No. _____

In the
Supreme Court of the United States

GARY S. WILLIKY,
Petitioner,
v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Did the Seventh Circuit Court of Appeals err in determining that the Trial Court did not abuse its discretion by awarding 2x civil penalties against Williky, a cooperating whistleblower who provided information used to help obtain guilty pleas and/or guilty verdicts against six other defendants?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

All parties to the proceedings are listed in the caption.

RULE 14.1(B)(III) STATEMENT

The proceedings in federal trial and appellate courts identified below are directly related to the above-captioned case in this Court.

Securities and Exchange Commission v. Williky, Cause No. 1:15-cv-0357-WTL-MJD, 2018 WL 3729137 (S.D. Ind.). The Southern District of Indiana entered judgment against Petitioner in this matter on August 3, 2018.

Securities and Exchange Commission v. Williky, Cause No. 1:15-cv-0357-WTL-MJD, 2019 WL 162578 (S.D. Ind.). The Southern District of Indiana denied Petitioner's request for reconsideration in this matter on January 9, 2019.

Securities and Exchange Commission v. Williky, 942 F.3d 389 (7th Cir.). The Seventh Circuit denied Petitioner's petition for appeal on November 8, 2019.

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Gary Williky respectfully petitions for a writ of certiorari to review the judgement of the Unites States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The decision of the Seventh Circuit (App. 1-11) is reported at 942 F.3d 389. The August 3, 2019 decision of the District Court (App. 17-45) is unreported, but is available at 2018 WL 3729137. The District Court's January 9, 2019 denial of reconsideration (App. 12-16) is unreported, but is available at 2019 WL 162578.

JURISDICTION

The judgment of the court of appeals was entered on November 8, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

15 U.S.C. § 78u-1(a)(2)

(a) Authority to impose civil penalties

(2) Amount of penalty for person who committed violation

The amount of the penalty which may be imposed on the person who committed such violation shall be determined by the court in light of the facts and circumstances, but shall not exceed three times the profit gained or loss avoided as a result of such unlawful purchase, sale, or communication.

App. 46-53.

INTRODUCTION AND STATEMENT OF THE CASE

Williky is an Arizona State University Liberal Arts graduate who focused his time in high school and college on obtaining (and holding for twenty-eight years) the college's shot put and discus records. After obtaining his liberal arts degree in physical education, Williky went on to work in a variety of jobs, including dealing with credit management and consulting. Williky, in person, is an affable, energized man who loves talking about his kids, his grandkids, and coaching kids in soccer, baseball, and track and field events. He also serves as a committee member for a public and private child-related and adult sports organization.

A. Williky is approached to manage public relations and debt reduction of Imperial Petroleum Inc.

In late 2009, Williky was approached by Jeffrey Wilson ("Wilson"), regarding a potential opportunity to work in public relations and debt reduction for a company in which Wilson was the CEO and board chairman, Imperial Petroleum Inc. ("Imperial"). The following year, on or about May 24, 2010, Imperial purchased e-biofuels LLC ("e-biofuels"), which Williky understood made and sold biofuels along with certain related tax credits ("Renewable Identification Number" or "RIN") related to those fuels. Williky was impressed with the knowledge and expertise of the e-biofuels principals, Chad Ducey and Craig Ducey. Williky was particularly impressed with Chad Ducey's expertise in the field as a graduate of the Rose-Hulman Institute of

Technology, a Forbes-listed "top college" for engineering.

Although Williky knew nothing about the biodiesel industry, he was excited for the opportunity to work in the very popular green energy movement. In July 2011, Imperial and Williky entered into a few verbal contracts for debt reduction help plus two written ones. Pursuant to the various contracts, Williky was hired to help with public relations, to help Imperial settle certain of its debts and outstanding liabilities, and to work with the city of Sanger, Texas for purposes of building a new Imperial plant in Texas. [Trial Court Doc.[1] 48-2 and Doc. 48-3]. Williky received various types of compensation for these contracts, including stock for his public relations work, a monthly fee for his work setting up the Sanger facility (plus a promised management role) and a percentage of all funds saved by Imperial if Williky was successful in debt reduction strategies, plus reimbursement for expenses incurred in the pursuit of any of the contract goals.

Williky visited the Imperial plant in Indiana on four separate occasions: February 21, 2011, April 19, 2011, May 9, 2011 and August 4, 2011. Each time Williky visited the plant, it appeared to be running at full steam. During these visits, he was shown memorandums regarding the viability and validity of the plant and the product as well as taped interviews with the employees about their work at the plant. He

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[1] Based on the volume of the trial court record, it is not included in the Appendix. It is available upon request. Further references to a trial court filing will just be referred to by the Doc. Number.

also worked closely with city officials from Sanger throughout the summer/fall of 2011 to negotiate city concessions, leases and other related items. [Doc. 48-4]. Williky even planned a plant visit with the Sanger officials for July 28, 2011. [Doc. 48-5]. The late July plant visit was ultimately denied by Wilson. [Doc. 48-6].

