APPENDIX TABLE OF CONTENTS

In the
United States Court of Appeals
for the Seventh Circuit

No. 20-1689

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

v.

RANDALL S. GOULDING,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 09-cv-1775—**Jeffrey T. Gilbert**, *Magistrate Judge.*

ARGUED JANUARY 20, 2021—DECIDED JULY 7, 2022

Before EASTERBROOK, WOOD, and BRENNAN, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* Randall Goulding has served time in prison for mail fraud and tax fraud. See *United States v. Goulding*, 26 F.3d 656 (7th Cir. 1994). Both state and federal judges have found that he engaged in other shady dealings. See, e.g., *Goulding v. United States*, 957 F.2d 1420 (7th Cir. 1992). But these convictions and findings did not deter people from continuing to trust him with their money, which

he managed under the name Nutmeg Group. The Securities and Exchange Commission charged in this suit under the Investment Advisers Act of 1940, 15 U.S.C. §§ 80b-1 to 80b-21, that Goulding ran Nutmeg through a pattern of fraud—including touting his supposed financial expertise while failing to tell investors about his crimes—in addition to violating many of the Act's technical rules.

Soon after the suit was filed, the district court issued an injunction removing Goulding from the business and appointing a receiver. The parties consented to a bench trial before a magistrate judge, who agreed with the SEC, enjoined Goulding from violating the securities laws, required him to disgorge $642,422 in ill-gotten gains (plus interest), and imposed a civil penalty of an additional $642,422, for a total award of $1,868,074. The findings of fact and conclusions of law are extensive; the magistrate judge summarizes them at 2020 U.S. Dist. LEXIS 52157 *13–19 (N.D. Ill. Mar. 25, 2020). See also *SEC v. Nutmeg Group, LLC*, 162 F. Supp. 3d 754 (N.D. Ill. 2016) (summary judgment in the SEC's favor on some issues); *Alonso v. Weiss*, 932 F.3d 995 (7th Cir. 2019) (resolving some of the litigation about Nutmeg Group in the wake of the receiver's appointment).

We recount a few of the court's findings to give the flavor of what happened. Goulding, an accountant and lawyer, formed Nutmeg to be an investment adviser. He also formed 15 funds that hired Nutmeg's advisory services. Nutmeg (which Goulding controlled) served as general partner of 13 funds. After investors put up

money, the funds invested in illiquid securities, such as warrants and convertible bonds that had been issued by small firms that were close to insolvent or had been given going-concern warnings by their accountants. Goulding wrote all of the disclosure documents that the funds used to raise money and made all of the investment decisions. Because the funds' investments were illiquid, they had to be valued by means other than market prices, and a considerable discount should have been applied under normal accounting standards. Goulding told investors that this would be done—but it wasn't. The funds were accordingly overvalued, and Goulding often announced increases in value without market evidence to support his pronouncements.

A complex structure such as Nutmeg, with illiquid investments and advisory fees tied to the value of the assets under management, needed independent legal counsel and independent accounting. But Goulding never hired an accountant for the funds (despite telling investors and the SEC that he had done so), and his own law firm provided Nutmeg and the funds with all of their legal advice. It gave bad advice. When the SEC began an audit in 2008, Goulding told the agency that he had never heard of the Investment Advisers Act, even though Nutmeg had been registered under that statute.

Another bit of advice that either an accountant or an independent lawyer would have provided was to maintain strict separation of accounts. That didn't happen. Having decided which fund should buy what assets, Nutmeg often held the securities in its own

name—not on deposit with a broker (less than 10% was held that way) but in drawers at Goulding's law office or in the hands of third parties that lacked experience managing or safeguarding investments. As for cash: well, that was commingled in one account that held Goulding's personal money, the funds' money, and Nutmeg's money. The magistrate judge found that Goulding used this account as his "personal piggy bank" and paid all sorts of expenses from it, without regard to his legal entitlements. By the time the SEC finished its audit in 2009, this account was empty and the relative entitlements of the funds to the illiquid securities was difficult to determine. The magistrate judge found that Goulding had drawn out at least $1.3 million more than his entitlement, though the restitution award was smaller (representing a conservative estimate of the excess in the five years before the SEC filed suit).

Nutmeg was entitled to fees based on the value of each investor's initial stake (a 4% load charge) plus monthly and yearly fees based in part on asset value and in part on any profits. Because Goulding valued the assets as he pleased, without an illiquidity discount, both the asset-based fees and the profit-based fees were overstated.

The conflict of interest was staggering: a single person was investment adviser (through Nutmeg), investment manager, controller of the funds under management, disclosure-writer, lawyer reviewing those disclosure documents, lawyer for all other purposes at both Nutmeg and each fund, accountant (to the extent

that there was any accounting), and chief financial officer. The documents furnished to investors did not reveal the extent of this self-dealing, and as we've already mentioned the documents contained both fraudulent statements (such as a promise to discount illiquid assets) and fraudulent material omissions (such as a neglect to mention Goulding's convictions for fraud and the commingling that gave him access to as much of the money as he pleased). By the time a receiver took over in 2009, investors had lost millions of dollars (just how many millions is hard to know) out of the roughly $32 million entrusted to Nutmeg's 15 funds.

Many of the magistrate judge's findings rest on Goulding's concessions. In this court he principally disputes the findings that particular assets were overvalued, which meant that Nutmeg's fees were excessive. Yet the judge's findings, far from being clearly erroneous, see Fed. R. Civ. P. 52(a)(6); *Anderson v. Bessemer City*, 470 U.S. 564 (1985); are supported by extensive evidence. Goulding asks us to make findings *independent* of the district court's—that is, to engage in what is often called de novo review—but that request is preposterous. We do not have authority to depart from Rule 52(a)(6). That some of the findings might be called mixed questions of law and fact does not matter. As the Supreme Court explained in *U.S. Bank N.A. v. Village at Lakeridge, LLC*, 138 S. Ct. 960 (2018), case-specific mixed findings are reviewed deferentially. That description fits the findings after this bench trial. More: even if we were to review the record without deference,

we would reach the same conclusions as the magistrate judge.

Goulding invokes *Liu v. SEC*, 140 S. Ct. 1936 (2020), in support of an argument that the maximum award of restitution is zero. *Liu* holds that restitution is a permissible remedy in litigation filed by the SEC but that the amount must be limited to the wrongdoer's net take, rather than his gross proceeds, unless the source of the funds was a scam from top to bottom. (Nutmeg does not fit that proviso; its funds had real assets, if risky and hard-to-value ones.) The magistrate judge made his restitution award before *Liu*, but it is not necessary to remand for a do-over. The judge found that the restitution award is a conservative estimate of the amount by which Goulding's withdrawals exceeded his contractual entitlements during the five years before the SEC sued. That is the definition of net unjustified proceeds.

Trying to attack this award, Goulding insists that the magistrate judge underestimated his contractual entitlement to cash by finding that the funds' assets, and thus Nutmeg's recurring fees, had been overvalued. (Goulding *was* Nutmeg, so its fees were his property, or close enough to this for current purposes.) We have already explained why the magistrate judge's findings on this score are not clearly erroneous.

The commingling of assets is another obstacle to the success of Goulding's argument. If there was a problem in determining the restitution award, it comes from the combination of two things: uncertainty about

how much Nutmeg should have received in fees, and determining the ownership of the money in the commingled account. Goulding asserts that more than $400,000 came from his own assets and was his to withdraw, but the magistrate judge found that his total capital contribution was only $70,000. That finding, too, is not clearly erroneous. (It is also not clear to us how Goulding could have withdrawn his capital contribution, whether $70,000 or $400,000, while investors in the funds were unable to do so, given the assets' illiquidity.)

The extent of Goulding's wrongdoing makes it hard to determine his net unjustified withdrawals, and as the wrongdoer he bears the consequence of uncertainty. We do not see any legal error in the magistrate judge's conclusion that the restitution reflects a conservative estimate of Goulding's ill-got gains. Nor did the judge err by declining to trace funds from their source to Goulding's pocket. One Justice argued for such a requirement in *Liu*, but he wrote in dissent. 140 S. Ct. at 1953–54 (Thomas, J., dissenting).

The magistrate judge adjusted for his conservative award of restitution by imposing a penalty. The Act provides authority for him to proceed as he did. The judge selected what the Act calls a third-tier penalty, 15 U.S.C. §80b-9(e)(2)(C), which may be the greater of $130,000 or the *gross* amount of the wrongdoer's pecuniary gain. The magistrate judge used this clause to double what had been calculated as Goulding's net wrongful withdrawal. Basing the penalty on the net extraction was favorable to Goulding—and this also

means that, if the restitution award was off in some manner, the judge still had substantial discretion under §80b-9(e)(2)(C) to make up for any difference by basing the penalty on Goulding's gross withdrawals. Neither the penalty, nor the restitution and penalty in combination, can be upset on this appeal as an abuse of discretion—which is the standard of appellate review. See *SEC v. Williky*, 942 F.3d 389, 393 (7th Cir. 2019).

One more subject and we are done. The magistrate judge entered an injunction that requires Goulding to obey the law. The injunction has several sections, implementing different sections of the Act. We set out one provision as an illustration:

> IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendant Goulding is permanently restrained and enjoined from violating, directly or indirectly, Sections 206(1) and (2) of the Advisers Act [15 U.S.C. §§ 80b-6(1) and 80b-6(2)] by, while acting as an investment adviser and by the use of the means and instrumentalities of interstate commerce and of the mails, employing devices, schemes, and artifices to defraud his clients and prospective clients, or engaging in transactions, practices, and courses of business which operate as a fraud or deceit upon his clients or prospective clients.

Goulding contends that federal judges should not issue injunctions that simply repeat a statute, for injunctions of this kind mean that any further dispute

between Goulding and the SEC will be resolved by a judge using the contempt power, or perhaps by the agency in administrative proceedings, rather than by a jury under the norms of ordinary litigation. Even a scoundrel is entitled to a jury trial when there are disputed issues of material fact.

We held in *Power v. Summers*, 226 F.3d 815 (7th Cir. 2000), that obey-the-law injunctions are not forbidden. But they still may amount to an abuse of discretion, and this one does so. Instead of repeating the statutory language, the judge could and should have forbidden with greater specificity what Goulding must not do. We remand for this purpose.

Goulding may not like the upshot of his request for that relief. One common remedy in securities-fraud cases is a fencing-out injunction—for example, telling the offender that he must never again have anything to do with investment management on behalf of persons other than his immediate relatives. See, e.g., *SEC v. Cherif*, 933 F.2d 403 (7th Cir. 1991) (prohibition on future trading); *SEC v. Koenig*, 557 F.3d 736 (7th Cir. 2009) (bar on serving as director or top manager of a public company); *SEC v. Patel*, 61 F.3d 137 (2d Cir. 1995) (same). Given Goulding's history of securities and tax fraud, such an injunction would have distinct benefits. The choice belongs to the magistrate judge. We mention the fencing-out possibility only to make clear to Goulding that he cannot complain if, on remand, things go from bad to worse.

The finding of liability and all of the financial awards are affirmed. The injunction is vacated, and the case is remanded for further proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

[SEAL]

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FINAL JUDGMENT

July 7, 2022

Before

FRANK H. EASTERBROOK, *Circuit Judge*
DIANE P. WOOD, *Circuit Judge*
MICHAEL B. BRENNAN, *Circuit Judge*

No. 20-1689	SECURITIES AND EXCHANGE COMMISSION, Plaintiff - Appellee v. RANDALL S. GOULDING, Defendant - Appellant
Originating Case Information:	
District Court No: 1:09-cv-01775 Northern District of Illinois, Eastern Division Magistrate Judge Jeffrey T. Gilbert	

The finding of liability and all of the financial awards are **AFFIRMED**. The injunction is **VACATED**, and

the case is **REMANDED** for further proceedings consistent with this opinion.

The above is in accordance with the decision of this court entered on this date.

/s/ [Illegible]
Clerk of Court

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. RANDALL GOULDING; and DAVID GOULDING, Defendants, DAVID GOULDING, INC.; DAVID SAMUEL, LLC; FINANCIAL ALCHEMY, LLC; PHILLY FINANCIAL, LLC; ERIC IRRGANG; and SAM WAYNE Relief Defendants.	Case No. 09-cv-1775 Jeffrey T. Gilbert Magistrate Judge (Filed Oct. 25, 2019)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I.

Findings of Fact

A. Nutmeg and the Funds

1. Defendant The Nutmeg Group, LLC ("Nutmeg"), was an investment advisory firm founded in 2003 by Michael Montaigne and Defendant Randall Goulding ("Randall"). Stipulations of Fact [ECF No. 1003] at ¶ 1. Nutmeg was founded to make investments and to provide investment advice to unregistered investment

pools. Proposed Agreed Findings of Fact and Conclusions of Law ("Agreed Findings and Conclusions") [ECF No. 927] at ¶ 1.

2. Initially, Nutmeg was not required to register as an investment adviser because it was too small. Stipulations of Fact [ECF No. 1003] at ¶ 2.

3. Nutmeg's business grew, however, and it eventually registered as an investment adviser on June 7, 2007. Stipulations of Fact [ECF No. 1003] at ¶ 3.

4. By December 2007, Nutmeg had fifteen advisory clients – which will be referred to collectively as the "Funds" and individually as a "Fund" – and claimed to have about $32 million under management. Stipulations of Fact [ECF No. 1003] at ¶ 4.

5. The Funds, created over several years, all were limited partnerships organized in Illinois or Minnesota. Stipulations of Fact [ECF No. 1003] at ¶ 5.

6. The Funds included: Nutmeg/AdZone, LP ("AdZone"), Nutmeg/Tropical, LP ("Tropical"), Nutmeg/Startech II, LP ("Startech"), Nutmeg/Image Globe, LP ("Image Globe"), Nutmeg/Nanobac, LP ("Nanobac"), Nutmeg/MiniFund LLLP ("MiniFund"), Nutmeg/MiniFund II, LLLP ("MiniFund II"), Nutmeg/Lightning, LLLP ("Lightning"), Nutmeg/October, LLLP ("October") Nutmeg/Michael, LLLP ("Michael"), Nutmeg/Fortuna, LLLP ("Fortuna"), Nutmeg/Patriot, LLLP ("Patriot"), Nutmeg/Mercury, LLLP ("Mercury"), Micro Pipe Fund I, LLC ("Micro Pipe") and The Stealth Fund, LLLP

("Stealth"). Randall's Answer to Amended Complaint ("Answer to Am. Compl.") [ECF No. 328] at ¶¶ 15-28.

7. The investors in the Funds were 328 individuals and entities who invested money with the Funds as limited partners. Agreed Findings and Conclusions [ECF No. 927] at ¶ 7.

8. The investors invested money with the Funds, which would then purchase securities issued by small companies (meaning those with market capitalizations below $50 million). Stipulations of Fact [ECF No. 1003] at ¶ 6.

9. At first, Nutmeg directed Fund assets towards investments in a single company. Answer to Am. Compl. [ECF No. 328] at ¶ 34.

10. During 2004, Adzone was formed to invest in Adzone Research; Tropical was formed to invest in Tropical Beverage, Inc.; Startech was formed to invest in Startech Environmental Corporation; Image Globe was formed to invest in Image Globe Solutions; and Nanobac was formed to invest in Nanobac Pharmaceuticals. Answer to Am. Compl. [ECF No. 328] at ¶¶ 15-19.

11. Beginning in 2005, Nutmeg opened funds to make investments in a number of different companies. Answer to Am. Compl. [ECF No. 328] at ¶ 35.

12. During 2005, MiniFund was organized to invest in five companies; MiniFund II was organized to invest in different companies; and Lightning and

October were formed to invest in in numerous companies. Answer to Am. Compl. [ECF No. 328] at ¶¶ 20-23.

13. During 2006, Nutmeg formed Michael, Fortuna, and Patriot to invest in the securities of numerous companies. Answer to Am. Compl. [ECF No. 328] at ¶¶ 24-26.

14. During 2007, Nutmeg formed Mercury, Micro Pipe, and Stealth to invest in the securities of numerous companies. Answer to Am. Compl. [ECF No. 328] at ¶¶ 27-29.

15. The Funds would acquire these securities through private investments in public equity ("PIPE") transactions. Stipulations of Fact [ECF No. 1003] at ¶ 7.

16. In a PIPE transaction, a public company sells a security directly to a private investor rather than through a public offering. Agreed Findings and Conclusions [ECF No. 927] at ¶ 9.

17. Generally, a company selling shares through a PIPE transaction offers a fixed number of shares at a discount to the current market price, and the shares sold are restricted for a period of time (such as six to nine months) before they can be resold. (Trial Transcript ("Tr.") 360:12-18).

18. In this context, a restriction means there is a restriction printed on the certificate and the shares cannot be sold until the restriction is lifted. (Tr. 360:19-22).

19. To the extent a PIPE transaction increases the number of shares of a company's stock in the market, a PIPE offering, like any offering of additional shares by an issuer, dilutes the value of existing shares held by investors. (Tr. 73:13-19).

20. In this case, the Funds mostly used the PIPE investments to acquire rights to convertible equity, convertible debt, and warrants. Stipulations of Fact [ECF No. 1003] at ¶ 8.

21. In other words, Nutmeg used mostly nontraditional or "structured" PIPEs, which allowed the Funds to convert their investments into restricted securities of the company that issued the instrument held by a Fund. (Tr. 75-77).

22. A convertible note is a debt instrument with certain equity features because under certain circumstances it can convert to equity shares. (Tr. 365:15-18).

23. The share equivalency for a convertible note is the number of shares derived from a formula based on the price of the issuing company's stock at the time of conversion, the amount of the conversion, and the discount percentage. (Tr. 1460:22-1461:1).

24. In most of the Funds, the investors were locked in – meaning they could not receive a distribution or withdraw capital – until the securities held by the relevant Funds were sold. Stipulations of Fact [ECF No. 1003] at ¶ 9.

25. In its work with the Funds, Nutmeg wore two hats. Nutmeg was an investment adviser for all fifteen

funds. It also was a general partner in thirteen funds. Stipulations of Fact [ECF No. 1003] at ¶ 10.

26. In fulfilling its duties as an investment adviser, Nutmeg directed the Funds' strategy and monitored their investments. Stipulations of Fact [ECF No. 1003] at ¶ 11; Answer to Am. Compl. [ECF No. 328] at ¶ 30.

27. As a general partner, Nutmeg was responsible for providing potential investors with offering documents (such as Private Placement Memoranda), sending investors their quarterly account statements, maintaining "full and accurate records and books of account" for all transactions, and executing portfolio transactions on behalf of the Funds. Answer to Am. Compl. [ECF No. 328] at ¶ 30; Stipulations of Fact [ECF No. 1003] at ¶ 12.

B. Defendant Randall Goulding and His Sons

28. Randall was one of Nutmeg's two founders. Stipulations of Fact [ECF No. 1003] at ¶ 13.

29. Randall is an accountant and an attorney licensed in Illinois. Agreed Findings and Conclusions [ECF No. 927] at ¶ 25.

30. Randall and his partner, Carl Duncan ("Duncan"), currently are the owners of a law firm that focuses on securities related matters. (Tr. 790:11-791:4, 833:18-834:3).

31. Randall's law firm, The Law Offices of Randall S. Goulding & Associates, P.C., shared office space with Nutmeg and provided legal services to Nutmeg and the Funds. Answer to Am. Compl. [ECF No. 328] at ¶ 14.

32. In 2006, a few years after Nutmeg's formation, Randall became its sole owner and managing member. He remained so until 2009. Stipulations of Fact [ECF No. 1003] at ¶ 14.

33. In these roles, Randall oversaw all of Nutmeg's operations. Agreed Findings and Conclusions [ECF No. 927] at ¶ 28; Stipulations of Fact [ECF No. 1003] at ¶ 15.

34. Randall decided whom to hire. Stipulations of Fact [ECF No. 1003] at ¶ 16.

35. Randall oversaw Nutmeg's employees. Agreed Findings and Conclusions [ECF No. 927] at ¶ 29; Stipulations of Fact [ECF No. 1003] at ¶ 17.

36. Randall prepared the Funds' offering documents. Agreed Findings and Conclusions [ECF No. 927] at ¶ 30; Stipulations of Fact [ECF No. 1003] at ¶ 18.

37. Sometimes Randall opened the brokerage and bank accounts. Stipulations of Fact [ECF No. 1003] at ¶ 19.

38. Randall identified investment opportunities, negotiated investment terms, and made investment

decisions for the Funds. Stipulations of Fact [ECF No. 1003] at ¶ 20.

39. Randall approved the transfer of funds and payment of expenses for both Nutmeg and the Funds. Stipulations of Fact [ECF No. 1003] at ¶ 21.

40. Randall valued the Funds. Stipulations of Fact [ECF No. 1003] at ¶ 22.

41. Randall was responsible for the books and records of both Nutmeg and the Funds. Stipulations of Fact [ECF No. 1003] at ¶ 23.

42. All of Nutmeg's Uniform Application for Investment Adviser Registration ("Form ADV") filings refer to the Investment Advisers Act of 1940 ("Advisers Act") and its provisions. (PX 1 at 3, 28, 38-39; PX 2 at 3, 26, 39; PX 3 at 3, 26, 39).

