No. _____

In the
Supreme Court of the United States

BARRY D. ROMERIL,
Petitioner,
v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

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

APPENDIX

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March 21, 2022

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19-4197-cv
SEC v. Romeril

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2020

(Argued: February 19, 2021
Decided: September 27, 2021)

Docket No. 19-4197-cv

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff-Appellee,

v.

BARRY D. ROMERIL,
Defendant-Appellant,

PAUL A. ALLAIRE, G. RICHARD THOMAN, PHILIP D. FISHBACH, DANIEL S. MARCHIBRODA, GREGORY B. TAYLER,
Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Before: LIVINGSTON, *Chief Judge*, AND CHIN AND BIANCO, *Circuit Judges*.

Appeal from an order of the United States District Court for the Southern District of New York (Cote, *J.*), entered November 18, 2019, denying defendant-appellant's motion pursuant to Federal Rule of Civil Procedure 60(b)(4) for relief from judgment. In 2003, the Securities and Exchange Commission brought a civil enforcement action against defendant-appellant (and others) alleging securities fraud. To resolve the matter, defendant-appellant consented to the entry of a final judgment against him and agreed, *inter alia*, not to deny any of the factual allegations of the complaint. Almost sixteen years later, he sought to invalidate the judgment on the basis that it incorporated a "gag order" that violated the First Amendment and his right to due process. The district court denied the motion, and defendant-appellant appeals.

AFFIRMED.

JEFFREY A. BERGER, Senior Litigation Counsel, *for* Robert B. Stebbins, General Counsel, and Michael A. Conley, Solicitor, Securities and Exchange Commission, Washington, D.C., *for Plaintiff- Appellee.*

MARGARET A. LITTLE, Senior Litigation Counsel (Kara Rollins, Litigation Counsel, *on the brief*), New Civil Liberties Alliance, Washington, D.C., *for Defendant-Appellant.*

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Helgi C. Walker (Brian A. Richman, *on the brief*), Gibson, Dunn & Crutcher LLP, Washington, D.C., *for Amicus Curiae The Competitive Enterprise Institute, in support of Defendant-Appellant.*

Brian Rosner, Carlton Fields, P.A., New York, New York,

for Amicus Curiae Americans for Prosperity Foundation, in support of Defendant-Appellant.

CHIN, *Circuit Judge*:

Almost sixteen years after entering into a consent agreement with the Securities and Exchange Commission (the "SEC") to resolve a civil enforcement action against him, defendant-appellant Barry Romeril moved to set aside the judgment incorporating the agreement, alleging that it contained a "gag order" that violated his First Amendment and due process rights. The district court denied Romeril's motion both on the grounds that it was untimely and on the merits, concluding that he had failed to allege a jurisdictional defect or violation of due process that would permit relief under Rule 60(b)(4) of the Federal Rules of Civil Procedure.

We do not reach the issue of the timeliness of the motion, for we agree with the district court that Romeril's motion fails on the merits because it does not allege a defect that would permit relief under Rule 60(b)(4).

Accordingly, the district court's order denying the motion is AFFIRMED.

BACKGROUND

A. *The SEC's "No-Deny" Policy*

For many years the SEC has incorporated into its procedures governing the settlement of civil actions a rule barring defendants who enter into consent decrees from publicly denying the allegations against them. In 1972, the SEC announced that it would not approve agreements that allowed defendants to "consent to a judgment or order that imposes a sanction while denying the allegations in the complaint." 37 Fed. Reg. 25,224 (Nov. 29, 1972). This policy is codified at 17 § C.F.R. 202.5(e), which states as follows:

> The Commission has adopted the policy that in any civil lawsuit brought by it or in any administrative proceeding of an accusatory nature pending before it, it is important to avoid creating, or permitting to be created, an impression that a decree is being entered or a sanction imposed, when the conduct alleged did not, in fact, occur. Accordingly, it hereby announces its policy not to permit a defendant or respondent to consent to a judgment or order that imposes a sanction while denying the allegations in the complaint or order for proceedings. In this regard, the Commission believes that a refusal to admit the allegations is equivalent to a denial, unless the defendant or respondent states that he neither admits nor denies the allegations.

Id.

B. *The Facts and Proceedings Below*

In 2002, Xerox Corporation ("Xerox") entered into a consent decree with the SEC settling claims that it had violated securities laws. While it neither admitted nor denied the SEC's allegations, it agreed to pay a civil penalty of $10 million and consented to an order enjoining it from future violations of securities laws.

On June 5, 2003, the SEC filed a civil enforcement action in the Southern District of New York pursuant to Section 21(d) of the Securities Exchange Act of 1934, 15 U.S.C. § 78u(d), alleging that Romeril, the former Chief Financial Officer of Xerox, and other senior executives at Xerox violated securities laws from 1997 to 2000 by manipulating Xerox's reporting of earnings to the SEC and investors. Specifically, the SEC alleged that Romeril "allowed Xerox to file public financial reports with the [SEC] that contained information that was not in conformity with [Generally Accepted Accounting Principles] . . . [and] failed to identify failures in Xerox's internal controls," and that he "engaged in other actions which caused the financial statements to be materially false and misleading." J. App'x at 16-17.

Romeril settled with the SEC. While represented by counsel, he entered into a consent agreement (the "Consent") in which he conceded the district court's jurisdiction over him and "the subject matter of th[e] action," and agreed, "[w]ithout admitting or denying the allegations of the complaint," J. App'x at 67, to pay more than $5 million in disgorgement, prejudgment interest, and civil

penalties.[1] He also agreed to certain injunctive relief. The Consent contained the following provision:

> Defendant understands and agrees to comply with the [SEC]'s policy 'not to permit a defendant . . . to consent to a judgment or order that imposes a sanction while denying the allegation in the complaint . . . .' 17 C.F.R. § 202.5. In compliance with this policy, Defendant agrees not to take any action or to make or permit to be made any public statement denying, directly or indirectly, any allegation in the complaint or creating the impression that the complaint is without factual basis. If Defendant breaches this agreement, the [SEC] may petition the Court to vacate the Final Judgment and restore this action to its active docket. Nothing in this paragraph affects Defendant's: (i) testimonial obligations; or (ii) right to take legal or factual positions in litigation in which the [SEC] is not a party.

J. App'x at 70.

The parties presented the Consent to the district court, which then issued a Final Judgment (the "Judgment") on June 13, 2003. The Judgment

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[1] Romeril was one of six Xerox executives who entered into consent agreementswith the SEC and agreed to pay a total of $22 million.

incorporated the Consent "with the same force and effect as if fully set forth herein," and ordered Romeril to "comply with all of the undertakings and agreements set forth" in the Consent. J. App'x at 65.