As part of Williky's "biofuels education," on August 9, 2011, Wilson and the Ducey brothers showed him a "highly confidential" memorandum analyzing one aspect of the e-biofuels program and how it a strong new trade secret process that complied with applicable laws. [Doc. 48-7]. The memo was about the use of "offspec methyl esters" and Williky was told that e-biofuels/Imperial had passed prior EPA certifications and audits. Williky had no reason to doubt the memo or the Ducey brothers' superior knowledge of the highly technical biofuels industry. At or around the same time, Williky was provided with an "Independent Third-Party Review of e-biofuels" by Dr. Jerry A. Caskey, a professional chemical engineer, detailing that the e-biofuels plant was a "fully operational plant capable of producing a biodiesel product meeting appropriate ASTM specifications." [Doc. 48-8].

However, during late August 2011, Williky began voicing suspicions that Imperial appeared to be diverting biofuels to another company owned by a pseudo-relative of the Duceys, Brian Carmichael ("Carmichael"), and shorting a paying customer's owed prepaid delivery (little did Williky know at the time what the actual fraud was and how deep it went).

Wilson told Williky to "give it a rest there is nothing going on." [Doc. 48-9].

On August 30, 2011, Wilson sent Williky a letter threatening him with a breach of fiduciary claim and termination if Williky continued to voice his concerns about the possible biofuels diversion. [Doc. 48-10].

On September 2, 2011, Wilson requested that Williky resign, presumably because of Williky's voiced suspicions that Imperial was diverting biofuels to Carmichael at below-market price, and shorting a paying customer's owed prepaid delivery. At the time of the requested resignation[2], Wilson again threatened Williky in more specific terms that going public or to any governmental agency with his suspicions would result in the shareholders filing a lawsuit against Williky. Williky did not feel he could do anything about his suspicions without hard evidence of their veracity and thus tendered his resignation letter as demanded. [Doc. 48-11].

Shortly thereafter, in October 2011, Wilson resigned himself and his request that Williky resign was never brought up again.

During the months of September – October 2011, Williky continued to work with Imperial and others to help finance the proposed new plant in Sanger, Texas. Williky met with investors, city officials and potential vendors to help facilitate the new plant.

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[2] The requested resignation was not to take effect until September 15, 2011, the end of the investment conference in New York City related to the Sanger Plant.

B. Furando Begins His Campaign of Terror, forcing Williky out.

In November 2011, Williky became concerned when he started receiving subtle and not-so-subtle threats from the Duceys' co-conspirator, Joseph Furando ("Furando"). At the time, Williky believed those threats related to either his suggestion to the Imperial Board of Directors that William Stratton ("Stratton") be hired as CEO or perhaps his voiced suspicions that Imperial was diverting biofuels and the supplier relationship with Furando's company. Williky later learned that he was not the only person to receive threats from Furando, who is now serving time in prison.[3]

On or about November 10, 2011, Williky learned about the threats Furando made against Stratton. [Doc. 48-13]. Williky decided that, based on the escalating threats against him from Furando and his continued suspicion of malfeasance regarding the potential biofuel diversion, he no longer wanted to be part of Imperial and began negotiating his severance package. The full description of Furando threats

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[3] https://www.ibj.com/articles/52622-prosecutors-man-in-biodiesel-scam-made-death-threats. Furando threatened to "start with Williky's sister and that he knew where she lived." [Doc. 48-30]. Furando repeatedly told Williky and others in front of Williky that he was "connected" to the mafia and that his father had actually been part of the mafia. [Doc. 48-30]. Later, Williky learned that Furando had held a gun to an employee's head when the employee displeased Furando. [Doc. 48-30]. *See also* August 24, 2012 Email from Williky's *Qui Tam* attorney mentioning Furando's threats to stab Tim Jones, an employee. [Doc. 48-29]. *See also* lawsuit filed by Joe Stratton detailing Furando's aggressive threats to oust him as CEO. [Doc. 48-28].

against Williky is detailed in Williky's Qui Tam Affidavit. [Doc. 48-30].

As part of his negotiations, Williky provided Imperial with his services invoice and began negotiating his severance. [Doc. 48-14].

During the negotiations for his severance, Williky still believed the extent of the misconduct was that the Duceys were skimming off the top by selling biofuels at a discounted price to Carmichael. Wilson continued to lead Williky down this path and act as though the need for secrecy was due to the "proprietary nature" of the biofuel making process. *See*, November 14, 2011 AIM conversation between Wilson and Williky wherein Wilson says, "Whether the Duceys were skimming is irrelevant, they are all worried about attention and press releases and people trying to duplicate their model." [Doc. 48-15].

On December 2, 2011, Williky agreed to a severance and nondisclosure agreement to be paid for services rendered, which were invoiced and negotiated. [Doc. 48-16].

C. Williky learns the true nature of the fraud.

During his severance negotiations, and still believing that the Duceys were skimming, on or about November 17, 2011, Williky suggested to John Ryer ("Ryer") who had just become the CEO, that he tape any conversations with Furando in order to discover whether Williky's skimming concerns were true.

On or about November 17, 2011, Ryer did tape a conversation with Furando, wherein Furando confessed

to selling fuel, not feedstock, to the company. However, based upon the "off-spec methyl ester" memo [Doc. 48-7] and the Third Party Review [Doc. 48-8], it was still unclear to Williky whether processing fuel was improper.

Williky received the recording on or around November 21, 2011, and requested that his assistant make a transcript so he could review it.

Williky received the transcript of the taped conversation between Ryer and Furando on or about January 23, 2012, and at that time realized the fraud went much deeper than what he had suspected. Through the transcript, Williky learned the truth about the Ducey's subterfuge and realized that Imperial's entire biodiesel business might be a sham. [Doc. 48-17].

