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App. 1

**United State Court of Appeals
for the Fifth Circuit**

No. 22-10359

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff—Appellee,

versus

TEAM RESOURCES INCORPORATED; FOSSIL
ENERGY CORPORATION; KEVIN A. BOYLES,

Defendants—Appellants.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:15-CV-1045

(Filed Feb. 1, 2023)

Before ELROD, HAYNES, and WILLETT, *Circuit Judges.*

PER CURIAM:*

This civil enforcement action has come before us twice before. Most recently, we remanded it to the district court for further proceedings in light of the U.S. Supreme Court’s decision in *Liu v. SEC*, 140 S. Ct.

* This opinion is not designated for publication. See 5TH CIR. R. 47.5.

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1936 (2020), which held that disgorgement, when ordered as “equitable relief” under 15 U.S.C. § 78u(d)(5), is limited to a wrongdoer’s net profits. On remand, the district court denied the defendants’ request to hold a live hearing on the recalculation of the disgorgement award, resolving the issue on the Government’s uncontradicted documentary evidence. The court also declined to revisit the civil penalty it imposed, which we had affirmed in the initial appeal of this matter, reasoning that the issue was outside the scope of its mandate on remand. The defendants have again appealed, arguing that they were entitled to a live evidentiary hearing (even though they waived any right to a live hearing); that the district court should not have imposed a civil penalty (even though they forfeited this challenge in their initial appeal); and that the civil penalties violate the Eighth Amendment (even though they did not raise this argument to the district court). We AFFIRM.

I

The Securities and Exchange Commission filed this civil enforcement action in 2015 against Kevin Boyles and two companies he created, Team Resources, Inc. and Fossil Energy Corp., alleging that these defendants had defrauded approximately 475 investors of more than \$33 million in violation of the federal

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securities laws. The parties quickly entered into settlements known as consent agreements.¹

Among other things, the parties agreed that the SEC would move for an order of disgorgement and for civil penalties. Of particular relevance to this appeal, the parties further agreed that in connection with the SEC's motion, "the parties may take discovery" but "the Court may determine the issues raised in the motion on the basis of affidavits, declarations, excerpts of sworn deposition or investigative testimony, and documentary evidence." The district court entered partial judgments incorporating the terms of the consents.

In 2018, upon motion by the SEC, the district court ordered the defendants jointly and severally liable for disgorgement in the amount of \$15,508,280, which is equal to the funds that the defendants fraudulently took from investors, less payments returned to the investors, within the applicable limitations period. Additionally, the court imposed a civil penalty against Boyles individually for \$15,508,280—the amount equal to Boyles' s gross pecuniary gain. The defendants appealed that initial judgment, attacking primarily the disgorgement award.

We affirmed. Relevant here, we rejected the defendants' argument that the disgorgement amount should have been lowered to account for their business expenses. *SEC v. Team Res., Inc.*, 942 F.3d 272, 279 (5th

¹ The facts of this case are set forth in more detail in our prior opinion, *SEC v. Team Res., Inc.*, 942 F.3d 272 (5th Cir. 2019), *cert. granted, judgment vacated*, 141 S. Ct. 186 (2020).

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Cir. 2019). We also held that the “district court did not abuse its discretion by ruling on the SEC’s remedies motion without holding an evidentiary hearing.” *Id.* at 278. After all, “the parties agreed that the district court could resolve issues in the SEC’s disgorgement motion ‘on the basis of the affidavits, declarations, excerpts of sworn deposition or investigative testimony, and documentary evidence.’” *Id.* at 278–79. “So the court’s decision to rule on the SEC’s motion without first holding a hearing could not have violated Appellants’ rights under the settlement agreements because those agreements did not create a right to a hearing.” *Id.* at 279. The defendants petitioned for certiorari.