On May 6, 2019, nearly sixteen years after the Judgment was entered, Romeril moved in the district court for relief from the Judgment pursuant to Federal Rule of Civil Procedure 60(b)(4). He argued that the Judgment was void because the provision barring public denials of the allegations against him -- in his words a "gag order" -- constituted a prior restraint that infringes his First Amendment rights and violated his right to due process. Specifically, Romeril argued that the provision deprived him of the right to "speak, write, or publish [his] account of the events leading to" his prosecution, to defend himself in the media, and to petition Congress and the SEC for securities law reform. J. App'x at 83. He contended further that he is unable "to exercise these rights of free expression" because the "gag order is worded so vaguely and reaches so broadly . . . that [he is] unable to speak without fear of a reopened prosecution." J. App'x at 82-83.

Together with the Rule 60(b)(4) motion, Romeril submitted a proposed amended Consent. The proposed amended Consent differed from the original Consent in only one material respect -- it omitted the no-deny provision.

On November 18, 2019, the district court denied Romeril's motion on the grounds that the motion was untimely and that, on the merits, Romeril failed to allege a jurisdictional defect or violation of due process that would render the Judgment void for purposes of Rule 60(b)(4). In particular, the district court concluded that (1) Romeril had acknowledged

the court's jurisdiction over him and the subject matter of the action, (2) he failed to state a violation of his due process rights because he had notice and an opportunity to be heard and executed the Consent and waived his right to trial while represented by counsel, and (3) his constitutional claims did not "implicate" the court's jurisdiction to enter the Judgment.

This appeal followed.

DISCUSSION

"[W]e review de novo a district court's denial of a Rule 60(b)(4) motion." *City of N.Y. v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 138 (2d Cir. 2011).

A. *Applicable Law*

Rule 60(b)(4) authorizes courts to "relieve a party . . . from a final judgment" when "the judgment is void." Fed. R. Civ. P. 60(b)(4). "[A] void judgment is one so affected by a fundamental infirmity that the infirmity may be raised even after the judgment becomes final." *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 270 (2010). "The list of such infirmities is exceedingly short; otherwise, Rule 60(b)(4)'s exception to finality would swallow the rule." *Id.*; *see* 12 Moore's Federal Practice § 60.44[1][a] (2020) ("The concept of void judgments is narrowly construed.").

Rule 60(b)(4) applies only in two situations: "where a judgment is premised either on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard." *Espinosa*, 559 U.S. at 271; *see also Mickalis Pawn Shop*, 645 F.3d at 138 ("A

judgment is void under Rule 60(b)(4) . . . if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or if it acted in a manner inconsistent with due process of law." (internal quotation marks and citation omitted)).[2] "A judgment is not void . . . simply because it is or may have been erroneous," and "a motion under Rule 60(b)(4) is not a substitute for a timely appeal." *Espinosa*, 559 U.S. at 270 (internal quotation marks and citations omitted). As for jurisdictional error, a judgment may be declared void for jurisdictional defect only "when there is a total want of jurisdiction and no arguable basis on which [the court] could have rested a finding that it had jurisdiction." *Cent. Vt. Pub. Serv. Corp. v. Herbert*, 341 F.3d 186, 190 (2d Cir. 2003) (internal quotation marks and citation omitted).

B. *Application*

We conclude that the district court's order denying Romeril's Rule 60(b)(4) motion must be affirmed because he failed to show either a jurisdictional error or a due process violation within the meaning of the rule.[3] We consider first Romeril's

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[2] Romeril contends that Rule 60(b)(4) is not limited to these two situations, but he cites no authority for the proposition, and the settled law is to the contrary. *See Espinosa*, 559 U.S. at 271; *Mickalis Pawn Shop*, 645 F.3d at 138; *Herbert*, 341 F.3d at 190. Hecites only *Crosby v. Bradstreet Co.*, 312 F.2d 483 (2d Cir.), *cert. denied*, 373 U.S. 911 (1963), which, as we discuss below, pre-dates *Espinosa*, *Mickalis Pawn Shop*, and *Herbert* by many years and in any event does not require a different result.

[3] A Rule 60(b) motion must also be made "within a reasonable time." Fed. R. Civ. P. 60(c)(1). Because Romeril's motion fails on the merits, we need not decide whether a sixteen- year gap

claim of jurisdictional error and second his claim of due process violations.

1. *Jurisdiction*

Romeril has not established "a total want of jurisdiction." To the contrary, the district court clearly had jurisdiction over both the subject matter, see 15 U.S.C. §§ 78u, 78aa; 28 U.S.C. § 1331, and his person. Indeed, in the Consent, Romeril "acknowledge[d] having been served with the complaint in this action, enter[ed] a general appearance, and admit[ted] the Court's jurisdiction over [him] and over the subject matter of this action." J. App'x at 67. Rather, relying principally on one case, *Crosby v. Bradstreet Co.*, Romeril argues that he is entitled to relief under Rule 60(b)(4) because the "gag order" was an unconstitutional prior restraint that violated the First Amendment and the district court therefore was "without power" to issue it. Appellant's Br. at 5-7.

As an initial matter, even assuming that Romeril is correct that the no-deny provision violates his First Amendment rights, his reliance on Rule 60(b)(4) is misplaced. Even if the district court somehow erred in incorporating the no-deny provision into the Judgment, the Judgment was not void

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between a judgment and Rule 60(b) motion is a reasonable time. We note that "this Court has been exceedingly lenient in defining the term 'reasonable time,' with respect to voidness challenges. In fact, it has been oft-stated that, for all intents and purposes, a motion tovacate a default judgment as void 'may be made at any time.'" *"R" Best Produce, Inc. v. DiSapio*, 540 F.3d 115, 123-24 (2d Cir. 2008) (internal quotation marks and citation omitted).

"simply because it is or may have been erroneous." *Espinosa*, 559 U.S. at 270; *accord Nemaizer v. Baker*, 793 F.2d 58, 65-66 (2d Cir. 1986) (judgment entered as result of "perhaps an erroneous exercise of federal jurisdiction" was not subject to collateral attack under Rule 60(b)(4)); *In re Texlon Corp.*, 596 F.2d 1092, 1100 (2d Cir. 1979) ("The financing order was within the parameters of the bankruptcy court's authority, '[a]nd even gross error in the decree would not render it void.'" (citation omitted)). Any legal error here was not jurisdictional, for the district court had both subject matter and personal jurisdiction; hence, relief under Rule 60(b)(4) was not available.

Moreover, we reject the claim that there was legal error, for the district court did not err in accepting a decree to which Romeril consented. The Judgment does not violate the First Amendment because Romeril waived his right to publicly deny the allegations of the complaint. A defendant in a civil enforcement action is not obliged to enter into a consent decree; consent decrees are "normally compromises in which the parties give up something they might have won in litigation and waive their rights to litigation." *SEC v. Citigroup Glob. Mkts., Inc.*, 752 F.3d 285, 295 (2d Cir. 2014) (quoting *United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 235 (1975)). A defendant who is insistent on retaining the right to publicly deny the allegations against him has the right to litigate and defend against the charges. Romeril elected not to litigate.