D. Williky becomes a Whistleblower and Cooperator.

On or about December 27, 2011, prior to his receipt of the Furando transcript, Williky anonymously contacted the EPA to try to talk to someone about the potential skimming by the Duceys and to determine whether that was a violation of EPA regulations that he should report. He was never able to talk to anyone who could give him an answer, although he was transferred to a number of agents. Williky called anonymously as he was scared about potential repercussions from Furando.

Upon information and belief, at least partially as a result of Williky's call, on or about February 2, 2012, the SEC opened an investigation of Imperial, *In the Matter of Imperial Petroleum, Inc.* (C-07912).

When Williky received the transcript of the taped conversation between Ryer and Furando on January 23, 2012, his focus shifted to the potentially larger fraud. However, based on the memorandum [Doc. 48-4] and independent third-party reports [Doc. 48-9] he had seen, Williky was still not sure if he understood whether the Duceys' actions were a fraud or not.

On January 26, 2012, three days after receiving the transcript, Williky contacted whistleblower counsel [Doc. 48-18] with substantial expertise in environmental crimes in order to see if he should contact the EPA again with his new knowledge. Williky ultimately hired Bruce Pasfield of Alston & Bird, an experienced whistleblower counsel who had extensive experience with environmental crimes at the Department of Justice. [Doc. 48-19].

On March 13, 2012, Williky reported Imperial's potential violations to multiple government agencies such as the EPA, FBI, IRS and SEC through a proffer. [Doc. 48-20].

On April 6, 2012, Williky consented to record conversations between him and the fraudsters. [Doc. 48-18; Doc. 48-21].

On April 24, 2012, Williky Applied for an Award for Original Information with the SEC's Whistleblower's office. [Doc. 48-23].

On May 11, 2012, Williky, working with Mr. Pasfield, provided the FBI with a hard drive of data as part of his whistleblowing activities. [Doc. 48-24].

On June 5, 2012, Williky, working with Mr. Pasfield, provided the FBI with a DVD of additional data as part of his whistleblowing activities. [Doc. 48-25].

On or about July 5, 2012, Williky filed a Qui Tam Complaint in the United States District Court, Northern District of Texas, Fort Worth Division, Case No. 4-12CV-472 Y.

On July 26, 2012, Williky, working with Mr. Pasfield, provided the FBI with yet another DVD of additional data as part of his whistleblowing activities. [Doc. 48-26].

Williky continued to cooperate with the SEC throughout 2012 and 2013. [Doc. 48-27; *see also* Doc. 64].

On August 31, 2012, Williky amended his Qui Tam action to a fictitious name under fear for his life. At that time, Williky was also under FBI protective surveillance in fear of Furando's mafia connections. [Doc. 48-30; Doc. 48-31; Doc. 48-32].

During the time Williky was providing information to the various governmental agencies, he was not, to his knowledge or the knowledge of his whistleblower counsel, under investigation or subject to any civil or criminal proceedings. [Doc. 48-18].

At least partially as a result of Williky's trove of information, on May 24, 2012, Congress held a hearing on the issue and raided the CIMA Green LLC offices.

On September 19, 2013, Jeffrey T. Wilson[4], Craig Ducey, Chad Ducey, Brian Carmichael, Joseph Furando, Evelyn Pattison, Caravan Trading LLC, CIMA Green LLC, CIMA Energy Group and Imperial Petroleum were indicted in what was referred to as "the largest instance of tax and securities fraud in [Indiana] state history."[5] The court even mentioned Williky's information, citing to a "collection of emails, documents and testimony from other Imperial employees" that supported the jury's verdict.[6] The DOJ used Williky's documents during Wilson's trial. *See, e.g.,* Transcript of Wilson Trial, Vol. 3, pgs. 545—547. [Doc. 48-35].

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[4] *U.S. v. Wilson*, Cause No. 1:13-cr-00190-SEB-TAB. Wilson was found guilty on July 20, 2015 and was sentenced to 120 months in prison with a $16,468,769.73 restitution award.

[5] *United States of America vs Craig Ducey, Chad Ducey, Chris Ducey, Joseph Furando, Evelyn Katirina Pattison a/k/a Katirina Tracy, E-Biofuels, LLC, Caravan Trading Company, LLC, Cima Green, LLC,* Case 1:13-cr-00189-SEB-TAB United States District Court Southern District of Indiana Indianapolis Division (filed and indicted on September 17, 2013).

[6] Https://www.law360.com/articles/1001622/print?section=Environmental

E. Specific examples that Williky's evidence was valuable and was used by the governmental agencies.[7]

i. The Furando/Ryer Tape was used in the indictments.

Perhaps the most important piece of evidence that Williky supplied to the United States during the March 13, 2012 Proffer was the tape of Joseph Furnando, in his own words, describing the Imperial scheme to John Ryer, the new named CEO of Imperial. Williky told the various agencies about the tape during the proffer and then provided his attorney with the recording on or about March 14, 2012 for production to the government. Here is an excerpt of that conversation:

> John: Ok. But its feedstock, that's what we consider feedstock.
>
> Joe: You can consider it what you want.
>
> John: Okay.
>
> Joe: The world considers it fuel.
>
> John: M'k.
>
> Joe: Fully processed. RIN – taken. Dollar – taken. K. you also get feedstock This feedstock—
>
> John: That's the soy.
>
> Joe: That's the soy. K? This is fuel. B99. RIN-less.