43. In Nutmeg's initial Form ADV filed with the SEC, Randall was designated as the firm's Chief Compliance Officer ("CCO"). Agreed Findings and Conclusions [ECF No. 927] at ¶ 31; (PX 1 at 22-23; PX 2 at 22-23).

44. As Nutmeg's CCO, it was Randall's responsibility to ensure that Nutmeg complied with the federal securities laws, including the Advisers Act. (Tr. 803:13-19).

45. Randall oversaw all of Nutmeg's operations, and ultimately was responsible for everything that went on at Nutmeg. (Tr. 777:23-778:6).

46. Randall was responsible for approving the expenses incurred by Nutmeg, including approving payments made to Randall or for his benefit. (Tr. 778:7-12).

47. According to Randall, the "buck stopped" with him. (Tr. 789:11-12).

48. Randall hired his son Ryan Goulding ("Ryan") to be Nutmeg's outside accountant, even though Randall could have chosen someone more experienced and independent. (Tr. 779:1-20).

49. Randall hired his son Defendant David Goulding ("David") to replace Randall as CCO, even though David had never been a CCO before and had not done compliance work before working for Nutmeg. (Tr. 781:12-21, 922:3-923:9).

50. Randall could have hired a CCO who was independent and had previous compliance experience. (Tr. 781:22-782:17).

51. Randall also assigned David responsibilities for valuing the Funds' investments even though Randall knew David had little, if any, experience with valuation principles contained in FAS 157. (Tr. 923:19-924:6).

52. Randall assigned his son Brandon Goulding ("Brandon") to do valuation work, even though Randall knew Brandon had never before worked for an investment adviser, had no experience with FAS 157 or the Advisers Act, and had no prior experience valuing

investments, illiquid investments, or restricted stock. (Tr. 782:22-784:1).

53. Randall could have hired someone who was more independent than Brandon and who had prior experience valuing restricted stock and other illiquid investments. (Tr. 784:2-15).

54. Randall paid his sons less than what Nutmeg would have had to pay employees who were not Randall's children. (Tr. 784:22-786:1).

55. Randall had the authority to overrule his sons' decisions at Nutmeg. (Tr. 789:13-22)

56. Randall made the decision to hire his own law firm to provide legal services for Nutmeg and the Funds. (Tr. 789:23-3).

57. Nutmeg was Randall's law firm's only client and Nutmeg was the firm's sole source of income, (Tr. 791:5-17).

58. Rather than hiring his firm to be Nutmeg's attorney, Randall could have hired a lawyer who was independent, had expertise with the Advisers Act, did not have a financial stake in Nutmeg, and who could have provided Nutmeg with more objective legal advice than Randall would provide as principal of Nutmeg. (Tr. 791:16-792:8).

59. But hiring an independent attorney would have meant that Randall received less money from Nutmeg because Nutmeg would have had to pay legal fees to an outside attorney. (Tr. 792:9-18).

60. Randall understood that he owed fiduciary duties to the Funds and he also understood he owed duties of care to the Investors in the Funds including duties to disclose all material facts and material conflicts of interest. (Tr. 846:17-847:22).

61. Randall understood that he had a duty to act in the best interests of the Funds and their investors. (Tr. 847:6-13).

62. Even though Randall's law firm provided legal services to both Nutmeg and the Funds, and Randall recognized a potential conflict existed between himself and the Funds' investors, Randall does not recall ever having disclosed any potential conflict to the Funds' investors. (Tr. 864:14-865:17, 868:3-869:19).

63. Randall's law firm also provided legal services to both the Relief Defendants and certain companies in which Nutmeg and the Funds invested. (Tr. 870:2-874:7).

C. Nutmeg Collected Fees and Distributed Statements to Investors

64. Nutmeg received administrative fees and performance fees from the Funds. Agreed Findings and Conclusions [ECF No. 927] at ¶ 13.

65. The fee structure varied by fund. Nutmeg received a one-time four percent (4%) administrative fee, which was deducted from an investor's original investment, in Adzone, Tropical, Startech, Image Globe, Nanobac, MiniFund, MiniFund II, Lightning, October,

Michael, Fortuna, and Patriot. Agreed Findings and Conclusions [ECF No. 927] at ¶ 14.

66. These same Funds also paid Nutmeg a performance fee, which ranged from 15% to 20% of the Funds' profits. Agreed Findings and Conclusions [ECF No. 927] at ¶ 15; Answer to Am. Compl. [ECF No. 328] at ¶ 38.

67. Randall decided the amount of management fees Nutmeg would charge the Funds. (Tr. 881:22-882:1).

68. Mercury and Stealth paid Nutmeg a monthly management fee of 2.5%, based on the value of the Funds' assets under management, and a performance fee based on the increase in the net asset value of the Funds' investments. Agreed Findings and Conclusions [ECF No. 927] at ¶ 16; Answer to Am. Compl. [ECF No. 328] at ¶¶ 39-40.

69. Nutmeg's performance fee for Mercury was between 25% and 30% of profits. Agreed Findings and Conclusions [ECF No. 927] at ¶ 17; Answer to Am. Compl. [ECF No. 328] at ¶ 39.

70. Nutmeg's performance fee for Stealth was 15% and could be higher based on the performance of the Fund's investments. Agreed Findings and Conclusions [ECF No. 927] at ¶ 18; Answer to Am. Compl. [ECF No. 328] at ¶ 40.

71. The amount of fees Nutmeg charged Mercury Fund were based, in part, on the value Nutmeg

assigned to the Mercury Fund's investments. (Tr. 883:7-887:6).

72. As the value of the securities held by Mercury Fund rose, Nutmeg's fees would increase. (Tr. 883:10-13).

73. Nutmeg sent the Funds' investors quarterly account statements by U.S. Mail or email. Agreed Findings and Conclusions [ECF No. 927] at ¶ 19; Answer to Am. Compl. [ECF No. 328] at ¶ 41.

74. Nutmeg combined the quarterly statements for AdZone, Tropical, Startech, Image Globe, Nanobac, MiniFund, Lightning, October, Patriot, Michael, and Fortuna into a single statement for each investor in these funds. Agreed Findings and Conclusions [ECF No. 927] at 1] 20; Answer to Am. Compl. [ECF No. 328] at ¶ 42.

75. The Funds' account statements sent to Mercury Fund investors did not disclose the formula by which Nutmeg calculated its fees. (Tr. 889:2-13).

76. For each of the Funds, Nutmeg reported an investor's proceeds from the sale of securities ("Sales Proceeds Earned") and the value of their portion of unsold securities ("Value of Remaining Securities"). Agreed Findings and Conclusions [ECF No. 927] at ¶ 21; Answer to Am. Compl. [ECF No. 328] at ¶ 42.

77. Nutmeg also reported the performance fee paid by the investors ("Carried Interest to Nutmeg") and the investors' "Current Cash Position." Agreed

Findings and Conclusions [ECF No. 927] at ¶ 22; Answer to Am. Compl. [ECF No. 328] at ¶ 42.

78. The account statements Nutmeg created for investors in Mercury, MiniFund II, and Stealth represented the investors' "Previous NAV," which signified the net asset value of the investment from the previous quarter, and "Current NAV," which signified the investment's current net asset value. Agreed Findings and Conclusions [ECF No. 927] at ¶ 23; Answer to Am. Compl. [ECF No. 328] at ¶ 43.

79. Both of these figures included deductions for Nutmeg's administrative fee. Agreed Findings and Conclusions [ECF No. 927] at ¶ 24; Answer to Am. Compl. [ECF No. 328] at ¶ 43.

80. Nutmeg also reported its performance fee ("Carried Interest") and the value of the investors' interest in the fund net of all fees ("Total NAV"). Answer to Am. Compl. [ECF No. 328] at ¶ 43.

D. Defendant David Goulding

81. Randall's son David became involved with Nutmeg after Randall and had a smaller role than his father. Stipulations of Fact [ECF No. 1003] at ¶ 24.

82. In 2007, David began working with Nutmeg as a consultant. Stipulations of Fact [ECF No. 1003] at ¶ 25.

83. In this capacity, David helped prepare account statements and track investments. Stipulations of Fact [ECF No. 1003] at ¶ 26.

84. Then, in January of 2008, David became a full-time Nutmeg employee and assumed additional responsibilities. Agreed Findings and Conclusions [ECF No. 927] at ¶ 34; Stipulations of Fact [ECF No. 1003] at ¶ 27.

85. As a Nutmeg employee, David helped prepare and distribute investor statements, track securities transactions (purchases and sales) in the Funds, and value the Funds' various investments and the investors' partnership units for the Funds. Agreed Findings and Conclusions [ECF No. 927] at ¶ 35.

86. In March 2008, David became Nutmeg's CCO. Stipulations of Fact [ECF No. 1003] at ¶ 28; Answer to Am. Compl. [ECF No. 328] at ¶ 8; (PX 3 at 22, 39).

87. As Nutmeg's CCO, it was David's responsibility to ensure that Nutmeg would comply or become compliant with the Advisers Act. Agreed Findings and Conclusions [ECF No. 927] at ¶ 37.

88. David had little or no investment experience outside of his relationship with Nutmeg and the Funds. (Tr. 487:14-488:17).

E. The Relief Defendants

89. Relief Defendants David Goulding, Inc., David Samuel, LLC, Financial Alchemy, LLC, Philly Financial, LLC, Eric Irrgang and Sam Wayne (collectively the "Relief Defendants") are Randall's family, friends, and companies owned by them. Stipulations of Fact [ECF No. 1003] at¶ 30.

90. David Goulding, Inc. and David Samuel, LLC are companies owned by David. Agreed Findings and Conclusions [ECF No. 927] at ¶ 38; Answer to Am. Compl. [ECF No. 328] at ¶¶ 19-10.

91. Financial Alchemy, LLC is a company owned by Randall's son Ryan. Agreed Findings and Conclusions [ECF No. 927] at ¶ 39; Answer to Am. Compl. [ECF No. 328] at ¶ 11.

92. Philly Financial, LLC is a company owned and controlled by Randall's son Brandon. Agreed Findings and Conclusions [ECF No. 927] at ¶ 40; Answer to Am. Compl. [ECF No. 328] at ¶ 12.

93. Eric Irrgang ("Irrgang") is Randall's nephew. Answer to Am. Compl. [ECF No. 328] at ¶ 13.

94. Sam Wayne ("Wayne") is a friend of the son of Nutmeg's former office assistant. Agreed Findings and Conclusions [ECF No. 927] at ¶ 41; Randall's Answer to Initial Complaint [ECF No. 50] at ¶ 14.

F. The Transfer of Assets to the Relief Defendants

95. The Funds were not always domiciled in the state where the shares they wanted to buy were registered. Stipulations of Fact [ECF No. 1003] at ¶ 31.

96. Therefore, Randall chose to work with the Relief Defendants based, at least in significant part, on two factors: personal relationship and state of residence. Stipulations of Fact [ECF No. 1003] at ¶ 32.

97. When the Relief Defendants made investments on behalf of the Funds, neither Nutmeg nor the Funds were parties to the investment agreements governing those investments. (Tr. 808:17-24).

98. Instead, the investments were made in the name of the Relief Defendants, were titled in the name of the Relief Defendants, and were held in the Relief Defendants' bank and brokerage accounts. The Funds did not retain legal ownership of those investments. (Tr. 808:25-809:7, 810:3-9).

99. Randall negotiated the terms of the investments made by the Relief Defendants on behalf of the Funds and was ultimately responsible for preparing the agreements and documents attendant to those investments. (Tr. 809:8-23).

100. The documents governing the Relief Defendants' investments often did not specify which Fund's assets were being used to make the investments. (Tr. 809:24-810:2).

101. Randall made the decision to buy, sell, or hold securities held by the Relief Defendants. (Tr. 810: 10-15).

102. Randall was not aware of another investment adviser employing an arrangement similar to the one Nutmeg employed vis-à-vis the Relief Defendants. (Tr. 810:22-812:21).

103. Randall never asked Duncan whether Nutmeg's arrangement with the Relief Defendants was legal and never received advice that Nutmeg's use of the Relief Defendants was legal. (Tr. 814:10-20, 819:17-20, 1414:16-1415:2, 1439:8-1441:6).

104. Randall did not rely on any SEC guidance regarding special purpose vehicles in deciding to use the Relief Defendants to make investments on behalf of the Funds or at any other time at issue in this lawsuit. (Tr. 1415:3-23, 1430:17-20).

105. Nutmeg transferred more than $4 million of the Funds' assets to the Relief Defendants. (Tr. 807:25-808:8).

106. Although the Relief Defendants received legal title, Randall continued to play a significant role in determining what happened to the assets. Stipulations of Fact [ECF No. 1003] at¶ 33.

107. Randall instructed the Relief Defendants when to receive the Funds' asset transfers and how to invest them. Stipulations of Fact [ECF No. 1003] at ¶ 34.

108. Randall decided which companies to invest in, determined how much to invest, negotiated the terms of the investments, and prepared the documentation for the investments. Stipulations of Fact [ECF No. 1003] at ¶ 35.

109. In fact, Relief Defendants never picked investments. Stipulations of Fact [ECF No. 1003] at ¶ 36.

110. And the securities and cash that Relief Defendants received through these transfers were held in bank and brokerage accounts in Relief Defendants' own names. Stipulations of Fact [ECF No. 1003] at ¶ 37.

111. Randall selected his nephew Irrgang to hold the Funds' investments. (Tr. 912:23-913:7).

112. Randall did not choose Irrgang based on Irrgang's investment experience, as Irrgang did not have any background or experience that would make him suitable for a job with an investment company. (Tr. 913:8-15).

113. At Randall's direction, Irrgang opened brokerage accounts in his own name, took custody of Fund assets, and traded in the accounts. Randall Goulding's Answer [ECF No. 328] at ¶ 13.

114. The account opening documents signed by Irrgang contained false information regarding his assets and investment experience. (PX 115, 116).

115. One of the other Relief Defendants was Wayne, who was the college roommate of the son of Randall's administrative assistant. (Tr. 902:1-10).

116. At the time Randall selected Wayne to hold the Funds' investments, Randall had never met Wayne. (Tr. 902:11-13, 904:16-18).

117. Randall understood that Wayne did not have any investment experience. (Tr. 903:14-22).

118. The asset transfers to the Relief Defendants took place over a number of years. Stipulations of Fact [ECF No. 1003] at ¶ 38.

119. At the time of Nutmeg's registration with the SEC, the Relief Defendants had not transferred back to the respective Funds all of the assets that Relief Defendants had received. Stipulations of Fact [ECF No. 1003] at ¶ 40.

G. Nutmeg's Payments to the Relief Defendants

120. When the Relief Defendants owned by Randall's sons sold securities, those Relief Defendants received 3% of the sales proceeds, regardless of whether the sales were profitable. (Tr. 851:5-854:24).

121. The other Relief Defendants received only 1% of the proceeds of their securities sales. (Tr. 904:19-905:5, 906:6-19, 913:16-914:19; PX 32, PX 76, PX 105).

122. Randall was the person who decided that his sons should get paid 3% of the proceeds of the sales of the Funds' securities. (Tr. 854:25-856:6).

123. The financial benefit to his sons was one motivating factor in Randall's decision to pay 3% of the sale proceeds. (Tr. 855:16-856:21).

124. Instead of using the Relief Defendants, Randall could have used independent third parties with far more securities experience than his family and friends. (Tr. 859:5-13).

125. However, Randall understood that an independent third party would exercise more scrutiny than the Relief Defendants, that he would be able to exert less influence over a third party, and that using an independent third party would mean less compensation for Randall's family and friends. (Tr. 859:14-25).

126. Financial Alchemy, LLC received at least $13,113; David Goulding Inc. received at least $3,318; David Samuel, LLC received at least $9,769; Philly Financial, LLC received at least $38,900; and Irrgang received at least $25,806. Randall Goulding's Answer [ECF No. 328] at ¶ 57; (PX 35, PX 36, PX 37, PX 38)

H. Nutmeg's Commingling of Client and Investor Funds

127. Prior to the SEC exam, money belonging to Nutmeg, Randall, and the Funds was commingled in the same bank accounts. Stipulations of Fact [ECF No. 1003] at ¶ 41; (Tr. 964:10-18).

128. Money from fourteen of the Funds was deposited along with Nutmeg's own money in a Nutmeg bank account. Stipulations of Fact [ECF No. 1003] at ¶ 42.

129. One consequence of the commingling was that when an asset belonging to a Fund was transferred to a Relief Defendant, that transfer was not recorded in the Fund's books and records. (Tr. 964:19-965:9).

130. Some of the Funds' investments were made in Nutmeg's name, rather than the relevant Fund's name. Stipulations of Fact [ECF No. 1003] at ¶ 43.

131. Likewise, securities owned by the Funds were deposited in brokerage accounts belonging to Nutmeg or the Relief Defendants. Stipulations of Fact [ECF No. 1003] at ¶ 44.

132. This commingling also involved Randall's own money held in Nutmeg's bank accounts, such that Randall's personal assets were commingled with Nutmeg's and the Funds' assets. (Tr. 964:15-18).

133. Randall was solely responsible for the commingling of the Funds' and Nutmeg's money. (Tr. 803:23-25, 966:25-967:2).

134. Randall admitted the commingling "was a very bad idea in retrospect" and the commingled assets "should have been severed out with separate accounts." (Tr. 967:3-8).

135. On January 10, 2007, Randall received an email from a potential investor who referenced a discussion with Duncan. (Tr. 968:11-970:4; PX 292 at 2).

136. The potential investor wrote: "I just spoke with and retained Carl Duncan. One of the many things we discussed, was the fact that Nutmeg takes the investments in the name Nutmeg and not the funds. He told me that he was unaware of this fact. He further stated and I quote 'That's crazy.' " (Tr. 969:17-970:4; PX 292 at 2).

137. On January 11, 2007, Randall received an email from Duncan stating: "Bottom line: if there isn't some indication of representative capacity (escrow, FBO, in name of fund, etc.), isn't this a classic example of commingling and leaves the funds and their respective investors bare?" (Tr. 970:1-25; PX 292 at 1).

138. On January 18, 2007, Duncan wrote Randall an email identifying "concerns" about Nutmeg, including that "[t]he title to securities (and broker accounts) were in the name of Nutmeg, not the respective fund." (Tr. 971:4-23; PX 291 at 2-3).

139. On March 19, 2007, Duncan wrote to Randall: "Whether you like it or not, hopefully you will now be getting the perception that you are in the securities business and have not done a real good job at it – particularly when you add in . . . the goofy one-off investment partnerships [and] not being familiar with the applicable standards." (PX 290 at 1).

140. As with the asset transfers, the commingling was not unwound by the time of Nutmeg's registration with the SEC. Stipulations of Fact [ECF No. 1003] at ¶ 50.

141. By the time of the SEC exam, Randall still had not remedied the commingling concerns identified by Duncan. (Tr. 971:19-972:18).

I. Nutmeg and the Funds Never Were Audited

142. On February 14, 2007, Duncan advised Randall: "[M]ost professional investors . . . expect to have performance reporting that is completely independent and/or the subject of generally accepted auditing principles. That is possible in one of two ways . . . Use of Administrators [or] Have Performance Audited. Failure to have one such 'fire wall' is now pretty regularly . . . viewed as insufficiently trustworthy . . . If one doesn't use an administrator . . . then at minimum one should use an outside auditor." (PX 293 at 1-2; Tr. 975:15-977:5).

143. On March 19, 2007, Duncan again advised Randall that Nutmeg should obtain a "[p]erformance review by someone independent, whether by engaging an administrator and/or audit." (PX 290 at 1-2; Tr. 978:9-979:6, 980:11-981:2).

144. Randall never followed Duncan's advice to retain an auditor. (Tr. 1418:16-21).

145. The Funds never were audited or subjected to surprise examinations. Stipulations of Fact [ECF No. 1003] at ¶ 51.

146. In his November 25, 2008 letter to the SEC, Randall represented: "we have hired an accounting firm to do annual surprise exams or to provide audited financial statements for each of our funds, as appropriate." (PX 22 at 2; Tr. 981:8-24).

147. That statement was untrue because, as of the date of Randall's letter, Nutmeg had not yet hired any accounting firm. (PX 295; Tr. 981:16-982:7, 983:19-984:4).

148. In fact, Nutmeg never took steps to conduct an audit or surprise examinations for the period from June 7, 2007 to December 31, 2007. Stipulations of Fact [ECF No. 1003] at ¶ 52.

149. Instead, Nutmeg only sought an audit for the 2008 calendar year. Stipulations of Fact [ECF No. 1003] at ¶ 53. But that audit never happened. Stipulations of Fact [ECF No. 1003] at ¶ 54.

150. In fact, by the time this lawsuit was filed in March 2009, Nutmeg still had not retained an auditor. (Tr. 984:1-9).

J. Nutmeg's and the Funds' Books and Records Were Deficient

151. During the SEC's examination of Nutmeg in 2008, the SEC asked for "accounting records,

financial statements, receipts, and ledgers . . . for each Fund." Stipulations of Fact [ECF No. 1003] at ¶ 58.