In the course of resolving legal proceedings, parties can, of course, waive their rights, including such basic rights as the right to trial and the right to confront witnesses. *See Town of Newton v. Rumery*, 480 U.S. 386, 393 (1987) ("[I]t is well settled that plea

bargaining does not violate the Constitution even though a guilty plea waives important constitutional rights."); *INS v. St. Cyr*, 533 U.S. 289, 321-22 (2001) ("Plea agreements involve a *quid pro quo* between a criminal defendant and the government. In exchange for some perceived benefit, defendants waive several of their constitutional rights (including the right to a trial) and grant the government numerous 'tangible benefits, such as promptly imposed punishment without the expenditure of prosecutorial resources.'" (citations omitted)). The First Amendment is no exception, and parties can waive their First Amendment rights in consent decrees and other settlements of judicial proceedings. *See United States v. Int'l Brotherhood of Teamsters*, 931 F.2d 177, 188 (2d Cir. 1991) (holding that union waived claim that restrictions in consent decree on publication of materials for union elections violated First Amendment because it consented to provision in consent decree).[4] To the extent Romeril had the right

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[4] *See also, e.g.*, *Leonard v. Clark*, 12 F.3d 885, 889 (9th Cir. 1994) ("First Amendment rights may be waived" as part of settlement as long as that "waiver is knowing, voluntary and intelligent."); *In re George F. Nord Bldg. Corp.*, 129 F.2d 173, 176 (7th Cir. 1942) ("Certainly, one who has been a party to a proceeding wherein a consent decree has been entered and who has been a party to that consent, is in no position to claim that such decree restricts his freedom of speech. He has waived his right and given his consent to its limitations within the scope of that decree."); *accord Snepp v. United States*,444 U.S. 507, 509 n.3 (1980) (per curiam) (rejecting claim that provision in employment agreement obligating employee to submit any proposed publication for prior review constituted unconstitutional "prior restraint on protected speech," where employee voluntarily entered into agreement); *Ronnie Van Zant, Inc. v. Cleopatra Recs., Inc.*, 906 F.3d 253, 257 (2d Cir. 2018) (per

to publicly deny the SEC's allegations against him, he waived that right by agreeing to the no-deny provision as part of a consent decree.

Romeril relies on our decision in *Crosby*. There, we held that the district court erred in denying a Rule 60(b) motion to vacate an order entered years earlier as part of the settlement of a libel action, on the ground that the district court was "without power" "to enjoin publication of information about a person, without regard to truth, falsity, or defamatory character of that information." 312 F.2d at 485. We explained:

> Such an injunction, enforceable through the contempt power, constitutes a prior restraint by the United States against the publication of facts which the community has a right to know and which [the defendant] had and has the right to publish. The court was without power to make such an order; that the parties may have agreed to it is immaterial.

Id.

While Romeril's reliance on the decision, in light of this broad language, is understandable, Crosby does not control this case. First, it was decided more than fifty years ago, long before *Espinosa* and the other cases discussed above limited the grounds

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curiam) ("parties are free to limit by contract publication rights otherwise available").

for relief under Rule 60(b)(4).[5] Second, *Crosby* is distinguishable, as the rights of non-parties were implicated by the prohibition on public comment at issue in the case.

Stanford Crosby ("Stanford") brought a libel action against Dun & Bradstreet ("D&B"), "the well-known . . . credit information company." *Id.* at 484. Stanford and D&B settled. Their settlement stipulation, which was so ordered by the district court, prohibited D&B from reporting not only about Stanford but also about his brother Lloyd Crosby ("Lloyd") as well as certain specified other individuals with whom Stanford and Lloyd had been in business. *Id.* The provision barred D&B "from issuing or publishing any report, comment or statement either in writing or otherwise concerning" Stanford, Lloyd, and the other individuals, "or concerning the business activities of any of the foregoing persons[,] . . . whether present, past or future." *Id.* (internal quotation marks omitted).

Some thirty years after the case was settled, Stanford moved to terminate the order, apparently because the absence of a credit listing by D&B was making it difficult for him to get credit. The brothers

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[5] We note that the movant in *Crosby* did not seek relief under Rule 60(b)(4). Rather, he moved under Rules 60(b)(5) and (6). As they existed then, subdivision (5) permitted a court to relieve a party from final judgment if "it is no longer equitable thatthe judgment should have prospective application," and subdivision (6) permitted a court to do so for "any other reason justifying relief from the operation of the judgment." *Crosby*, 312 F.2d at 484 n.2 (quoting Fed. R. Civ. P. 60(b)(5), (6)). The Court, however, apparently on its own initiative, relied on Rule 60(b)(4). *Id.* at 485.

had severed their business relations, however, and were competing against each other; Lloyd contended that Stanford's purpose in seeking to terminate the order was to "destroy his business," and thus he opposed the motion. D&B did not oppose termination as long as it could refer to Lloyd in its reports about Stanford. *Id.*

The Court reversed the order. Although the Court did not explicitly frame its reasoning in these terms, the disputed provision barred D&B from making statements not only about Stanford (the only plaintiff in the case), but also about Lloyd and other individuals who were not parties to the litigation that led to the order. In that sense, the district court lacked jurisdiction over these other persons, who were not before the court and likely had not had notice of the proceedings or an opportunity to be heard. *See Texlon Corp.*, 596 F.2d at 1099 ("[A] judgment . . . is void . . . if the court that rendered it lacked jurisdiction . . . of the parties." (citation omitted)). Here, the Judgment affected only Romeril, who was before the court and had an opportunity to be heard.[6] Hence, *Crosby* does

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[6] The SEC also argues that *Crosby* is distinguishable because the Court there relied on the rule that "a court in 'equity ha[s] no jurisdiction to enjoin a libel,'" and noting thatthe present case does not involve an injunction against a libel. Appellee's Br. at 13 (quoting *Am. Malting Co. v. Keitel*, 209 F. 351, 354 (2d Cir. 1913)); *see Northridge Church v. Charter Twp. of Plymouth*, 647 F.3d 606, 612 (6th Cir. 2011) (holding that "*Crosby* rested ona unique *jurisdictional* issue that rendered the court entering the order without power todo so," citing general rule that court of equity will not enjoin publication of libel). We need not reach this argument, but we note that the Court in *Crosby* set aside the judgment even assuming that "it is proper for a federal court to enjoin a libel," and observed

not control, and we agree with the district court that Romeril did not establish "a total want of jurisdiction" rendering the Judgment void.

2. *Due Process*

Romeril contends that his right to due process was violated in several respects: the "gag order" is unconstitutionally vague; the SEC lacked statutory authority to issue the "gag order"; the "gag order" silences him in perpetuity; and the "gag order . . . implicates the judiciary in violating the constitution." Appellant's Br. at 52. We are not persuaded.

