Appendix A - OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED JULY 22, 2021

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2020

(Argued: June 3, 2021 Decided: July 22, 2021)
Docket No. 20-1081-cv

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

v.

DONALD J. FOWLER,

Defendant-Appellant.*

Opinion

LOHIER, Circuit Judge:

The principal questions presented on appeal are (1) whether 28 U.S.C. § 2462, which imposes a five-year statute of limitations on Securities and Exchange Commission (SEC) enforcement actions for civil penalties, is jurisdictional and not subject to tolling by the parties; (2) whether excessive trading in customer accounts constitutes a violation of customer suitability requirements as well as churning;[1] and (3) whether civil penalties were properly imposed based on the number of defrauded customers in this case. We hold that the five-year statute of limitations in § 2462 is not jurisdictional and may be tolled by the parties. We also conclude that the SEC's suitability claim and the civil penalties imposed in this case were proper and that the other challenges on appeal are without merit. After modifying the judgment to correct one error in the amount of disgorgement, we affirm.

BACKGROUND

I

Donald Fowler, a financial broker, challenges a February 28, 2020 judgment of the United States

District Court for the Southern District of New York (Woods, J.) entered after a jury trial. The jury found that Fowler lied to his investors, recommended a high frequency trading strategy that was not suitable for any customer, and made a series of unauthorized trades in customer accounts, in violation of Section 10(b) of the Securities Exchange Act of 1934, Rule 10b-5 promulgated under Section 10(b) of the Exchange Act, and Sections 17(a)(1), 17(a)(2), and 17(a)(3) of the Securities Act of 1933. After trial, the District Court ordered Fowler to disgorge $132,076.40, with prejudgment interest, and to pay civil penalties in the amount of $1,950,000 based largely on the number of defrauded customers who were the focus at trial. It also permanently enjoined Fowler from further violations of the securities laws.

Fowler was a registered representative (a broker) for J.D. Nicholas & Associates, Inc. from January 2007 to November 2014. By 2011 Fowler and another J.D. Nicholas broker, Gregory Dean, began pursuing an "event-driven" investment strategy on behalf of several J.D. Nicholas customers.[2]The event-driven strategy was uncomplicated. Fowler reviewed the financial news and found "events" that he believed the stock price of particular companies had yet to fully absorb. He then traded based on his assessment of whether those events would lower or increase the price of a stock. The frequency of Fowler's trades in customer accounts and the average turnover rate of customer accounts—that is, the number of times that assets in the account were replaced—was very high. While J.D. Nicholas considered a turnover rate of just four times per year to be high for an account with conservative objectives, Fowler's customer accounts examined at trial experienced a turnover rate of 116 times per year.

Fowler's excessive trading in these accounts came with significant costs. Customers were charged $65 (later $49.95) per trade. Fowler, meanwhile, had the discretion to charge an extra 3.5 percent fee on any purchase or sale. Fowler received portions of both of those fees as compensation. To make matters worse, Fowler also recommended margin trading to several of his customers, permitting him to borrow money (for which his customers were on the hook) to buy even more stock and thereby increase his commissions.

These various costs devoured any potential gains that Fowler's customers might have hoped to make and only compounded their losses. Indeed, the average account for Fowler's customers needed to generate a 142.6 percent rate of return to cover the costs charged and to break even.[3] To give an idea of how astonishingly high that rate was, J.D. Nicholas warned its brokers that a cost-to-equity ratio of “greater than 10% is often considered high for many clients, because a 10% return is needed for the client to break even." App'x 398. And for more than half the trades that are at issue in this appeal, Fowler also failed to get his customers' approval before making them.

Thirteen customers were the focus of Fowler's trial. Combined, they lost $467,627 as a result of Fowler's trading. Customers, including those who were not the focus of trial, eventually complained about Fowler to the Financial Industry Regulatory Authority (FINRA), a self-regulatory organization that oversees brokers. In particular, they pointed to violations of FINRA's customer suitability requirements and to Fowler's unauthorized trading in their accounts. These complaints prompted J.D. Nicholas to put Fowler on special supervision in 2012, but he nevertheless continued to use the same investment strategy that had landed him in trouble with his customers.

The SEC's investigation of Fowler's trading activity began in 2014. In 2016 the SEC and Fowler executed two agreements that tolled the five-year statute of limitations for the SEC to file an action against Fowler for one year, from March 1, 2016 to February 28, 2017. It is not clear why the parties entered into the tolling agreement when they did, although the District Court surmised that the SEC needed more time to investigate what it discovered were "unsuitable investment strategies implemented by ... Dean and Fowler in their customers' accounts." Sp. App'x 68. In any event, the SEC filed this action on January 9, 2017, well before the tolling agreement was set to lapse. By the time the complaint was filed, J.D. Nicholas had gone out of business.

The SEC's amended complaint alleged that Fowler knowingly recommended to customers a "high-cost, in-and-out trading strategy without having a reasonable basis for believing that this strategy was suitable for anyone." App'x 24. The amended complaint also alleged that Fowler "knew or recklessly disregarded that the strategy ... was bound to lose money," App'x 17, but made "little or no mention of fees and costs" that he knew would erase any gains, App'x 21. Finally, it alleged that Fowler made trades without customer authorization and engaged in churning with respect to at least three customer accounts. In all, the allegations targeted a series of trades implemented by Fowler (and Dean) in twenty-seven accounts at J.D. Nicholas. For reasons not apparent in the record, the SEC eventually dropped the churning cause of action and proceeded with six causes of action under Section 10(b) of the Exchange Act, Rule 10b-5, and Sections 17(a)(1), (2), and (3) of the Securities Act.

III

Before trial, the District Court resolved the parties' motions in limine. Fowler wanted to adduce evidence of customer sophistication to counter what he described as the SEC's "quantitative suitability [i.e. churning] claim masked as a reasonable basis suitability claim."[4] Sp. App'x 28. "[T]he evidence of customer sophistication," he contended, "[was] highly relevant to the issue of [his] control [of the customer's account]," which the SEC would need to demonstrate in order to state a churning claim. Id.

The District Court decided that the SEC could properly bring a suitability claim arising from Fowler's excessive trading in customer accounts and that the sophistication of his customers was irrelevant. The customers' background or diligence, the court said, did not justify the brokers' affirmative misrepresentations or failure to disclose adverse financial information. *See Hanly v. SEC*, 415 F.2d 589, 595 (2d Cir. 1969).

As noted, Dean settled with the SEC on the eve of trial and Fowler proceeded to trial alone. The SEC's case in chief focused on thirteen of Fowler's customers. The jury heard testimony from four of those customers, as well as from an expert and from Fowler himself. The

SEC also introduced a summary chart based on Fowler's phone records to show that Fowler made the majority of trades in the customer accounts without notifying the clients in advance.

The jury rendered a verdict against Fowler on all six causes of action, finding that Fowler had run afoul of the relevant securities laws by recommending an unsuitable investment strategy, making unauthorized trades, and making false and misleading statements to his clients. After the jury's verdict, the District Court ordered Fowler to disgorge $132,076.40 and pay a civil penalty in the amount of $1,950,000. It also permanently enjoined him from future violations of the securities laws.

DISCUSSION

I

On appeal, Fowler makes a number of arguments, the most serious of which is that the relevant five-year statute of limitations for SEC enforcement actions, 28 U.S.C. § 2462, is jurisdictional and could not be tolled by agreement between the parties. We address that argument first.

The SEC alleged that Fowler's fraudulent scheme began in 2011, meaning that the statute of limitations would ordinarily have expired in 2016. To buy more time, the SEC and Fowler entered into two agreements that together tolled the statute of limitations for a year, from March 1, 2016 through February 28, 2017. The SEC ultimately sued on January 9, 2017, well within the tolled statute of limitations period.

Fowler maintains that the statute of limitations is jurisdictional and not subject to tolling, so that the limitations period clearly lapsed by 2016 and the SEC could not have sued him thereafter for any of the misconduct alleged in this case. His position runs headlong into the Supreme Court's decision in *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 131 S.Ct. 1197, 179 L.Ed.2d 159 (2011). There the Court held that "[f]iling deadlines ... are quintessential claim-processing rules" that "should not be described as jurisdictional" absent a "clear indication that Congress wanted the rule to be jurisdictional." *Id.* at 435–36, 131 S.Ct. 1197 (quotation marks omitted). The "bright line rule for deciding such questions" therefore turns on clear congressional intent. *Id.* at 435, 131 S.Ct. 1197 (quotation marks omitted). In other words, Fowler "must clear a high bar to establish" that the statute of limitations "is jurisdictional." *United States v. Kwai Fun Wong*, 575 U.S. 402, 409, 135 S.Ct. 1625, 191 L.Ed.2d 533 (2015). "[T]raditional tools of statutory construction must plainly show that Congress imbued a procedural bar with jurisdictional consequences." *Id.* at 410, 135 S.Ct. 1625. Without "a clear statement, ... courts should treat [statutes of limitations] as nonjurisdictional." *Id.* at 409, 135 S.Ct. 1625 (quotation marks omitted).