152. Nutmeg did not have general or auxiliary ledgers, trial balances, or income and expense statements for the period of time during which it was doing business. Ryan told the SEC staff he had not prepared such records. Randall and David admitted to the SEC staff that such records did not exist. (PX 21 at 9; Tr. 94:15-95:2).

153. Nutmeg did not have complete historical records of the Funds' investments or its purchases and sales of securities on behalf of the Funds. (PX 21 at 9; Tr. 95:3-13).

154. Many of the notes and other documents reflecting the Funds' investments in PIPEs were not signed or were missing. (Tr. 97:25-98:15).

155. For example, an August 2007 $600,000 convertible note was payable to "The Nutmeg Group, LLC" from Physicians Healthcare Management Group, Inc. But no fund was identified in the note. (PX 9).

156. Randall was responsible for ensuring Nutmeg maintain the required books and records. (Tr. 803:20-22).

157. The people most familiar with Nutmeg's spreadsheet-based valuation system all admitted Nutmeg grew too big for its record keeping system and there were mistakes and errors in that system. David characterized the spreadsheet-based valuation system as "an absurdly unwieldy system" that "seemed to

lend itself to a problem happening." (Tr. 1571:5-24). Although David thought the spreadsheet-based system may have worked better in Nutmeg's early years, he acknowledged he has no evidence to validate that speculation. (Tr. 1598:16-24).

158. Randall agreed there were errors in Nutmeg's valuation system. (Tr. 776:18-24). Ryan acknowledged there were mistakes in the valuation spreadsheets and he could not tell if Nutmeg's fees were too high as a result of its erroneous valuations. (Tr. 1819:14-21, 1821:12-1822:9).

159. Brandon similarly agreed Nutmeg's Excel-based spreadsheet valuation system grew to be unwieldy and there were errors in that system. (Tr. 1516:18-1518:9).

160. The SEC found errors in Nutmeg's spreadsheets when its examiners first went in to conduct their investigation. (Tr. 119:19-21).

K. Randall Made False Statements to the SEC

161. In his November 25, 2008 letter to the SEC, Randall claimed that, before the SEC's compliance examination in 2008, he "wasn't even aware of this [Advisers] Act or its potential applicability" to himself or Nutmeg, because he "never happened across the Investment Advisers Act" previously. (PX 22 at 1-2)

162. In this letter, Randall explained that an attorney named Carl Duncan had performed a "legal

audit" of Nutmeg and suggested that the firm become "federally-registered" as an investment adviser, which Randall agreed to do and submitted the necessary paperwork without ever becoming "aware of the Act." (PX 22 at 1-2).

163. In fact, on January 18, 2007, Duncan sent Randall an email in which specifically called to Randall's attention "the Investment Adviser Act of 1940." (PX 291 at 2).

164. Duncan also advised Randall to use an outside auditor or third-party administrator to handle Nutmeg's valuation and reporting, and expressed concerns about Nutmeg maintaining title to the Funds' securities in its own name rather than in the names of the respective Funds. (PX 291 at 2, PX 292 at 1, PX 293 at 2).

165. Subsequently, on March 18 and April 11, 2007, Duncan referred Randall to certain requirements and substantive provisions of the Advisers Act. (PX 294 at 2-3; DX 81 at 2-3).

166. Randall also signed and certified Nutmeg's May 7, 2007 Form ADV, which was Nutmeg's application to register with the SEC as an investment adviser. (Tr. 918:9-20; PX 1).

167. That Form ADV contained multiple references to the Advisers Act. (Tr. 919:5-19; PX 1 at 3, 26, 38-39, 40).

168. Randall signed Nutmeg's ADV without personally taking any action to learn of the requirements of the Advisers Act. (Tr. 920:16-19).

169. By the time Nutmeg registered with the SEC in 2007, Randall was aware of the existence of the Advisers Act. (Tr. 940:3-17).

170. During 2007, Randall authored the Mercury Fund's amended private placement memorandum, which contains multiple references to the Advisers Act. (PX 6 at 11, 21, 66).

171. Randall admitted that he failed to familiarize himself with the Advisers Act or its requirements and was not as conversant with the Act as he should have been. (Tr. 940:10-13, 959:23-962:4).

172. Randall says he delegated responsibility for the Advisors Act to a young attorney working for him who was just a couple of years out of law school, though Randall has no specific recollection of actually delegating responsibility for the Act to this young attorney. (Tr. 961:25-963:6). According to Randall, when Nutmeg received notice of the SEC audit, this young attorney "ran into [Randall's] office and shouted, "did you realize that there is a whole securities act regulating us that we were not aware of?? How could we have registered under an Act we didn't even know existed??" (PX 22 at 2).

L. Randall and Nutmeg Made False or Misleading Statements to Investors

173. Randall prepared, reviewed, and approved the offering materials, including private placement memoranda ("PPM"), provided to the Funds' potential investors. (Tr. 834:16-835:20).

174. Until its registration with the SEC, Nutmeg touted itself to investors and potential investors as having achieved an "internal rate of return on its investments, since its inception, exceeding 130% per annum," meaning that Nutmeg's overall return on investments exceeded 400 percent. (PX 21 at 15 § C, PX 131 at 1).

175. Randall prepared the Nutmeg Overview sometime after the death of his partner. Michael Montaigne, in 2006. (Tr. 836:25-837:5-8).

176. Nutmeg claimed that it purchased "publicly-traded stocks, directly from the company, at a discount, with substantial upside potential, invariably with warrants." (PX 131 at 1).

177. Nutmeg further described its "investment strategy" as the "discounted acquisition of publicly-traded stocks." (PX 131 at 1).

178. However, most of the assets managed by Nutmeg were not certificated, but were PIPE agreements, convertible notes, warrants, and stock certificates. Defendants' Proposed Findings of Fact and Conclusions of Law ("Defendants' Proposed Findings and Conclusions") [ECF No. 983] at ¶ 52.

179. The vast majority of the Funds' investments were not in company stock, but in convertible notes. (Tr. 1406:23-1407:5).

180. In fact, the investments Nutmeg made for the Funds were "very speculative investments" involving companies that "were not very stable," were "very risky," and had "going concern issues." (Tr. 838:15-839:14). Randall admitted that was Nutmeg's "focus." (Tr. 1404:18-21).

181. The Nutmeg Overview included a biography of Randall that touted his career with the IRS, his legal practice, and his charitable endeavors. (Tr. 839:21-840:18; PX 131 at 5-6).

182. The Nutmeg Overview does not disclose the IRS had imposed penalties on Randall for his negligent preparation of tax returns, or that Randall had later been convicted for various felonies, including fraud, or that Randall's law license had been suspended. (Tr. 841:7-844:14, 845:8-25; PX 131).

183. The Funds' offering materials did not explain that Randall gave key roles at Nutmeg to his three sons. (Tr. 894:1-5; PX 254).

184. The Funds' offering materials did not disclose Nutmeg's use of the Relief Defendants to make investments for the Funds. (Tr. 894:6-16, 895:6-896:4, 897:3-898:12; PX 254).

185. Randall prepared, reviewed, and approved the Mercury Fund's August 2, 2007 disclosure memorandum. (Tr. 898:13-22; PX 254).

186. The Mercury Fund disclosure memorandum included a biography of Randall that touted his career with the IRS, his legal practice, and his charitable endeavors. (Tr. 899:10-23; PX 6 at 13).

187. The Mercury Fund disclosure memorandum does not disclose the IRS had imposed penalties on Randall for his negligent preparation of tax returns, that Randall had later been convicted of various felonies, including fraud, or that Randall's law license had been suspended. (Tr. 842:22-845:13, 899:10-900:20; PX 6).

188. It was Randall's decision not to disclose his conviction and law license suspension to investors. (Tr. 900:7-11).

189. Randall did not disclose his conviction or law suspension in any offering documents that preceded the Stealth Fund, which is the last Fund at issue in this lawsuit. (Tr. 900:12-20).

M. Nutmeg's Inaccurate and Overstated Valuations of the Funds

190. On March 27, 2008, Nutmeg certified to the SEC that it had assets under management of $25.9 million. (PX 3 at 8). However, in identifying each of its client Funds for which it was an adviser, Nutmeg described assets under management totaling only $18.1 million. (PX 3 at 28-34).

191. During the SEC's compliance examination, Nutmeg claimed to have assets under management of

approximately $32.3 million as of April 1, 2008. Answer to Am. Compl. [ECF No. 328] at ¶ 32; (PX 8).

192. As of April 1, 2008, four Funds held the majority of assets under Nutmeg's management: Stealth, Mercury, Michael and Fortuna. Answer to Am. Compl. [ECF No. 328] at ¶ 32; (PX 8).

193. Stealth had 19 investors and claimed to have assets under management valued at $10,376,294. Answer to Am. Compl. [ECF No. 328] at ¶ 32; (PX 8).

194. Mercury had 100 investors and claimed to have assets under management valued at $8,074,009. Answer to Am. Compl. [ECF No. 328] at ¶ 32; (PX 8).

195. Michael had 86 investors and claimed to have assets under management valued at $2,439,985. Answer to Am. Compl. [ECF No. 328] at ¶ 32; (PX 8).

196. Fortuna had 89 investors and had assets under management purportedly valued at $1,982,435. Answer to Am. Compl. [ECF No. 328] at ¶ 32; (PX 8).

197. Of the $32.3 million Nutmeg claimed to hold in purported Fund assets, approximately $1 million was held in the custody of a bank or brokerage firm. (Tr. 98:16-98:24).

198. The remaining Fund assets consisted of documents – including PIPE agreements, convertible notes, warrants, and stock certificates – which were kept at Nutmeg's offices. (Tr. 98:25-99:10).

199. Randall admitted that Nutmeg made errors in the valuation of the Mercury Fund's investments as

reported to the Fund's investors in quarterly statements though he claimed those errors were unintentional. (PX 22 at 3).

200. Nutmeg did not maintain documentation adequate to reconcile the assets or the value of the assets under management as reported to investors in each of the Michael, Fortuna, Mercury, and Stealth Funds, which were the largest of Nutmeg's Funds. (Tr. 97:3-99:15, 117:20-140:13). In short, the account statements for the Funds that Nutmeg sent to investors were wrong and inaccurate. (Tr. 127:15-20).

201. Nutmeg provided the SEC's examiners with documentation for these funds which differed from the information shown on Nutmeg's internal records, as well as the information reported to investors during the first quarter of 2008. (PX 10, PX 11, PX 13, PX 14, PX 15, PX 16).

202. Nutmeg could not determine how to allocate from $400,000 to $1 million among the Funds or their investors. (Tr. 127:15-130:7, 132:16-132:19).

203. In addition, Nutmeg's valuations of the Mercury and Stealth Funds in the first quarter of 2008 were overstated. (PX 15; Tr: 136:6-137:9, 164:2-13).

204. Nutmeg recorded incorrect stock prices for Mercury and Stealth Funds' investments in Nutmeg's internal records by using incorrect stock prices, overstating the proceeds from the sale of shares, and inflating the number of shares received from the Funds' investments. (PX 19, PX 20).

205. These errors caused the value of Mercury Fund's holdings in the first quarter of 2008 to be overstated by $485,000, or nearly 6%. (PX 15; Tr. 136:6-137:9, 132:16-19).

206. Nutmeg also overstated the values for the Stealth Fund's holdings in the first quarter of 2008 by nearly $578,000 or 5.5%. (PX 16; Tr. 137:16-138:13)

207, Nutmeg also incorrectly valued the holdings of the Michael and Fortuna Funds during the first quarter of 2008. (PX 13, PX 14, PX 17, PX 18).

208. One consequence of Nutmeg overvaluing the Funds' holdings was that the Funds and their investors were paying Nutmeg inflated management and performance fees. (Tr. 681:1-21).

N. Nutmeg's Actions Following the SEC's Compliance Examination

209. In May 2008, the SEC began a five-month-long compliance examination of Nutmeg. Stipulations of Fact [ECF No. 1003] at ¶ 29.

210. In a letter to Mercury Fund investors dated September 9, 2008, David attributed Nutmeg's delay in sending investor statements to "switching over our tracking/valuation/reporting software" and a manual recalculation of all Mercury Fund investment positions. (PX 288).

211. David did not mention the SEC's compliance examination or any of the SEC's concerns about

record-keeping, commingling of investor and Fund assets, transfer of Fund assets to the Relief Defendants, or Nutmeg's inability to account for the Funds' holdings. (PX 288).

212. Instead, David advised the Mercury Fund investors that Nutmeg was restating the Fund's valuations for three prior reporting periods, and that in each case the Fund's value was understated and the NAV actually was greater than previously reported. (PX 288).

213. The SEC's compliance examiners sent Nutmeg a letter on September 30, 2008 identifying a number of issues which the SEC stated were problems, deficiencies, or violations of the securities laws. Agreed Findings and Conclusions [ECF No. 927] at 1143; (PX 21).

214. On November 25, 2008, Randall sent the SEC a letter on behalf of Nutmeg responding to the statement of deficiencies. Agreed Findings and Conclusions [ECF No. 927] at 44; (PX 22).

215. In that letter, Randall only disputed certain of the SEC's statements about the problems observed with Nutmeg and the Funds. Randall argued that any inaccurate statements were unintentional and immaterial, and he described the remedial efforts Nutmeg would undertake to improve its operations. (PX 22).

216. One of the remedial efforts that Randall described was a "massive review of each and every component of the Mercury Fund," which reconstructed

valuations for three prior reporting periods. (PX 22 at 3).

217. As a result, Randall advised the SEC that Nutmeg had underreported the value of the Mercury Fund's assets to investors. (PX 22 at 3).

218. David prepared a memorandum describing this review which was dated November 20, 2008 and entitled "Chronicle of Nutmeg/Mercury Fund LLLP valuation review." (PX 226).

219. Nutmeg had revalued the Mercury Fund for a number of prior quarters, increasing the total value of the fund's investments, and it advised investors that that their investments were worth more than previously reported. (PX 226, PX 288).

220. Nutmeg had advised the SEC that it was imposing discounts on convertible notes for illiquidity and late interest payments. (PX 21 at 2).

221. However, Nutmeg continued to value unconverted notes as if they were freely tradeable stock and even added additional share equivalents for unpaid interest. (PX 226 at 7, 13 for AKYI).

222. A Nutmeg memo dated May 1, 2009 acknowledged the necessity of discounting illiquid investments and overdue promissory notes. (PX 227 at 1).

223. The discounts described in this memo, however, were formulaic. (PX 227 at 1; Tr. 631:19-633:5).

224. Nutmeg valued convertible debentures at the *higher* of principal plus accrued interest or the market value of the number of securities which could be converted. (PX 227).

O. Crowe Horwath LLP's Examination of the Mercury Fund

225. On May 7, 2009 Randall signed an engagement letter on behalf of Nutmeg with Crowe Horwath LLP ("Crowe Horwath"), requesting that Mari Reidy of Crowe Horwath and her team perform the court-ordered accounting services required by the Court's Temporary Restraining Order. (PX 58).

226. On August 31, 2009 Mari Reidy provided the Receiver with a Project Status Update describing the work that Crowe Horwath had performed up to that date. (PX 59).

227. Crowe Horwath concentrated its forensic accounting efforts on the Mercury Fund because that Fund was relatively large, had its own bank account, and held investments in the same companies as several of the other Funds. (PX 59 at 1).

228. Crowe Horwath reviewed documents relevant to the Mercury Fund, including offering documents, subscription agreements, QuickBooks general ledger entries prepared by Ryan, Mercury Fund investor statements prepared by David, Mercury Fund valuations prepared by David, Mercury Fund bank and

brokerage statements, and Nutmeg bank statements. (PX 59 at 1-2).

229. At the end of May 2009, according to Crowe Horwath, the Mercury Fund had no cash left in its bank account. (PX 59 at 3).

230. The Mercury Fund's general ledger showed management fees paid to Nutmeg in the amount of $369,002, as well as certain other compensation paid to Nutmeg, which was defined as "carried interest," in the amount of $743,031. (PX 59 at 3).

231. The Mercury Fund's records also showed that, on February 14, 2007, a total of $1.8 million in investor contributions was transferred from the Fund's bank account to Nutmeg's bank account, which was nearly 100% of the investor contributions that had been made to that date. (PX 59 at 4).

232. According to Crowe Horwath, the purpose of this transfer was unclear, but the amount transferred was over $700,000 more than the total management fees and carried interest that Nutmeg calculated it was owed by the Mercury Fund for all of 2007 and 2008. (PX 59 at 4).

233. By July 31, 2007, approximately $2.3 million in investor contributions had been transferred from the Mercury Fund's account into Nutmeg's bank account. (PX 59 at 5).

234. Nutmeg's general ledger showed that Nutmeg funded $355,000 in investments on behalf of the Mercury Fund and made distributions to Fund

investors in the amount of $307,000 during the same period of time. (PX 59 at 5).

235. According to Crowe Horwath, of the total cash distributions of $1.9 million to the Mercury Fund's investors, approximately $650,000 (or 34%) was disbursed from Nutmeg's bank account and the remaining $1.25 million in distributions (or 66%) was made from the Mercury Fund bank account. (PX 59 at 6).

236. Based on Nutmeg's records, Crowe Horwath traced approximately $5.6 million of disbursements from the Mercury Fund's bank account to purchase investments. (PX 59 at 6).

237. However, according to Crowe Horwath, $907,000 in investments recorded in the Mercury Fund's investment account consisted of the reallocation or reassignment of investments previously made by Nutmeg, along with the gains or losses on those investments. (PX 59 at 6-7).

238. For example, according to Crowe Horwath, by September 14, 2007, the Mercury Fund had paid AccessKey a total of $699,700 and received a convertible note with a face value of only $585,607. (PX 59 at 8).

239. By May of 2008, according to Crowe Horwath, Randall had assigned to the Mercury Fund $840,100 of the total amount of $3.8 million that Nutmeg, the Relief Defendants, and the Mercury Fund had invested in AccessKey. The $840,100 is $140,400 more

than the Mercury Fund had invested in AccessKey (PX 59 at 8).

P. Randall Overstated the Valuations of the Funds

240. Randall was responsible for valuing the Funds' investments and selecting the methodology Nutmeg used to value the Funds' investments. (Tr. 768:6-11, 769:4-770:11).

241. Randall approved the model Nutmeg used to value the Funds' investments. (Tr. 770:12-14).

242. Randall made all the ultimate valuation determinations for the Funds' investments and had the final word on all judgment calls regarding valuation. (Tr. 770:15-20).

243. Under Randall's direction, Nutmeg generally valued the Funds' securities holdings by multiplying the number of shares of a particular issuer of a convertible note by the current price for the issuer's publicly traded securities. (Tr. 521:3-7; 1497:1-5).

244. Nutmeg applied this same approach when valuing securities which were not publicly-traded, including restricted stock and convertible notes and debentures. In doing so, Nutmeg did not follow the valuation methodologies that it previously told investors it would follow that called for Nutmeg to consider a number of relevant variables when valuing securities that were not publicly-traded. (PX 6, § 63, at A-11 and A-12; PX 7, § 6.3, at A-45 and A-46; PX 131 at 1).

245. Nutmeg told Mercury and Stealth investors that it would value non-publicly traded securities by considering a number of factors, including the issuer's financial condition, operating results, recent sales prices for the same or similar securities, restrictions on transfer, the price paid to acquire the investment, significant recent events affecting the issuer, and the percentage of outstanding securities owned by the Fund. (PX 6, § 6.3(b), at A-12; PX 7, § 6.3(b) at A-45 and A-46).

246. Nutmeg did not follow this approach, however, and never advised Mercury's and Stealth's investors that it was not following the disclosed valuation methodologies.

247. In valuing the securities held by the Mercury and Stealth Funds which were not publicly-traded, Nutmeg was required to establish a fair value for those securities by following FAS 157 and the SEC's guidance for valuing restricted securities – Accounting Series Releases ("ASR") 113 and 118. (Tr. 603:5-610:24, 622:3-631:18).

248. ASR 113 and 118 prohibit the use of simple formulas and require consideration of factors including: the issuer's financial condition, any discount on the purchase price, and the size of the fund's holdings. (*Id.*)

249. Under FAS 157, fair value is defined as the price at which an asset can be sold in an orderly market transaction. (DX 72 at ¶ 7).

250. An issuer's restricted security cannot be valued at its unrestricted market price; the restriction must be taken into account as long as market participants would do so. (DX 72 at 25, A29; Tr. 604:1-23, 622:9-22; 760:3-12).

251. According to academic studies, restricted securities are discounted by an average of at least 33%, and these discounts are even higher for the restricted securities of companies in financial distress. (Tr. 624:11-627:8).

252. Randall knew that Nutmeg needed to comply with FAS 157 and he was responsible for performing Nutmeg's FAS 157 analyses and making sure that Nutmeg's valuation analyses complied with FAS 157. (Tr. 770:21-771:8).

253. Randall claimed that, in valuing the Funds' investments, Nutmeg would employ liquidity discounts in accordance with FAS 157. (Tr. 771:9-773:4).

254. Randall claimed that, based on his understanding of FAS 157, Nutmeg would discount the value of the Funds' investments if those investments were not immediately tradeable. (Tr. 774:4-8).