First, the due process right implicated by Rule 60(b)(4) is the right to "notice 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Espinosa*, 559 U.S. at 272 (quoting *Mullane v. Cent. Hanover Bank & Trust*, 339 U.S. 306, 314 (1950)). As a general matter, there is no "denial of due process for purposes of Rule 60(b)(4) if the party seeking relief received actual notice of the proceedings and had a full and fair opportunity to litigate the merits." 12 Moore's Federal Practice Civil § 60.44[4]; *see Espinosa*, 559 U.S. at 276. The due process right implicated by Rule 60(b)(4) does not extend to the claims of due process asserted by Romeril here. Romeril had actual notice of the proceedings as well as a full and fair opportunity to litigate on the merits. He participated in the

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that the order in question was not directed solely at defamatory statements. 312 F.2d at 485.

proceedings while represented by capable and experienced counsel.

Second, there is no merit in any event to Romeril's claims of a violation of due process, for he willingly agreed to the no-deny provision as part of a consent decree. While he waived certain rights, including the right to trial and the right to publicly deny the allegations against him, he eliminated the expense of further litigation and the risk of an adverse judgment, including higher monetary penalties and judicial findings that he had violated securities laws. We see no basis for not enforcing the Consent and Judgment as written. *See Citigroup Glob. Mkts.*, 752 F.3d at 293 ("Our Court recognizes a 'strong federal policy favoring the approval and enforcement of consent decrees.'" (quoting *SEC v. Wang*, 944 F.2d 80, 85 (2d Cir. 1991))). Romeril cannot complain now, on post- judgment, collateral review, that the provision violates his right to due process.

CONCLUSION

For the reasons set forth above, the district court's order is

AFFIRMED.

* * *

Appendix B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,	:	
	:	03cv4087
Plaintiff,	:	(DLC)
	:	
-v-	:	OPINION AND
	:	ORDER
PAUL A. ALLAIRE, G. RICHARD THOMAN, BARRY D. ROMERIL, PHILIP D. FISHBACH, DANIEL S. MARCHIBRODA, and GREGORY B. TAYLOR,	:	
	:	
Defendants.	:	

APPEARANCES

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DENISE COTE, District Judge:

Almost sixteen years after entering a consent agreement ("Consent") with the Securities and Exchange Commission ("SEC"),defendant Barry D. Romeril ("Romeril") moves pursuant to Rule 60(b)(4), Fed. R. Civ. P., to vacate it. Romeril argues that a no-deny provision in the Consent, which was incorporated into an Order of Final Judgment ("Judgment"), violates the First Amendment by forbidding him from publicly denying allegations in the SEC complaint. Romeril's motion is untimely and, in any event, fails to allege a jurisdictional defect or violation of due process that would permit relief under Rule 60(b)(4).

Background

On May 3, 2002, Xerox Corp. ("Xerox") agreed to restate its financial results, pay a $10 million

penalty, and enter a consent judgment to resolve a multibillion-dollar accounting fraud action brought against Xerox by the SEC. This was the largest corporate penalty imposed as of that date through an SEC action.

On June 5, 2003, the SEC filed a complaint against Romeril and the others alleging their participation in the accounting fraud at Xerox. Romeril was the Chief Financial Officer of Xerox and a central figure in the SEC's complaint.

Romeril promptly settled with the SEC and signed the Consent, which was incorporated into the Judgment entered onJune 13, 2003. In the Consent, Romeril admitted "the Court'sjurisdiction over [him] and over the subject matter of this action." Without admitting or denying the allegations of the SEC complaint (except as to personal and subject matter jurisdiction), he agreed to pay disgorgement, prejudgment interest, and civil penalties in excess of $5 million and to beenjoined from violating specified securities laws in the future. Romeril further agreed that he had entered into the Consent voluntarily and that "no threats, offers, promises, or inducements of any kind" had been made by the SEC to induce himto enter into the Consent. He agreed that the Consent would beincorporated into the Judgment and that this Court would retain jurisdiction to enforce it. He waived, however, the entry of findings of fact and conclusions of law, as well as any right hemay have to appeal the Judgment.

The Consent contains a no-deny provision. That provisionstates, in pertinent part:

> Defendant understands and agrees to comply with the [SEC]'s policy 'not to permit a defendant . . . to consent to a

> judgment or order that imposes a sanctionwhile denying the allegations in the complaint . . . .' 17 C.F.R. § 202.5. In compliance with this policy, Defendant agrees not to take any action or tomake or permit to be made any public statement denying, directly or indirectly, any allegation in the complaint or creating the impression that the complaint is without factual basis. If Defendant breaches this agreement, the [SEC] may petition the Court to vacate the Final Judgment and restore this action to its active docket. Nothing in this paragraph affects Defendants: (i) testimonial obligations; or (ii) right to take legal or factual positions in litigation in which the [SEC] is not a party.

The no-deny provision reflects a policy of the SEC, enacted in 1972, to prohibit settlement agreements in which a defendant consents to a judgment that imposes a sanction while denying the allegations in the complaint. See 17 C.F.R. § 202.5(e). The policy was designed to "avoid creating, or permitting to be created, an impression that a decree is being entered or sanction imposed, when the conduct alleged did not, in fact, occur." Id.

On May 6, 2019, Romeril moved under Rule 60(b)(4) to vacate the Judgment to the extent it incorporates the no-deny provisionof the Consent. He asserts that he now wishes to engage in truthful speech concerning the SEC's claims against him, even ifthat speech directly or indirectly denies allegations in the SECcomplaint or creates an impression that the

complaint is without factual basis. Romeril has submitted a proposed amended consentexcising the offending language.

Discussion

"Relief under Rule 60(b) is generally not favored and is properly granted only upon a showing of exceptional circumstances." Ins. Co. of N. Am. v. Pub. Serv. Mut. Ins. Co.,609 F.3d 122, 131 (2d Cir. 2010) (citation omitted). Rule 60(b)(4) authorizes a court to relieve a party from a final judgment only if "the judgment is void." Fed. R. Civ. P. 60(b)(4). A judgment is void if it is "so affected by a fundamental infirmity that the infirmity may be raised even after the judgment becomes final." United Student Aid Funds v. Espinosa, 559 U.S. 260, 270 (2010). The rule "strikes a balance between the need for finality of judgments and the importance of ensuring that litigants have a full and fair opportunity to litigate a dispute." Id. at 276. Accordingly, the list of infirmities that may be raised by a motion under Rule 60(b)(4) "is exceedingly short; otherwise, Rule 60(b)(4)'s exception to finality would swallow the rule." Id. at 270. A judgment is not void, for example, merely because it is erroneous. Id. Nor is a motion under Rule 60(b)(4) "a substitute for a timelyappeal." Id.

Relief from a judgment pursuant to Rule 60(b)(4) will be "rare"; it is available in only two circumstances. *Id.* at 271. The movant must demonstrate either "a certain type of jurisdictional error" or "a violation of due process that deprives a party of notice or the opportunity to be heard." Id.; see

also City of New York v. Mickalis Pawn Shop, LLC, 645 F.3d 114, 138 (2d Cir. 2011).