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[7] Doc. 64-1.

John: RIN-less. Okay.

Joe: Mm-hmm. This B99 RIN-less goes back to e-Bio…

John: Right.

Joe: Where…

John: We mix it or do something to it.

Joe: You don't do anything to it. What you do is you take it…

John: Filter it.

Joe: You do nothing to it.

John: We don't?

Joe: No.

John: Okay. I just dunn..So why haven't I been told?

Joe: Okay. *sigh* Okay.

John: *laughs*

Joe: We can play games

John: No, but I'm telling you tha-, I'm telling you – I have not been told yet.

Joe: Okay, you do nothing to it and it passes through, so there's a dollar on the RIN here,

John: Right.

> Joe: There's a dollar on the RIN here and it goes from being whoever made it to now being the property of e-Bio. Where there's an e-Bio RIN and then e-Bio gets the dollar or if you save, sell it as B100, somebody else takes the dollar. So right now, all you're doing is creating RINs
>
> John: But if it's B99, somethin' has to be done to it to make it B100, am I wrong or wrong?
>
> Joe: Nothing is done to the fuel. Nothing.

This "smoking gun" tape, provided to multiple governmental agencies by Williky *prior* to his knowledge that any governmental agency was investigating Imperial and provided three years *before* any claims were brought against him, was then used in the September 17, 2013 Indictment of Craig Ducey, Chad Ducey, Chris Ducey, Joseph Furando,[8] Katirina Tracy, Brian Carmichael, E-Biofuels, Caravan Trading Company, and CIMA Green by being specifically mentioned as "Overt Act 24." For example, the Carmichael information says, "On or about November 17, 2011, Furando and TRACY met with PERSON 5, explained the operation of the conspiracy to PERSON 5 and recruited PERSON 5 as a new member of the conspiracy." (This same "Overt Act 24" is in the Furando information. [Doc. 64-9]. That is specifically

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[8] For brevity, if we just look at the conviction of Furando alone, it resulted in a voluntary forfeiture of approximately $153,678,355.00 in cash as well as art, jewelry, Orange County Choppers motorcycles, a Ferrari, real property and other items. *See* Case No. 1:13-cr-00189-SEB-TAB, Doc. 423.

referencing the Furando/Ryer tape. [Docs. 64-1, 64-9 and 64-10].

ii. Evidence produced by Williky was used in the Wilson Indictment and Trial and helped result in guilty pleas for six other Defendants.

In addition to the "smoking gun" tape mentioned above, the government used thirty-six (36) documents provided by Williky in its trial against Jeffrey Wilson, Cause No. 1:13-cr-190-SEB-TAB-1, styled *United States of American v. Jeffrey Wilson*. Specifically, Exhibits 23, 41, 46, 48, 49, 51, 52-55, 57-60, 63, 65-72, 81 – 84, 86-89, 92-95, 105-106 were provided by Williky in 2012 during his productions to the government. [Doc. 64-1]. That same evidence was also used in the Wilson Indictment. [Doc. 64-1].

On January 31, 2014, Williky submitted an SEC form TCR related to his March 13, 2012 Proffer. [Doc. 48-33].

A year later, in April and May 2015, at least partially as a result of Williky's information, the defendants pled or were found guilty in the $145 million biodiesel fraud. Furando pled guilty on April 17, 2015 and was sentenced to 240 months in prison. Craig Ducey pled guilty on April 20, 2015 and was sentenced to 74 months in prison. Chad Ducey pled guilty on April 28, 2015 and was sentenced to 84 months in prison. Chris Ducey pled guilty on April 22, 2015 and was sentenced to 72 months in prison. Evelyn Pattison pled guilty on July 18, 2014 and was sentenced to three years probation. Carmichael was

sentenced to 151 months in prison. The three Ducey brothers, Furando, Pattison, and the entities, e-Biofuels, LLC, Caravan Trading Company and CIMA Green, LLC, were all ordered to pay restitution of $56,135,811.00.

F. The SEC Sues Williky.

On March 2, 2015, three years after providing whistleblower information to multiple governmental agencies, including the SEC, the SEC brought suit against Williky, seeking disgorgement, among other things.

On August 10, 2015, prior to anything occurring in his case, including Williky filing an answer, the SEC and Williky's attorney, Robert Webster, negotiated a settlement of $1,100,000.00 [$747,577.89 (disgorgement) + $108,927.89 (prejudgment interest) + $243,494.22 (penalty)]. [Doc 48-34].

On August 26, 2015, the Court administratively closed the SEC suit against Williky pending the resolution of the criminal actions against the Ducey brothers, Wilson and others. [Doc. 8]. No criminal claims were brought against Williky. At the time the case was administratively closed, the case was in its infancy with a negotiated settlement that merely needed final paperwork.

On September 18, 2015, Williky's attorney, Webster, was injured in a horrific hunting accident, resulting in the loss of portions of his hand. [Doc. 48-38]. Webster was in and out of hospitals and surgeries from September 18, 2015 – early April 2016. *Id*. As a result, Williky was left without legal counsel, but believed that

he had an all-but-done settlement with the SEC that would be inked once the case was reopened and his lawyer healed.