28 U.S.C. § 2462 provides, in relevant part, that "[e]xcept as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued." Focusing on the phrase "shall not be entertained," Fowler says that the plain text of the statute supports his argument that it is jurisdictional. *See SEC v. Graham*, 21 F. Supp. 3d 1300, 1308 (S.D. Fla. 2014) (holding that the phrase "shall not be entertained" in this context "amounts to an unequivocal statutory command to federal courts not to entertain an untimely claim" (quotation marks omitted), aff'd in part on other grounds, rev'd in part on other grounds, 823 F.3d 1357 (11th. Cir. 2016). As Fowler suggests, the Supreme Court has described subject matter jurisdiction as "the classes of cases a court may entertain." *Fort Bend Cnty. v. Davis*, ––– U.S. ––––, 139 S. Ct. 1843, 1848, 204 L.Ed.2d 116 (2019). But the Court has also explained that most statutes of limitations are nonjurisdictional "even when the time limit is important (most are) and even when it is framed in mandatory terms (again, most

are); indeed, that is so however emphatic[ally] expressed those terms may be." *Wong*, 575 U.S. at 410, 135 S.Ct. 1625 (emphasis added) (quotation marks omitted). For that reason, the phrase "shall not be entertained," on which Fowler so heavily relies, does not itself tell us that Congress intended § 2462 to be jurisdictional.

The statutory history of § 2462 signals that Congress did not intend to impose a jurisdictional requirement where it did not previously exist. In 1948 Congress changed the statutory language from "[n]o suit or prosecution ... shall be maintained" if not brought within a five-year period to the current language, which (again) provides that "an [enforcement] action ... shall not be entertained" if not brought within a five-year period. *Compare* 28 U.S.C. § 791 (1946) (emphasis added), with Pub. L. No. 80-773, § 2462, 62 Stat. 869, 974 (1948) (emphasis added). Recognizing that the predecessor statute was not itself jurisdictional, Fowler submits that the amendment was designed to give the statute jurisdictional teeth. But the amendment does no such thing. First of all, the amendment is "presume[d]" not to "work[ ] a change in the underlying substantive law unless an intent to make such a change is clearly expressed." *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 136, 128 S.Ct. 750, 169 L.Ed.2d 591 (2008) (quotation marks omitted). Replacing the term "maintained" with "entertained" in 1948 does not clearly express an intent to convert § 2462 into a jurisdictional statute. And the Reviser's Notes to § 2462 contained in the House Committee report confirm that the "[c]hanges were made in phraseology" only. H.R. Rep. 80-308, at A191 (1947). We see no indication that Congress intended to engineer a substantive legal change in the statute. See *Wong*, 575 U.S. at 410, 135 S.Ct. 1625; *see also 3M Co. (Minn. Mining & Mfg.) v. Browner*, 17 F.3d 1453, 1458 (D.C. Cir. 1994) (rejecting a reading of § 2462 that would "treat the Reviser's rewriting of § 2462 as a modification of the statute's substance" and concluding that "[w]hen the Reviser's Notes describe the alterations as changes in phraseology, the well-established canon of construction is that the revised statute means only what it meant before 1948").

Even if we were to set aside statutory text and history, however, this case is not "the exceptional one in which a century's worth of precedent and practice in American courts rank a time limit as jurisdictional." *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 155, 133 S.Ct. 817, 184 L.Ed.2d 627 (2013) (quotation marks omitted). Until now, we have not squarely addressed the issue in a precedential opinion, although some of our sister circuits have treated § 2462 as a nonjurisdictional statute without specifically holding that it is. *See, e.g., Arch Min. Corp. v. Babbitt*, 104 F.3d 660, 670 (4th Cir. 1997) (noting that the district court had jurisdiction to consider a § 2462 statute of limitations defense as an affirmative defense); *FEC v. Williams*, 104 F.3d 237, 240 (9th Cir. 1996) (noting that § 2462 "is subject to equitable tolling"). We see no reason to diverge from the consistent view of our sister circuits. "Neither the text nor the context nor the legislative history indicates (much less does so plainly) that Congress meant to enact something other than a standard time bar" or to engineer a substantive legal change in the statute. *Wong*, 575 U.S. at 410, 135 S.Ct. 1625. We therefore hold that § 2462 is a nonjurisdictional statute of limitations, that the parties' tolling agreement was enforceable, and that the District Court had the authority to hear this case.

II

Next, Fowler argues that the SEC improperly brought and pursued a suitability claim rather than a churning claim arising from his excessive trading in his customers' accounts. As we previously noted, the SEC claimed that Fowler had violated his reasonable-basis suitability obligation under FINRA's rules. Fowler's conduct contravened this suitability obligation, the SEC alleged, because he "knew or recklessly disregarded that the strategy [he] knowingly recommended—a high-cost strategy of excessive in-and-out trading—was bound to lose money and was not suitable for [his] customers." App'x 17.

Fowler insists that the SEC's suit should have been limited to a churning claim rather than a reasonable-basis suitability claim. Of course, this argument assumes that churning claims and suitability claims arise from mutually exclusive events. They do not. The various securities law provisions do not cover "different, mutually exclusive, spheres of conduct. ... [The Supreme] Court and the [SEC] have long recognized considerable overlap among the subsections of ... Rule [10b-5] and related provisions of the securities laws." *Lorenzo v. SEC*, —— U.S. —— , 139 S. Ct. 1094, 1102, 203 L.Ed.2d 484 (2019). So brokers may, in the same course of conduct, make unsuitable trading recommendations to their customers while at the same time actively churning customer accounts just to generate fees and commissions. In other words, churning claims and suitability claims can arise from the same general set of facts.

The SEC had an adequate basis to pursue its suitability claim under the circumstances of this case. The agency itself has long held that "excessive trading ... can violate [FINRA] suitability standards by representing an unsuitable frequency of trading." *Pinchas, Exchange Act Release No. 41816*, 1999 WL 680044, at *6 (Sept. 1, 1999). And even if pursuing a suitability claim on the facts of this case represented a novel approach, novelty is not error. Indeed, Fowler has never suggested that the SEC failed to state a reasonable-basis suitability claim; instead, he has merely asserted that a churning claim was more appropriate.

For these reasons, we find no error in the District Court's decision to allow the SEC to proceed to trial with its reasonable-basis suitability claim.

In his final challenge to the jury verdict, Fowler suggests that the SEC failed to prove that he controlled the customer accounts. There is no doubt that a churning claim requires a plaintiff to prove that the defendant exercised actual or de facto control over the churned accounts. *See Newburger, Loeb & Co. v. Gross*, 563 F.2d 1057, 1069–70 (2d Cir. 1977). Even the SEC, which has the burden of proof on this issue, appears to agree. *See Calabro, Exchange Act Release No. 9798*, 2015 WL 3439152, at *1 (May 29, 2015). But what is before us is a suitability claim, not a churning claim. And a suitability claim is different: it fundamentally rests on the broker's recommendation to a potential or actual customer rather than on any actual trading activity. The SEC was therefore not required to show that Fowler controlled any account in order to prove its suitability claim. *See Brown v. E.F. Hutton Grp., Inc.*, 991 F.2d 1020, 1031 (2d Cir.

1993). The District Court's ruling to that effect was correct.

III

Fowler challenges the verdict against him for unauthorized trading because not every victim of his scheme testified at trial to his lack of authorization. Only some of his customers testified that they had not authorized certain trades Fowler made on their behalf. In addition to customer testimony, however, the SEC relied on records of phone calls between Fowler and the thirteen customers who were the focus of the trial. Those records were summarized in a chart. Fowler had earlier stipulated that he communicated with his customers exclusively by phone, and there was no genuine dispute that the chart accurately reflected Fowler's phone records. The chart was admitted pursuant to Federal Rule of Evidence 1006 over Fowler's objection, but Fowler does not contest its admission on appeal. It showed that Fowler had failed to communicate with his customers before making a majority of the trades in their accounts. The jury ultimately found that Fowler had made unauthorized trades in twelve of the thirteen accounts. On appeal, Fowler contends that the SEC was required to elicit testimony from each customer regarding their accounts and any unauthorized trades at issue.[6] We conclude that the SEC was not required to elicit testimony from every affected customer in order to prove its suitability claim.

As an initial matter, the summary chart itself, which was admitted under Rule 1006 and as such constituted substantive evidence, powerfully demonstrated the extent of Fowler's unauthorized trading by showing how seldom Fowler called his customers before executing trades in their accounts. It signaled how often Fowler traded in the accounts without first checking with his clients and obtaining their approval.[7] Limited customer testimony about the nature and frequency of Fowler's unauthorized trading in certain accounts served only to make it more likely than not that Fowler had engaged in unauthorized trading in all thirteen accounts. Additional customer testimony was not necessary to reaffirm the point.[8]

IV

After the jury's verdict, the District Court imposed (along with a disgorgement award and a permanent injunction) a penalty of $150,000 for each of the thirteen customers who were the focus at trial, totaling $1,950,000. Fowler complains that these penalties exceed the maximum permitted by the statute and in any event are excessive under the Fifth and Eighth Amendments. The SEC responds that Fowler forfeited these arguments by failing to raise them before the District Court. But "we ... exercise discretion to address an issue not raised properly before the district court" where, as here, "the issue is purely legal and there is no need for additional fact-finding." *Davis v. Shah*, 821 F.3d 231, 246 (2d Cir. 2016) (quotation marks omitted).