To qualify for relief under Rule 60(b)(4), an alleged jurisdictional defect will not render a judgment void unless the court that entered the judgment "lacked even an 'arguable basis' for jurisdiction." Espinosa, 559 U.S. at 271 (citation omitted). "Total want of jurisdiction must be distinguished from an error in the exercise of jurisdiction, and only rare instances of a clear usurpation of power will render a judgment void." Id. (citation omitted). Accordingly, for purposes of Rule 60(b)(4), "jurisdiction" refers to the court's adjudicatory authority. Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 160-61 (2010); see also Nemaizer v. Baker, 793 F.2d 58, 65 (2d Cir. 1985); 12 Moore's Federal Practice § 60.44[2][a] (2019).

Separately, a motion for relief pursuant to Rule 60(b)(4) must be made "within a reasonable time." Fed. R. Civ. P. 60(b)(4). Federal courts have been lenient in defining the term "reasonable time" with respect to voidness challenges to judgments entered in default. "R" Best Produce, Inc. v. DiSapio, 540 F.3d 115, 124 (2d Cir. 2008). Where a party moves under Rule 60(b)(4) to vacate a default judgment, courts have often stated that the motion "may be made at any time." Id. (citation omitted). Whether delay by a movant is reasonable, however, depends on the facts of the case. See, e.g., Grace v. Bank Leumi Tr. Co. of N.Y., 443 F.3d 180, 190-91 (2d Cir. 2006); Days Inns Worldwide, Inc. v. Patel, 445 F.3d 899, 906 (6th Cir. 2006).

Romeril's motion is denied for two independent reasons. First, the motion was not brought within a reasonable time. Romeril brings this motion nearly

sixteen years after the Judgment was entered. While the SEC does not explicitly opposeRomeril's motion on the ground that it is untimely, its opposition highlights that Romeril has enjoyed the benefits of his settlement with the SEC for the entirety of the sixteen years between the Judgment and Romeril's motion. Even now, Romeril does not seek a trial; he seeks to keep the Consent in place while excising its no-deny provision. But Romeril does not contend that he lacked notice of the terms of the Consent or the Judgment. At the time he executed the Consent, he was represented by competent and experienced counsel. Nor does he suggest that any interim action by the SEC contributed to his extraordinary delay in bringing this motion. Romeril's sixteen-year delay is unreasonable.

Second, even if the motion could be found to be timely, and it cannot, Romeril has not identified a jurisdictional defect orviolation of due process that would render the Judgment void forpurposes of Rule 60(b)(4). Romeril does not dispute personal jurisdiction. And this Court properly exercised subject matter jurisdiction over the SEC's claims pursuant to 15 U.S.C. §§ 78u(d) and 78aa (jurisdiction to enforce Securities Act of1933 and Securities Exchange Act of 1934), as well as 28 U.S.C § 1331 (federal question jurisdiction). In the Consent, Romerilacknowledged this Court's jurisdiction over him and the subject matter of the action. In his proposed amended consent and judgment, he continues to acknowledge this Court's jurisdiction.

Romeril's motion likewise does not suggest that the Judgment is void due to a violation of his due process rights. He does not, and could not, argue that he was deprived of noticeof the SEC action or of an

opportunity to be heard. While represented by counsel, he executed the Consent and waived his right to trial. Had he chosen to contest the SEC's claims, he would have been able to present his defense to a jury and appealany adverse verdict.

Romeril argues that, because a judgment containing a no- deny provision is an unconstitutional prior restraint in violation of the First Amendment, the Judgment is void for purposes of Rule 60(b)(4).[7] In support of this claim, Romeril principally relies on Crosby v. Bradstreet Co., 312 F.2d 483 (2dCir. 1963). In Crosby, the Court of Appeals vacated an "extremely broad" order, entered on consent, that prohibited the defendant from publishing "any report, past, present, or future,about certain named persons." Id. at 485. The Court held that that injunction constituted a prior restraint, that a court is "without power" to make such an order, and that it is "immaterial" that the parties agreed to it. Id.

Crosby is of no assistance to Romeril. As the Supreme Court recently explained in Espinosa, a party must identify "a certain type of jurisdictional error" if it seeks to invoke Rule60(b)(4) because of an asserted jurisdictional deficiency in thejudgment. 559

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[7] Romeril also argues, in a footnote in his reply, that the Judgment is void under Rule 60(b)(4) because the no-deny provision is unconstitutionally vague. An argument mentioned only in a footnote is not adequately raised and need not be considered. See Niagra Mohawk Power Corp. v. Hudson River-BlackRiver Regulating Dist., 673 F.3d 84, 107 (2d Cir. 2012). In anyevent, this iteration of his challenge to the no-deny provision does not reflect the type of due process violation that could render a judgment "void" under Rule 60(b)(4).

U.S. at 171. There is no such jurisdictional error here. This Court had subject matter jurisdiction over this securities action and the authority to enter the Judgment.

Even assuming Crosby survives Espinosa, an issue that it is unnecessary to reach, its holding is inapplicable to Romeril'sargument here. The Court of Appeals in Crosby appeared to conclude that it had no power to enjoin the publication of information without regard to its truth or falsity. 312 F.2d at 485. As explained by the Sixth Circuit, Crosby turned on a unique jurisdictional issue. Northridge Church v. Charter Twp.of Plymouth, 647 F.3d 606, 612 (6th Cir. 2011). The scope of the Judgment entered in this case presents no comparable jurisdictional issue. The no-deny provision does not implicate this Court's jurisdiction to enter the Judgment in this securities action.

Conclusion

Romeril's May 6, 2019 motion for relief from the Judgmentis denied.

Dated: New York, New York
November 18, 2019

DENISE COTE
United States District Judge

* * *

Appendix C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,

v.

PAUL A. ALLAIRE, G. RICHARD THOMAN, BARRY D. ROMERIL, PHILIP D. FISHBACH, DANIEL S. MARCHIBRODA, AND GREGORY B. TAYLER,
Defendants.

Civil Action No. 03cv4087(DLC)

FINAL JUDGMENT AS TO DEFENDANT BARRY D. ROMERIL

The Securities and Exchange Commission having filed a Complaint and Defendant Barry D. Romeril ("Defendant") having entered a general appearance; consented to the Court's jurisdiction over Defendant and the subject matter of this action; consented to entry of this Final Judgment without admitting or denying the allegations of the Complaint (except as to jurisdiction, which is admitted); waived findings of fact and conclusions of law; and waived any right to appeal from this Final Judgment:

I.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendant, Defendant's agents, servants, employees, attorneys, assigns, and

all persons in active concert or participation with them who receive actual notice of this Final Judgment by personal service or otherwise are permanently restrained and enjoined from violating, directly or indirectly, Section l0(b) of the Securities Exchange Act of 1934 (the "Exchange Act") [15 U.S.C. § 78j(b)] and Rule l0b-5 promulgated thereunder [17 C.F.R. § 240.l0b-5], by using any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange:

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

(b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or

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

in connection with the purchase or sale of any security.