255. Prior to July of 2007, Nutmeg told investors that it assessed a "10% discount for liquidity" on all illiquid investments. (PX 131 at 1). Nutmeg did not, however, assess this liquidity discount on all illiquid investments.

256. Randall conceded that Nutmeg did not begin applying liquidity discounts until July 2008. (Tr. 774:9-776:13).

257. Randall conceded that the convertible notes the Funds purchased did not trade in "active markets" and were not "Level 1" assets. (Tr. 1413:5-10).

258. Randall conceded that Nutmeg made a number of errors in the valuation of Mercury Fund and in the valuation of certain investments reported in the Funds' quarterly statements to investors. (Tr. 776:18-24).

259. The valuations contained in the investors account statements were based on data contained in Nutmeg's internal spreadsheets. (Tr. 877:14-16; PX 46, PX 47).

260. Randall approved the account valuations contained on the investors' account statements. (Tr. 879:15-18).

261. Randall and Nutmeg did not follow FAS 157 and ASR 113 and 118 and did not discount illiquid and restricted investments which had the effect of inflating the reported value of the Funds including in Nutmeg's reporting to investors. (Tr. 644:19-645:12, 647:2-10).

262. Many of the securities held by the Mercury and Stealth Funds were notes that were convertible into restricted stock of the issuing companies. (Tr. 643:5-644:18).

263. Since these notes (and the stock they could be converted into) were not publicly-traded, Nutmeg should have applied significant discounts when valuing these securities. (Tr. 642:1-12, 651:23-652:18).

264. Nutmeg's failure to value the Funds properly resulted in the Funds being over-valued. (Tr. 680:6-12).

265. In addition, many of the illiquid and restricted securities held in the Mercury and Stealth Funds also required discounts because they were issued by companies in poor financial condition with going concern opinions in their audit letters, no revenue, and notes or debt that were in default. (Tr. 652:19-653:14).

266. The valuation and purported profitability of the Mercury and Stealth Funds also was driven by restricted investments that were concentrated in just a few portfolio companies, so any decrease in the valuation of these securities would have had a dramatic impact on the reported valuation of these Funds. (PX 70, 71, 72; Tr. 680:13-25).

267. By valuing the convertible debentures and restricted securities of the Mercury and Stealth Funds as if they were equivalent to unrestricted, freely-tradeable shares, Nutmeg significantly overstated the valuation of both Funds in quarterly investor statements. (Tr. 647:210; 680:6-12).

Q. Randall Withdrew Hundreds of Thousands of Dollars from Nutmeg's Commingled Accounts That Was Not His To Withdraw

268. Randall consistently withdrew money from Nutmeg's commingled accounts for his own personal benefit and to pay his personal expenses. (Tr. 984:13-991:18) Randall withdrew large amounts of money from Nutmeg whenever he wanted to do so, for whatever he wanted to spend it on, and without regard to whether the money was his to take or, instead, belonged to the Funds or investors in the Funds. The evidence establishes that between at least 2004 and 2009, Randall withdrew from Nutmeg substantially more money than was his to withdraw.

(1) Nutmeg's Records

269. Randall testified that his initial capital contribution to Nutmeg was $70,000. (Tr. 1398:7-9). There is no evidence that he ever contributed more capital to Nutmeg.

270. Ryan testified, however, that the Nutmeg general ledger he prepared after the SEC's examination showed that as of March 31, 2008, Randall's capital account at Nutmeg had a balance of $418,361. (Tr. 1830:15-1832:9; PX 276 at 12). No back up documents

were introduced into evidence to support that number in the general ledger.[1]

271. These same Nutmeg records show total distributions to Randall as of March 31, 2008 of $1,267,983. (Tr. 1827:9-20; PX 276 at 18). No evidence was introduced as to how those distributions were calculated.

272. During the same time period, Nutmeg's own records show Nutmeg owed the Funds $974,054. (Tr. 1829:5-1830:6; PX 276 at 12).

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[1] The Court seriously questions the credibility of Ryan's testimony that Randall's capital account with Nutmeg was a positive $418,000 in March 2008 when Ryan prepared a general ledger for Nutmeg, after the SEC had begun its examination. This finding is based on, among other things, the lack of any evidence in the record to support that figure, the extremely haphazard, at times non-existent, and endemically error prone record keeping practices at Nutmeg, the lack of historical documentation of Nutmeg's true finances and Randall's capital account, Ryan's overall lack of independence as Nutmeg's accountant, and his admitted bias in favor of his father. (Tr. 1775:20-1778:21). Further, the $418,000 number in Ryan's ledger is a negative number. Ryan testified that a negative number in Nutmeg's ledger really means that his father's capital account had a positive balance because of the way in which Ryan prepared the ledger. Ryan's testimony on this point, however, was a bit shaky and more than a little equivocal, and it therefore is viewed with skepticism by the Court. (Tr. 1830:15-1831:2) ("I have to think about that question. Hold on. Let me see. This is where I started talking about the negatives and the positives and the debits and credits. So I don't – let me look at this for a second . . . I would say that is a – wait a minute. I bold on. I have to make sure I understand that. It appears to me that would be a credit balance.").

273. These same records also show Nutmeg had negative cash balances in both of its bank accounts as of March 31, 2008. (PX 276 at 1, 4).

274. Taken together, Ryan's testimony and the documents he prepared show that Nutmeg paid Randall more than $1.2 million as of March 31, 2008, Nutmeg owed the Funds approximately $1 million as of the same date, and Nutmeg had no money in the bank. This state of affairs could not have occurred if Randall was not paid to a large extent with money from Nutmeg's commingled bank accounts that belonged to the Funds and ultimately to their investors.

275. Nutmeg's financial statements for the period ending in March 31, 2008, also prepared by Ryan after the SEC's exam, tell a similar story. Those financial statements show that Nutmeg owed the Funds more than $1.2 million (Tr. 1833:7-1837:25; PX 181 (March 31, 2008 balance sheet)).[2] The financial statements also show that Nutmeg reported a members' deficit of over $150,000 when total reported assets of $2,574,324 are subtracted from total liabilities reported as $2,735,347. (PX 181 (March 31, 2008 balance sheet)). Nutmeg's reported assets, though, include "investments" of $1,298,359 that the notes to the financial statements say "will later be allocated to a client fund, and thus are not really Company assets." (PX 181 (note 4 to financial statements)). If the reported Nutmeg

[2] According to Ryan, Nutmeg owed the Funds $1,247,361 composed of proceeds due to investors of $1,034,875 and amounts due to client funds under management of $212,486. (PX 181; Tr. 1833:7-1837:25).

assets that "are not really Company assets" are subtracted from the assets reported in Nutmeg's financial statements, then the members' deficit is over $1.4 million.

(2) The SEC's Examination of Nutmeg's Records

276. According to SEC accountant Ann Tushaus's examination of Nutmeg's records, for every year between 2003 and 2009, Randall deposited far less into Nutmeg's co-mingled bank accounts than he took out. During that six-year time period, Tushaus concluded Nutmeg made payments directly or indirectly to Randall totaling $1,390,058 more than Randall paid into Nutmeg or that was paid into Nutmeg on his behalf. (*See* PX 43, Schedule 2; Tr. 1024:24-1026:13). If, however, the net amount of Nutmeg's payments to Randall during only the period from March 23, 2004 to March 23, 2009, the date this lawsuit was filed, is included in the calculation,[3] then the net benefit to Randall is $642,422 based on this Schedule.[4]

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[3] The SEC only is seeking disgorgement of alleged ill-gotten gains pocketed by Randall for the five-year period preceding the SEC's filing of its lawsuit in March 2009. SEC's Post-Trial Brief [ECF No. 1042] at p. 17, n.10.

[4] The Court's calculation is as follows based on PX 43: $1,390,058 net benefit from October 1, 2003 through January 2, 2009 (PX 43, Summary Schedule and Schedule 2) minus $747,636 net amount paid to Randall between October 1, 2003 and March 11, 2004 (PX 43, Schedule 2) equals $642,422.

277. There is abundant evidence in the record that Randall used Nutmeg as his personal piggy bank. The SEC's Tushaus calculated that Nutmeg paid $227,763 for certain of Randall's personal expenses and on credit cards in either Randall's or Nutmeg's name (PX 43, Schedules 5b, 5c, and 5d) during the relevant time period. During the five years beginning in 2004 before the filing of this lawsuit in 2009, Nutmeg's payment of Randall's personal expenses included $67,181 for such things as an Acura automobile which, though titled in Nutmeg's name, was used by Randall as his personal vehicle for more than four years until he was required to turn it over to the Receiver (Tr. 989:9-990:19; 1029:18-130:16); $404 for season tickets to the Chicago White Sox and a $10,000 entry fee for Randall's father to play in the World Series of Poker (Tr. 990:20-23; 991:4-7; 1031:3-12); $16,333 to Lamico Designers, Inc.; $1,200 to the Human Relief Fund; and $5,500 for miscellaneous auto repairs. Nutmeg also made at least $160,582.11 in payments on Randall's personal credit cards and on Nutmeg's credit cards for Randall's personal benefit during this time period. (PX 43, Schedules 5c and 5d; Tr. 1029:4-17; 1031:5-8; 1031-18-20; 1031:25-1032:22; 1045:18-1046:17). Nutmeg also paid $285,115 to Randall's law offices net of payments from the law offices to Nutmeg (PX 43, Schedule 1).

278. Tushaus also calculated that Nutmeg made payments to Randall's Home Equity Line of Credit ("HELOC"). Those payments totaled approximately

$660,000 in 2005 and 2006.[5] When Nutmeg's payments to Randall's HELOC during that same time period are offset by money Randall paid to Nutmeg from his HELOC, however, the net benefit to Randall's HELOC is $62,050. (PX 44). It is unclear whether some of the transfers between Nutmeg and Randall's HELOC – as reflected in PX 43, Schedule 5a, and PX 44 – also are included in the SEC's calculation of money that Nutmeg paid to Randall in PX 43, Schedule 2. It appears that at least a few of those transfers accounted for in PX 43, Schedule 5a, also may be included in PX 43, Schedule 2.[6]

279. Including only the amounts reported in PX 43 and PX 44 with respect to (a) Nutmeg's net payments to Randall's law office ($285,115) (PX 43, Schedule 1); (b) the amounts Nutmeg paid on Randall's credit cards, on Nutmeg's credit cards for Randall's benefit, and for certain of Randall's other personal

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[5] The SEC's numbers vary slightly with respect to Nutmeg's gross payments to Randall's HELOC. The Court is using $660,000 here because it is at the lowest end of the range of the SEC's evidence. Randall did not specifically rebut or contradict any of the SEC's HELOC numbers. *See* PX 43 (Compare Summary Schedule, payments to Randall's HELOC, $663,828 with PX 43, Schedule 5a, payments to Randall's HELOC, $660,580.82). In PX 44, which purports to be a summary of transfers between Nutmeg and Randall's HELOC, the SEC says Nutmeg's payments to Randall's HELOC total $660,600.82. (PX 44).

[6] For example, both schedules include transfers in the same dollar amounts on October 31, 2005, February 2, 2006, and February 10, 2006. (PX 43, Schedules 2 and 5a). The Court cannot tell whether other payments catalogued in PX 43, Schedule 2, also are included in other schedules within PX 43.

expenses ($227,763) (PX 43, Schedules 5b, 5c, and 5d); (c) the net benefit to Randall from Nutmeg's payments on his HELOC ($62,050) (PX 44); and (d) the net amount of certain miscellaneous payments to Randall from one of the Relief Defendants and certain of the Funds ($5,230) (PX 43, Schedules 3 and 4), the total benefit to Randall comes to $580,158.

280. The SEC is seeking disgorgement in this case in the amount of $1,249,471. Plaintiff's Post-Trial Brief [ECF No. 1042] at 17. That number is based on a Declaration from Ann Tushaus which was filed by the SEC after trial and was not introduced into evidence at trial. The Declaration purports to be based on bank and brokerage account statements, Randall's sworn accounting (presumably PX 42), and unspecified information contained in the SEC's investigative files and from conversations with SEC staff. Tushaus Declaration [ECF No. 1043] at ¶ 3. In its post-trial brief, the SEC says that if the Court were to include only the net payments Nutmeg made to Randall's HELOC of $62,050, after considering the payments Nutmeg received from the HELOC, then the Court should order disgorgement in the amount of $650,921 rather than $1,249,471. [ECF No. 1043 at 16 and 1043-3].[7]

281. Some of the information in the Tushaus Declaration is in PX 43. Some of the numbers in the post-trial submission, however, are different than the

[7] Randall objects to the Court considering the post-trial Declaration of Ann Tushaus as it is not in evidence. Randall's Post-Trial Reply [ECF No. 1058] at 7-8.

numbers in PX 43, and in one instance, are not included in PX 43 or even in evidence as far as the Court can tell. For example, the net payment to Randall's law office is stated as $219,721 in the Tushaus Declaration [ECF No. 1043-1] compared to $285,115 in PX 43, Schedule I. Reimbursement of Randall's personal expenses is pegged at $156,108 in the post-trial submission [ECF No. 1043-1] compared to a total of $227,763 paid by Nutmeg for Randall's personal expenses as reflected in PX 43 (PX 43, Schedules 5b, 5c, and 5d). And Nutmeg's total payment to Randall's HELOC is stated as $663,828 in the post-trial submission [ECF No. 1043-1] compared to $660,600 in the document in evidence (PX 44). There is no explanation for these discrepancies and no explanation as to how the SEC arrived at the numbers in its post-trial submission.

282. The post-trial submission also includes $209,814, which is said to represent a loan Nutmeg made to Randall's son-in-law [ECF No. 1043-1]. This loan does not appear to be included in PX 43, nor can the Court find any testimony or documentary evidence of that loan in the trial record.

(3) Randall's Sworn Accounting

283. According to Randall's own sworn accounting submitted to the Court under penalty of perjury on April 10, 2009, Randall received payments totaling more than $620,343.29 from Nutmeg in just 2007 and 2008. (PX 42 at 5). Randall's sworn accounting specifically does not include at least $61,176 in payments

Nutmeg made to Randall in 2006, as set out in PX 43, Schedule 5b. Nor does it appear to include the $62,050 net benefit to Randall from the transactions between Nutmeg and Randall's HELOC in 2005 and 2006.[8] It also does not appear to include all payments Nutmeg made on credit cards in Randall's name or on Nutmeg's credit cards for Randall's benefit between 2006 and 2009. Adding just the documented 2006 payments to Randall or for his benefit listed in PX 43, Schedule 5b, and in PX 44 to his own sworn accounting of money paid to him in 2007 and 2008, the total comes to $743,569.[9]

(4) The Morgan Wilbur Deals

284. Randall says the SEC did not account for personal investments he says he made through Nutmeg in 2005 and 2006 in the so-called Morgan Wilbur deals, any profit or gain on those investments, or fees Nutmeg earned from the Funds. According to Randall, these sources of income to him were sufficient to cover all the payments he received from Nutmeg during the relevant time period. Randall said he put his own money into the Morgan Wilbur deals, the investments were very profitable, and the gains he earned on those

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[8] Randall's sworn accounting includes transfers to and from his line of credit, which may be his HELOC, but it does not include transfers before 2007. (PX 42 at 5).

[9] The Court's calculation is as follows: $620,343.29 (PX 42 at 5) plus $61,176 in payments Nutmeg made to Randall in 2006 that are set out in PX 43, Schedule 5b, plus $62,020 (PX 44) equals $743,569.

investments were deposited into Nutmeg's co-mingled accounts. Randall said the Morgan Wilbur investments generated at least $1.6 million in profit. (Tr. 1298:17-1299:6). Randall maintained he orally agreed with Morgan Wilbur to share the $1.6 million in profit from these investments, with 40% going to Morgan Wilbur and 60%, or almost $960,000, going to Randall. (PX 61 at 2-4; Tr. 1363:10-18). According to Randall, his share of the profits from the Morgan Wilbur deals had nothing to do with the Funds and was available to him to withdraw from Nutmeg's accounts as he desired.

285. Randall introduced no evidence to show how much he invested in the Morgan Wilbur deals, where that money came from, what his gains on those investments were, where that money was deposited, or what it was used for. At one point during the trial, Randall testified he could produce such evidence and would do so. (Tr. 1399:17-1399:21). He never did.

286. Nutmeg's own books and records do not say whether any of the payments made to Randall from Nutmeg's commingled bank accounts in the five years preceding the filing of this lawsuit were attributable to returns on the Funds' investments or to returns on personal investments Randall says he made through Nutmeg such as the Morgan Wilbur deals. (Tr. 1026:7-1027:15).

287. Nutmeg's records concerning the Funds' payments of management, performance, or other fees to Nutmeg are inaccurate and undependable. *See* Sections M and P above. As just one example of the loose

link between Nutmeg's books and records and reality, Randall testified that although he calculated the fee that Mercury was to pay Nutmeg in the first quarter of 2008, and it was deducted from the Mercury Fund as an accounting matter, Nutmeg did not actually take that fee and the money stayed in the Nutmeg commingled account. (Tr. 886:17-887:23).

288. In addition, as discussed above, Nutmeg inflated the value of the Funds so that any fees realized by Nutmeg on those inflated values also were inflated. *See* Sections M and P above.

(5) Crowe Horwath's and Craig L. Greene's Analysis **of the Morgan Wilbur Deals**

289. The Receiver asked Crowe Horwath to investigate the accuracy of Randall's position that he used his own personal money to invest in the Morgan Wilbur deals. (PX 61 at 1, 3).

290. Crowe Horwath concluded only 3% of the money used to fund the Morgan Wilbur investments came from a bank account held in Randall's name. The rest of the money used to fund the Morgan Wilbur deals came from Nutmeg's bank account or from the bank accounts of certain Relief Defendants. (PX 61 at 7).

291. Crowe Horwath performed a detailed analysis of Nutmeg's cash position in 2004 and 2005 to determine whether the cash in Nutmeg's accounts at

that time belonged to Nutmeg or the Funds. Crowe Horwath's analysis showed that the Funds' actual cash position should have ranged from $756,524.55 to $963,647.55 by the end of 2004, whereas Nutmeg's general ledger cash balance was only $273,301.71. According to Crowe Horwath, while Nutmeg started 2004 with a small positive cash balance, Nutmeg ended the year with a deficit cash position ranging from a negative $483,222.84 to a negative $690,345.84. Crowe Horwath concluded Nutmeg not only had no cash of its own by the end of 2004, but it owed the Funds a significant amount of money by that time. (PX 61 at 7).

292. According to Crowe Horwath, any money Randall put into Nutmeg's commingled bank accounts at a time when Nutmeg owed the Funds money first should have been used to satisfy Nutmeg's obligations to the Funds, not to fund Randall's personal investments.

293. Overall, Crowe Horwath concluded:

(1) at the end of 2004, all the money in Nutmeg's accounts belonged to the Funds;

(2) Randall personally owed the Funds a significant amount of money;

(3) the money Randall transferred to Nutmeg in 2005 and 2006 was less than he or Nutmeg owed the Funds as of that time, and should not have been treated as Randall's personal investment capital;

> (4) nearly all the money Nutmeg invested in the Morgan Wilbur Deals belonged to the Funds; and
>
> (5) nearly all the money generated by Nutmeg in 2005 and 2006, including the proceeds of the Morgan Wilbur Deals, was paid directly to Randall.

(PX 61 at 8-11); Mari Reidy Transcript [ECF No. 1031-3] at 90:4-94:7.

294. Craig L. Greene ("Greene"), an accountant hired by Randall, disagreed with Crowe Horwath. He testified that based on the information he was given by Randall, there was enough non-investor money in Nutmeg's accounts to fund the Morgan Wilbur deals. He thus concluded that profits from the Morgan Wilbur deals rightfully belonged to Randall and were available to him to use as he saw fit. [ECF No. 1032].

295. Greene says at the beginning of his report that he was retained to come to a specific conclusion: "to verify that investor monies were not used to fund personal investments of the Defendants [defined to include Randall Goulding]." And Greene did what he was hired to do. To reach his "opinion," Greene looked at the documents Randall provided to him and, based on those documents and what Randall told him, he agreed with Randall.

296. Among the documents Greene reviewed were "Client prepared Spreadsheets of Carried Interest Receivable, Randall Goulding Portion of Securities Held in the Funds, Randall Goulding Portion of Cash Due from The Funds and Nutmeg Schedule of Expenses." [ECF No. 1032 at 7]. If there is one thing that

is clear in the record, it is that Nutmeg's record keeping and valuation systems, to the extent they existed, were haphazard, cumbersome, not current, and they yielded valuations and other numbers that were inaccurate. The people most familiar with Nutmeg's valuation system all admitted Nutmeg grew too big for its spreadsheet-based valuation system and there were mistakes and errors in that system. *See* Section M above. There is no evidence in the record that Nutmeg's valuation system ever was sufficient to deliver accurate valuations of the Funds. In fact, the record evidence is to the contrary because, among other things, Nutmeg did not employ proper valuation principles for the Fund's assets which, in turn, affected Nutmeg's ability to calculate accurately the fees it was to be paid by the Funds. *See* Sections M and P above. Therefore, the information Randall provided to Greene was, by definition, flawed. Greene's reliance on what Randall told him and the Nutmeg documents that Randall gave him undercuts the credibility and reliability of his opinion.