A

We first address Fowler's argument that the civil penalties in this case run afoul of the penalty sections of the Securities Act, which provide for three tiers of civil penalties. See 15 U.S.C. § 77t(d)(2). The most serious of these, a Tier III civil penalty, sets a maximum penalty "for each ... violation" that involved "fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement," and "directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons." *Id.* at § 77t(d)(2)(C). In those cases, the maximum penalty is "$100,000 for a natural person" or "the gross amount of pecuniary gain to such defendant as a result of the violation," (what we refer to as the gain clause). Id. The SEC adjusts the $100,000 maximum penalty for inflation based on the date of the violations. See 17 C.F.R. § 201.1001. In Fowler's case, the penalty was adjusted to $150,000. *See id.* at § 201.1001 tbl.I.

The term "violation" is not defined by the statutory scheme. In the course of determining the appropriate unit of violation, the District Court observed that "Fowler selected his victims for this conduct individually." Sp. App'x 86. As a result, it concluded that "treating his treatment of each of his defrauded customers as a separate violation best effectuates the purposes of the statute." Id. This conclusion is entirely plausible. In *SEC v. Pentagon Capital Management PLC*, for example, we determined that it was not error to "calculat[e] the maximum penalty by counting each [violative] trade as a separate violation," let alone each customer victimized by the trades. 725 F.3d 279, 288 n.7 (2d Cir. 2013). Fowler argues that Pentagon Capital is inapposite because the total penalty awarded there fell within the alternative statutory maximum in the gain clause. *See* 15 U.S.C. § 77t(d)(2)(C). Here, by contrast, the District Court imposed iterative civil penalties of $100,000 (adjusted for inflation) per customer under § 77t(d)(2)(C).

The difference between the two statutory caps in § 77t(d)(2)(C) is irrelevant to this appeal. The question before us is whether each defrauded customer can be counted as a separate "violation" under the statute. In Pentagon Capital, we actually emphasized the statute's use of the phrase "each such violation" to conclude that each of the trades in that case was an appropriate unit of violation. *See* 725 F.3d at 288 n.7.

With this in mind, we note that "[o]nce the district court has found federal securities law violations, it has broad equitable power to fashion appropriate remedies, ... and its choice of remedies is reviewable for abuse of discretion." *SEC v. Sourlis*, 851 F.3d 139, 146 (2d Cir. 2016) (quotation marks omitted). Here, the District Court adequately explained that a per-trade penalty "would be so substantial" that Fowler would not "reasonably be capable" of paying it. Sp. App'x 87.[9] And in opposing the SEC's post-trial motion for remedies below, Fowler acknowledged that the jury's findings of liability were customer-specific rather than based on specific trades, even as he insisted that he was merely "carrying out a single scheme." App'x 168–69 (quotation marks omitted). For these reasons, we will not second-guess the District Court's discretionary decision to resort to a per-customer unit of violation to determine the civil penalty in this case.

Adopting a slightly different tack, Fowler points to the SEC's allegations that he engaged in a single fraudulent scheme rather than multiple schemes. He protests that he likewise should have been penalized for a single violation rather than multiple violations.

We reject the idea that the penalty imposed by a district court must track the SEC's litigation approach. And in this case, the District Court did not "believe that penalties should be assessed as if this was a single scheme" because Fowler "selected his victims for this conduct individually" and "each set of trades within a given defrauded customer's account could be considered to be part of a single scheme to defraud that individual." Sp. App'x 86–87. Indeed, Fowler has acknowledged that the number of violations at issue should be determined "based on the Verdict," Appellant's Br. 32, and the jury found Fowler liable on a customer-basis. And Fowler has not disputed that the course of conduct in which he engaged involved multiple violations of the securities laws. Moreover, his argument before the District Court was only that "a single-violation penalty ... is more appropriate," thus leaving discretionary room for the District Court's conclusion that a multiple-violation penalty was also appropriate. App'x 169–71.

Finally, Fowler urges us to focus on a district court's authority to impose a third-tier penalty "for each ... violation" only if the "violation directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons," 15 U.S.C. § 77t(d)(2)(C)(II) (emphasis added). The "clear implication" of the use of the plural "persons," he claims, "is that when multiple investors are affected, the appropriate remedy is to upgrade the penalty from Second to Third Tier, not multiply it for each affected investor." Appellant's Br. 34.

Fowler's reading would foreclose a Tier III penalty whenever there is a single victim regardless of the type or level of harm. The interpretation also contradicts the basic principle that "unless the context indicates otherwise ... words importing the plural include the singular." 1 U.S.C. § 1. Recall that the maximum penalties in the Tier III provision describe the offender as either a "natural person" or "any other person." 15 U.S.C. § 77t(d)(2)(C). In order to distinguish from the offender, the statute refers to "other persons" to indicate that Tier III penalties do not include losses the offender suffered. When viewed in the context of the entire statute, therefore, the term "other persons" means "anyone other than the offender," not "multiple victims."

Fowler also asks us to consider that the monetary penalty that the SEC can impose in SEC administrative proceedings under the Investment Company Act, 15 U.S.C. § 80a-9(d)(2)(C) is based on each "act or omission," not each victim. But this compares statutory apples to statutory oranges. Unlike the statute at issue here, the Investment Company Act provision on which Fowler relies permits the SEC to impose administrative penalties on aiders and abettors. *See* 15 U.S.C. § 80a-9(d)(1)(A)(ii). The term "act or omission" in that context only makes clear that the SEC can impose penalties specifically for each act of aiding or abetting.

In sum, we are not persuaded that the District Court was barred from treating each defrauded customer as a separate unit of violation in imposing civil penalties. We see no need to set a maximum number of violations that would be appropriate on these facts. We conclude only that the District Court did not abuse its wide discretion in finding at least thirteen violations here.

B

Fowler's constitutional argument fares no better than his statutory challenge. Analogizing to punitive damages, he submits that his civil penalty is so grossly disproportionate to the amount he was ordered to disgorge (fifteen times) that it violated his rights under the Fifth and Eighth Amendments. *See, e.g.*, *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23–24, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991) (noting that a punitive damage award more than quadruple the compensatory damage award was "close to the [constitutional] line").

We have not previously held that the civil penalty for a securities fraud offense needs to be proportional to the disgorgement amount. Instead, several factors determine an appropriate civil penalty award: "(1) the egregiousness of the defendant's conduct; (2) the degree of the defendant's scienter; (3) whether the defendant's conduct created substantial losses or the risk of substantial losses to other persons; (4) whether the defendant's conduct was isolated or recurrent; and (5) whether the penalty should be reduced due to the defendant's demonstrated current and future financial condition." *SEC v. Rajaratnam*, 918 F.3d 36, 44 (2d Cir. 2019).

Fowler has never said that he is unable to pay the civil penalty. The District Court nevertheless considered various factors to decide whether the penalty was proportionate to the gravity of his offense. The District Court found that a significant penalty was warranted against Fowler because "[h]is conduct was egregious." Sp. App'x 85. It especially noted that Fowler "took advantage of the relative lack of sophistication of some of his clients to bilk them"; that he "acted with scienter," continuing his misconduct even in the face of multiple customer complaints about his investment strategy; and that his conduct resulted in "substantial" losses for customers and was "recurrent." Sp. App'x 85–86. Its conclusion that the penalty was thus proportionate to Fowler's conduct was not error, and the civil penalties imposed in this case fell within constitutional bounds.

V

Fowler also asks us to vacate the District Court's disgorgement award and remand to allow it to recalculate the amount of disgorgement in light of *Liu v. SEC*, ––– U.S. ––––, 140 S. Ct. 1936, 207 L.Ed.2d 401 (2020), which held in relevant part that "courts must deduct legitimate expenses before ordering disgorgement under § 78u(d)(5)." 140 S. Ct. at 1950. Consistent with Liu, the District Court deducted the portion of Fowler's commissions that were transferred to J.D. Nicholas and Dean in the ordinary course. But Fowler failed then and fails now to identify any other legitimate business expenses that the District Court should have deducted in light of *Liu*.

In general, "[t]he amount of disgorgement ordered need only be a reasonable approximation of profits causally connected to the violation." *SEC v. Razmilovic*, 738 F.3d 14, 31 (2d Cir. 2013) (quotation marks omitted). If the disgorgement amount is generally reasonable, "any risk of uncertainty" about the amount "fall[s] on the wrongdoer whose illegal conduct created that uncertainty." *Id.* (quotation marks omitted). Fowler failed to identify any additional "legitimate" business expenses that, consistent with *Liu*, should have been deducted from an otherwise reasonable disgorgement amount. Yet it was his burden to do so. We therefore decline to remand to the District Court on this issue.

Relatedly, the parties agree that the District Court miscalculated the disgorgement award by ordering Fowler to disgorge more postage fees—that is, the $65 and then $49.95 per trade fee, of which Fowler was to receive a portion—than he actually received. The District Court found that Fowler received $27,498 in postage fees, and ordered him to disgorge that amount (along with his commissions) because it thought that Fowler received 50 percent of the postage fees charged to the thirteen customers, when in fact he received only $3,005 in postage fees. We need not remand to correct this agreed error. *See SEC v. Palmisano*, 135 F.3d 860, 863–64 (2d Cir. 1998). Instead, we modify the disgorgement award to $107,591.40, plus prejudgment interest in the amount of $25,891.17.