After the Supreme Court decided *Liu v. SEC*, 140 S. Ct. 1936 (2020), the Court granted the defendants’ petition for certiorari and vacated our prior judgment, remanding this case for reconsideration in light of *Liu*. *See Team Res., Inc. v. SEC*, 141 S. Ct. 186 (2020). *Liu* held that an order of disgorgement, when awarded as “equitable relief” under 15 U.S.C. § 78u(d)—at least as the statute existed at the time²—is limited to a defendant’s *net* profits, meaning a court must deduct legitimate business expenses when calculating the award. *Liu*, 140 S. Ct. at 1940. We therefore remanded to the district court “for further proceedings consistent with the Supreme Court’s decision in *Liu*.” *SEC v. Team Res., Inc.*, 815 F. App’x 801 (5th Cir. 2020) (per curiam).

² Congress amended the statute after *Liu* to explicitly permit disgorgement as a legal remedy. *See SEC v. Hallam*, 42 F.4th 316, 334–35 (5th Cir. 2022) (discussing the amendments).

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On remand, the SEC filed a renewed motion for remedies, deducting what it deemed legitimate expenses according to *Liu* and, as a result, reducing its calculation of disgorgement from \$15,508,280 to \$2,410,630. The SEC supported its motion with over 500 pages of documentary evidence. In response, the defendants critiqued the SEC’s calculations as “flawed and incomplete” but submitted no rebuttal documentary evidence. Instead, they argued that a live evidentiary hearing was necessary to properly calculate disgorgement under *Liu*. Additionally, Boyles asked the district court not to impose a civil penalty against him because of his financial condition.

The district court denied the request for a live hearing, reasoning that “[i]n the settlement agreements . . . the Defendants waived any right to a hearing and expressly agreed for [the district court] to resolve this issue on the papers.” *SEC v. Team Res., Inc.*, No. 3:15-CV-1045-N, 2022 WL 463390, at *2 (N.D. Tex. Feb. 15, 2022). Noting that the defendants did not oppose the SEC’s calculation of disgorgement with documentary evidence, the court concluded from the evidence it had that the SEC’s calculation was correct. *Id.* Additionally, the court imposed the same civil penalty it had imposed before, reasoning that *Liu* addressed only disgorgement, not civil penalties, so a reconsideration of the penalty was outside the scope of its mandate on remand. *Id.* at *3. Altogether, the court awarded disgorgement, jointly and severally among the defendants, in the amount of \$2,410,630 and a penalty against Boyles in the amount of \$15,508,280.

II

On appeal, the defendants raise three sets of arguments, none of which is persuasive.

First, they primarily contend that the district court erred in denying them a live evidentiary hearing on remand at which they could challenge the SEC's calculation of disgorgement and civil-penalty amounts. We review the district court's denial of a hearing for abuse of discretion, *SEC v. Hallam*, 42 F.4th 316, 325 (5th Cir. 2022), and find no reversible error. Here, the appellants agreed that the district court could calculate disgorgement and penalties on the basis of the papers alone. The district court did not abuse its discretion in doing so. Indeed, we reached this very same conclusion in the prior appeal of this matter and see no reason to hold otherwise this time around. *Team Res., Inc.*, 942 F.3d at 279. Finally, as we observed recently in a similar case, the Federal Rules of Civil Procedure allow district courts to decide motions—including motions for remedies under the securities laws such as the one at issue here—“on briefs, without oral hearings.” *Hallam*, 42 F.4th at 324 (quoting FED. R. Civ. P. 78(b)). The district court did not abuse its discretion in denying a live evidentiary hearing.