On August 31, 2016, the SEC informed Williky's counsel, Webster, that they intended to reopen the case and had added a stiff civil penalty and additional disgorgement to their settlement offer—with the new final settlement offer being $1,961,980.96. [Doc. 48-36]. Nothing had changed in the case to warrant the additional settlement demand.

From August 26, 2015 – the August 2016 contact by the SEC, the case remained dormant and Williky was without legal counsel.

On January 19, 2017 the case was reopened. [Doc. 15].

Williky answered on February 21, 2017 as a *pro se* defendant. [Doc. 19]. In fact, Williky was without counsel from February 21, 2017 thorough October 16, 2017, when his current counsel, David Clouston was admitted *pro hac vice.* [Doc. 37].

On March 24, 2017, Williky reached out to the SEC about finalizing the previously negotiated settlement. [Doc. 48-37].

During the renewed settlement discussions in March - October 2017, the SEC referenced that prejudgment interest calculations would be higher but did not mention any other requested sums (such as the brand-new request for disgorgement and interest of Williky's severance found in the SEC's November brief [Doc. 39]). *Cf.* Doc. 48-39, pg. 1-2 with Doc. 39, pg. 10,

13. At the time, the SEC was aware Williky was without counsel.

On October 3, 2017, Williky entered into a bifurcated settlement with the SEC based on the negotiations conducted in August 2015 and finalized in August 2016. [Doc 34]. At the time Williky began discussing inking the settlement, he was without counsel. His conversations with the SEC mainly centered around a dispute as to whether he would agree to the August 2016 demand of $1.9 million as opposed to the original August 2015 settlement of $1.1 million. The SEC told Williky that based on the disagreement, they could enter into a bifurcated settlement with the monetary relief to be determined by the Court and that the Court would usually "pick a number in the middle." Williky contacted his current counsel, David Clouston, at the tail end of the discussion. However, the paperwork, done in reliance of the August 2016 numbers and the SEC's representations regarding the Court's penchant for splitting the difference as a result of a bifurcated settlement, was all but done before Williky was even represented by counsel.

On November 6, 2017, the SEC filed its *Brief in Support of Its Motion for Injunctions, Disgorgement, Civil Penalties, and Entry of Final Judgment Against Defendant Williky*. [Doc. 39]. In it, for the first time, the SEC requested disgorgement, penalties and interest of $4,923,916—an eye-popping $2,961,935.04 more than what was discussed when Williky was determining whether to agree to the bifurcated settlement. The Brief added a never-before-requested

disgorgement of Williky's severance ($1,237,500.00) from Imperial and added significant interest between the time of the original negotiations in August 2016 and the execution of the bifurcated settlement—even though the execution of the settlement was delayed due to the Court closing the case and Williky's attorney's tragic accident. The SEC did not assert any causes of action or claims for disgorgement of the severance and had never before asserted a claim for those funds. The SEC's mushrooming settlement changes were as follows:

Category	**August 10, 2015 Settlement**	**August 31, 2016 Settlement Change**	**November 6, 2017 Brief Request**
Insider Trading Disgorgement	$683,948.89	$810,714.00	$798,217.00
Civil penalty	$135,645.59	$810,714.00	$2,394,651.00
Insider Trading PJI	$58,624.52	$115,167.30	$159,110.13
Scalping Disgorgement	$63,629.00	$63,629.00	$65,617.00
Scalping Penalty	$63,629.00	$63,629.00	Requests Court determination
Scalping PJI	$7,023.00	$10,627.66	$14,866.97
Wash Trading Penalty	$80,000.00	$80,000.00	$0
13D First Tier penalty	$7,500.00	$7,500.00	$0
Employment Severance disgorgement	$0	$0	$1,237,500.00
Employment Severance PJI			$253,953.94
Total	**$1,100,000.00**	**$1,961,980.96**	**$4,923,916.00**

Ultimately, the Trial Court ruled against the SEC on the newly-asserted employment severance request, but ruled in favor of the SEC on the disgorgement for insider trading, scalping and interest. The Trial Court awarded a 2x civil penalty related to the insider trading claim, referencing Williky's whistleblower activities as "of limited value." [Doc. 67].

STATEMENT OF ARGUMENT

A review of the appropriateness of a civil penalty for insider trading appears to be a matter of first impression in the Seventh Circuit. Other Circuits have held that the standard is abuse of discretion. *S.E.C. v. Happ*, 392 F.3d 12, 32 (1st Cir. 2004); *S.E.C. v. Rajaratnam*, 918 F.3d 36, 41 (2d Cir. 2019) ("We review [the trial court's] decision on … the appropriateness of the district court's selection of a civil penalty, for abuse of discretion"). Under the abuse of discretion standard, "[a]buse occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed, but the court makes a serious mistake in weighing them." *S.E.C. v. Sargent*, 329 F.3d 34, 38 (1st Cir. 2003).

Williky respectfully asserts that the Trial Court abused its discretion in awarding a 2x civil penalty by either ignoring a material fact deserving significant weight or making a serious mistake in weighing the fact–namely his status as a cooperating whistleblower whose document productions (made before he was sued by the SEC) resulted in six guilty pleas and one guilty trial verdict.