297. Greene did no independent investigation or analysis, his opinion is not the product of independent expert or professional analysis, and he relied solely on information he received from Randall and Nutmeg that was objectively flawed. In the Court's view, Crowe Horwath's analysis and conclusions with respect to the Morgan Wilbur deals and the money in Nutmeg's commingled accounts available to fund those investments is more credible, plausible, and reasonable than Greene's so-called "analysis." Other than Greene's

opinion, Randall introduced no evidence to controvert Crowe Horwath's analysis and conclusions.

298. Based on all the evidence in the record, it is reasonable to conclude that Randall withdrew more money from Nutmeg than he contributed to it and that was his to withdraw.

II.

Conclusions of Law

A. The Investment Advisers Act

1. The Investment Advisers Act of 1940 ("the Advisers Act") was intended to eliminate certain abuses in the securities industry which contributed to the stock market crash of 1929 and the Great Depression of the 1930s. *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186 (1963); *SEC v. Nutmeg Group, LLC*, 162 F. Supp. 3d 754, 771 (N.D. Ill. 2016); Agreed Findings and Conclusions [ECF No. 927] at ¶ 45.

2. The Advisers Act reflects the intent of Congress to eliminate or expose all conflicts of interest which might encourage an investment adviser, either consciously or unconsciously, to render advice which is not in an investor's best interests. *SEC v. DiBella*, 587 F.3d 553, 567 (2d Cir. 2009); *Nutmeg Group, LLC*, 162 F. Supp. 3d at 772.

3. An investment adviser is any person who receives compensation for providing advice to others regarding to the value of securities or the advisability of

investing, purchasing, or selling securities. 15 U.S.C. § 80b-2(a)(11); *Nutmeg Group, LLC*, 162 F. Supp. 3d at 772; Agreed Findings and Conclusions [ECF No. 927] at ¶ 46.

4. This definition includes any person or entity that manages the funds of others for compensation or controls an investment advisory firm. *SEC v. Bolla*, 401 F. Supp. 2d 43, 59-60 (D.D.C. 2005), *aff'd in part sub nom*, *SEC v. Washington Inv. Network*, 475 F.3d 392, 400 (D.C. Cir. 2007); *Nutmeg Group, LLC*, 162 F. Supp. 3d at 772; Agreed Findings and Conclusions [ECF No. 927] at ¶ 47.

5. Both Nutmeg and Randall were investment advisers. *Nutmeg Group, LLC*, 162 F. Supp. 3d at 772; Agreed Findings and Conclusions [ECF No. 927] at ¶ 48.

B. The Anti-Fraud Provisions of the Advisers Act

6. Section 206(1) of the Advisers Act prohibits an investment adviser from employing any device, scheme, or artifice to defraud any client or prospective client. 15 U.S.C. § 80b-6(1).

7. Violations of Section 206(1) require proof that a defendant acted with intent to deceive, manipulate or defraud. This intent also can be shown by recklessness, which is defined as an extreme departure from the standards of ordinary care. *Robin v. Arthur Young & Co.*, 915 F.2d 1120, 1126 (7th Cir. 1990); *SEC v.*

Nutmeg Group, LLC, 2011 WL 5042094, at *5 (N.D. Ill. 2011); *SEC v. Householder*, 2002 WL 1466812, at *5 (N.D. Ill. 2002); *see also SEC v. Steadman*, 967 F.2d 636, 642 (D.C. Cir. 1992); *Vernazza v. SEC*, 327 F.3d 851, 860 (9th Cir. 2003).

8. Section 206(2) of the Advisers Act prohibits an investment adviser from engaging in any transaction, practice or course of business which operates as a fraud or deceit upon any client or prospective client. 15 U.S.C. § 80b-6(2); *Nutmeg Group, LLC*, 2011 WL 5042094, at *3-4; *Nutmeg Group, LLC*, 162 F. Supp. 3d at 778.

9. Violations of Section 206(2) do not require proof of scienter or intent to defraud. *Nutmeg Group, LLC*, 162 F. Supp. 3d at 775.

10. Further, Section 206(2) establishes a statutory fiduciary duty for investment advisers and requires them to act in their clients best interests. *Belmont v. MB Inv. Partners, Inc.*, 708 F.3d 470, 501-03 (3d Cir. 2013); *Nutmeg Group, LLC*, 162 F. Supp. 3d at 778.

11. Section 206(2) requires investment advisers to employ reasonable care in order to avoid misleading their clients, and to fully disclose all material facts and conflicts of interest. *Belmont*, 708 F.3d at 501; *Nutmeg Group, LLC*, 162 F. Supp. 3d at 778.

12. Section 206(4) of the Advisers Act prohibits an investment adviser from engaging in any act, practice or course of business which is fraudulent,

deceptive or manipulative. 15 U.S.C. § 80b-6(4); *Nutmeg Group, LLC*, 162 F. Supp. 3d at 775-76.

13. Advisers Act Rule 206(4)-8 prohibits an investment adviser from making false statements of material fact to any investor or prospective investor in a pooled investment vehicle or failing to state material facts that are necessary to make statements made to such investors not misleading. 17 C.F.R. § 275.206(4)-8; *Nutmeg Group, LLC*, 2011 WL 5042094, at *3; *Nutmeg Group, LLC*, 162 F. Supp. 3d at 780.

14. All of the investment funds for which Nutmeg and Randall served as investment advisers, including the Mercury and Stealth Funds, were pooled investment vehicles. *Nutmeg Group, LLC*, 162 F. Supp. 3d at 780

15. For violations of Section 206(4), and each of the rules promulgated thereunder, the SEC is not required to offer proof of intent to deceive. *Id.* at 775; *see also Householder*, 2002 WL 1466812, at *7; *Capital Gains Research Bur., Inc.*, 375 U.S. at 200.

16. Accordingly, an investment adviser may be found liable under Sections 206(2) and 206(4) for an act of negligence, which is defined as the failure to exercise ordinary care. *DiBella*, 587 F.3d at 567; *SEC v. Bolla*, 401 F. Supp. 2d at 66-67; *Nutmeg Group, LLC*, 2011 WL 5042094, at *3-4; *Nutmeg Group, LLC*, 162 F. Supp. 3d at 775.

17. A person may be found negligent by doing what no reasonable person would do, or by not doing

what a reasonable person would do. Accordingly, violations of Section 206(2) and 206(4), and the rules thereunder, may be proven by a showing that, under the circumstances of this case, a defendant should have acted differently. *Nutmeg Group, LLC*, 162 F. Supp. 3d at 775.

18. As an investment adviser, Randall's conduct was subject to all the foregoing standards.

C. Valuation Standards for Illiquid and Restricted Securities

19. Under the Investment Company Act of 1940, investment funds are required to value portfolio securities for which "market quotations are readily available" at current market value, "and other securities and assets shall be valued at fair value as determined in good faith by the board of directors" of the registered entity. 15 U.S.C. § 80a-2(41)(B); 17 C.F.R § 270.2a-4(a)(1); *DH2, Inc. v. SEC*, 422 F,3d 591, 592 (7th Cir. 2005); *In re Eaton Vance Corp. Sec. Lit.*, 206 F. Supp. 2d 142, 147 (D. Mass. 2002).

20. Under the SEC's applicable guidance, Accounting Series Releases ("ASR") 113 and 118, a "good faith" valuation requires a determination of the price a fund could expect to receive for a security upon its "current sale." *SEC v. Welliver*, 2013 WL 12149244, at *20 (D. Minn, 2013).

21. Ordinarily, a fund must adhere to the valuation methodology provided to investors and discount

restricted portfolio securities below the market price. *See Rockies Fund, Inc. v. SEC*, 428 F.3d 1088, 1097 (D.C. Cir. 2005); *see also In re R. Marvin Mears*, 61 S.E.C. Docket 947, 1996 WL 86539 (Feb. 27, 1996).

22. Failing to apply a restricted securities discount pursuant to ASR 113 and 118 demonstrates a reckless disregard for a fund's actual net asset value. *In re Parnassus Investments*, Rel. No. 131, 1998 WL 558996, at *14 (Sept. 3. 1998).

23. As Nutmeg's managing member, Randall was subject to all these standards when valuing, or approving Nutmeg's valuations of, the Funds.

D. Violating the Advisers Act by Misappropriation and Misrepresentation

24. The misappropriation of investor assets while misrepresenting investment results is a clear violation of Sections 206(1) and (2) of the Advisers Act. *SEC v. Desai*, 145 F. Supp. 3d 329, 336 (D.N.J. 2015).

25. These same sections are violated when an adviser commingles fund earnings or assets and redistribute them to other funds or investors. *SEC v. Sentinel Mgmt. Group, Inc.*, 2012 WL 1079961, at *16 (N.D. Ill. 2012).

26. Similarly, the misappropriation of the assets of an investment fund to pay undisclosed expenses is a violation of Sections 206(1) and (2) of the Advisers Act. *SEC v. Penn*, 225 F. Supp. 3d 225, 237-38 (S.D.N.Y. 2016).

27. In addition, it is a violation of Sections 206(1) and (2) of the Advisers Act to misappropriate fees from investment funds in order to benefit a company insider and to make related misrepresentations and omissions to investors as part of that scheme. *SEC v. Markusen*, 143 F. Supp. 3d 877, 890-92 (D. Minn. 2015).

28. An adviser who commingles his own assets with the assets of an investment fund and misstates the value and performance of fund assets while making withdrawals for his own personal benefit violates Sections 206(1) and (2) of the Advisers Act. *SEC v. Trabulse*, 526 F. Supp. 2d 1008, 1016-17 (N.D. Cal. 2007).

29. Finally, intentionally inflating the value of investor assets and collecting management fees based upon those valuations violates Sections 206(1) and (2) of the Advisers Act. *SEC v. Mannion*, 789 F. Supp. 2d 1321, 1340 (N.D. Ga. 2011).

30. All of these same activities should be deemed violations of Section 206(4) and Rule 206(4)-8, which apply to pooled investment vehicles.

E. Randall Goulding Violated Section 206 of the Advisers Act

31. Randall violated Section 206(1) of the Advisers Act by intentionally or recklessly: (a) commingling and failing to segregate the Funds' assets in separate bank and brokerage accounts; (b) transferring legal title to $4 million of the Funds' assets to the Relief

Defendants, who were members of his family and friends; (c) making undisclosed payments to the Relief Defendants for acting on his own instructions to invest and sell the assets he transferred to them; and (d) failing to disclose to investors the commingling and transfer of the Funds' assets and the payments to the Relief Defendants.

32. Randall also violated Section 206(1) of the Advisers Act by intentionally or recklessly (a) overstating the valuation of Fund assets and investments; (b) assessing fees from the Funds payable to Nutmeg based on overstated asset valuations; (c) misappropriating client and investor assets from Nutmeg's commingled bank accounts for his own personal benefit; and (d) failing to disclose the overstatement of investment assets and fees, and the misappropriation of investor assets.

33. Randall also violated Sections 206(2) and 206(4) of the Advisers Act, and Rule 206(4)-8 thereunder, by failing to employ reasonable care in: (a) the valuation of Fund assets and investments; (b) assessing fees from the Funds payable to Nutmeg based on overstated assets valuations; (c) misappropriating client and investor assets from Nutmeg's commingled bank accounts for his own personal benefit; and (d) failing to disclose to investors the overstatement of investment assets and fees, and the misappropriation of investor assets.

F. Randall's Violations of the Advisers Act Were Material

34. A fact is considered material if there is a substantial likelihood that its disclosure would be viewed by a reasonable investor as significantly altering the total mix of information available. Under this standard, deciding what is material necessarily depends on all relevant circumstances. *Basic, Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988); *SEC v. Bauer*, 723 F.3d 758, 772 (7th Cir. 2013); *DiBella*, 587 F.3d at 565; *Nutmeg Group, LLC*, 162 F. Supp. 3d at 778-79.

35. This Court already has found that Randall's previously-established violations of the Advisers Act were material as a matter of law. *Nutmeg Group, LLC*, 162 F. Supp. 3d at 778-79.

36. In addition, significantly overstating the "value and true ownership" of a fund's investments to investors is a material misrepresentation. *See SEC v. Lauer*, 2008 WL 4372896, at *20 (S.D. Fla. Sept. 24, 2008), *aff'd* 478 Fed. Appx. 550 (11th Cir. 2012); *see also Penn*, 225 F. Supp. 3d at 237-38; *Mannion*, 789 F. Supp. 2d at 1339; *SEC v. Nadel*, 97 F. Supp. 3d 117, 123-24, 126 (E.D.N.Y. 2015).

37. Randall's violations of the Advisers Act were material, in that he: (a) overstated the valuation of Fund assets and investments; (b) assessed fees from the Funds payable to Nutmeg based on overstated asset valuations; (c) misappropriated client and investor assets from Nutmeg's commingled bank accounts for his own personal benefit; and (d) failed to disclose to

investors the overstatement of investment assets and fees, and the misappropriation of investor assets.

G. Randall Should Be Permanently Enjoined

38. The Court has the authority to enter a permanent injunction under Section 209(d) of the Advisers Act, 15 U.S.C. § 80b-9(d). A district court's decision imposing injunctive relief is reviewed under an abuse of discretion standard. *SEC v. Cherif*, 933 F.2d 403, 408 (7th Cir. 1991).

39. Once a defendant has been found to be in violation of the federal securities laws, the SEC need only show a reasonable likelihood of future violations of the law in order to obtain a permanent injunction. *SEC v. Yang*, 795 F.3d 674, 681 (7th Cir. 2015); *SEC v. Holschuh*, 694 F.2d 130, 144-45 (7th Cir. 1982).

40. In predicting the likelihood of future violations, a court must assess the totality of the circumstances surrounding the defendant and his violation, including such factors as the gravity of the harm caused by the offense; the extent of the defendant's participation and his degree of scienter; the isolated or recurrent nature of the infraction and the likelihood that the defendant's customary business activities might again involve him in such transactions; the defendant's recognition of his own culpability; and the sincerity of his assurances against future violations. *Yang*, 795 F.3d at 681; *Holschuh*, 694 F.2d at 144-45.

41. Based on the evidentiary record, and an analysis of the relevant factors, it is reasonably likely that Randall will engage in future violations of the law and should be permanently enjoined. This conclusion is based, *inter alia*, on Randall's complete failure to comply with the Advisers Act, his comingling of investor funds with his personal assets, his implementation of flawed internal systems and methods for valuing and reporting the value of assets under management, his inattention to internal controls, his transfers of millions of dollars out of the Funds to the Relief Defendants, and his failure to disclose any of this to investors.

42. The fact that a defendant currently is not working as an investment adviser does not preclude the Court from imposing injunctive relief. *SEC v. Lipson*, 129 F. Supp. 2d 1148, 1157-59 (N.D. Ill. 2001), *aff'd*, 278 F.3d 656 (7th Cir. 2002) (defendant had training, skill and capital needed to resume his prior position); *SEC v. Koenig*, 532 F. Supp. 2d 987, 993-94 (N.D. Ill. 2007), *aff'd*, 557 F.3d 736 (7th Cir. 2009) (defendant failed to provide sufficient assurances that he would not commit future violations).

43. Accordingly, Randall should be enjoined permanently from violating the provisions of the Advisers Act which are at issue in this case.

H. Disgorgement of Ill-Gotten Gains

44. "Disgorgement is an equitable remedy that takes ill-gotten gains from a wrongdoer so that he does

not profit from his misconduct." *SEC v. Rooney*, 2014 WL 3500301, at *2 (N.D. Ill. 2014) (citing *SEC v. Lipson*, 278 F.3d 656, 662-63 (7th Cir. 2002)). "The simple question is whether the profits, fees and other compensation derived from wrongdoing." *Id.* at *2 (quoting *SEC v. Capital Solutions Monthly Income Fund, LP*, 2014 WL 2922644 (D. Minn. 2014)).

45. To obtain disgorgement, the SEC need only demonstrate that its disgorgement figure is "a reasonable approximation of profits causally connected to the violation." *SEC v. Michel*, 521 F. Supp. 2d 795, 830-31 (N.D. Ill. 2007) (quoting *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989)); *see also SEC v. Black*, 2009 WL 1181480, at *2-3 (N.D. Ill. 2009); *SEC v. DeMaria*, 2013 WL 4506867, at *1 (N.D. Ill. 2013); *SEC v. Benger*, 2015 WL 6859168, at *4 (N.D. Ill. 2015); *SEC v. Randy*, 38 F. Supp. 2d 657, 674 (N.D. Ill. 1999).

46. Disgorgement calculations do not have to be exact. *Koenig*, 532 F. Supp. 2d at 994. Once the SEC offers a reasonable disgorgement calculation, the burden then shifts to the defendant to show that this approximation is inaccurate. *Black*, 2009 WL 1181480, at *2; *Randy*, 38 F. Supp. 2d at 674. Any "ambiguity in the calculation should be resolved against the defrauding party." *Black*, 2009 WL 1181480, at *2; *see also Koenig*, 532 F. Supp. 2d at 994. That is particularly true in a case such as this one in which Randall commingled the money in Nutmeg's accounts making it nearly impossible to trace dollars that belonged to Randall, Nutmeg, or the Funds or their investors at any point in time. In such a case, "the SEC is not required to identify the

misappropriated money." *Black*, 2009 WL 1181480, at *3.

47. Moreover, "where a defendant's record-keeping or lack thereof has so obscured matters that calculating the exact amount of illicit gains cannot be accomplished without incurring inordinate expense, it is well-within the district court's discretion to rule that the amount of disgorgement will be the more readily measurable proceeds received from the unlawful transactions." *SEC v. Calvo*, 378 F.3d 1211, 1217-18 (11th Cir. 2004).

48. "Disgorgement of salaries and other forms of compensation may be an appropriate remedy." *Black*, 2009 WL 1181480, at *7. *See also Order in SEC v. Resources Planning Group, Inc.*, Case No. 1:12-cv-9509 (N.D. Ill. 2014). Moreover, in cases involving investment adviser fraud, money obtained or misappropriated from investors should be considered ill-gotten gains and disgorged accordingly. *See e.g., SEC v. Brown*, 579 F. Supp. 2d 1228, 1245 (D. Minn. 2008), *aff'd* 658 F.3d 858 (8th Cir. 2011) (ordering disgorgement of misappropriated investor funds); *SEC v. Haligiannis*, 470 F. Supp. 2d 373, 384-85 (S.D.N.Y. 2007) (investor funds obtained by adviser subject to disgorgement).

49. It is "irrelevant for disgorgement purposes, how the defendant chose to dispose of the ill-gotten gains; subsequent investment of these funds, payments to charities, and/or payment to co-conspirators are not deductible from the gross profits subject to

disgorgement." *SEC v. Universal Express, Inc.*, 646 F. Supp. 2d 552, 564 (S.D.N.Y. 2009) (internal quotes and citations omitted), *aff'd* 438 Fed. App'x 23 (2d Cir. 2011).

50. In addition, a defendant's financial condition, or the hardship that disgorgement might impose, are not relevant to the Court's calculation of a disgorgement award. *See, e.g., SEC v. Warren*, 534 F.3d 1368, 1370 (11th Cir. 2008); *SEC v. Mohn*, 2005 WL 2179340, at *5 (E.D. Mich. 2005); *SEC v. Grossman*, 1997 WL 231167, at * 10 (S.D.N.Y. 1997) ("[T]here is no legal support for [the defendant's] assertion that his financial hardship precludes the imposition of an order of disgorgement."). A rule to the contrary would be "absurd" as defendants could "escape disgorgement liability by spending their ill-gotten gains." *Warren*, 534 F.3d 1368 at 1370.

51. The evidence in the record supports the conclusion that a reasonable approximation of Randall's ill-gotten gains is contained in PX 43, Schedule 2, which catalogues the money Randall withdrew from Nutmeg's commingled bank accounts over and above what he deposited into those accounts. The information in that schedule is corroborated by the other schedules that comprise PX 43 as well as by Randall's own itemization of money he withdrew from Nutmeg's accounts during the relevant time period (PX 42). As discussed above and as set forth in PX 43, Nutmeg's net direct payments to Randall during the five years preceding the filing of this lawsuit in 2009 total $642,422 more than Randall contributed to Nutmeg.

This is the cleanest calculation of ill-gotten gains during the relevant time period that the SEC submitted and that is in evidence.

52. Randall's argument that he made enough profit on the Morgan Wilbur deals to cover all the money he withdrew from Nutmeg's accounts during the five years before the SEC filed its lawsuit is not credible and is not supported by the evidence. In fact, Randall introduced no evidence to support this argument other than his own say-so. To the same effect is Randall's argument that fees paid to Nutmeg by the Funds were his to withdraw as Nutmeg's sole owner. Randall's systematic overvaluation of the Funds means that the fees paid to Nutmeg by the Funds were inflated. And the pervasive commingling of monies held in Nutmeg's accounts makes it difficult or impossible to identify whether any legitimate management, performance, or other fees received by Nutmeg are the source of the money that Randall withdrew from that account over the years.