Second, Boyles contends that the district court erred by not revisiting its imposition of the civil penalty because the district court misunderstood the scope of its mandate on remand. Boyles, however, did not challenge the civil penalty in his initial appeal to this Court. Any such challenge, therefore, was forfeited in

the initial appeal to this Court. *See SEC v. World Tree Fin., LLC*, 43 F.4th 448, 466 n.13 (5th Cir. 2022) (“Though the district court also imposed civil penalties against each Defendant, Defendants do not brief any challenges to the civil penalties and thus waive any related issues.”). And because the issue was forfeited in the initial appeal, it is likewise deemed forfeited in any subsequent appeal unless there was no reason to raise it in the initial appeal. *See United States v. Griffith*, 522 F.3d 607, 610 (5th Cir. 2008) (“Mil the first appeal Griffith waived the issue of a decrease for his limited participation in the conspiracy, because he did not raise it in that court. The issue is deemed waived on this appeal as well, unless ‘there was no reason to raise it in the initial appeal.’” (quoting *United States v. Lee*, 358 F.3d 315, 324 (5th Cir. 2004))); *see also Air Midwest Inc. v. Atl. Ltd. P'Ship XII*, 742 F.3d 206, 213 (5th Cir. 2014) (in a subsequent appeal, refusing to consider a claim that appellants failed to raise on initial appeal despite broadly worded remand language); *Gen. Universal Sys., Inc. v. HAL, Inc.*, 500 F.3d 444, 453-54 (5th Cir. 2007) (same). Here, Boyles had every reason to challenge the imposition of a civil penalty in his initial appeal, but he did not do so. Accordingly, we hold that he cannot challenge the penalty for the first time in this subsequent appeal.

Finally, Boyles argues that the civil penalty violates the Eighth Amendment because it is more than six times the disgorgement award. Because Boyles did not raise this argument to the district court, however, it is forfeited as well. *See Rollins v. Home Depot USA*,

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Inc., 8 F.4th 393, 397 (5th Cir. 2021) (“A party forfeits an argument by failing to raise it in the first instance in the district court[.]”). We therefore decline to consider it. *See Spotts v. United States*, 613 F.3d 559, 569 (5th Cir. 2010) (declining to consider Eighth Amendment argument not raised to the district court).

AFFIRMED.

**United State Court of Appeals
for the Fifth Circuit**

No. 22-10359

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff—Appellee,

versus

TEAM RESOURCES INCORPORATED; FOSSIL
ENERGY CORPORATION; KEVIN A. BOYLES,

Defendants—Appellants.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:15-CV-1045

Before ELROD, HAYNES, and WILLETT, *Circuit Judges.*

JUDGMENT

(Filed Feb. 1, 2023)

This cause was considered on the record on appeal
and the briefs on file.

IT IS ORDERED and ADJUDGED that the judgment
of the District Court is AFFIRMED.

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IT IS FURTHER ORDERED that each party bear its own costs on appeal.

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

SECURITIES AND EXCHANGE COMM.,	§	
Plaintiff,	§	Civil Action No.
TEAM RESOURCES, INC., <i>et al.</i> ,	§	3:15-CV-1045-N
Defendants.	§	

MEMORANDUM OPINION AND ORDER

(Filed Feb. 15, 2022)

This Order addresses Plaintiff Securities and Exchange Commission’s (“SEC”) renewed motion for remedies and judgment [96]. Because the SEC meets its evidentiary burden on the written record before the Court, the Court grants the motion.

I. PROCEDURAL HISTORY

The SEC brought this enforcement action against Defendants Team Resources, Inc. (“Team Resources”), Fossil Energy Corp. (“Fossil”), Kevin Boyles, Phillip Dressner, Michael Eppy, Andrew Stitt, and John Olivia seeking injunctive and monetary relief. Each defendant partially settled with the SEC on identical terms. Pursuant to the settlements, the Court entered bifurcated judgments of permanent injunction that incorporated the terms of the settlements (the “Bifurcated

Judgments”). The Bifurcated Judgments also established a procedure for the Court to determine monetary damages (disgorgement, prejudgment interest, and civil penalty) on a written record without need for an evidentiary hearing. The SEC moved for remedies (and amended its motion), and the Court granted in part and denied in part the amended motion and entered a Final Judgment. The Defendants appealed the Final Judgment and the Fifth Circuit affirmed. 942 F.3d 272 (5th Cir. 2019). Defendants filed a petition for certiorari with the Supreme Court. While the petition was pending, the Supreme Court decided *Liu v. SEC*, 140 S. Ct. 1936 (2020). The Supreme Court then granted the petition in this case, vacated the Fifth Circuit’s decision, and remanded to the Fifth Circuit for further consideration in light of *Liu*. 141 S. Ct. 186 (2020). The Circuit then vacated this Court’s judgment and remanded to this Court for further proceedings consistent with *Liu*. 815 F. App’x 801 (5th Cir. 2020) (unpub.). The case is now before the Court on the SEC’s renewed motion for remedies and final judgment.