CONCLUSION

For the foregoing reasons, the judgment of the District Court is AFFIRMED and the disgorgement award is MODIFIED consistent with this opinion.

Appendix B - OPINION OF THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK, FILED FEBRUARY 25, 2020

SECURITIES AND EXCHANGE COMMISSION, Plaintiff,

v.

Donald J. FOWLER, Defendant. 1:17-cv-139-GHW

United States District Court, S.D. New York.

Signed 02/25/2020

MEMORANDUM OPINION AND ORDER

GREGORY H. WOODS, United States District Judge:

Defendant Donald J. Fowler misused his position as a broker to recommend a series of investments that were unsuitable to any investor. He implemented trades in his customers' accounts without their consent. His customers lost thousands, while Mr. Fowler profited from the substantial commissions that his trades generated. A jury unanimously found Mr. Fowler liable with respect to the charges mounted against him by the Securities and Exchange Commission in this case. Because the Court finds that there is a substantial likelihood that Mr. Fowler will again violate the securities laws, the Court will enter a permanent injunction to protect the public from future violations by Mr. Fowler. The Court also orders Mr. Fowler to disgorge his ill-gotten gains, and to pay Tier III penalties for each of his violations.

I. BACKGROUND

A. The Investigation and Resulting Complaint Against Fowler and Dean

This case developed out of an investigation of J.D. Nicolas, Inc. ("J.D. Nicolas") by the Securities and Exchange Commission (the "SEC"). The investigation began in 2014. Plaintiff's 56.1 Statement, Dkt. No. 70 ("P's 56.1 Statement"), ¶ 137. At the time of the investigation, Defendants Donald Fowler and Gregory Dean were brokers at the firm. *Id.* The SEC focused its investigation on Mr. Fowler and Mr. Dean, among others. *Id.* ¶¶ 136, 138. In April 2014, the SEC asked J.D. Nicolas to retain documents "created, modified, or accessed" by Messrs. Dean and Fowler. *Id.* ¶ 138. And in November of the same year, Mr. Fowler and Mr. Dean both provided investigative testimony to the SEC. *Id.* ¶ 138.

In March 2016—approximately a year and a half after his investigative testimony—Mr. Fowler entered into his first tolling agreement with the SEC. Declaration of Jorge G. Tenreiro, Dkt. No. 190 ("Tenreiro Decl."), Ex. X. The SEC and Mr. Fowler entered into another tolling agreement in August 2016. *Id.* Ex. Y. The Court is unaware of what transpired between the 2014 investigation and the 2016 tolling agreements. For purposes of this motion, what is significant is that, notwithstanding any conclusions reached as a result of the investigation, the SEC did not seek to enjoin Mr. Fowler from further conduct that would violate the securities laws, potentially harming his current and prospective customers. No request for injunctive relief was made by the SEC until after the close of trial in this matter.

But the SEC's investigation had unearthed something of great concern—the unsuitable investment strategies implemented by Messrs. Dean and Fowler in their customers' accounts. In January 2017, the SEC commenced this action against Mr. Fowler and Mr. Dean. Dkt. No. 1. The SEC alleged that Mr. Fowler and Mr. Dean "recommended to customers a high-cost trading strategy consisting of the excessive buying and selling of stocks." *Id.* at 1. The allegations targeted a series of trades allegedly implemented by Mr. Fowler and Mr. Dean in 27 customer accounts at J.D. Nicolas. *Id.* at 2. By the time that the complaint was filed, J.D. Nicolas had gone out of business. *Id.* at 4.

The complaint alleged that Mr. Fowler and Mr. Dean engaged in excessive trading in their customers' accounts, driving up transaction fees and costs on their customers' accounts to unconscionable levels. "Many of the accounts had cost-to-equity ratios in excess of 100%, with a couple over 200%, and one at 463.65%. The average annualized cost-to-equity ratio for these accounts was 110.90%, meaning that the customers, on average, had to realize 110.90% in profits just to break even." *Id.* at 8.

The complaint also contained allegations that Mr. Fowler and Mr. Dean churned several of their customers' accounts. *Id.* at 9. For example, the complaint focused on the trading in the account of one of Mr. Fowler's customers—Customer 24. "The average equity in Customer 24's account was only $54,739, but Fowler made a total of $1,709,242 in purchases, and each investment was held for an average of 10.9 days." *Id.* at 10.

On the basis of these allegations, the SEC claimed that Mr. Fowler and Mr. Dean violated Section 17(a) of the Securities Act of 1933 (the "Securities Act"), 17 U.S.C. § 77q(a), and Section 10(b) of the Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78j(b), and Rule 10b–5 promulgated thereunder, 17 C.F.R. § 240.10b–5.

B. The Litigation Through Mr. Dean's Settlement on the Eve of Trial

After the complaint was filed, this case proceeded in the ordinary manner. The parties engaged in an extended period of discovery. Following the completion of discovery, the SEC and the defendants filed cross-motions for summary judgment. *See* Dkt. Nos. 52, 68. The Court denied both motions, Dkt. No. 91, and later scheduled trial to begin on June 10, 2019. Throughout the litigation, Mr. Dean and Mr. Fowler were represented by the same counsel—Liam O'Brien.

On the morning of June 10, 2019, while awaiting the arrival of the venire, the Court was informed that the SEC and Mr. Dean had agreed to resolve the SEC's claims against him. The Court entered a final judgment as to Mr. Dean later that day, implementing the resolution that had been agreed upon by the SEC and Mr. Dean. Dkt. No. 168.

That final judgment included, among other things, a permanent injunction, prohibiting Mr. Dean from violating the Securities Act or the Exchange Act. *Id.* at 1. The judgment also ordered that Mr. Dean pay disgorgement of "$253,881.98, representing profits gained as a result of the conduct alleged in the Complaint ... and a civil penalty in the amount of

$253,881.98." *Id.* at 3. Mr. Dean expressly consented to the relief entered by the Court. Dkt No. 159-1, at 1. In addition, Mr. Dean admitted certain of the facts that led to his conclusion that he had violated the securities laws, namely that he "from 2011 through 2014: (a) knowingly or recklessly made trade recommendations to customers with no reasonable basis; (b) made material misrepresentations and omissions to customers; and (c) engaged in unauthorized trading in customer accounts." *Id.* at 7.

C. The Trial

1. The Verdict

In the wake of Mr. Dean's settlement, trial proceeded against Mr. Fowler alone. The evidence presented by the SEC against Mr. Fowler over the course of the following days was powerful, and ultimately persuasive. The SEC's case focused on the accounts of 13 of Mr. Fowler's clients. The jury unanimously found Mr. Fowler liable with respect to all of the SEC's six causes of action. The jury found that Mr. Fowler *with scienter* did "employ any device, scheme or artifice to defraud, or engage in any act ... which would operate as a fraud or deceit on any person" in violation of identified sections of the Exchange Act. Verdict

Sheet, Dkt. No. 169 (emphasis added). The jury also concluded that Mr. Fowler did "*with scienter* make any untrue statement or a material fact, or any omission of a material fact, in violation of Section 10(b) of the Exchange Act and Exchange Act Rule 10b-5(b)." *Id.* (emphasis added). He also "negligently obtain[ed] money or property by means of an[ ] untrue statement of a material fact, or by an[ ] omission of a material fact" in violation of Section 17(a)(2) of the Securities Act, *id.*, and negligently engaged in a transaction, practice, or course of business which operated or would operate as a fraud or deceit on the purchaser of a security, in violation of Section 17(a)(3) of the Securities Act. *Id.*

The jury specifically found that Mr. Fowler "with scienter recommend[ed] an investment strategy with no reasonable basis to believe the strategy was suitable for any customer, in violation of Section 10(b) of the Exchange Act." *Id.* And, moreover, the jury found that Mr. Fowler, again, acting with scienter, made unauthorized trades in the accounts of 12 of the 13 customer accounts that were the focus of the litigation.[1] *Id.*

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[1] The jury did not find that Mr. Fowler engaged in unauthorized trading in the account of Clay B. Miller.

These ultimate conclusions are dry, but damning. The Court will not recount the emotional testimony of several of Mr. Fowler's victims recounting their losses, and how they were injured as a result of Mr. Fowler's breach of their trust. The jury's conclusion says it all.

Not all of Mr. Fowlers' 13 customers at issue in the trial testified, either live or by deposition designation, but the testimony presented a consistent picture of Mr. Fowler's management of their accounts—describing substantial trading volume beyond their expectations, resulting in excessive costs. *See, e.g.* Trial Transcript ("Tr.") 173:14-16 ("Q: Was that in-and-out rapid trading activity, was that something that you were asking for? A: No, but I, I apparently let it happen."). There was also substantial evidence that Mr. Fowler disregarded the wishes of his customers, driving them to the strategies that the jury found to have been unsuitable. For example, after one of his customers wrote that his investment goal was "current income," through conversation, Mr. Fowler got the customer to "what he truly wanted." *Id.* 687:25-688:3; *see also id.* 688:8-14 ("He did want to have some level of income at one point or another, I'm not denying that, we had that conversation but for what he was doing in that ... account ..., he wanted speculation and I know that he wrote current income, but the conversation that him and I had were not accurate to just write in current income and that's it."); *id.* 690:6-10 ("Q: So, Mr. Weather said I don't use margin, right? A: He said that, yeah. Q: But he did use margin in your account. You had him sign a margin agreement, correct? A: He also used margin accounts, yes.").