53. In similar cases, courts have rejected arguments remarkably like those made by Randall that sound good but are built on air. An investment manager who commingled his own money with investor assets, overstated the value of funds under management, and used the comingled accounts essentially as his own piggy bank was enjoined from continuing to withdraw money for anything other than legitimate and reasonable business expenses in the absence of evidence that the money paid out to the investment manager was his to withdraw and use for his own purposes.

Trabulse, 526 F. Supp. 2d at 1017 ("[defendant] has been utterly unable to show that there ever were 'net profits' of sufficient magnitude [to cover his withdrawals from the comingled funds].").

54. The SEC asks for a disgorgement award of $650,921 based on a calculation of the money paid to Randall or for his benefit during the relevant time period. Plaintiff's Post-Trial Brief [ECF No. 1042] at 18, n.11; Tushaus Declaration [ECF No. 1043] at ¶ 6, 1043-3. For the purpose of this calculation, the SEC used the net rather than the gross amount of Nutmeg's payments to Randall's HELOC. (PX 44). In the Court's view, that is fair because there were transfers to and from Nutmeg involving Randall's HELOC during the relevant time period, so the gross amount paid by Nutmeg to Randall's HELOC would overstate the ultimate benefit to him. (PX 44).

55. The Tushaus Declaration [ECF No. 1043], however, was submitted after trial by the SEC to support its proposed disgorgement award and it is not in evidence. It is, however, a judicial admission by the SEC that a reasonable approximation of Randall's ill-gotten gains for the purpose of a disgorgement award does not exceed $650,921. This admission appears to validate to some extent the Court's reliance on PX 43, Schedule 2 as a reasonable approximation of Randall's ill-gotten gains during the relevant time period in the amount of $642,422.

56. "A judicial admission is a statement, normally in a pleading, that negates a factual claim that

the party making the statement might have made or considered making 'in order to qualify as judicial admissions, an attorney's statements must be deliberate, clear and unambiguous.'" *Robinson v. McNeil Consumer Healthcare*, 615 F.3d 861, 872 (7th Cir. 2010) (citing *MacDonald v. General Motors Corp.*, 110 F.3d 337, 340 (6th Cir. 1997); *Best v. District of Columbia*, 291 U.S. 411, 415–17 (1934); *Oscanyan v. Arms Co.*, 103 U.S. 261, 263–64 (1880); *McCaskill v. SCI Management Corp.*, 298 F.3d 677, 680 (7th Cir. 2002); *Butynski v. Springfield Terminal R. R.*, 592 F.3d 272, 277–78 (1st Cir. 2010)). "Judicial admissions are formal concessions in the pleadings, or stipulations by a party or its counsel, that are binding upon the party making them. They may not be controverted at trial or on appeal. Indeed, they are 'not evidence at all but rather have the effect of withdrawing a fact from contention.'" Michael H. Graham, *Federal Practice and Procedure: Evidence* § 6726 (Interim Edition); *see also* John William Strong, *McCormick on Evidence* § 254, at 142 (1992). A judicial admission is conclusive, unless the court allows it to be withdrawn; ordinary evidentiary admissions, in contrast, may be controverted or explained by the party. *Id.*

57. "Judicial admissions may occur at any point during the litigation process. They may arise during discovery, pleadings, opening statements, direct and cross-examination, as well as closing arguments." *Kohne v. EC*, 818 P.2d 360, 362 (1991) (citing *Lowe v. Kang*, 167 Ill. App. 3d 772 (2d Dist.1988)). The focus is on the statement, not on a certain stage of the

litigation. *Id.*; *see also Postscript Enters. v. City of Bridgeton*, 905 F.2d 223, 227–28 (8th Cir. 1990) (judicial admission in defendant's appellate brief foreclosed necessity of considering certain arguments raised by plaintiff). "Any 'deliberate, clear and unequivocal' statement, either written or oral, made in the course of judicial proceedings qualifies as a judicial admission." *In re Lefkas Gen. Partners No. 1017*, 153 B.R. 804, 807 (N.D. III. 1993) (citing *Ensign v. Pennsylvania*, 227 U.S. 592 (1913); *In re Corland Corp.*, 967 F.2d 1069, 1074 (5th Cir. 1992) (denial of request for admission No. 11 combined with other evidence adduced at trial rendered admission in request for admission No. 9 inconclusive and not binding as a judicial admission); *Wheeler v. John Deere Co.*, 935 F.2d 1090, 1097–99 (10th Cir. 1991) (affirmative, formal, factual statements contained in stipulation agreement entered into prior to first trial constituted judicial admissions binding on the party at the second trial where no manifest injustice resulted and party only complained of tactical disadvantage); *United States v. Cravero*, 530 F.2d 666 (5th Cir. 1976) (defense counsel's statements made at the bench constituted judicial admissions)).

58. Further corroboration of the Court's disgorgement award analysis is contained in Randall's own sworn accounting that lists the payments he says he received from Nutmeg in just 2007 and 2008. (PX 43). Randall says he received payments totaling $620,439 from Nutmeg's comingled accounts. (PX 43). Coupled with certain other uncontroverted payments

Randall received from Nutmeg in 2005 and 2006, that number increases to $743,569. (Finding of Fact 283).

59. Accordingly, based on the evidentiary record, the Court holds that a disgorgement award of $642,422 is a reasonable approximation (and quite possibly at the low end of what is reasonable) of the ill-gotten gains Randall derived from his wrongdoing during the relevant period. Therefore, the Court orders Randall to disgorge $642,422 in ill-gotten gains.

I. Prejudgment Interest

60. The decision to award prejudgment interest rests within the Court's discretion. *See Michel*, 521 F. Supp. 2d at 831. However, "Di an enforcement action brought by the SEC, the disgorgement order should include gains flowing from the illegal conduct, including prejudgment interest, to ensure that the wrongdoer does not make any illicit profits." *Randy*, 38 F. Supp. 2d at 674.

61. Within the Seventh Circuit, the Internal Revenue Service underpayment rate is the proper measurement for determining prejudgment interest. *SEC v. Koenig*, 557 F.3d 736, 744-45 (7th Cir. 2009); *Rooney*, 2014 WL 3500301, at *3.

62. Accordingly, Randall shall pay prejudgment interest on the disgorgement award.

J. Civil Penalties

63. Disgorgement alone "is plainly an insufficient remedy" because it merely requires a wrongdoer to "give back the profits of his wrong." *SEC v. Illarramendi*, 260 F. Supp, 3d 166, 182 (D. Conn. 2017) (quoting *SEC v. Rabinovich & Assoc., LP*, 2008 WL 4937360, at *6 (S.D.N.Y. 2007)).

64. Civil penalties help to achieve the dual goals of punishing the violator and deterring future violations. *See SEC v. Jakubowski*, 1997 WL 598108, *3 (N.D. Ill. 1997), *aff'd* 150 F.3d 675 (7th Cir. 1998); *SEC v. Moran*, 944 F. Supp. 286, 296 (S.D.N.Y. 1996) (quoting H.R. Rep. No.101-616 (1990)).

65. In order to determine whether a penalty should be imposed, and how much a defendant should pay, a court should consider: (1) the egregiousness of a defendant's conduct; (2) the degree of a defendant's scienter; (3) whether the defendant caused substantial losses or created the risk of substantial losses; (4) whether a defendant's conduct was isolated or recurring; and (5) the defendant's current financial condition. *Illarramendi*, 260 F. Supp. 3d at 183; *Haligiannis*, 470 F. Supp. 2d at 385-86.

66. This Court is authorized to impose civil penalties for violations of the Advisers Act, which provides for three separate tiers of penalties. *See* 15 U.S.C. § 80b-9(e)(2)(A)-(C); *Illarramendi*, 260 F. Supp. 3d at 182.

67. A first-tier penalty may be imposed for any violation of the Act. 15 U.S.C. § 80b-9(e)(2)(A). A second-tier penalty can be imposed for a violation involving "fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement." 15 U.S.C. § 80b-9(e)(2)(B). And a third-tier penalty is appropriate for any violation which "directly or indirectly resulted in substantial losses or created a significant risk of losses substantial losses to other persons." 15 U.S.C. § 80b-9(e)(2)(C).

68. For violations of the Advisers Act occurring between February 14, 2005 and March 9, 2009, a court may assess a penalty for "each violation" which may not exceed $6,500 (first-tier), $65,000 (second-tier), or $130,000 (third-tier), *or* the amount of the defendant's gross pecuniary gain. *See* 17 C.F.R.§ 201.1001, Table 1; *Illarramendi*, 260 F. Supp. 3d at 183 (emphasis in original); *see also Benger*, 2015 WL 6859168, at *8-9; *Koenig*, 532 F. Supp. 2d at 994.

69. Because the term "violation" is not defined, court have discretion to calculate penalties in several ways, including: (a) determining that each illegal act constituted a violation; (b) counting separate violations by the number of investors affected by the defendant's conduct; or (c) treating many individual acts as a single plan or scheme. *See Illarramendi*, 260 F. Supp. 3d at 183; *SEC v. Tourre*, 4 F. Supp. 3d 579 (S.D.N.Y. 2014); *SEC v. Milan Group, Inc.*, 124 F. Supp. 3d 21, (D.D.C. 2015); *SEC v. Locke Capital Mgmt., Inc.*, 794 F. Supp. 2d 355, 369 (D.R.I. 2011).

70. Randall shall pay a civil penalty of $642,422, which is equal to the amount of the disgorgement award, The Court believes that a civil penalty of this magnitude serves as an appropriate punishment in this case and will deter future violations of the Advisers Act by others. Randall's conduct in this case was egregious. It went on for many years and caused millions of dollars in losses to investors. Randall is an accountant and a lawyer. He was advised on multiple occasions that at least some of what he was doing was wrong. He blatantly misstated the facts to investors in Nutmeg's Funds and to the SEC. Randall's misconduct as Nutmeg's principal was not an isolated instance; he has run afoul of the law before. A substantial penalty, therefore, is warranted in this case.

71. In its post-trial submissions, the SEC asked for a civil penalty equal to the disgorgement award. The maximum disgorgement award the SEC requested was $1,249,471. But the SEC asked the Court to impose a penalty $1,263,953.94 (an amount larger than the maximum disgorgement award it sought)[10] and to impose a penalty in that amount even if the Court reduced the disgorgement award the SEC requested, as it has done here, by using the net rather than the gross benefit to Randall from Nutmeg's payments to his HELOC. SEC's Post-Trial Brief [ECF No. 1042] at 20. The SEC argued that Randall committed at least ten violations of the Advisers Act so an award of

[10] The Court does not know where the SEC got the $1,263,953.94 figure.

almost $1.3 million is merited ($130,000 maximum civil penalty for each proven violation times 10 violations). SEC's Post-Trial Brief [ECF No. 1042] at 20. The SEC did not itemize each of the ten violations of the Act it says Randall committed for the purpose of calculating a penalty in this case, and the Court does not believe it is its job to identify each of the ten violations the SEC has in mind in this regard.[11] More importantly, in the Court's view, the disgorgement award and the civil penalty assessed against Randall in the same amount, which together total almost $1.3 million even before the assessment of prejudgment interest on the disgorgement award, strikes the right balance in this case.

72. The SEC shall calculate the prejudgment interest Randall must pay on the disgorgement award and file a proposed final judgment order that is consistent with these Findings of Fact and Conclusions of Law via the CM/ECF system by November 8, 2019. Within seven (7) days of the entry of these Findings of Fact and Conclusions of Law, the SEC shall provide to Randall a draft of that order including the prejudgment interest calculation for his review, comment, and approval.

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[11] The Court recognizes it has identified at least eight violations of the Act in Conclusions of Law ¶¶ 31 and 32.

It is so ordered.

/s/ Jeffrey T. Gilbert
Jeffrey T. Gilbert
United States Magistrate Judge

Dated: October 25, 2019

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff, Case No.: 09-CV-1775

v. Magistrate Judge Gilbert

THE NUTMEG GROUP, LLC, ET AL.

Defendants,

FINAL JUDGMENT AS TO DEFENDANT RANDALL GOULDING

(Filed Nov. 12, 2019)

After a bench trial in which this Court issued findings of fact and conclusions of law [Docket No. 1085] in favor of the Plaintiff Securities and Exchange Commission ("SEC") and against Defendant Randall Goulding ("Defendant Goulding" or "Goulding") finding Goulding liable for violating Sections 206(1), 206(2), and 206(4) of the Investment Advisers Act of 1940 ("Advisers Act") [15 U.S.C. §§ 80b-6(1), 80b-6(2), and 80b-6(4)] and Rule 206(4)-8 thereunder [17 C.F.R. § 275.206(4)-8], and after this Court having granted summary judgment against Goulding [Docket No. 795] finding him liable for violating Sections 206(2) and 206(4) of the Advisers Act [15 U.S.C. §§ 80b-6(2) and 80b-6(4)] and Rule 206(4)-8 thereunder [17 C.F.R. § 275.206(4)-8], and the Court having considered the evidence in this matter

and the parties' submissions and arguments regarding appropriate remedies, the Court hereby enters this Final Judgment:

I.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendant Goulding is permanently restrained and enjoined from violating, directly or indirectly, Sections 206(1) and (2) of the Advisers Act [15 U.S.C. §§ 80b-6(1) and 80b-6(2)] by, while acting as an investment adviser and by the use of the means and instrumentalities of interstate commerce and of the mails, employing devices, schemes, and artifices to defraud his clients and prospective clients, or engaging in transactions, practices, and courses of business which operate as a fraud or deceit upon his clients or prospective clients.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Final Judgment by personal service or otherwise: (a) Defendant Goulding's officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Defendant Goulding or with anyone described in (a).

II.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendant Goulding is permanently restrained and enjoined from violating, directly or indirectly, Section 206(4) of the Advisers Act [15 U.S.C. § 80b-6(4)] and Rule 206(4)-8 thereunder [17 C.F.R. § 275.206(4)-8] by, while acting as an investment adviser to a pooled investment vehicle and using the means and instrumentalities of interstate commerce and of the mails, making untrue statements of material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which they were made, not misleading, to an investor or prospective investor in the pooled investment vehicle or otherwise engage in any act, practice, or courses of business that is fraudulent, deceptive, or manipulative with respect to an investor or prospective investor in the pooled investment vehicle.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Final Judgment by personal service or otherwise: (a) Defendant Goulding's officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Defendant Goulding or with anyone described in (a).

III.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant Goulding is liable for disgorgement of $642,422, representing profits gained as a result of Goulding's misappropriation of client assets, together with prejudgment interest thereon in the amount of $583,230 and a civil penalty in the amount of $642,422 pursuant to Section 209(e) of the Advisers Act [15 U.S.C. § 80b-9(e)(2)]. Defendant Goulding shall satisfy this obligation by paying $1,868,074 to the Securities and Exchange Commission within 30 days after entry of this Final Judgment. Defendant Goulding may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request. Payment may also be made directly from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm. Defendant Goulding may also pay by certified check, bank cashier's check, or United States postal money order payable to the Securities and Exchange Commission, which shall be delivered or mailed to

Enterprise Services Center
Accounts Receivable Branch
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

and shall be accompanied by a letter identifying the case title, civil action number, and name of this Court; Randall Goulding as a defendant in this action; and specifying that payment is made pursuant to this Final Judgment. Defendant Goulding shall simultaneously

transmit photocopies of evidence of payment and case identifying information to the Commission's counsel in this action. By making this payment, Defendant Goulding relinquishes all legal and equitable right, title, and interest in such funds and no part of the funds shall be returned to Goulding. The Commission shall send the funds paid pursuant to this Final Judgment to the United States Treasury.

The Commission may enforce the Court's judgment for disgorgement and prejudgment interest by moving for civil contempt and/or through other collection procedures authorized by law at any time after 30 days following entry of this Final Judgment. Defendant Goulding shall pay post judgment interest on any delinquent amounts pursuant to 28 U.S.C. § 1961.

IV.

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

V.

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

SO ORDERED this 12 day of November, 2019.

/s/ Jeffrey T. Gilbert
HON. JEFFREY T. GILBERT
UNITED STATES
MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. RANDALL GOULDING and DAVID GOULDING, Defendants.	No. 09-cv-1775 Jeffrey T. Gilbert Magistrate Judge

MEMORANDUM OPINION AND ORDER

(Filed Mar. 25, 2020)

On October 25, 2019, the Court entered its post-trial Findings of Fact and Conclusions of Law in this case. [ECF No. 1085]. On November 12, 2019, the Court entered Final Judgment as to Defendant Randall Goulding ("Randall") and ordered, among other things, that he disgorge $642,222 in ill-gotten gains as a result of multiple violations of the Investment Advisers Act ("Advisers Act"), 18 U.S.C. § 206. [ECF No. 1094]. On December 10, 2019, Randall filed a Motion for a Revised Finding of Fact, Revised Conclusions of Law, and an Amended Judgement, as well as a Memorandum in Support ("Randall's Motion"). [ECF Nos. 1096, 1097]. Shortly thereafter, Randall *sua sponte* filed a notice withdrawing one of the arguments made in his Motion. [ECF No. 1100]. The Securities and Exchange

Commission ("SEC") responded to Randall's Motion, [ECF No. 1104], and the Motion is now fully briefed.

As explained below, the Court finds that as a matter of procedure, Randall's Motion is not proper under Rule 59(e) because Randall has not articulated any manifest error of law or fact, or cited to any newly discovered evidence, that would have prevented the Court from entering judgment on November 12, 2019. Randall simply rehashes arguments he made in his original post-trial briefs or presents slightly revised arguments not previously made in the way they are being made now but to the same effect as his earlier submissions. Randall's Motion also fails on the merits because his basic premise that he cannot be required to disgorge money Nutmeg paid him that might have come from management fees Nutmeg received from original securities offerings to investors in funds managed by Nutmeg is flawed on the facts and law applicable to this case. Further, Randall's attempt to reopen the record for a limited purpose is unsupportable and the Court again declines to accept his argument that the Supreme Court has foreclosed the SEC from seeking disgorgement of ill-gotten gains in a case like this. As a result, Randall's Motion is denied in its entirety.

I. Federal Rules of Civil Procedure 59(a)(2) and 59(e)

Randall cites Federal Rules of Civil Procedure 59(a)(2) and 59(e) in support of his Motion. [ECF No. 1097] at 5. Rule 59(a)(2) applies to a motion for a new

trial: "[a]fter a nonjury trial, the court may, *on motion for a new trial*, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment." FED.R.CIV.P 59(a)(2) (emphasis added). Rule 59(e), by contrast, simply states that "[a] motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment." FED.R.CIV.P 59(e). As the added emphasis to the language of Rule 59(a)(2) should suggest, Randall's Motion is not well-taken under Rule 59(a)(2). Randall has not requested a new trial, either in form or in substance.[1] The Court therefore will consider the arguments advanced in Randall's Motion, both procedurally and substantively, only under the standard of review provided by Rule 59(e).[2]

A motion to alter or amend judgment under Rule 59(e) asks the Court to reconsider matters "properly encompassed in a decision on the merits." *Osterneck v. Ernst & Whitney*, 489 U.S. 169, 174 (1989). A party seeking an altered or amended judgment must "clearly establish" that the court committed a manifest error of law or fact or that newly discovered evidence precluded entry of judgment. *Harrington v. City of Chi.*, 433 F.3d 542, 546 (7th Cir. 2006) (citing *Bordelon v. Chicago Sch. Reform Bd. of Trs.*, 233 F.3d 524, 529 (7th Cir. 2000)). Manifest error is more than mere disappointment of

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[1] Randall specifically disclaims any argument that the Court should reopen the judgment against him. [ECF No. 1097] at 6-7.

[2] The Court notes that Randall does not contest this point, as raised by the SEC, in his Reply. [ECF No. 1110].

the losing party: it is the "wholesale disregard, misapplication, or failure to recognize controlling precedent." *Oto v. Metro. Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000) (quoting *Sedrak v. Callahan*, 987 F. Supp. 1063, 1069 (N.D. Ill. 1997)). Newly discovered evidence is limited to evidence that, even with reasonable diligence, could not have been discovered and produced prior to the judgment. *Caisse Nationale de Credit Agricole v. CBI Industries, Inc.*, 90 F.3d 1264, 1269 (7th Cir. 1996).

A party has a heavy burden to show that a court should reverse its prior judgment. *Scott v. Bender*, 948 F.Supp.2d 859, 865 (N.D. Ill. 2013). Motions pursuant to Rule 59(e) are granted only in rare circumstances, as court rulings "are not intended as mere first drafts, subject to revision and reconsideration at a litigant's pleasure." *Quaker Alloy Casting Co. v. Gulfco Industries, Inc.*, 123 F.R.D. 282, 288 (N.D. Ill. 1988). Nor does Rule 59(e) allow parties to relitigate previously rejected arguments or argue "matters that could have been heard during the pendency of the previous motion." *Caisse Nationale de Credit Agricole*, 90 F.3d at 1270; *see also*, *Brown v. Univ. of Illinois*, 2014 WL 1477412, at *1 (N.D. Ill. 2014) ("Plaintiff *cannot* seek to relitigate his disparate pay claim by *now* alleging a different theory for the same harm.") (emphasis original). Rather, motions for an altered or amended judgment are reserved for circumstances where the moving party has shown "good reason" to set the judgment aside in the interest of justice. *Hecker v. Deere & Co.*, 556 F.3d

575 (7th Cir. 2009). As discussed below, Randall has not done so here.