In 2017, Bridget Fitzpatrick, then Acting Co-Chief Litigation Counsel of the SEC, now Chief Litigation Counsel with oversight over the national litigation program for the SEC, spoke about the SEC's cooperation initiatives, noting that the SEC takes such initiatives very seriously and wants to encourage people to cooperate "early, frequently, and strongly."[9] She mentioned that the availability of cooperators has allowed the SEC to bring cases faster, and the SEC uses cooperators both at trial as well as via affidavit in support of efforts to seek injunctive relief or asset freezes. She commented that the benefits available to cooperators depend on the specific case at hand, and could include the SEC recommending against charges or recommending only non-scienter-based charges, reducing penalties or assessing no penalties at all. In cases with cooperators, the SEC "generally favors" bifurcated settlements by which liability is established, but a decision as to remedies is pushed to a later date to allow the SEC to effectively assess the value of the cooperation. According to Ms. Fitzpatrick, a substantial percentage of bifurcated agreements result in the SEC recommending that no penalty be imposed. Ms. Fitzpatrick recommended that attorneys representing persons or entities being investigated by the SEC evaluate the potential for cooperation early in the process, and that respondents be prepared to honor their cooperation agreements.

Mr. Williky cooperated "early, frequently, and strongly." He approached the EPA with the original (skimming) fraud he thought he had detected and then

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[9] https://www.vedderprice.com/highlights-from-sec-speaks-2017

sought whistleblower counsel to help him disclose the true fraud to the appropriate governmental agencies within three days of reading the Furando/Ryer transcript. Despite being threatened physically by Furando and with legal action by Wilson, Williky provided testimony and produced hard drives and discs of thousands of documents to the government before any cases were filed or persons were indicted. Judging by the timeline, the fact that the FBI filed indictments so soon after Williky's document production indicates that his information was helpful in indicting, and later convicting, the seven individuals responsible for the fraud.

The Trial Court's decision to award 2x civil penalties ignores or mistakenly underweighs a material factor deserving significant weight—Williky's cooperation—and chills future whistleblowers.

Against the great weight of case law, and in juxtapose to what had been discussed, the SEC sought disgorgement, penalties and other sums beyond what was discussed or negotiated during the course of the settlement discussions or agreement. It is concerning that the Trial Court's award is referenced as evidence of a lack of predictability for settling defendants. § 8:2.Civil penalty—Primary liability, 18 Insider Trading Regulation, Enforcement and Prevention § 8:2.

> At present, it is safe to say that there is no predictability regarding judicial imposition of the civil penalty: It is very much affected by the attitude of the judge both to the individual defendant and to the nature of his conduct, and

> to the defendant's financial situation at the time of the judgment.

Id.

The Trial Court's award of 2x the disgorgement amount for the "insider trading" penalties ignored Williky's cooperation with multiple governmental agencies as well as his whistleblowing activities.

In determining what a civil penalty should be, the court should consider the following (1) the seriousness of the violations; (2) the defendant's scienter; (3) the repeated nature of the violations; (4) whether the defendant admitted wrongdoing; (5) the losses or risk of losses caused by the conduct; (6) any cooperation provided to enforcement authority; and (7) ability to pay. *S.E.C. v. Zenergy Int'l, Inc.*, Cause No. 13-CV-5511, 2016 WL 5080423 (N.D. Ill. Sept. 20, 2016). To determine the appropriate amount of any such penalty, a court must consider the "facts and circumstances" of the particular case. 15 U.S.C. §§77t(d)(2), 78u(d)(3).

The Trial Court's award of 2x penalties ignored the great weight of case law in dealing with cooperating and settling defendants. Courts assessing penalties in bifurcated settlements typically either do not assert a penalty at all or assert a penalty equaling the gross amount of the gain, even when the conduct is egregious. *See, e.g. S.E.C. v. Bluestein,* No. 09-13809, 2013 WL 1759091, at * 5 (E.D. Mich. March 7, 2013) (assessing no civil penalty); *Zenergy Int'l, Inc.*, 2016 WL 5080423, at *6-7 (ruling that the settling defendants should disgorge the amount of profit plus prejudgment interest plus a penalty equal to the gross amount of the

gain); *S.E.C. v. Universal Express, Inc*., 646 F.Supp.2d 552 (S.D.N.Y. 2009) (ruling that the settling defendants should pay penalties of 1/9th and 1/12th of the disgorgement amounts); *S.E.C. v. Sample*, Civ. A. No. 3:14-CV-1218-B, 2017 WL 5569873, at * 3 (N.D. Tex. Nov. 11, 2017) (ruing that the settling defendants' civil penalty should be equal to the disgorgement amount); *S.E.C. v. Esposito*, Case No. 8:08-cv-494-T-26EAJ, 2011 WL 13186000, at *7 (M.D. Fla. June 24, 2011) (ruling that the two settling defendants should pay penalties equal to their gross pecuniary gains). And, none of the courts enforcing these penalties dealt with cooperating, whistleblowing defendants—which would merit even less of a civil penalty. *See, id.* In fact, Counsel was unable to find a case wherein *any* civil penalty was assessed against a defendant who established he was a whistleblower and cooperator.