Ultimately, the jury found that Mr. Fowler engaged in unsuitable trading in all of the customer accounts that were examined and engaged in unauthorized trading in 12 of 13 of his customers' accounts. The consequences of this conduct was significant, resulting in substantial losses for Mr. Fowler's clients, many of whom were not wealthy, and were ill-suited to suffer the consequences of Mr. Fowler's misconduct. In all instances in which the jury was asked the question, Mr. Fowler was found to have engaged in his misconduct with scienter.

2. Fowler's Background and Investment Strategy

Mr. Fowler testified at length. He explained that he had worked substantially his entire career in stock brokerage firms, starting with the predecessor firm for J.D. Nicolas in 2007. *Id.* 624:9-10. Mr. Fowler never graduated from college; he left SUNY

Farmingdale after an illness, deciding to focus on building his "book of business." *Id.* 808:1-8. Mr. Fowler had limited instruction in finance and investment outside of his on-the-job training.

Early in his career, Mr. Fowler made cold-calls to find customers for the brokerage, but by 2011 he had graduated to pursuing leads generated by his junior, cold-calling colleagues. *Id.* 643:1-645:25. Hundreds of cold-calls were made from his office each day, working to identify prospects. *Id.*645:11-21. Once a prospect was identified, he or she was handed over to a broker, such as Mr. Fowler, who then worked to persuade them to invest through his firm. After 2011, he did very little cold calling. *Id.* 810:11-12. By then, his role had evolved, such that junior brokers would do the cold-calling and pass on leads to him. Mr. Fowler followed up on those leads to try to develop the leads into customers. *Id.* 810:23-811:10. By the time that he was managing the 13 accounts that were the focus of the trial, Mr. Fowler had developed his book of business to include nearly 100 individual customers at a time; and approximately 400 over the course of the years at issue. *Id.* 811:15-24.

Over the course of his years in the industry, Mr. Fowler obtained a number of licenses, including Series 7, Series 63, and Series 24. *Id.* 648:17-650:1. In order to obtain those licenses, Mr. Fowler had to pass a number of exams and was required to take continuing education classes regarding the responsibilities of brokers to their clients. *Id.* Mr. Fowler was aware of the rules and obligations imposed on him by FINRA, and, in particular the concepts of reasonable basis suitability—broadly, the requirement that a broker have a reasonable basis to believe that an investment is suitable for his customer, *id.* 650:7-651:22—and the concept of customer-specific suitability, which, broadly, requires that a trading strategy recommended for a customer must be suitable for a given customer, *id.* 652:10-21. He was also aware that he was prohibited from placing his own interests ahead of those of his clients. *Id.* 652:1-6.

It was in his role as a broker that Mr. Fowler invested assets in his customers' accounts—implementing trading ideas that he developed. He had limited formal education in business or investment. He took business classes at college before dropping out. *Id.* 808:2-4. Apart from that, he learned to invest on the job, through on the job training and his own reading. He has "read lots and lots of books throughout the years, a lot of webinars, stuff like that." *Id.* 808:13-15. He testified that he was particularly influenced by four books, "Investing in Stocks," "Event Trading," "One Good Trade," and "Trading Catalysts" "which was a very good book in regard to how an event-trading strategy works. I read that a few times." *Id.* 809:8-14. He also read a number of periodicals in the financial industry.

During his testimony, Mr. Fowler described the methodology that he used to develop ideas for the "event driven strategy" that he implemented for many of the customers who were the subject of this case. Mr. Fowler testified that he found his ideas in public documents. *Id.* 847:13-23 ("Q: With respect to your stock-specific recommendations, how did you come up with those recommendations? A: So, I'm constantly reading all the time. In regards to financial news, I would read different financial websites, research reports, different publications, 10-Q filings, anything I could get my hands on stock specific. I would read that. Q: What publications during that time period did you read regularly? A: Wall Street Journal I read regularly. Investor[']s Business Daily, those are probably the most.") Once he had an idea, Mr. Fowler did additional research. *Id.* 848:10-21 ("I would then typically look at the financials on a company. How big the company was, their float, that's the amount of shares that are actually out on the market trading. I'd look at insiders' buys and sales to see sentiment from an insider's standpoint. I would look at recent news, I would look at recent upgrades and downgrades by other research analysts that had coverage on the company. I would then essentially look at the chart and the history of the chart. I'd get an idea of the direction on where I thought the stock was going to trade. And then at that point in time, if it passed—if it passed through everything and got to the bottom, then I would make a recommendation."). Mr. Fowler did not describe any financial analysis associated with his proposed trades. Indeed, Mr. Fowler testified that he did not know the performance associated with his recommended strategies. *Id.* 696:24-697:10 ("Q: You are talking about hundreds of accounts; what was your performance? A: Again, I can point out plenty of accounts that have made plenty of money throughout the years. With that said, I have never done an analysis where I have taken all of my customer accounts and put it into a spreadsheet.").

From the Court's perspective, Mr. Fowler's testimony showed him to be alternatively dismissive, or fundamentally ignorant of, the problematic nature of the trading strategy that he implemented. Again, this is ultimately captured by the jury's verdict, but some excerpts from Mr. Fowler's testimony are illustrative. Mr. Fowler explained his view of the turnover ratio in his clients' accounts. He testified that "I don't view—and I testified to this earlier—turnover as the sole indicator of risk. You can look at turnover, and it can be indicative of higher risk due to the commissions that are tied to turnover. But turnover, in and of itself, you know, I don't view as indicative of anything really." *Id.* 670:15-20. Similarly, Mr. Fowler discredited the value of measuring the commission-to-equity ratio—a ratio that is broadly used in the industry and one that his own firm's supervisory manual recommended. *See id.* 751:15-752:15 (A: "[The cost-equity-ratio] is a totally distorted number and that's all I have to say about that. It is a distorted number that you cannot just look at commission equity and then figure out how much money this account needs in order to break even.").

Mr. Fowler may have felt obliged to express such disdain for those commonly used financial metrics because those of his customers dramatically exceeded the benchmarks established by his own firm for even its most risk-seeking customers. A high cost-equity ratio was considered to be 10%; but for the 13 customers of Mr. Fowler examined at trial, it was 142%. *Id.* 755:2-3, 25-756:3. And a turnover ratio of 4 was considered by Mr. Fowler's firm to be high; the turnover ratio for the 13 customers examined at trial was 116. *Id.* 756: 9-14.

Mr. Fowler was subject to "special supervision" while at J.D. Nicolas. *Id.* 319:15-320:9. While he was on special supervision, a supervisor would call three to five of his customers a month to 394:14-21. Mr. Fowler also received a substantial number of complaints regarding unsuitable recommendations and unauthorized trades while at J.D. Nicolas. *See, e.g.*, *id.* 703-4-709:10. He was aware that a number of his clients were unhappy with what he was doing with their money. *Id.* 698:15-20. He testified that he did nothing to change his strategy as a result of the complaints or the fact that he had been placed under special supervision as a result. *Id.*; *see also id.* 699:2-12 (Q: You acknowledged, in August of 2012, that you were placed under special supervision at J.D. Nicolas; right? A: Yes. Q: But nothing changed about how you were trading in your clients['] accounts after this, did it Mr. Fowler? A: The trading strategies essentially remained the same.... The strategy in and of itself did not change. Q: And the costs and the level of costs that you were implementing did not change, right? A: Correct.").

Rather than using the complaints to influence his manner of handling his customers' accounts, Mr. Fowler described the complaints about his strategy and the associated losses in a self-focused way—articulating his apparent view that such complaints are principally designed to support asset recovery efforts against him. In the Court's view, Mr. Fowler expressed a profound a lack of empathy regarding the impact of the strategies that he recommended to his customers, coupled with an inability or unwillingness to learn from his past mistakes. *See, e.g. id.* 703:21-704-6 ("When people lose money in the stock market, it is a business decision to file a complaint for them and ultimately there are kitchen sink claims that are often the same exact thing where they'll allege an unsuitable or an unauthorized transaction and, frankly, it puts the burden on me to prove that that was not the case in some sort of an arbitration proceeding. So, this, as far as customer filing complaints when there is an actual business around asset recovery for stock market losses, usually it's 80 percent of these complaints are from the same asset recovery firm, it is the same exact thing every time."); *see also id.* 706:9-16 ("Q: Why didn't you, to protect yourself from this business of filing complaints against brokers, do something? A: Well, I tried. Like I said, I tried. It didn't work. And, frankly, it wouldn't have changed anything. They would still say they were unauthorized. Even if you could prove that they were unauthorized they would still say unsuitable. It would still be the same kitchen sink claims.") Rather than considering that the complaints may have been the same every time because his conduct was inappropriate in the same way, Mr. Fowler discredited the complaints as routine and "kitchen sink." And he did nothing to change his own investment strategy in spite of the expressed concerns of certain of his customers, even after he was placed on special supervision.