II. LIU AND THE FIFTH CIRCUIT’S REMAND

Liu dealt with the scope of equitable relief available to the SEC under 15 U.S.C § 78u(d)(5), which provides: “In any action or proceeding brought or instituted by the Commission under any provision of the securities laws, . . . any Federal court may grant . . . any equitable relief that may be appropriate or necessary for the benefit of investors.” Upon review of

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historic equitable remedies, the Supreme Court discerned two principles:

First, equity practice long authorized courts to strip wrongdoers of their ill-gotten gains, with scholars and courts using various labels for the remedy. Second, to avoid transforming an equitable remedy into a punitive sanction, courts restricted the remedy to an individual wrongdoer's net profits to be awarded for victims.

Id. at 1942. The Court thus held: "By incorporating these longstanding equitable principles into § 78u(d)(5), Congress prohibited the SEC from seeking an equitable remedy in excess of a defendant's net profits from wrongdoing." *Id.* at 1946.

In this case, on remand from the Supreme Court, the Fifth Circuit stated as follows:

Our previous decision in this appeal, *see SEC v. Team Resources, Inc.*, 942 F.3d 272 (5th Cir. 2019), has been vacated and remanded by the Supreme Court "for further consideration in light of *Liu v. SEC*, 591 U.S. __, 140 S. Ct. 1936, __ L.Ed.2d __ (2020)." *Team Resources, Inc. v. SEC*, No. 19-978, __ U.S. __, __ S.Ct. __, __ L.Ed.2d __, 2020 WL 3578673, at *1 (U.S. July 2, 2020). As relevant here, *Liu* held "that a disgorgement award that does not exceed a wrongdoer's net profits and is awarded for victims is equitable relief permissible under [15 U.S.C.] § 78u(d)(5)." 140 S. Ct. at 1940. *Liu* also discussed various "principles that may guide the lower courts' assessment" of

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the amount of disgorgement that may be lawfully awarded in particular cases. *Id.* at 1947; *see also id.* at 1947-50.

In this case, the district court did not have the benefit of *Liu*'s guidance when it determined the amount of disgorgement. Application of *Liu* to the facts of this case should be left in the first instance to the district court's sound judgment.

We therefore VACATE the judgment of the district court and REMAND the case for further proceedings consistent with the Supreme Court's decision in *Liu*.

815 F. App'x 801 (5th Cir. 2020) (unpub.).

III. THE MANDATE RULE

Absent exceptional circumstances, the mandate rule compels compliance on remand with the dictates of a superior court and forecloses relitigation of issues expressly or impliedly decided by the appellate court. *United States v. Bell*, 988 F.2d 247, 251 (1st Cir.1993). Moreover, the rule bars litigation of issues decided by the district court but foregone on appeal or otherwise waived, for example because they were not raised in the district court. *See id.* at 250. Accordingly, a lower court on remand "must implement both the letter and the spirit of the appellate court's mandate and may not disregard the explicit directives of that court.'" [*United States v. Matthews*, 312 F.3d 652, 657 (5th Cir.2002)] (quoting [*United*

States v. Becerra, 155 F.3d 740, 753 (5th Cir.1998)]) (internal alterations and quotation marks omitted).

United States v. Lee, 358 F.3d 315, 321 (5th Cir. 2004).