II.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant, Defendant's agents, servants, employees, attorneys, assigns, and all persons in active concert or participation with them who receive actual notice of this Final Judgment by personal service or otherwise are permanently restrained and enjoined from violating, directly or indirectly, Section 13(b)(5) of the Exchange Act [15 U.S.C. § 78m(b)(5)] and Rule 13b2-l thereunder [17 C.F.R. §240.13b2-l] by knowingly circumventing or knowingly failing to

implement a system of internal accounting controls or knowingly falsify any book, record, or account for any issuer which has a class of securities registered pursuant to Section 12 of the Exchange Act [15 U.S.C. § 78l] and any issuer which is required to file reports pursuant to Section 15(d) of the Exchange Act [15 U.S.C. § 78o(d)].

III.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant, Defendant's agents, servants, employees, attorneys, assigns, and all persons in active concert or participation with them who receive actual notice of this Final Judgment by personal service or otherwise are permanently restrained and enjoined from aiding and abetting violations of Section 13(a) of the Exchange Act [15 U.S.C. §78m(a)] and Rules 13a-1, 13a-13 and 12b-20 thereunder [17 C.F.R. §§ 240.13a-1, 240.13a-13, 240.12b-20] by, directly or indirectly, in a report filed with the Commission:

(1) making or causing to be made a materially false or misleading statement; or

(2) omitting to state, or causing another person to omit to state, any material fact necessary in order to make statements made, in light of the circumstances under which such statements were made, not misleading.

IV.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant, Defendant's agents, servants, employees, attorneys, assigns, and all persons in active concert or participation with them who receive actual notice of

this Final Judgment by personal service or otherwise are permanently restrained and enjoined from aiding and abetting violations of Sections 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act [15 U.S.C. §§ 78m(b)(2)(A) and 78m(b)(2)(B)] by, directly or indirectly, in regard to any issuer that has a class of securities registered pursuant to Section 12 of the Exchange Act or is required to file reports pursuant to Section 15(d) of the Exchange Act:

(1) failing to make and keep books, records and accounts which in reasonable detail fairly and accurately reflect the transactions and disposition of the assets of the issuer; or

(2) failing to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that transactions are recorded as necessary to permit the preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements.

V.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant disgorge $2,987,282 representing profits gained as a result of the conduct alleged in the Complaint, together with prejudgment interest thereon in the amount of $1,227,688, and pay a civil penalty in the amount of $1,000,000 pursuant to Section 2l(d)(3) of the Exchange Act [15 U.S.C. § 78u(d)], for a total of $5,214,970. Defendant shall satisfy this obligation by paying $5,214,970 within thirty (30) business days to the Clerk of this Court, together with a cover letter identifying Barry D. Romeril as a defendant in this

action; setting forth the title and civil action number of this action and the name of this Court; and specifying that payment is made pursuant to this Final Judgment. Defendant shall simultaneously transmit photocopies of such payment and letter to the SEC's counsel in this action. By making this payment, Defendant relinquishes all legal and equitable right, title, and interest in such funds, and no part of the funds shall be returned to Defendant. The Clerk shall deposit the funds into an interest bearing account with the Court Registry Investment System ("CRIS"). These funds, together with any interest and income earned thereon (collectively, the "Fund"), shall be held by the CRIS until further order of the Court. In accordance with the guidelines set by the Director of the Administrative Office of the United States Courts, the Clerk is directed, without further order of this Court, to deduct from the income earned on the money in the Fund a fee equal to ten percent of the income earned on the Fund. Such fee shall not exceed that authorized by the Judicial Conference of the United States. The Commission may by motion propose a plan to distribute the Fund subject to the Court's approval. Such a plan may provide that Fund shall be distributed pursuant to the Fair Fund provisions of Section 308(a) of the Sarbanes-Oxley Act of 2002. Regardless of whether any such Fair Fund distribution is made, amounts ordered to be paid as civil penalties pursuant to this Final Judgment shall be treated as penalties paid to the government for all purposes, including all tax purposes.

VI.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant be, and hereby is,

pursuant to Section 2l(d)(2) of the Exchange Act [15 U.S.C. §78u(d)(2)], permanently prohibited from acting as an officer or director of any issuer that has a class of securities registered pursuant to Section 12 of the Exchange Act [15 U.S.C. § 78l] or that is required to file reports pursuant to Section 15(d) of the Exchange Act [15 U.S.C. § 78o(d)].

VII.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Consent is incorporated herein with the same force and effect as if fully set forth herein, and that Defendant shall comply with all of the undertakings and agreements set forth therein.

VIII.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that this Court shall retain jurisdiction of this matter for the purposes of enforcing the terms of this Final Judgment.

IX.

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

Dated: June 11, 2003
New York, New York

DENISE COTE
United States District Judge

* * *

Appendix D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

PAUL A. ALLAIRE, G. RICHARD THOMAN, BARRY D. ROMERIL, PHILIP D. FISHBACH, DANIEL S. MARCHIBRODA, AND GREGORY B. TAYLER,

Defendants.

Civil Action No. 03cv4087(DLC)

CONSENT OF DEFENDANT BARRY D. ROMERIL

1. Defendant Barry D. Romeril ("Defendant") acknowledges having been served with the complaint in this action, enters a general appearance, and admits the Court's jurisdiction over Defendant and over the subject matter of this action.

2. Without admitting or denying the allegations of the complaint (except as to personal and subject matter jurisdiction, which Defendant admits), Defendant hereby consents to the entry of the Final Judgment in the form attached hereto and incorporated by reference herein, which, among other things:

(a) permanently restrains and enjoins Defendant from violation of Sections l0(b) and 13(b)(5) of

the Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. §§ 78j(b); 78m(b)(5)] and Rules l0b-5 and 13b2-1 promulgated thereunder, (17 CFR §§ 240.l0b-5; 240.13b2-1];

(b) permanently restrains and enjoins Defendant from aiding and abetting violations of Sections 13(a), 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act, [15 U.S.C. §§ 78m(a), 78m(b)(2)(A) and 78m(b)(2)(B)] and Rules 12b-20, 13a-l, and 13a-13 promulgated thereunder, [17 CFR §§ 240.12b-20, 240.13a-l and 240.13a-13];

(c) orders Defendant to pay disgorgement in the amount of $2,987,282 plus prejudgment interest thereon in the amount of $1,227,688;

(d) orders Defendant to pay a civil penalty in the amount of $1,000,000 under Section 21(d)(3) of the Exchange Act [15 U.S.C. §78u(d))]; and

(e) permanently prohibits Defendant, pursuant to Section 21(d)(2) of the Exchange Act [15 U.S.C. § 78u(d)(2)], from acting as an officer or director of any issuer that has a class of securities registered pursuant to Section 12 of the Exchange Act [15 U.S.C. § 78l] or that is required to file reports pursuant to Section 15(d) of the Exchange Act [15 U.S.C. § 78o(d)].