In reaching its verdict, the jury must have concluded that Mr. Fowler's testimony was not credible. The Court did not find him to be credible either. For example, the jury found that Mr. Fowler executed unauthorized trades in 12 of his customers' accounts. However, Mr. Fowler testified that he spoke with his customers about each of his trades in advance. *See, e.g. id.* 764:19-21 (Q: And if there is [sic] 1,200 trades[,] your testimony is there is [sic] 1,200 phone calls? A: That's correct."). Similarly, Mr. Fowler testified that he spoke about his commissions with each of his clients on a "recommendation-by-recommendation" basis. *Id.* 817:3-20. But the phone records introduced by the SEC did not show evidence of phone calls regarding Mr. Fowler's customers' trades—and the jury reasonably concluded that Mr. Fowler's sworn version of events at trial was false. Similarly, in finding that Mr. Fowler acted with scienter, the jury concluded that Mr. Fowler's testimony regarding his asserted beliefs with respect to the reasonableness of his strategy was not credible.

3. The Impact of Fowler's Misconduct

In the aggregate, the 13 customers at issue in the trial suffered total losses of $467,627 during the period in which Mr. Fowler was servicing their accounts. Tenreiro Decl. Ex. C (PX-1A). All of those customers lost money. *Id.* The substantial losses of Mr. Fowler's customers came during a period in which the S & P 500 Index maintained substantial growth.

Much of the customers' losses was the result of the very high amount of commissions that Fowler charged his clients. Mr. Fowler's sole source of income from J.D. Nicolas was the receipt of commissions generated by his customers' trades. Tr. 614:14-16. As a result, Mr. Fowler had substantial personal motivation to engage in the misconduct found by the jury. From the commissions paid, twenty percent went to J.D. Nicolas, Mr. Fowler's firm. The remainder of the commissions for each of the 13 of Mr. Fowler's customers at issue in trial were shared 50/50 by Mr. Fowler, and his partner, Mr. Dean. *Id.* 614:22-24.

For the 13 customers at issue in the trial, the aggregate commissions charged by J.D. Nicolas between 2011 and 2014 were as shown in the following table. Tenreiro Decl. Ex. D (PX-1G). Of these sums, Mr. Fowler personally received 40% of the commissions generated. The SEC seeks disgorgement of those amounts.

Account Name	Aggregate Commissions	Fowler's Take
Kenneth J. Bayer	\$13,537	\$5,414.80
Lane Clizbe	\$9,445	\$3,778.00
Louis A. Dellorfano	\$23,292	\$9,316.80
G. Allen Deuschle	\$20,993	\$8,397.20
Steve B. DiMercurio	\$24,912	\$9,964.80
Jeffrey Funk	\$16,097	\$6,438.80
Bob Krueger	\$8,493	\$8,4930

Clay B. Miller	$20,437	$8,174.80
Al Riedstra	$13,870	$5,548.00
Peter Skrna	$13,097	$5,238.80
Robert & Glenna Weathers	$33,805	$13,522.00
Gary J. Wendorff	$27,755	$11,102.00
Donald Womeldorph Jr.	$35,735	$14,294.00
Total	$261,466	$104,568.40

In addition, Mr. Fowler received half of the "postage fees" charged to his customers; the other half was paid to his partner, Mr. Dean. Tenreiro Decl. Ex. I (PX-234), at 9. In the aggregate, the 13 customers at issue during the trial paid $54,996 in postage fees, of which Mr. Fowler received $27,498. PX-1G.

The SEC also presented evidence regarding the commissions paid by a number of Mr. Dean's customers during the same period. Those commissions summed up to $508,672 across the period. *Id.* The evidence presented at trial supports the conclusion that 40% of Mr. Dean's customer's commissions (totaling approximately $203,469) were shared with Mr. Fowler. Mr. Dean's customers also paid a substantial amount of "postage fees" that were split with Mr. Fowler. The SEC requests that the Court order disgorgement of those amounts by Mr. Fowler as well.

II. ANALYSIS

A. Disgorgement

1. Legal Standard[2]

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

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[2] The legal analysis in this and subsequent sections of this opinion is drawn with appreciation from the accurate description of the applicable legal principles in *S.E.C. v. Amerindo Inv. Advisors Inc.*, No. 05 CIV. 5231 RJS, 2014 WL 2112032 (S.D.N.Y. May 6, 2014) (Sullivan, J.), *aff'd sub nom. S.E.C. v. Amerindo Inv. Advisors*, 639 F. App'x 752 (2d Cir. 2016)

v. Razmilovic, 738 F.3d 14, 31 (2d Cir. 2013) (quotation omitted). Disgorgement "consists of factfinding by a district court to determine the amount of money acquired through wrongdoing ... and an order compelling the wrongdoer to pay that amount plus interest to the court." *SEC v. Cavanagh*, 445 F.3d 105, 116 (2d Cir. 2006). Unlike other remedies, disgorgement is not designed to compensate victims or to punish wrongdoers, *id*. at 116 n. 25, 117, but is instead meant to deter wrongdoing by "forcing a defendant to give up the amount he was unjustly enriched," *id*. at 117 (quotation omitted).

To determine the amount of money acquired through wrongdoing, courts apply a two-part burden shifting framework. *See FTC v. Bronson Partners, LLC*, 654 F.3d 359, 368 (2d Cir. 2011); *see also SEC v. Lorin*, 76 F.3d 458, 462 (2d Cir. 1996). First, the agency seeking disgorgement must "show that its calculations reasonably approximate[ ] the amount of the defendants' unjust gains." *Bronson Partners*, 654 F.3d at 368 (brackets and quotation omitted). Once the agency has met that burden, "defendants [can attempt] to show that [the agency's] figures [are] inaccurate," *id.* (quotation omitted), or that some of the gains were not the result of wrongdoing, *Razmilovic*, 738 F.3d at 31. A defendant's burden is high, however. If the agency has made a reasonable approximation, “the risk of uncertainty falls on the wrongdoer whose illegal conduct created the uncertainty.” *Bronson Partners*, 654 F.3d at 368 (quotation omitted); *see also Razmilovic*, 738 F.3d at 31 (holding that the risk of uncertainty falls on the wrongdoer as long as the agency's “measure of disgorgement is reasonable”).

In making the disgorgement calculation, the proper focus is revenues, not profits. *See Bronson Partners*, 654 F.3d at 375 (“[W]here the profits from fraud and the defendant's ill-gotten gains diverge, the district court may award the larger sum.”). Defendants “are not entitled to deduct costs associated with committing their illegal acts.” *Id.* (quotation omitted). Nevertheless, courts should deduct any money that a defendant returns or has returned to her or his victims. *See id.* at 369; *cf. SEC v. First Jersey Secs., Inc.*, 101 F.3d 1450, 1475 (2d Cir. 1996) (approving a district court's decision to credit defendants for money they had already paid to victims as part of a private settlement). Defendants are “only required to give back the proceeds of [their] securities fraud once.” *SEC v. Palmisano*, 135 F.3d 860, 863 (2d Cir. 1998) (quotation omitted).

As part of the disgorgement judgment, a court may order a defendant to pay prejudgment interest to "prevent [the] defendant from obtaining the benefit of what amounts to an interest free loan." *SEC v. Moran*, 944 F. Supp. 286, 295 (S.D.N.Y. 1996); *see also SEC v. Koenig*, 557 F.3d 736, 745 (7th Cir. 2009) (noting that prejudgment interest is designed to take account of "inflation and the power of money to earn an economic return"). A district court has discretion both in deciding whether to require prejudgment interest and in setting the appropriate interest rate. *See First Jersey Secs.*, 101 F.3d at 1476. "The personal wrongdoing of a defendant should be considered in determining that an award of interest is in accord with doctrines of fundamental fairness. In the context of Section 10(b) and Rule 10b–5 actions, proof of scienter is sufficient to justify an award of prejudgment interest." *S.E.C. v. Musella*, 748 F. Supp. 1028, 1042–43 (S.D.N.Y. 1989), *aff'd*, 898 F.2d 138 (2d Cir. 1990) (citations omitted).

2. Application

The SEC argues that Mr. Fowler should disgorge the full amount of the commissions and "postage fees" that he received from the 13 clients who were the subject of the trial. The SEC also asks that the Court order disgorgement of his portions of commissions on Mr. Dean's accounts. The Court takes up the question of whether the SEC has satisfied its burden to show the amount of Mr. Fowler's gains with respect to each of these two categories in turn.

The SEC has clearly met its burden to prove the amount of the commissions and “postage fees” extracted by Mr. Fowler from his 13 customers. The SEC presented evidence at trial regarding each of the 13 accounts, including the trading history in each of the accounts and the commissions and “postage fees” paid. The jury found that Mr. Fowler's strategy with respect to each of the accounts was unsuitable. Of those commission amounts, however, Mr. Fowler personally received only 40% of the total because a 20% fee was first paid to J.D. Nicolas, and he shared the remaining 80% with his partner, Mr. Dean. Therefore, the Court concludes that Mr. Fowler was unjustly enriched by $104,568.40 in commissions as a result of his fraud on his 13 customers. He also received $27,498 in “postage fees” from those clients. Mr. Fowler has presented no argument to rebut the SEC's proof with respect to these amounts. Consequently, the Court will order disgorgement in the amount of $132,076.40. Because Mr. Fowler acted with scienter, an award of prejudgment interest is warranted. The Court will apply prejudgment interest at the underpayment rate established for the Internal Revenue Service pursuant to 26 U.S.C. § 6621.