Courts, even when a defendant takes the case all the way to trial, generally impose no more than one times the alleged illegal profit made. *See, e.g., S.E.C. v. Johnson*, 174 F. App'x 111 (3d Cir. 2006) (awarding one times the insider trading profits made after trial on the merits); *S.E.C. v. Koenig*, 557 F.3d 736, 744 (7th Cir. 2009) (imposing one times the bonus plus prejudgment interest after a trial on the merits); *S.E.C. v. Gunn*, 2010 WL 3359465, at * 11 (N. D. Tex. Aug. 25, 2010) (assessing $50,000 civil penalty under 15 U.S.C. § 78-1(a)(2) related to $108,587.87 disgorgement against the noncooperating non-whistleblowing defendant); *S.E.C. v. Berrettini*, 218 F.Supp.3d 754, 764-65 (N.D. Ill. 2016) (assessing 1x penalties under 15 U.S.C. § 78-1(a)(2) equal to the disgorgement assessment against the noncooperating and non-whistleblowing defendants);

S.E.C. v. Conradt, 696 F. App'x 46, 48 (2d Cir. 2017) (imposing only a 1x penalty under 15 U.S.C. § 78-1(a)(2) against an initially cooperating witness/defendant who later became an uncooperative witness at trial); *S.E.C. v. Softpoint, Inc.*, 958 F. Supp. 846, 868 (S.D.N.Y. 1997), aff'd, 159 F.3d 1348 (2d Cir. 1998) (district court reduced a default judgment order assessing a 3x penalty under 15 U.S.C. § 78-1(a)(2) to less than a 1x penalty); *cf. S.E.C. v. Alanar*, Civ. A. No. 2008 U.S. Dist. LEXIS 37241, at * 7 (S.D. Ind. May 6, 2008) (awarding more against noncooperating defendants, but, noticeably, ordering $2,862,191 disgorgement against the only (non-whistleblowing) cooperating defendant, Vaughn Reeves, but only assessing a $120,000 penalty).

The cases imposing the maximum 3x penalty are all distinguishable from the present situation in that they were all jury trials where the defendant never admitted fault and never cooperated—wholly different from Williky's situation. *S.E.C. v. Lipson*, 278 F.3d 656, 664 (7th Cir. 2002) (imposing the maximum penalty after the jury verdict because the defendants' refusal to accept punishment "argues that he was likely to repeat his crimes"); *S.E.C. v. Maio*, 51 F.3d 623 (7th Cir. 1995) (imposing the maximum penalty after bench trial). In *SEC v. Ferrero*, the SEC argued that the three times penalty was warranted because the defendants lied repeatedly, forcing the SEC to spend considerable funds and time to disprove the defendants' fabrications. *S.E.C. v. Ferrero*, No. IP 91 271 C, 1993 WL 625964, at * 18 (S.D. Ind. Nov. 15, 1993), *aff'd sub nom. S.E.C. v. Maio*, 51 F.3d 623 (7th Cir. 1995). In that same action, the SEC agreed to the imposition of a one times profits

penalty for the one defendant who agreed to a settlement. *Id*.

It is reasonable to either reduce or decline to impose a civil penalty when dealing with a cooperating defendant because "cooperation is important to the investigation, prosecution and punishment of frauds of this kind, and should be rewarded." *S.E.C. v. Opulentica, LLC*, 479 F. Supp. 2d 319, 332 (S.D.N.Y. 2007) (assessing a civil penalty against the cooperating defendant of only ½ disgorgement amount).

> Dawoud, fully acknowledging his accountability for the fraud, does not object to the propriety of a civil penalty, but submits to the Court that his "involvement and conduct should result in a minimal first-tier penalty" . . . [Dawoud] has demonstrated meaningful contrition by his prompt and significant cooperation in the criminal investigation conducted by the U.S. Attorney's Office. At least one other court in this district, faced with similar facts, declined to impose a civil penalty, reasoning that "[s]uch cooperation is important to the investigation, prosecution and punishment of frauds of this kind, and should be rewarded." *Inorganic Recycling Corp.,* 2002 U.S. Dist. LEXIS 15817, 2002 WL 1968341, at *5.

Id.

Further, there is no legal justification for only rewarding cooperation if made to one specific governmental agency, such as the SEC impliedly

argued to the Trial Court.[10] Regardless of the accuracy of the SEC's statement regarding the SEC's participation in Williky's proffer of evidence (provided to two U.S. Attorneys, two Trial Attorneys for the Environmental Crime Section of the U.S. DOJ, a Special Agent for the IRS, a Special Agent for the FBI, and a special agent for the U.S. EPA Criminal Investigation Division), the determination of whether a defendant's cooperation merits a reduction of civil penalties is not limited to cooperation "credit" solely to governmental agency that later asserts claims against the defendant. *See e.g, S.E.C. v. Opulentica*, LLC, 479 F. Supp. 2d 319, 332 (S.D.N.Y. 2007) (reducing civil penalty because the cooperating defendant cooperated with the DOJ). Like in *Opulentica*, this Court should be able to review the defendant's cooperation with any governmental agency because such cooperation is