3. Defendant agrees that Defendant shall not seek or accept, directly or indirectly, reimbursement or indemnification, including but not limited to payment made by any issuer or pursuant to any insurance policy, with regard to the civil penalty amounts that Defendant shall pay pursuant to the Final Judgment, regardless of whether such penalty amounts or any part thereof are added to a

distribution fund or otherwise used for the benefit of investors. Defendant further agrees that Defendant shall not claim, assert, or apply for a tax deduction or tax credit with regard to any federal, state, or local tax for the civil penalty amounts that Defendant shall pay pursuant to the Final Judgment, regardless of whether such penalty amounts or any part thereof are added to a distribution fund or otherwise used for the benefit of investors.

4. Defendant waives the entry of findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure.

5. Defendant waives the right, if any, to appeal from the entry of the Final Judgment.

6. Defendant enters into this Consent voluntarily and represents that no threats, offers, promises, or inducements of any kind have been made by the Commission or any member, officer, employee, agent, or representative of the Commission to induce Defendant to enter into this Consent.

7. Defendant agrees that this Consent shall be incorporated into the Final Judgment with the same force and effect as if fully set forth therein.

8. Defendant will not oppose the enforcement of the Final Judgment on the ground, if any exists, that it fails to comply with Rule 65(d) of the Federal Rules of Civil Procedure, and hereby waives any objection based thereon.

9. Defendant waives service of the Final Judgment and agrees that entry of the Final Judgment by the Court and filing with the Clerk of the Court will constitute notice to Defendant of its terms and conditions.

10. Consistent with 17 C.F.R. § 202.5(f), this Consent resolves only the claims asserted against

Defendant in this civil proceeding. Defendant waives any claim of Double Jeopardy based upon the settlement of this proceeding, including the imposition of any remedy or civil penalty herein. Defendant further acknowledges that the Court's entry of a permanent injunction may have collateral consequences under federal or state law and the rules and regulations of self-regulatory organizations, licensing boards, and other regulatory organizations. Such collateral consequences include, but are not limited to, a statutory disqualification with respect to membership or participation in, or association with a member of, a self-regulatory organization. This statutory disqualification has consequences that are separate from any sanction imposed in an administrative proceeding.

11. Defendant understands and agrees to comply with the Commission's policy "not to permit a defendant or respondent to consent to a judgment or order that imposes a sanction while denying the allegation in the complaint or order for proceedings." 17 C.F.R. § 202.5. In compliance with this policy, Defendant agrees not to take any action or to make or permit to be made any public statement denying, directly or indirectly, any allegation in the complaint or creating the impression that the complaint is without factual basis. If Defendant breaches this agreement, the Commission may petition the Court to vacate the Final Judgment and restore this action to its active docket. Nothing in this paragraph affects Defendant's: (i) testimonial obligations; or (ii) right to take legal or factual positions in litigation in which the Commission is not a party.

12. Defendant hereby waives any rights under the Equal Access to Justice Act, the Small Business

Regulatory Enforcement Fairness Act of 1996, or any other provision of law to pursue reimbursement from the United States, or any agency, or any official of the United States acting in his or her official capacity, of attorney's fees or other fees, expenses, or costs expended by Defendant to defend against this action. For these purposes, Defendant agrees that Defendant is not the prevailing party in this action since the parties have reached a good faith settlement.

13. In connection with this action and any related judicial or administrative proceeding or investigation commenced by the Commission or to which the Commission is a party, Defendant (i) will accept service by mail or facsimile transmission of notices or subpoenas for documents or testimony at depositions, hearings, or trials, or in connection with any related investigation by Commission staff; (ii) appoints Defendant's undersigned attorney as agent to receive service of such notices and subpoenas; (iii) with respect to such notices and subpoenas, waives the territorial limits on service (but not attendance) contained in Rule 45 of the Federal Rules of Civil Procedure and any applicable local rules, provided that the party requesting the testimony reimburses Defendant's travel, lodging, and subsistence expenses at the then-prevailing U.S. Government per diem rates; (iv) pursuant to a subpoena served in compliance with paragraph 12(i)-(iii), will attend a deposition, hearing or trial and/or produce and permit the inspection and copying of documents at a place within 100 miles from the place where he resides, is employed, or regularly transacts business in person or within 100 miles of the United States District Court in which SEC v. KPMG. et al. is pending; and (v) for purposes of enforcing any subpoena served in

compliance with paragraph 12(i)-(iii) and specifying a place permitted under paragraph 12(iv), consents to personal jurisdiction in the United States District Court in which SEC v. KPMG, et al. is pending.

14. Defendant agrees that the Commission may present the Final Judgment to the Court for signature and entry without further notice.

15. Defendant agrees that this Court shall retain jurisdiction over this matter for the purpose of enforcing the terms of the Final Judgment.

16. Except as explicitly provided in this Final Judgment and Consent, nothing herein is intended to or shall be construed to have created, compromised, settled or adjudicated any claims, causes of action, or rights of any person whomsoever, other than as between the Commission and Defendant, in accordance with the Consent.

17. Defendant states that it is his intention that this Consent, the Complaint and Final Judgment not constitute collateral estoppel as to any issue of law or fact nor constitute a record, report, statement or data compilation within the meaning of Rule 803(8) of the Federal Rule of Evidence. Defendant understands that the Commission takes no position concerning Defendant's statement or his intention.

Dated: 5/22/03

/s/ Barry D. Romeril
Barry D. Romeril

On May 22, 2003, Barry D. Romeril, a person known to me, personally appeared before me and acknowledged executing the foregoing Consent.

/s/ Melissa G. Hough
Notary Public Melissa G. Hough
Commission expires: 3/31/05

Approved as to form:
/s/ Andrew Vollmer
William McLucas
Andrew Vollmer
Colleen Doherty-Minicozzi
Clifton L. Brinson
Heather Jones

Wilmer, Cutler & Pickering
2445 M Street, NW
Washington, DC 20037
(202) 663-6622
Attorneys for Defendant

* * *

Appendix E

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 21st day of December, two thousand twenty-one.

Securities and Exchange Commission,

Plaintiff - Appellee,

v.

Barry D. Romeril,

Defendant - Appellant,

Paul A. Allaire, G. Richard Thoman, Philip D. Fishbach, Daniel S. Marchibroda, Gregory B. Tayler,

Defendants.

ORDER
Docket No: 19-4197

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

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

* * *

Appendix F

Constitutional, Statutory, and Regulatory Provisions Involved

U.S. Const. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

* * *

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * *

Federal Rule of Civil Procedure 60

Rule 60. Relief from a Judgment or Order

(a) CORRECTIONS BASED ON CLERICAL MISTAKES; OVERSIGHTS AND OMISSIONS. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

(b) GROUNDS FOR RELIEF FROM A FINAL JUDGMENT, ORDER, OR PROCEEDING. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

(c) TIMING AND EFFECT OF THE MOTION.