The Court concludes that the SEC has not met its burden with respect to Mr. Dean's customers who were not the subject of the trial. It is worthwhile to flash back to the procedural history of the case. On the morning of the trial, the SEC was planning to present a case against both Mr. Fowler and Mr. Dean. When Mr. Dean settled with the SEC, the SEC culled its case and limited the direct evidence of fraud to the 13 customers who were principally serviced by Mr. Fowler. As a result, there was relatively little evidence presented regarding the management of Mr. Dean's accounts. The trial included evidence of the aggregate losses in Mr. Dean's accounts, and the costs associated with them. But the SEC, understandably, did not focus its proof at trial on the management of those accounts.

Instead, as evidence of fraudulent conduct with respect to those accounts, the SEC asks the Court to rely on the admission provided by Mr. Dean in connection with the consent order of judgment entered against him. In it, as noted above, Mr. Dean admitted that he "from 2011 through 2014: (a) knowingly or recklessly made trade recommendations to customers with no reasonable basis; (b) made material misrepresentations and omissions to customers; and (c) engaged in unauthorized trading in customer accounts." Dkt No. 159-1, at 7. And he agreed, as part of the judgment to pay "$253,881.98, representing profits gained as a result of the conduct alleged in the Complaint ...." *Id.* at 3.

On this record, the Court declines to infer that the commissions on Mr. Dean's accounts were necessarily the product of fraud. The language of Mr. Dean's admission does not tie to the specific accounts to which the SEC now points. Without more detail to link each account to Mr. Dean's admitted misconduct, the Court is left to take an inferential leap to conclude that the accounts identified by the SEC were the affected ones. [3]

The Court is also conscientious of the fact that the information that links Mr. Dean's accounts to fraudulent conduct was not presented at trial, and that Mr. Fowler did not have the opportunity to challenge it as evidence of an obligation on his part to pay any amount as disgorgement. While both Mr. Dean and Mr. Fowler were represented by the same lawyer, the Court is mindful that, ultimately, these were admissions of Mr. Dean only. Therefore, the Court will not order that Mr. Fowler disgorge the

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[3] This is a gap that the SEC might readily have filled with a more detailed set of admissions from Mr. Dean.

amount of commissions that he received from Mr. Dean's customers' accounts.

B. Civil Penalties

1. Legal Standard

In addition to disgorgement, federal statutes authorize three increasing tiers of civil fines for violations of the securities laws. *See* 15 U.S.C. §§ 77t(d)(2) (Securities Act), 78u(d)(3)(B) (Exchange Act), 80b9(e)(2)(IAA). For any violation, a court may impose Tier I penalties-fines of up to the higher of (1) $5,000 for each violation by a natural person or $50,000 for each violation by "any other person," such as a corporation; or (2) the defendant's "gross amount of pecuniary gain." *See* 15 U.S.C. §§ 77t(d)(2)(A), 78u(d)(3)(B)(i), 80b9(e)(2)(A). If a violation "involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement," a court may instead impose Tier II penalties—fines of up to the higher of (1) $50,000 for each violation by a natural person or $250,000 for each violation by "any other person"; or (2) the defendant's "gross amount of pecuniary gain." 15 U.S.C. §§ 77t(d)(2)(B), 78u(d)(3)(B)(ii), 80b–9(e)(2)(B). If a violation "involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement," and "directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons," a court may instead impose Tier III penalties—fines of up to the higher of (1) $100,000 for each violation by a natural person or $500,000 for each violation by "any other person"; or (2) the defendant's "gross amount of pecuniary gain." 15 U.S.C. §§ 77t(d)(2)(C), 78u(d)(3)(B) (iii), 80b–9(e)(2)(C)[4]

A defendant's gross amount of pecuniary gain is similar to that defendant's disgorgement amount, but with three differences. First, gross pecuniary gain, unlike disgorgement, may consider gains only from frauds occurring within the five-year statute of limitations for civil penalties. *See Gabelli v. SEC*, 568 U.S. 442, 447-448, 133 S.Ct. 1216, 185 L.Ed.2d 297 (2013) (interpreting 28 U.S.C. § 2462). Second, because the civil penalties statutes focus on the gross amount of pecuniary gain—as opposed to disgorgement, which is focused on simple gains—defendants are not entitled to deduct money returned

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[4] The amount of these statutory penalties are adjusted by the SEC by regulation. *See* 17 C.F.R. § 201.1001. For the period from March 4, 2009 to March 5, 2013, which embraces most of the period at issue here, the maximum Tier III penalty was $150,000 for each violation by a natural person. *Id.* The maximum penalty was $160,000 thereafter. *Id.*

to victims. Otherwise, a defendant who paid back all gains before judgment could practically nullify the statutory penalty. Third, disgorgement can be awarded jointly and severally, but civil penalties cannot. *See S.E.C. v. Pentagon Capital Mgmt. PLC*, 725 F.3d 279, 287-88 (2d Cir. 2013). Nevertheless, where multiple defendants mutually benefitted from the same gains, the best calculation of a single defendant's gain may be the total gains obtained by the group through that defendant's violations. *See SEC v. Great Am. Techs., Inc.*, No. 07 Civ. 10694 (DC), 2010 WL 1416121, at *2 (S.D.N.Y. Apr. 8, 2010) (in a case where a corporate defendant gained $2.3 million and an individual defendant personally diverted $1 million of that sum, fining the individual defendant based on the full $2.3 million gain), *aff'd sub nom. SEC v. Setteducate*, 419 F. App'x 23 (2d Cir. 2011). Hence, there may be some overlap among defendants' gains, and the gains attributed to each defendant may add up to over one hundred percent of total gains.

"Beyond setting maximum penalties, the statutes leave the actual amount of the penalty ... up to the discretion of the district court." *Razmilovic*, 738 F.3d at 38 (quotation omitted); *see also* 15 U.S.C. §§ 77t(d)(2)(A) ("The amount of the penalty shall be determined by the court in light of the facts and circumstances."), 78u(d)(3)(B)(i) (same), 80b–

9(e)(2)(A) (same). "In exercising this discretion, courts weigh (1) the egregiousness of the defendant's conduct; (2) the degree of the defendant's scienter; (3) whether the defendant's conduct created substantial losses or the risk of substantial losses to other persons; (4) whether the defendant's conduct was isolated or recurrent; and (5) whether the penalty should be reduced due to the defendant's demonstrated current and future financial condition." *SEC v. Tourre*, 4 F. Supp. 3d 579, 593 (S.D.N.Y. 2014) (quotation omitted).

The penalty provisions of the relevant securities laws do not define "violation," 15 U.S.C. §§ 77t(d), 78u(d)(3), 80b–9(e). As a result, courts have determined the number of violations using a variety of methods. *See In re Reserve Fund Secs. and Derivative Litig.*, Nos. 09 MD 2011, 09 Civ. 4346 (PGG), 2013 WL 5432334, at *20 (S.D.N.Y. Sept. 30, 2013). For example, a court can look to the number of investors defrauded or the number of fraudulent transactions to determine the number of violations. *Id.* (*citing Pentagon Capital Mgmt. PLC*, 725 F.3d at 288 n.7) (approving district court's methodology of counting each trade as a separate violation); *SEC v. Elliot*, No. 09 Civ. 7594 (KBF), 2012 WL 2161647, at *11 (S.D.N.Y. June 12, 2012) (counting each transaction as a separate violation); *SEC v. Glantz*, No. 94 Civ. 5737(LAP), 2009 WL 3335340, at *6 (S.D.N.Y. Oct. 13, 2009)(assessing one violation for each victim); *SEC v. Milan Capital Grp., Inc.*, No. 00 Civ. 108 (DLC), 2001 WL 921169, at *3 (S.D.N.Y. Aug. 14, 2001)(same); *SEC v. Kenton Capital Ltd.*, 69 F.Supp.2d 1, 17 n.15 (D.D.C. 1998) (same)). In the alternative, a court may consider the number of statutes that each defendant violated, or whether the violations were all part of a single scheme. *Id.* (*citing SEC v. Shehyn*, No. 04 Civ. 2003 (LAP), 2010 WL 3290977, at *8 (S.D.N.Y. Aug. 9, 2010) (assessing penalty for each statute violated); *SEC v. Johnson*, No. 03 Civ. 177(JFK), 2006 WL 2053379, at *10 (S.D.N.Y. July 24, 2006) (assessing penalty for each statutory violation found by jury); *SEC v. Rabinovich & Assocs., LP*, No. 07 Civ. 10547(GEL), 2008 WL 4937360, at *6 (S.D.N.Y. Nov. 18, 2008) (finding one violation where defendant's conduct was part of "single scheme or plan")).

2. Application

Tier III penalties are clearly appropriate for Mr. Fowler. The jury found him liable of several counts of securities fraud. As a result, there is no doubt that his conduct "involved fraud." His conduct was egregious. Many of Mr. Fowler's clients were relatively unsophisticated. And the Court believes that the evidence at trial established that Mr. Fowler took advantage of the relative lack of sophistication of some of his clients to bilk them. As described above, and as found by the jury, the strategy employed by Mr. Fowler was unsuitable for anyone. Mr. Fowler disregarded the outrageously high cost-to-equity and turnover ratios of his customers' accounts, which exceeded his firm's guidance for risk-seeking customers by many multiples. And he traded in 12 of their accounts without authorization.

