department of Justice or the State securities agency determines that the information should be disclosed or used for any other purpose, it may do so if it notifies the customer, except as otherwise provided in the Right to Financial Privacy Act of 1978 [12 U.S.C. 3401 et seq.], within 30 days of its determination, or complies with the requirements of section 1109 of such Act [12 U.S.C. 3409] regarding delay of notice.

(10) Any government authority violating paragraph (9) shall be subject to the procedures and penalties applicable to the Commission under paragraph (7)(A) with respect to a violation by the Commission in obtaining financial records.

(11) Notwithstanding the provisions of this subsection, the Commission may obtain financial records from a financial institution or transfer such records in accordance with provisions of the Right to Financial Privacy Act of 1978 [12 U.S.C. 3401 et seq.].

(12) Nothing in this subsection shall enlarge or restrict any rights of a financial institution to challenge requests for records made by the Commission under existing law. Nothing in this subsection shall entitle a customer to assert any rights of a financial institution.

(13) Unless the context otherwise requires, all terms defined in the Right to Financial Privacy Act of 1978 [12 U.S.C. 3401 et seq.] which are common to this subsection shall have the same meaning as in such Act.

(i) Information to CFTC

The Commission shall provide the Commodity Futures Trading Commission with notice of the commencement of any proceeding and a copy of any order entered by the Commission against any broker or dealer registered pursuant to section 78o(b)(11) of this title, any exchange registered pursuant to section 78f(g) of this title, or any national securities association registered pursuant to section 78o–3(k) of this title.

15 U.S.C. § 78aa. Jurisdiction of offenses and suits

(a) In general

The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. In any action or proceeding instituted by the Commission under this chapter in a United States district court for any judicial district, a subpoena issued to compel the attendance of a witness or the production of documents or tangible things (or both) at a hearing or trial may be served at any place within the United States. Rule 45(c)(3)(A)(ii) of the Federal Rules of Civil Procedure shall not apply to a subpoena issued under the preceding sentence. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291, 1292, and 1294 of title 28. No costs shall be assessed for or against the Commission in any

proceeding under this chapter brought by or against it in the Supreme Court or such other courts.

(b) Extraterritorial jurisdiction The district courts of the United States and the United States courts of any Territory shall have jurisdiction of an action or proceeding brought or instituted by the Commission or the United States alleging a violation of the antifraud provisions of this chapter involving—

(1) conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or

(2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.