(1) Timing. A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

(2) Effect on Finality. The motion does not affect the judgment's finality or suspend its operation.

(d) OTHER POWERS TO GRANT RELIEF. THIS RULE DOES NOT LIMIT A COURT'S POWER TO:

(1) entertain an independent action to relieve a party from a judgment, order, or proceeding;

(2) grant relief under 28 U.S.C. §1655 to a defendant who was not personally notified of the action; or

(3) set aside a judgment for fraud on the court.

(e) BILLS AND WRITS ABOLISHED. The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela.

* * *

7 C.F.R. § 202.5

§ 202.5 Enforcement activities.

(a) Where, from complaints received from members of the public, communications from Federal or State agencies, examination of filings made with the Commission, or otherwise, it appears that there may be violation of the acts administered by the Commission or the rules or regulations thereunder, a preliminary investigation is generally made. In such preliminary investigation no process is issued or testimony compelled. The Commission may, in its discretion, make such formal investigations and authorize the use of process as it deems necessary to determine whether any person has violated, is violating, or is about to violate any provision of the federal securities laws or the rules of a self-regulatory organization of which the person is a member or participant. Unless otherwise ordered by the Commission, the investigation or examination is non-public and the reports thereon are for staff and Commission use only.

(b) After investigation or otherwise the Commission may in its discretion take one or more of the following actions: Institution of administrative proceedings looking to the imposition of remedial sanctions, initiation of injunctive proceedings in the courts, and, in the case of a willful violation, reference of the matter to the Department of Justice for criminal prosecution. The Commission may also, on some occasions, refer the matter to, or grant requests for access to its files made by, domestic and foreign

governmental authorities or foreign securities authorities, self-regulatory organizations such as stock exchanges or the National Association of Securities Dealers, Inc., and other persons or entities.

(c) Persons who become involved in preliminary or formal investigations may, on their own initiative, submit a written statement to the Commission setting forth their interests and position in regard to the subject matter of the investigation. Upon request, the staff, in its discretion, may advise such persons of the general nature of the investigation, including the indicated violations as they pertain to them, and the amount of time that may be available for preparing and submitting a statement prior to the presentation of a staff recommendation to the Commission for the commencement of an administrative or injunction proceeding. Submissions by interested persons should be forwarded to the appropriate Division Director or Regional Director with a copy to the staff members conducting the investigation and should be clearly referenced to the specific investigation to which they relate. In the event a recommendation for the commencement of an enforcement proceeding is presented by the staff, any submissions by interested persons will be forwarded to the Commission in conjunction with the staff memorandum.

(d) In instances where the staff has concluded its investigation of a particular matter and has determined that it will not recommend the commencement of an enforcement proceeding against a person, the staff, in its discretion, may advise the

party that its formal investigation has been terminated. Such advice if given must in no way be construed as indicating that the party has been exonerated or that no action may ultimately result from the staff's investigation of the particular matter.

(e) The Commission has adopted the policy that in any civil lawsuit brought by it or in any administrative proceeding of an accusatory nature pending before it, it is important to avoid creating, or permitting to be created, an impression that a decree is being entered or a sanction imposed, when the conduct alleged did not, in fact, occur. Accordingly, it hereby announces its policy not to permit a defendant or respondent to consent to a judgment or order that imposes a sanction while denying the allegations in the complaint or order for proceedings. In this regard, the Commission believes that a refusal to admit the allegations is equivalent to a denial, unless the defendant or respondent states that he neither admits nor denies the allegations.

(f) In the course of the Commission's investigations, civil lawsuits, and administrative proceedings, the staff, with appropriate authorization, may discuss with persons involved the disposition of such matters by consent, by settlement, or in some other manner. It is the policy of the Commission, however, that the disposition of any such matter may not, expressly or impliedly, extend to any criminal charges that have been, or may be, brought against any such person or any recommendation with respect thereto. Accordingly, any person involved in an enforcement matter before the Commission who consents, or

agrees to consent, to any judgment or order does so solely for the purpose of resolving the claims against him in that investigative, civil, or administrative matter and not for the purpose of resolving any criminal charges that have been, or might be, brought against him. This policy reflects the fact that neither the Commission nor its staff has the authority or responsibility for instituting, conducting, settling, or otherwise disposing of criminal proceedings. That authority and responsibility are vested in the Attorney General and representatives of the Department of Justice.

* * *

37 Fed. Reg. 25,224 (Nov. 29, 1972)

Title 17—COMMODITY AND SECURITIES EXCHANGES

Chapter II—Securities and Exchange Commission

[Release Nos. 33–5337, 34–9882, 35–17781, IC–7526, IA–352.]

PART 202—INFORMAL AND OTHER PROCEDURES

Consent Decrees in Judicial or Administrative Proceedings

The Securities and Exchange Commission today announced adoption of a policy with respect to consent decrees in judicial or administrative proceedings under the laws which it administers. In this connection it has amended § 202.5 of Part 202 of the Code of Federal Regulations relating to informal and other proceedings, as indicated below.

COMMISSION ACTION

Pursuant to the authority granted in section 19 of the Securities Act of 1933, section 23 (a) of the Securities Exchange Act of 1934, section 20 of the Public Utility Holding Company Act of 1935, section 38 of the Investment Company Act of 1940 and section 211 of the Investment Advisers Act of 1940, the Securities and Exchange Commission hereby amends

§ 202.5 of Chapter II of Title 17 of the Code of Federal Regulations by adding thereunder a new paragraph (c) reading as follows:

§ 202.5 Enforcement activities.

* * * * * *

(e) The Commission has adopted the policy that in any civil lawsuit brought by it or in any administrative proceeding of an accusatory nature pending before it, it is important to avoid creating, or permitting to be created, an impression that a decree is being entered or a sanction imposed, when the conduct alleged did not, in fact, occur. Accordingly, it hereby announces its policy not to permit a defendant or respondent to consent to a judgment or order that imposes a sanction while denying the allegations in the complaint or order for proceedings. In this regard, the Commission believes that a refusal to admit the allegations is equivalent to a denial, unless the defendant or respondent states that he neither admits nor denies the allegations.

(Secs. 19, 209, 48 Stat. 85, 908, 15 U.S.C. 77s; sec. 23(a), 48 Stat. 901, sec. 8, 49 Stat. 1379, 15 U.S.C. 78w(a); sec. 20, 49 Stat. 833, 15 U.S.C. 79t; sec. 38, 54 Stat. 841, 15 U.S.C. 80a–37; sec. 211, 54 Stat. 855, sec. 14, 74 Stat. 888, 15 U.S.C. 80b–11)

The Commission finds that the foregoing amendment relates only to rules of agency organization, procedure and practice and, therefore, notice and procedures specified in 5

U.S.C. 553 are unnecessary. The foregoing amendment is declared to be effective immediately.

By the Commission.

RONALD F. HUNT,
Secretary.

NOVEMBER 28, 1972.

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