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[10] The SEC asserted that Williky's cooperation was of no help to the SEC. The SEC stated that it did not participate in the proffer wherein Williky presented much of the information later used by the FBI to prosecute and incarcerate Defendants Jeffrey T. Wilson, Craig Ducey, Chad Ducey, Brian Carmichael, and Joseph Furando. The SEC admitted, however, that it did obtain copies of the proffer and the documents provided by Williky by at least May 3, 2012—which was still one year before the FBI's indictments of Jeffrey T. Wilson, Craig Ducey, Chad Ducey, Brian Carmichael, and Joseph Furando and sixteen months before the SEC brought claims against Imperial, Jeffrey T. Wilson, Craig Ducey, Chad Ducey, Brian Carmichael, Joseph Furando, Caravan Trading LLC, Cima Green LLC, and CIMA Energy Group. https://www.sec.gov/litigation/litreleases/2013/lr22800.htm. And, to the extent that the Court relied on the SEC's somewhat misleading statements to devalue Williky's cooperation—which was clearly used by the SEC to build its case—such reliance clearly ignored or underweighted a material fact, necessitating reversal.

beneficial to the entirety of the government and, in theory at least, should result in a benefit for all governmental agencies—including the agency later seeking disgorgement and/or penalties.

Williky provided concrete evidence, including tapes and recordings which only he had, that were *directly* used in the indictment, prosecution and conviction of the defendants. This far surpassed any "modest value" determination and Williky requests that Court reverse the Seventh Circuit's affirmation of the Trial Court's award and that his conduct instead be compared to the cooperating defendant in *Opulentica*. Further, "Cooperation is important to the investigation, prosecution and punishment of frauds … and should be rewarded." *S.E.C. v. Opulentica, LLC*, 479 F. Supp. 2d 319, 332 (S.D.N.Y. 2007) (assessing a civil penalty against the cooperating defendant of only ½ disgorgement amount). Like in *Opulentica*, the trial court should have reviewed Williky's cooperation with the various governmental agencies (even if Williky did not go straight to the SEC first) because such cooperation is beneficial to the entirety of the government and, in theory at least, should result in a benefit for all governmental agencies.

In this case, without any supporting evidence, the Seventh Circuit made the blanket statement that "the SEC has undoubtably spent significant resources in litigating the matter against Williky." [Opinion at 394]. However, the SEC spent little to no funds to prosecute Williky. Williky negotiated a settlement before he even answered and, but for the SEC closing the case and his attorney's horrific accident, would currently be done

paying that settlement. Williky entered into a bifurcated settlement soon after the case was reopened, admitted wrongdoing and cooperated early, frequently, and strongly with the FBI as well as other governmental agencies (was, in fact, a whistleblower). Imposing the maximum penalty on a cooperator would chill future whistleblowers and cooperators and completely thwart the government's stated purpose to encourage cooperation with the government. Rather, courts when awarding civil penalties on a bifurcated settlement tend to award substantially under even the first-tier penalties. *See S.E.C. v. Hayter*, 96 F. Supp. 3d 1299, 1304–05 (M.D. Fla. 2015).

Additionally, the allegedly near-simultaneous tipping by Williky and Cheperko does not devalue Williky's contribution. The SEC provided the Trial Court with no evidence that Cheperko provided the "smoking gun" tape, the numerous exhibits used at trial or the depth of documents Williky provided to the various governmental agencies. Thus, the Trial Court's decision to ignore the treasure trove of evidence provided by Williky, and clearly used by the criminal court, on the unsubstantiated statement by Hlavacek that Williky was not valuable was an abuse of discretion. (Even if the SEC had established that Cheperko provided it with the significant documentation provided by Williky, there is certainly no rule that only one cooperating witness can be helpful.)

For the stated reasons, including Williky's whistleblowing, early and frequent cooperation and admission of wrongdoing, Williky asserts that that the

Seventh Circuit's affirmation of the Trial Court's award of 2x penalty be reversed and that no penalty or a penalty be imposed of no more than one times the amount of his profit for trading between November 2011 through February 2012——$302,852.00.

THE SEVENTH CIRCUIT'S OPINION

Petitioner appealed to the Seventh Circuit, arguing that the Trial Court abused its discretion in awarding a 2x civil penalty because it failed to adequately take into account the value and weight of Williky's cooperation with multiple governmental agencies.

REASONS FOR GRANTING THE PETITION

This case is a strong vehicle for resolving an important and significant question of the method in which to determine relevant "facts and circumstances" that a Trial Court should take into account when determining a civil penalty pursuant to 15 U.S.C. § 78u-1(a)(2). In particular, the Seventh Circuit noted the relevancy of the case law factors to determine a civil penalty under *S.E.C. v. Zenergy Int'l, Inc.*, Cause No. 13-CV-5511, 2016 WL 5080423 (N.D. Ill. Sept. 20, 2016) and *S.E.C. v. Custable*, 1996 WL 745372, at * 2-5 (N.D. Ill. Dec. 26, 1996), aff'd, 132 F.3d 36 (7th Cir. 1997), but then appeared to disregard those factors entirely. "These factors are certainly relevant, but we should also point out that the civil penalty for insider trading comes from its own independent statutory provision . . .'. [Opinion at 393]. "In this light, Williky's focus on the nobility of his whistleblowing endeavors misses the mark since the civil penalty's main design is to deter insider trading, not to encourage

whistleblowing and cooperation after the fact." [Opinion at 393].

Further, this case is a strong vehicle for determining the effect of simultaneous whistle-blowing activities by numerous individuals and value of a whistleblower's knowledge and cooperation and of considerations due to a bifurcated settlement when the SEC procures such a settlement through implication that certain values will not be sought and then subsequently and aggressively pursued significant civil penalties.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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