Here, the command from the Circuit is to conduct further proceedings consistent with *Liu*. The letter of that command would appear to permit this Court to do anything it wants, so long as it does not go against *Liu*. That appears to this Court, however, to grossly go against the spirit of the Circuit's directive. This Court's previous judgment calculating disgorgement was erroneous in light of *Liu*. This Court believes the spirit of the Circuit's mandate is for this Court to recalculate the disgorgement amount in light of *Liu*, and to do nothing else. "The mandate rule requires a district court on remand to effect our mandate and to do nothing else." *Deutsche Bank Nat'l Trust v. Burke*, 902 F.3d 548, 551 (5th Cir. 2018) (per curiam) (quoting *Gen. Universal Sys., Inc. v. HAL, Inc.*, 500 F.3d 444, 453 (5th Cir. 2007)).

IV. DISGORGEMENT

Defendants once again urge the Court to conduct an evidentiary hearing to determine the proper amount of disgorgement. It is unclear whether this argument is precluded by the mandate rule. In any event, this Court has previously denied Defendants' request for an evidentiary hearing. Order (June 4, 2018) [75]. The reason is simple. In the settlement agreements and the Bifurcated Judgments, the Defendants waived

any right to a hearing and expressly agreed for this Court to resolve this issue on the papers. The Court therefore again denies the requests for an evidentiary hearing.

The Court now turns to determination of the proper amounts for disgorgement. The SEC accompanied its motion with documentary evidence. The Defendants primarily devote their responses to arguing for an evidentiary hearing. Although they quarrel with the SEC's calculation, they do not support their criticism with any documentary evidence. Thus, at this point, the only evidence before the Court on the proper amount of disgorgement is from the SEC.

Based on the record before the Court, the Court finds that the SEC's calculation of net profit is correct and will award disgorgement in the amounts requested by the SEC.

V. CIVIL PENALTY

The SEC urges the Court to refine its calculation of the civil penalty previously awarded. Defendants argue that the Court should not award any civil penalties. Both these positions fall afoul of the mandate rule. Unlike disgorgement after *Liu*, civil penalties are not limited to net profits. *See* 15 U.S.C. §§ 77t(d), 78u(d)(3). Thus *Liu* does not expressly or implicitly affect the calculation of any civil penalty. Since this Court on remand is limited to considering the effect of *Liu* on its prior disgorgement finding, it is outside the scope of the Circuit's mandate for the Court to consider either

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sides' arguments regarding the civil penalties imposed.¹

CONCLUSION

The Court grants the SEC's renewed motion for remedies with respect to disgorgement and awards disgorgement as requested by the SEC. The Court denies the SEC's request to recalculate civil penalties as barred by the mandate rule. The Court will by separate instrument enter final judgment consistent with this Order.

Signed February 15, 2022.

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

¹ If the Court were able to reach the merits of the parties' respective arguments, it would find the SEC's calculation to be correct and it would award civil penalties in the amounts requested by the SEC.

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

SECURITIES AND EXCHANGE COMMISSION,	§	
Plaintiff,	§	Civil Action No.
v.	§	3:15-CV-01045-N
JOHN OLIVIA,	§	
Defendant.	§	

FINAL JUDGMENT

(Filed Feb. 15, 2022)

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

It is therefore ORDERED that Team Resources, Fossil, and Boyles are jointly and severally liable for disgorgement of \$2,410,629.91, representing net profits gained as a result of the conduct alleged in the SEC's complaint (the "Complaint"), together with prejudgment interest thereon in the amount of \$466,148.86, for a total of \$2,876,778.77.

It is further ORDERED that Boyles is individually liable for a civil penalty in the amount of \$15,508,280.13

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pursuant to section 20(d) of the Securities Act and section 21(d)(3) of the Exchange Act.

It is further ORDERED that Olivia is individually liable for disgorgement of \$663,042.24, representing net profits gained as a result of the conduct alleged in the Complaint, together with prejudgment interest thereon in the amount of \$132,165.47, for a total of \$795,207.71.

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

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

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

Signed February 15, 2022.

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