II. Procedurally, Randall Merely Rehashes Previously Rejected Arguments or Makes Those Same Arguments in a Slightly Different Way, and He Therefore Fails to Demonstrate "Good Reason" to Set Aside the Court's Judgment Under Rule 59(e)

Randall's Motion raises three issues[3] with the Court's Findings of Fact and Conclusions of Law. First, Randall urges the Court to conclude that because the management fees Nutmeg received from money it raised from investors in its investment funds was not tainted by any fraud in connection with those securities offerings and, in total, those management fees exceed the money or benefits the Court concluded Randall received from Nutmeg as ill-gotten gains, Randall cannot be required to disgorge any amount of money in this case. In other words, Randall's argument seems to be that since money is fungible and there was enough "clean" money in Nutmeg's coffers at some point in time to cover the total amount the Court has ordered him to disgorge, Randall is entitled to keep everything he was paid by Nutmeg and should disgorge nothing despite his violations of the Advisers Act. [ECF No.

[3] Randall withdrew a fourth argument, [ECF No. 1097] at 15-17, disputing whether he received any "ill-gotten gains" at all from Nutmeg based on his interpretation of PX 43. [ECF No. 1100].

1097] at 10-15. Second, Randall asks the Court to reopen the evidence so that two documents – PX 68 and Nutmeg's Statement from LaSalle Bank – may be added to the trial record, presumably pursuant to Rule 59(a)(2). [ECF No. 1097] at 17. Finally, Randall argues that the Supreme Court's decision in *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), and grant of certiorari in *SEC v. Liu*, 754 Fed. Appx. 505 (9th Cir. 2018), should cause the Court to hold that disgorgement of ill-gotten gains is not a remedy available to the SEC in this case.

None of Randall's arguments demonstrate any mistake of law or fact, or present any newly discovered evidence, that would entitle him to an altered or amended judgment under Rule 59(e). Rather, Randall simply rehashes arguments that were previously raised and rejected at or after trial, or he repackages those arguments in slightly different wrapping paper, in an effort to convince the Court now to rule differently than it did earlier. In either case, the result is the same; Randall's Motion is not well-taken. *Caisse Nationale de Credit Agricole*, 90 F.3d at 1270 (Rule 59(e) does not permit parties to argue "matters that could have been heard during the pendency of the previous motion"); *Brown*, 2014 WL 1477412, at *1.

Randall argued at trial and in his original post-trial briefs that Nutmeg had enough money untainted by any wrongdoing to cover distributions it made to him or benefits it provided to him so that he received no ill-gotten gains. Randall's Second Amended Post-Trial Brief [ECF No. 1048] at 13-15; Randall's Post-Trial Reply [ECF No. 105 8] at 10-12. At that time,

Randall focused primarily on money he says was his own personal property from the so-called Morgan Wilbur deals that was deposited into Nutmeg's commingled accounts. But he also referenced money Nutmeg received in performance and management fees that he said was untainted by any wrongdoing and, therefore, was properly paid to him by Nutmeg. *Id.* Randall specifically mentioned management fees Nutmeg received from Mercury Fund offerings, [ECF No. 1058] at 12, an argument he repeats in his current Motion. While Randall earlier argued the Mercury management fees amounted to $369,002, based on less than all the securities offerings he focuses on in his current Motion, [ECF No. 1058] at 13, he now pegs that number at $568,139. [ECF No. 1097] at 8. Together with other management fees he did not focus on in his original post-trial briefs, Randall now says the total amount of management fees Nutmeg received was $869,749.99, more than sufficient to cover the $642,422 he was required to disgorge. [ECF No. 1097] at 6. The Court previously rejected this argument, if not expressly, then certainly by implication.

Randall also argued previously that disgorgement is not an available remedy in SEC proceedings like this one after the Supreme Court's decision in *Kokesh*. Randall's Second Amended Post-Trial Brief [ECF No. 1048] at 27. Similarly, the Court implicitly rejected that argument, made in the last paragraph of Randall's post-trial brief and not at all in his post-trial reply brief, with its detailed ruling on why disgorgement is an

appropriate remedy here. Conclusions of Law [ECF No. 1085] at ¶¶ 44-59.

Randall's current Motion reflects nothing more than mere "disappointment" that the Court did not agree with him, particularly regarding the amount of money the Court ordered him to disgorge as ill-gotten gains. That is not enough to establish a "wholesale disregard, misapplication, or failure to recognize controlling precedent." *Oto*, 224 F.3d at 606. The Court heard, understood, and rejected Randall's post-trial arguments that he now is either raising again or repackaging. Randall therefore cannot meet the requirements he must under Rule 59(e). Accordingly, the Court finds as a threshold matter that Randall has not met his heavy burden of proof under Rule 59(e) and his Motion is denied on procedural grounds.

III. On the Merits, Randall Raises Nothing to Indicate the Court Committed a Manifest Error of Law or Fact

Although Randall's Motion is not procedurally well-taken under Rule 59(e), in the interest of a complete record, the Court will nevertheless briefly address the substance of Randall's arguments. For the reasons discussed below, Randall's Motion also is denied on the merits.

A. Randall is not Entitled to a Set-Off in the Amount of the Management Fees Purportedly Received by Nutmeg and Paid to Him, Nor Are Such Fees Immune From Disgorgement as Part of Randall's Compensation From Nutmeg

As discussed above, Randall argues that Nutmeg received management fees from investors in its investment funds that he says were untainted by any fraud. Because the total amount of those "untainted" fees supposedly paid to Nutmeg exceeds the amount of the ill-gotten gains the Court found Randall had received from Nutmeg, Randall believes he should not be required to disgorge a penny despite his violations of the Advisers Act. This is a classic straw-person argument. The Court found Randall violated Section 206 of the Advisers Act, that his violations were pervasive, ongoing, and material, and therefore he was required to disgorge the profits, fees, and other compensation he received from Nutmeg as a result of his wrongdoing. Conclusions of Law [ECF No. 1085] at ¶¶ 31-59.

In its Conclusions of Law, the Court found that Randall violated Section 206 of the Advisers Act, [ECF No. 1085] at ¶¶ 31-33, for his conduct related, but not limited, to Nutmeg's unwieldy and flawed valuation system, rampant commingling of assets, assessment of fees based on overstated asset valuations, misappropriation of client and investor assets from Nutmeg's commingled bank accounts, and the dissemination of investor statements with inflated performance values.

The Court further concluded that those violations were material. *Id.* at ¶¶ 34-37. Based on these and other findings, the Court held that "money obtained or misappropriated from investors should be considered ill-gotten gains and disgorged accordingly." Conclusions of Law [ECF No. 1085] at ¶ 48 (citing *SEC v. Brown*, 79 F.Supp.2d 1228, 1245 (D. Minn. 2008)). The Court approximated the amount of these ill-gotten gains paid to Randall or for his benefit to be $642,222 (at the low end). Conclusions of Law [ECF No. 1085] at ¶¶ 45, 46 (citing *SEC v. Michel*, 521 F.Supp.2d 795, 830-31 (N.D. Ill. 2007), and other cases). This approximation is particularly reasonable in a "case such as this one in which Randall commingled the money in Nutmeg's accounts" to such a degree that it was "nearly impossible to trace dollars that belonged to Randall, Nutmeg, or the Funds or their investors at any point in time." Conclusions of Law [ECF No. 1085] at ¶ 46.

Randall's admitted and systematic commingling of Nutmeg's money with Randall's and investors' money makes it impossible to determine definitively the source of any money Nutmeg paid to Randall. It is simply not feasible to determine whether the money that found its way into Randall's pocket came from Nutmeg's receipt of fees as an investment advisor or other money held in Nutmeg's accounts. Randall has not shown and cannot show that the money he was paid by Nutmeg during the relevant time period came from management fees Nutmeg received as opposed to another source. The Court repeatedly emphasized this point in its Findings of Fact and Conclusions of Law,

stating that "the pervasive commingling of monies held in Nutmeg's accounts makes it difficult or impossible to identify whether any legitimate management, performance, or other fees received by Nutmeg are the source of the money that Randall withdrew from that account over the years." Conclusions of Law [ECF No. 1085] at ¶ 52. Indeed, "[i]f there is one thing that is clear in the record, it is that Nutmeg's record keeping and valuation systems, to the extent they existed, were haphazard, cumbersome, not current, and they yielded valuations and other numbers that were inaccurate." Findings of Fact [ECF No. 1085] at ¶ 296. Moreover, "[a]s just one example of the loose link between Nutmeg's books and records and reality, Randall testified that although he calculated the fee that Mercury was to pay Nutmeg in the first quarter of 2008, and it was deducted from the Mercury Fund as an accounting matter, Nutmeg did not actually take that fee and the money stayed in the Nutmeg commingled account. (Tr. 886:17-887:23)." Findings of Fact [ECF No. 1085] at ¶ 287.[4]

Randall's wrongdoing also completely permeated Nutmeg's investment advisory operations for the

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[4] As the Court also explained previously, the SEC does not have to identify the money that was misappropriated with particularity. *SEC v. Black*, 2009 WL 1181480 (N.D. Ill. 2009). Once the SEC puts forth "a reasonable approximation of profits causally connected to the violation," the burden then shifts to Randall to show that approximation is inaccurate. *Id.* at *2-3. Randall has not done so here, and the pervasive commingling of money in Nutmeg's accounts makes it nearly impossible for him to do so. Conclusions of Law [ECF No. 1085] at ¶¶ 45-46.

entire relevant time frame, and as a result, any compensation, money, or other benefit Randall received from Nutmeg during that period was causally connected to his wrongdoing and properly included in the Court's disgorgement calculation. It does not matter whether the money Nutmeg paid to Randall or for his benefit originally came from management fees or some other source. The money was commingled in Nutmeg's accounts and the money Randall pocketed was generated by an investment advisory operation that Randall was operating unlawfully and in complete disregard of relevant legal requirements. These are classic ill-gotten gains in the investment advisory context. *See*, *e.g.*, *SEC v. Trabluse*, 526 F. Supp. 2d 1008 (N.D. Ca. 2007).

Randall's argument that the management fees Nutmeg received (or supposedly received; *see* Findings of Fact [ECF No. 1085] at ¶ 287) from investment fund offerings was essentially free, clean money that he was entitled to withdraw despite his pervasive violations of the Advisers Act finds no support in the case law, or specifically, in the new cases he cites in his Motion. Randall's citation to cases decided under the Securities Act and the Securities Exchange Act, in particular, does not support the relief he seeks here. As this Court previously explained, the requirements for liability under Section 206 of the Advisers Act are "less stringent than the requirements for liability under Section 10(b) [of the Securities Exchange Act] and Section 17(a) of the Securities Act." *SEC v. Nutmeg Group, LLC*, 2016 WL 3023291, at *2 (N.D. Ill. 2016). The Advisers Act

establishes a statutory fiduciary duty for investment advisers. *SEC v. Nutmeg Group, LLC*, 162 F.Supp.3d 754, 778 (N.D. Ill. 2016). Investment advisers must act in their clients' best interests, employ reasonable care to avoid misleading clients, and fully and frankly disclose all material facts. *Id.* Randall violated each and every one of these requirements. There is therefore a direct causal relationship between the money and benefits Randall received from Nutmeg, which the Court has ordered him to disgorge, and Randall's wholesale violations of the Advisers Act.

Moreover, as the SEC correctly points out in response to Randall's Motion, to the extent Randall is arguing that the management fees Nutmeg was paid were not obtained from securities offerings that were tainted by fraud, that is irrelevant. The requirement in Section 10(b) cases that the defendant's fraud must occur "in connection with" a purchase or sale of securities does not apply in Advisers Act cases because that Act is designed to address different conduct and wrongdoing than the Securities Exchange Act. *SEC v. Lauer*, 2008 WL 4372896, at *24 (S.D. Fla. 2008), *aff'd*, 478 F. App'x 550 (11th Cir. 2012). This is not the first time the Court has made this point in this case. *See Nutmeg Group, LLC*, 2016 WL 3023291, at *2. So, Randall's argument that no fraud tainted the investment fund offerings in their inception is of no consequence to whether the Court properly ordered him to disgorge compensation and other benefits he received from Nutmeg during the period he was flagrantly violating the Advisers Act.

Randall's argument also belies the facts and the Court's prior rulings in this case on motions for summary judgment. As this Court explained in ruling on an earlier motion to reconsider filed by Randall, "[a] reasonable investor would have found it important when considering whether to invest in a later-formed fund that Nutmeg and Randall were transferring and commingling the assets of the earlier-formed funds and paying Relief Defendants for accepting those transfers. If a reasonable investor knew about this fraud in the earlier-formed funds, he would have been less likely to decide to invest in a later-formed fund. That means an investment adviser's conduct in the past can be and often is material and must be disclosed to investors who decide to invest after the conduct has occurred." *Nutmeg Group, LLC*, 2016 WL 3023291, at *2.

Plainly put, for all these reasons, the Court disagrees with Randall that there is no causal relationship between his wrongdoing and the money the Court has ordered him to disgorge. The Court also therefore disagrees that the cases Randall cites for the unremarkable proposition that there must be a causal connection between a defendant's wrongful conduct and the amount he is required to disgorge mandate a different result in this case.

Finally, Randall's heavy reliance on *SEC v. Onyx Capital Advisers, LLC*, 2014 WL 354491 (E.D. Mich. 2014), a case brought under the Securities Act, is wholly misplaced. Randall points to the fact that the court in that case ordered a defendant to disgorge

"excess management fees." *Id.* at *3. But the fact that the SEC asked the court in *Onyx Capital* to order disgorgement measured, in part, by the excess management fees paid to one of the defendants in that case, and that the court awarded disgorgement in that amount, does not mean that a disgorgement award in this case must be measured in the same way. Accordingly, Randall's Motion fails substantively on this point.

B. Randall May Not Supplement the Record with PX 68 and Nutmeg's Statement from LaSalle Bank Pursuant to Rule 59(e)

Randall next asks to reopen the proofs, presumably pursuant to Rule 59(a)(2), so that two documents – PX 68 and Nutmeg's Statement from LaSalle Bank – may be added to the trial record.[5] [ECF No. 1097] at 17. However, as noted above, Rule 59(a)(2) requires that a motion for a new trial be filed, something Randall has

[5] The SEC notes that Randall asked to supplement the trial record with the above-described documents in the context of his now-withdrawn argument, and as a result, the SEC considers this argument moot. However, Randall apparently continues to request the Court grant his motion with respect to this issue, which was labeled as Point IV, in his reply brief. [ECF No. 1110] at 10. He further cites to one of the documents he seeks to admit, PX 68, in support of the argument that he is entitled to a set-off based on management fees "earned" through Nutmeg. [ECF No. 1097] at 12. Because it is not clear to the Court whether Randall still wants the documents at issue to be added to the trial record or whether this argument has been withdrawn, in an abundance of caution, the Court addresses this argument on the merits.

chosen not to do. He in fact disclaims any notion that the SEC should not have prevailed on certain issues, stating he is "not looking to overturn that outcome now." [ECF No. 1097] at 7. He merely contests the amount he was ordered to disgorge and, as a separate matter discussed *infra*, whether he should have been ordered to disgorge anything at all given the Supreme Court's decision in *Kokesh*. However, without having moved for new trial, either in form or in substance, Randall cannot invoke the Court's authority to reopen proofs and supplement the trial record with additional testimony or evidence under Rule 59(a)(2). The Court is limited to the authority provided by Rule 59(e), which does not allow the Court to consider evidence or testimony that was, by Randall's own admission here, fully available for use at trial.

The Seventh Circuit has clearly stated that "[a] Rule 59(e) motion cannot be used to present evidence that could and should have been presented prior to the entry of final judgment." *Retired Chicago Police Ass'n v. City of Chicago*, 76 F.3d 856, 867 (7th Cir. 1996). Where a party is made aware that a particular issue will be relevant to its case but fails to produce readily available evidence pertaining to that issue, the party may not introduce the evidence to support a Rule 59(e) motion. *Green v. Whiteco Indus., Inc.*, 17 F.3d 199, 202 n. 5 (7th Cir. 1994). This is precisely what Randall is seeking to do here: introduce documents that both he and the SEC possessed before and during trial simply because he feels disadvantaged by their ultimate exclusion from the trial record. [ECF No. 1097] at 17.

Rather than invoke the standard of review under Rule 59(e), Randall argues that the documents should be admitted because "neither document is prejudicial to the SEC," "the SEC intended to have PX 68 admitted," and the "January 2004 LaSalle statement has been in the SEC's possession at all relevant times." [ECF No. 1097] at 17. Yet this talismanic invocation of legal concepts and phrases – no prejudice to the opposing party, materiality of the documents, and no surprise in their admission – is of no help to Randall under Rule 59(e). Rule 59(e) provides only for the consideration of "newly discovered" evidence, a characterization that neither document meets here. Both documents were indisputably available to Randall prior to the entry of judgment. In fact, Randall actually objected before trial to the admission of PX 68, which was marked by the SEC as a potential trial exhibit. Plaintiff's Trial Exhibits [ECF No. 934] at 32. And the LaSalle Bank statement was not marked as an exhibit by either party, nor was it offered into evidence. Because a "Rule 59(e) motion cannot be used to present evidence that could and should have been presented prior to the entry of final judgment," *In re Prince*, 85 F.3d 314, 324 (7th Cir. 1996), the Court, in the exercise of its discretion, declines to supplement the trial record with PX 68 or the LaSalle Bank Statement. Randall's Motion is therefore denied on this point.

C. Disgorgement Remains an Available Remedy in SEC Proceedings Post-*Kokesh*

The Court has considered Randall's argument regarding the impact of *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), on at least three occasions: at the pre-trial conference, [ECF No. 956] at ¶ 1, in the context of Randall's Trial Memorandum, [ECF No. 982], and as argued in Randall's Second Amended Post-Trial Brief [ECF No. 1048] at 27. The Court repeatedly has declined to accept that argument. The fourth time is not the charm. The Court again declines to adopt Randall's view that the Supreme Court has precluded the SEC from seeking disgorgement in this case or that there is a "high likelihood that *Liu* will be overturned and equitable disgorgement outlawed" based on Randall's reading of whatever tea leaves may underlie the Supreme Court's grant of certiorari in *Liu*. [ECF No. 1097] at 19.

In 2017, the Supreme Court in *Kokesh* addressed whether disgorgement in SEC proceedings was a "penalty" under 28 U.S.C. § 2462 and therefore subject to a five-year statute of limitations. 137 S. Ct. 1635. In concluding that disgorgement was a "penalty" in that context, the Supreme Court explicitly noted that its holding was narrow and limited solely to the statute of limitations in 28 U.S.C. § 2462. *Id.* Indeed, it went further to say that "[n]othing in this opinion should be interpreted as an opinion on whether courts possess authority to order disgorgement in SEC enforcement proceedings or on whether courts have properly

applied disgorgement principles in this context." *Id.* at 1642 n.3. Notwithstanding this footnote, Randall asks this Court to conclude that the Supreme Court was implicitly doing what it explicitly said it was not: eliminating disgorgement as an available remedy in SEC enforcement proceedings.

Every Circuit that has considered whether disgorgement is an available remedy in SEC proceedings after *Kokesh* has declined to overrule decades of precedent allowing such a remedy to the SEC, particularly when the amount ordered disgorged does not exceed the amount of a defendant's profits from his wrongdoing, as is the case here. *SEC v. de Maison*, 2019 WL 4127328, at *1 (2d Cir. 2019); *SEC v. Gentile*, 939 F.3d 549, 562-63 (3d Cir. 2019); *SEC v. Team Res. Inc.*, 2019 WL 5704525 (5th Cir. 2019) ("We must decide whether *Kokesh* necessarily overruled our established precedent recognizing district courts' authority to order disgorgement in SEC enforcement proceedings. It did not. We recognize that the Supreme Court has recently agreed to review a Ninth Circuit decision addressing whether district courts have disgorgement authority after *Kokesh*. Nonetheless, we have traditionally held that even when the Supreme Court has granted certiorari in a relevant case, we will continue to follow binding precedent.") (internal citations and quotations omitted); *United States v. Dyer*, 908 F.3d 995, 1003 (6th Cir. 2018), cert. denied, 139 S. Ct. 1610 (2019); *Fed. Trade Commin v. Credit Bureau Ctr., LLC*, 937 F.3d 764, 793 (7th Cir. 2019); *SEC v. Williky*, 942 F.3d 389 (7th Cir. 2019); *Fed. Trade Commin v. Dantuma*, 748 F.