Mr. Fowler was found by the jury to have acted with scienter. And as described above, he was aware that customers had complained about his investment strategy. In response to those known complaints, Mr. Fowler chose to do nothing to change his strategy. Mr. Fowler's conduct resulted in substantial losses in his customers' accounts—thousands of dollars that some could ill afford to lose. And his conduct was recurrent—he applied the strategy again and again to the 13 customers at issue in the trial. The Court acknowledges that the 13 customers at issue were a fraction of his 400 accounts over the relevant period. But the number of affected customers was substantial, and the evidence revealed a repeated pattern of misconduct by Mr. Fowler. Mr. Fowler has presented no evidence or argument regarding his inability to pay a penalty assessed by the Court.

The Court will impose a third-tier penalty on Mr. Fowler of $150,000 with respect to each of the 13 customers whose accounts were the focus of the trial. While Mr. Fowler implemented the same unsuitable strategy for each of the 13 accounts, the Court does not believe that penalties should be assessed as if this was a single scheme. It was not, for example, a scheme derived from a single offering. *See e.g., SEC v. Riel*, 282 F. Supp. 3d 499, 529 (N.D.N.Y. 2017); *SEC v. Locke Capital Mgmt., Inc.*, 794 F. Supp. 2d 355, 370-71 (D.R.I. 2011). Instead, as Mr. Fowler argued throughout the trial, he approached each of his customers individually. The 13 customers at issue in his trial were only a subset of his entire customer base. Mr. Fowler selected his victims for this conduct individually; therefore, treating his treatment of each of his defrauded customers as a separate violation best effectuates the purposes of the statute. While the Court has the authority to impose penalties for each of the trades in those customers' accounts, the Court declines to do so for two reasons: first, because each set of trades within a given defrauded customer's account could be considered to be part of a single scheme to defraud that individual; and, second simply because the resulting award would be so substantial that the Court does not believe that Mr. Fowler would reasonably be capable of satisfying the award. Therefore, the Court will impose a third-tier penalty of $150,000 for each of Mr. Fowler's 13 victims—for a total of $1,950,000.

C. Permanent Injunction

1. Legal Standard

The SEC may seek permanent injunctive relief for violations of the Securities Act, and the Exchange Act. *See* 15 U.S.C. §§ 77t(b) (Securities Act); 78u(d)(1) (Exchange Act). To obtain such relief, "[t]he SEC must demonstrate that there is a substantial likelihood of future violations of illegal securities conduct." *SEC v. Cavanagh*, 155 F.3d 129, 135 (2d Cir. 1998); *see also SEC v. Gabelli*, 653 F.3d 49, 61 (2d Cir. 2011) (quoting *SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1100 (2d Cir. 1972)), *rev'd on other grounds sub nom. Gabelli v. SEC*, 568 U.S. 442, 133 S.Ct. 1216, 185 L.Ed.2d 297 (2013) (requiring a showing of a "reasonable likelihood that the wrong will be repeated."); *Sec. & Exch. Comm'n v. Gentile*, 939 F.3d 549, 556 (3d Cir. 2019) ("Unless the agency shows a real threat of future harm, 'there is in fact no lawful purpose to be served' by a preventive injunction." (quoting *SEC v. Torr*, 87 F.2d 446, 450 (2d Cir. 1937)).

To evaluate whether there is a substantial likelihood of future violations of the securities laws, courts look to the following factors: (1) the fact that a defendant has been found liable for illegal conduct; (2) the degree of scienter involved; (3) whether the infraction is an isolated occurrence; (4) whether the defendant continues to maintain that his past conduct was blameless; and (5) whether the defendant might be in a position where future violations could be anticipated. *Cavanagh*, 155 F.3d at 135 (citation omitted). Ultimately, "in deciding whether to grant injunctive relief, a district court is called upon to assess all those considerations of fairness that have been the traditional concern of equity courts. Accordingly, the adverse effect of an injunction upon defendants is a factor to be considered by the district court in exercising its discretion." *Manor Nursing Centers, Inc.*, 458 F.2d at 1102.

2. Application

The entry of a permanent injunction against Mr. Fowler is warranted here. As described above, Mr. Fowler was found liable for securities fraud with respect to 13 of his customers' accounts. He made unauthorized trades in 12 of those customers' accounts. Mr. Fowler acted with a high degree of scienter. The jury found that he engaged in that misconduct with scienter. Mr. Fowler testified that he was aware of the FINRA's suitability rules, but he implemented a trading strategy that flagrantly violated them. He did so despite the fact that he had received complaints from other customers regarding the suitability of his strategies, and was placed on special supervision as a result. Those complaints put Mr. Fowler on notice regarding the potential impropriety of his conduct, yet he engaged in the conduct charged in this case.

Mr. Fowler's offenses here were not isolated. He was proven to have engaged in this course of misconduct with 13 clients over the course of three years. And, as just noted, the evidence of prior complaints involving Mr. Fowler suggests that he may have engaged in similar practices with other customers not examined during the course of this trial.

Mr. Fowler continues to assert that his conduct was blameless. Mr. Fowler had every right to defend himself vigorously in this case and the Court does not hold the fact that he did so against him in any way. However, Mr. Fowler's testimony regarding his views on investments generally, and the propriety of his conduct show him to present a substantial risk of future injury to his customers. As described above, Mr. Fowler discredited standard industry metrics designed to measure the risk of his strategies. Mr. Fowler did not analyze the performance of his recommended strategies, or even, according to his testimony, conduct financial analysis of his recommended trades. Mr. Fowler's professed disdain of commonplace financial metrics suggests that he presents a continuing risk to customers.

So too does Mr. Fowler's apparent lack of interest in learning from past mistakes. Confronted with customer complaints regarding the unsuitability of his trading strategy, Mr. Fowler did nothing to reconsider his strategy. Instead, he belittled the complaints as “kitchen sink” and blustered forward with his approach, disregarding client feedback, and, in the case of these 13 customers, the clear data showing that his strategies were unsuitable to any investor. No one excerpt from the trial testimony can capture what the Court observed over the course of Mr. Fowler's days of testimony: he presented himself disdainful of his customers' concerns, and unjustifiably satisfied with his performance in the face of concrete evidence of his malfeasance and data showing the terrible investment returns for all the 13 clients examined at trial. Mr. Fowler's overconfidence may make him a good salesman, but it also makes him a danger to future customers.

Mr. Fowler continues to work in the securities industry. He has worked in the industry since he left college, so the likelihood that he will be in a position to commit further violations is very high.

All of the factors laid out in *Cavanagh* weigh heavily in favor of the entry of a permanent injunction against Mr. Fowler. Mr. Fowler argues that an injunction is not warranted because of the long delay between the commission of his misconduct and the trial. He argues that the SEC's failure to pursue an injunction earlier supports the conclusion that no injunction is necessary. He also points to the absence of evidence of similar misconduct by Mr. Fowler in the period after 2014. The Court appreciates the argument that the SEC might have taken more prompt action to protect Mr. Fowler's customers from similar misconduct. But ultimately, it is the Court, not the SEC, that must determine whether the entry of an injunction is warranted. The SEC's delay in seeking an injunction does not bear significant weight in the Court's analysis given the substantial evidence supporting the need for entry of injunctive relief against Mr. Fowler.

The Court has considered Mr. Fowler's argument that the events at issue in the trial are now dated. However, the evidence of the events proven at trial amply support the Court's conclusion that an injunction is warranted. The Court has little assurance that Mr. Fowler's conduct has changed in the intervening years: to the Court's knowledge, the SEC did not examine those years. The Court is hesitant to rely on the word of Mr. Fowler, given the jury's conclusion that, contrary to his sworn testimony, he engaged in unauthorized trades. Moreover, Mr. Fowler's testimony at trial in 2019 reflected his continued belief in the propriety of his abusive investment strategies and his disregard for financial metrics commonly used to measure the risk of investment strategies. Mr. Fowler's testimony dates from 2019, not 2014, and supports the Court's conclusion that injunctive relief remains necessary here.

The Court is very mindful of the potential impact of this type of injunctive relief on Mr. Fowler and the stigma that it places on him in the industry. The Court has weighed that harm. But ultimately, "the public interest, when in conflict with private interest, is paramount." *SEC v. Culpepper*, 270 F.2d 241, 250 (2d Cir. 1959). The Court finds that Mr. Fowler presents a continuing substantial risk of future securities violations, and will enter an injunction requiring him to fully comply with those laws in the future.

III. Conclusion

For the reasons stated above, the SEC's motion is GRANTED. Mr. Fowler is ordered to disgorge $132,076.40, plus prejudgment interest at the underpayment rate established for the Internal Revenue Service pursuant to 26 U.S.C. § 6621. Mr. Fowler is further ordered to pay civil penalties in the amount of $1,950,000. The Court will also permanently enjoin Mr. Fowler from further violations of the securities laws.

The SEC is directed to submit an appropriate proposed permanent injunction and form of judgment within 14 days of the entry of this Memorandum Opinion and Order. The SEC is also directed to submit to the Court a letter by the same date, setting forth its calculation of prejudgment interest, attaching an Excel spreadsheet to show its calculations. The spreadsheet should also be submitted in native format to the Court's chambers email account, copying counsel for the defendant.

The Clerk of Court is directed to terminate the motion pending at Dkt. No. 189.

SO ORDERED.