App'x 735, 737-38 (9th Cir. 2018) ("Contrary to PBS's argument, *Kokesh* has not abrogated this long-standing precedent. The *Kokesh* Court itself expressly restricted its ruling to whether the SEC's power to seek equitable disgorgement was subject to a five-year statute of limitations and specifically stated that "[n]othing in this opinion should be interpreted as an opinion on whether courts possess authority to order disgorgement in SEC enforcement proceedings.") (internal citations and quotations omitted); *SEC v. Weaver*, 773 F. App'x 354, 356-57 (9th Cir. 2019); *SEC v. Kokesh*, 2019 WL 6652003 (10th Cir. 2019); *SEC v. Hall*, 759 F. App'x 877, 882 (11th Cir. 2019).[6]

Nor does the fact that the Supreme Court heard oral argument in *Liu*, the transcript of which the Court has reviewed,[7] change the Court's mind on this point. Even were this Court to attempt to divine the direction of the Supreme Court's eventual ruling from the Justices' questions at oral argument, as Randall proposes it should do, such an endeavor would yield no more than a "best guess" as to where the Supreme Court might land on the issue, assuming it addresses the merits of the issue at all. Given the wealth of precedent in favor of the continued viability of disgorgement as a remedy in SEC proceedings, including within this

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[6] This Court also recently rejected the same argument Randall is making here when it was made by his codefendant, *SEC v. Goulding*, 2020 WL 354454, at *9-10 (N.D. Ill. 2020), and it sees no reason to rule any differently now.

[7] Transcript of Oral Argument, *SEC v. Liu*, (No. 18-1501), https://www.supremecourt.gov/oralarguments/argument_transcripts/2019/18-1501_8n59.pdf (last accessed March 24, 2020).

Circuit, it is more prudent to "continue to follow binding precedent" even when the Supreme Court has granted certiorari in a potentially relevant case. *See*, *e.g.*, *United States v. Islas-Saucedo*, 903 F.3d 512, 521 (5th Cir. 2018).

IV. Conclusion

For all the reasons discussed above, Randall's Motion for a Revised Finding of Fact, Revised Conclusions of Law, and an Amended Judgement [ECF No. 1096] is denied in its entirety.

It is so ordered.

/s/ Jeffrey T. Gilbert
Jeffrey T. Gilbert
United States Magistrate Judge

Dated: March 25, 2020

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

September 7, 2022

Before

FRANK H. EASTERBROOK, *Circuit Judge*

DIANE P. WOOD, *Circuit Judge*

MICHAEL B. BRENNAN, *Circuit Judge*

No. 20-1689

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff-Appellee,

v.

RANDALL S. GOULDING,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 09-cv-1775

Jeffrey T. Gilbert, *Magistrate Judge*.

ORDER

Defendant-Appellant filed a petition for rehearing and rehearing en banc on August 22, 2022. No judge in regular active service has requested a vote on the petition for rehearing en banc, and all the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore **DENIED**.

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

(a) Authority and discretion of Commission to investigate violations

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

regulations under this chapter, or in securing information to serve as a basis for recommending further legislation concerning the matters to which this chapter relates.

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

(b) Attendance of witnesses; production of records

For the purpose of any such investigation, or any other proceeding under this chapter, any member of the Commission or any officer designated by it is empowered to administer oaths and affirmations, subpena

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

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

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

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

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

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

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

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

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

(3) Civil money penalties and authority to seek disgorgement

(A) Authority of Commission

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

(i) impose, upon a proper showing, a civil penalty to be paid by the person who committed such violation; and

(ii) require disgorgement under paragraph (7) of any unjust enrichment by the person who received such unjust enrichment as a result of such violation.

(B) Amount of penalty

(i) First tier

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

(ii) Second tier

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

(iii) Third tier

Notwithstanding clauses (i) and (ii), the amount of a civil penalty imposed under subparagraph (A)(i) for each violation described in that subparagraph shall not exceed the greater of (I) $100,000 for a natural person or $500,000 for any other person, or (II) the gross amount of pecuniary gain to such defendant as a result of the violation, if –

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

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

(C) Procedures for collection

(i) Payment of penalty to treasury

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

(ii) Collection of penalties

If a person upon whom such a penalty is imposed shall fail to pay such penalty within the time prescribed in the court's order, the Commission may refer the

matter to the Attorney General who shall recover such penalty by action in the appropriate United States district court.

(iii) Remedy not exclusive

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

(iv) Jurisdiction and venue

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

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

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

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

Except as otherwise ordered by the court upon motion by the Commission, or, in the case of an administrative action, as otherwise ordered by the Commission, funds disgorged under paragraph (7) as the result of an action brought by the Commission in Federal court, or as a result of any

Commission administrative action, shall not be distributed as payment for attorneys' fees or expenses incurred by private parties seeking distribution of the disgorged funds.

(5) Equitable relief

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

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

(A) In general

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

(B) Definition

For purposes of this paragraph, the term "person participating in an offering of penny stock" includes any person engaging in activities with a broker, dealer, or issuer for purposes of issuing, trading, or inducing or attempting to induce the purchase or sale of,

any penny stock. The Commission may, by rule or regulation, define such term to include other activities, and may, by rule, regulation, or order, exempt any person or class of persons, in whole or in part, conditionally or unconditionally, from inclusion in such term.

(7) Disgorgement

In any action or proceeding brought by the Commission under any provision of the securities laws, the Commission may seek, and any Federal court may order, disgorgement.

(8) Limitations periods

(A) Disgorgement

The Commission may bring a claim for disgorgement under paragraph (7) –

(i) not later than 5 years after the latest date of the violation that gives rise to the action or proceeding in which the Commission seeks the claim occurs; or

(ii) not later than 10 years after the latest date of the violation that gives rise to the action or proceeding in which the Commission seeks the claim if the violation involves conduct that violates –

(I) section 78j(b) of this title;

(II) section 77q(a)(1) of this title;

(III) section 80b-6(1) of this title; or

(IV) any other provision of the securities laws for which scienter must be established.

(B) Equitable remedies

The Commission may seek a claim for any equitable remedy, including for an injunction or for a bar, suspension, or cease and desist order, not later than 10 years after the latest date on which a violation that gives rise to the claim occurs.

(C) Calculation

For the purposes of calculating any limitations period under this paragraph with respect to an action or claim, any time in which the person against which the action or claim, as applicable, is brought is outside of the United States shall not count towards the accrual of that period.

(9) Rule of construction

Nothing in paragraph (7) may be construed as altering any right that any private party may have to maintain a suit for a violation of this chapter.

(e) Mandamus

Upon application of the Commission the district courts of the United States and the United States courts of any territory or other place subject to the jurisdiction of the United States shall have jurisdiction to issue writs of mandamus, injunctions, and orders commanding (1) any person to comply with the provisions of this chapter, the rules, regulations, and orders thereunder,

the rules of a national securities exchange or registered securities association of which such person is a member or person associated with a member, the rules of a registered clearing agency in which such person is a participant, the rules of the Public Company Accounting Oversight Board, of which such person is a registered public accounting firm or a person associated with such a firm, the rules of the Municipal Securities Rulemaking Board, or any undertaking contained in a registration statement as provided in subsection (d) of section 780 of this title, (2) any national securities exchange or registered securities association to enforce compliance by its members and persons associated with its members with the provisions of this chapter, the rules, regulations, and orders thereunder, and the rules of such exchange or association, or (3) any registered clearing agency to enforce compliance by its participants with the provisions of the rules of such clearing agency.

(f) Rules of self-regulatory organizations or Board

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

for the protection of investors, or (2) such action is otherwise necessary or appropriate in the public interest or for the protection of investors.

(g) Consolidation of actions; consent of Commission

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

(h) Access to records

(1) The Right to Financial Privacy Act of 1978 shall apply with respect to the Commission, except as otherwise provided in this subsection.

(2) Notwithstanding section 1105 or 1107 of the Right to Financial Privacy Act of 1978, the Commission may have access to and obtain copies of, or the information contained in financial records of a customer from a financial institution without prior notice to the customer upon an ex parte showing to an appropriate United States district court that the Commission seeks such financial records pursuant to a subpena issued in conformity with the requirements of section 19(b) of the Securities Act of 1933, section 21(b) of the Securities Exchange Act of 1934, section 42(b) of the Investment Company Act of 1940, or section 209(b) of the

Investment Advisers Act of 1940, and that the Commission has reason to believe that –

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

(i) flight from prosecution;

(ii) destruction of or tampering with evidence;

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

(iv) improper conversion of investor assets; or

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

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

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

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

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

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

(i) involve significant financial speculation in securities; or

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

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

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

(B) Extensions of the period of delay of notice provided in subparagraph (A) of up to ninety days each may be granted by the court upon application, but only in accordance with this subsection or section 1 109(a), (b)(1), or (b)(2) of the Right to Financial Privacy Act of 1978.

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

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

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

(6) Repealed. Pub.L. 114-113, Div. O, Title VII, § 708, Dec. 18, 2015, 129 Stat. 3030

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

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

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

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

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

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

representative. The Commission shall take the corrective action that the Office of Personnel Management recommends.

(8) The relief described in paragraphs (7) and (10) shall be the only remedies or sanctions available to a customer for a violation of this subsection, other than paragraph (1), and nothing herein or in the Right to Financial Privacy Act of 1978 shall be deemed to prohibit the use in any investigation or proceeding of financial records, or the information contained therein, obtained by a subpena issued by the Commission. In the case of an unsuccessful action under paragraph (7), the court shall award the costs of the action and attorney's fees to the Commission if the presiding judge or magistrate judge finds that the customer's claims were made in bad faith.

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

(B) The Commission may, without notice to the customer pursuant to section 1112 or the Right to Financial Privacy Act of 1978, transfer financial records or the information contained therein to a State securities

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

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

(11) Notwithstanding the provisions of this subsection, the Commission may obtain financial records from a financial institution or transfer such records in accordance with provisions of the Right to Financial Privacy Act of 1978.

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

existing law. Nothing in this subsection shall entitle a customer to assert any rights of a financial institution.

(13) Unless the context otherwise requires, all terms defined in the Right to Financial Privacy Act of 1978 which are common to this subsection shall have the same meaning as in such Act.

(i) Information to CFTC

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

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, vs. THE NUTMEG GROUP, LLC, et al., Defendants. DAVID GOULDING, et al., Relief Defendants.	)	No. 09 CV 1775 Chicago, Illinois January 23, 2018 9:35 o'clock a.m.

VOLUME 6 - A
TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE
MAGISTRATE JEFFREY T. GILBERT

For the Plaintiff: U.S. SECURITIES & EXCHANGE COMMISSION
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Audio technician: Patrick Murphy

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* * *

[1144] we discussed how the number of units declined when they were at liquidations.

In Exhibit 25, I see no liquidations during the time period that the statements cover, but there were changes in the number of units held by that investor.

Q. Well, you see that there is a liquidation in – that's correct. Okay.

In MiniFund, in Exhibit 25, there is a liquidation on October 31, 2007; isn't that correct?

A. Yes.

Q. And that's the third quarter of 2007; isn't that right?

A. It would be the fourth quarter of 2007.

Q. The beginning of the fourth quarter, end of the third quarter; isn't that correct?

A. It would have occurred in the fourth quarter of 2007.

Q. Thank you.

Now, on this summary schedule, you show that there was a total – the summary schedule that's been admitted as PX43, you see that you show a total benefit of $2.5 million and change to Randall Goulding; isn't that correct?

A. Yes.

Q. Okay. Now, did you ever yourself conduct any analysis of what Mercury was entitled to receive under its agreements with the various investment funds?

A. No.

[1145] Q. Okay. So you yourself – you don't have any view one way or another as to whether the amount that Nutmeg was entitled to receive under its agreements with the investment funds was more or less than $2.5 million?

A. I do not have an opinion.

Q. Okay. Now, did you – do you know who owned Mercury? I'm sorry.

Do you know who owned Nutmeg?

A. I believe Randall Goulding owned Nutmeg.

Q. Okay. And was it your assumption that Randall Goulding owned the entirety of Nutmeg?

A. Yes. I'm trying to recall from his deposition if there was maybe one unit held by his wife, but it was at least 99 percent owned by Mr. Goulding.

Q. Okay. But, in any event, it's correct that Mr. Goulding would be entitled to distributions equivalent to the – most of the profit earned by Nutmeg; isn't that right?

A. It would go back to the capital account.

Q. I'm not talking about capital account.

A. But that is part of the capital account because you would have to take into account his contributions and withdrawals and then any net income or loss, and then you come with an ending number. That ending number, he could take a hundred percent of that every year, he could take zero. That's his capital balance, but it also includes any contributions or [1146] distributions during that year.

Q. Okay. I'm asking a far simpler question.

Just as a general matter, if a limited liability company, such as Nutmeg, is owned by a single individual and has profits over and above its expenses, isn't the owner of that limited liability entitled to take those profits?

A. It's the owner of the company. They can take profits.

Q. Okay. And that profit he takes is considered income for tax purposes, right?

A. I'm not a tax expert.

Q. Okay. But –

A. I don't know how he reported it on his personal tax return.

Q. That's not the question.

But as a general matter, if there is revenue in excess of expenses and it's distributed to a partner or an owner, that is – whether it's technically income or not, it's something similar to income?

A. Yes –

Q. He has personal –

A. – from my standard.

Q. He has personal ownership of it, and he can do with it what he wants?

A. But if there were actual distributions made to the owner of the company, it would somehow be reported on that member's

* * *

TRIAL EXHIBIT PX43

Summary Schedule of Benefit to Randall S. Goulding*	
Payments from The Nutmeg Group to the Law Office of Randall S Goulding	$ 541,238
Payments from the Law Office of Randall S Goulding to The Nutmeg Group	256,123
Net benefit to the Law Office of Randall S Goulding	285,115
Payments from The Nutmeg Group to Randall S Goulding	$ 4,152,330
Payments from Randall S Goulding to The Nutmeg Group	2,762,272
Net benefit to Randall S Goulding	1,390,058
Payments from Financial Alchemy to Randall S Goulding	$ 27,000
Payments from Randall S Goulding to Financialy Alchemy	29,140
Net benefit to Randall S Goulding	(2,140)

Payments from the Funds to Randall S Goulding	$ 15,371
Payments from Randall S Goulding to the Funds	8,000
Net benefit to Randall S Goulding	7,371
Payments from The Nutmeg Group to Randall S Goulding HELOC	$ 663,828
Payments from The Nutmeg Group for Randall S Goulding personal expenses	67,181
Payments from The Nutmeg Group to Randall S Goulding credit cards	104,262
Payments from The Nutmeg Group to the Nutmeg Group credit cards for non-business expenses	56,320
Net benefit to Randall S Goulding	891,591
Total Benefit to Randall S Goulding	$ 2,571,995
(See Attached Schedules 1 through 5(a)-(d) for supporting details and dates)	

* * *

2-Schedule of Nutmeg Payments to/from Randall S. Goulding			
DATE	**PAYMENTS FROM NUTMEG TO RSG**	**PAYMENTS FROM RSG TO NUTMEG**	**DESCRIP-TION**
10/1/2003	$ 25,000.00		NUTMEG GROUP LASALLE ACCT 6182
10/10/2003	$ 12,000.00		NUTMEG GROUP LASALLE ACCT 6182
10/15/2003	$ 9,000.00		NUTMEG GROUP LASALLE ACCT 6182
10/30/2003		$ 1,000.00	NUTMEG GROUP LASALLE ACCT 6182
11/10/2003		$ 1,000.00	NUTMEG GROUP LASALLE ACCT 6182
12/3/2003		$ 400.00	NUTMEG GROUP LASALLE ACCT 6182

1/23/2004	$ 352,018.76		NUTMEG GROUP LASALLE ACCT 6182
1/30/2004	$ 352,018.76		NUTMEG GROUP LASALLE ACCT 6182
3/11/2004	$ 300.00		NUTMEG GROUP LASALLE ACCT 6182
4/1/2004	$ 70,000.00		NUTMEG GROUP LASALLE ACCT 6182
4/6/2004	$ 27,084.02		NUTMEG GROUP LASALLE ACCT 6182
4/6/2004	$ 180,000.00		NUTMEG GROUP LASALLE ACCT 6182
5/13/2004		$ 134,000.00	NUTMEG GROUP LASALLE ACCT 6182
5/20/2004		$ 380,000.00	GROUP LASALLE ACCT 6182 'NUTMEG

6/21/2004	$ 1,585.65		NUTMEG GROUP LASALLE ACCT 6182
6/23/2004	$ 124,000.00		NUTMEG GROUP LASALLE ACCT 6182
7/9/2004		$ 600.00	NUTMEG GROUP LASALLE ACCT 7723
7/23/2004	$ 9,950.38		NUTMEG GROUP LASALLE ACCT 6182
7/28/2004		$ 500.00	NUTMEG GROUP LASALLE ACCT 7723
8/2/2004		$ 10,000.00	NUTMEG GROUP LASALLE ACCT 6182
8/2/2004		$ 200.00	NUTMEG GROUP LASALLE ACCT 7723
8/2/2004		$ 40,000.00	NUTMEG GROUP LASALLE ACCT 6182

8/16/2004		$ 66,000.00	NUTMEG GROUP LASALLE ACCT 6182
8/16/2004		$ 91,467.57	NUTMEG GROUP LASALLE ACCT 6182
8/20/2004	$ 15,000.00		NUTMEG GROUP LASALLE ACCT 6182
8/30/2004		$ 1,500.00	NUTMEG GROUP LASALLE ACCT 7723
9/3/2004	$ 80,000.00		NUTMEG GROUP LASALLE ACCT 6182
9/7/2004	$ 6,500.00		NUTMEG GROUP LASALLE ACCT 6182
9/7/2004	$ 73.77		NUTMEG GROUP LASALLE ACCT 7723
9/17/2004	$ 80,000.00		NUTMEG GROUP LASALLE ACCT 6182

10/5/2004		$ 1,200.00	NUTMEG GROUP LASALLE ACCT 7723
10/6/2004		$ 40,000.00	NUTMEG GROUP LASALLE ACCT 6182
10/15/2004	$ 150,000.00		NUTMEG GROUP LASALLE ACCT 6182
10/29/2004		$ 1,500.00	NUTMEG GROUP LASALLE ACCT 7723
11/1/2004	$ 10,000.00		NUTMEG GROUP LASALLE ACCT 6182
11/3/2004	$ 440,000.00		NUTMEG GROUP LASALLE ACCT 6182
11/9/2004	$ 10,000.00		NUTMEG GROUP LASALLE ACCT 6182
11/10/2004	$ 160,000.00		NUTMEG GROUP LASALLE ACCT 6182

11/18/2004	$ 10,000.00		NUTMEG GROUP LASALLE ACCT 6182
11/30/2004	$ 7,500.00		NUTMEG GROUP LASALLE ACCT 6182
12/15/2004		$ 185,607.05	NUTMEG GROUP LASALLE ACCT 6182
1/28/2005		$ 1,400.00	NUTMEG GROUP LASALLE ACCT 7723
2/8/2005		$ 40,000.00	NUTMEG GROUP LASALLE ACCT 6182
2/11/2005		$ 5,000.00	NUTMEG GROUP LASALLE ACCT 6182
3/2/2005		$ 1,476.36	NUTMEG GROUP LASALLE ACCT 7723
3/11/2005	$ 5,000.00		NUTMEG GROUP LASALLE ACCT 6182

3/28/2005	$ 250,000.00		NUTMEG GROUP LASALLE ACCT 6182
3/31/2005	$ 10,000.00		NUTMEG GROUP LASALLE ACCT 6182
4/4/2005	$ 40,000.00		NUTMEG GROUP LASALLE ACCT 6182
4/5/2005		$ 1278.50	NUTMEG GROUP LASALLE ACCT 7723
4/7/2005	$ 15,000.00		NUTMEG GROUP LASALLE ACCT 6182
4/8/2005	$ 5,000.00		NUTMEG GROUP LASALLE ACCT 6182
4/11/2005		$ 170,000.00	NUTMEG GROUP LASALLE ACCT 6182
4/13/2005		$ 30,000.00	NUTMEG GROUP LASALLE ACCT 6182

4/18/2005	$ 55,000.00		NUTMEG GROUP LASALLE ACCT 6182
4/18/2005		$ 55,000.00	NUTMEG GROUP LASALLE ACCT 6182
4/27/2005	$ 250,000.00		NUTMEG GROUP LASALLE ACCT 6182
4/28/2005	$ 6,000.00		NUTMEG GROUP LASALLE ACCT 6182
4/28/2005	$ 100,000.00		NUTMEG GROUP LASALLE ACCT 6182
4/29/2005		$ 35,000.00	NUTMEG GROUP LASALLE ACCT 6182
5/4/2005	$ 7,000.00		NUTMEG GROUP LASALLE ACCT 6182
5/4/2005		$ 80,000.00	NUTMEG GROUP LASALLE ACCT 6182

5/6/2005		$ 25,000.00	NUTMEG GROUP LASALLE ACCT 6182
5/11/2005		$ 1,342.94	NUTMEG GROUP LASALLE ACCT 7723
5/11/2005		$ 10,000.00	NUTMEG GROUP LASALLE ACCT 6182
5/12/2005		$ 110,000.00	NUTMEG GROUP LASALLE ACCT 6182
5/16/2005	$ 3,000.00		NUTMEG GROUP LASALLE ACCT 6182
5/16/2005		$ 50,000.00	NUTMEG GROUP LASALLE ACCT 6182
5/18/2005	$ 3,000.00		NUTMEG GROUP LASALLE ACCT 6182
5/18/2005		$ 20,000.00	NUTMEG GROUP LASALLE ACCT 6182

5/20/2005	$ 2,500.00		NUTMEG GROUP LASALLE ACCT 6182
5/20/2005		$ 60,000.00	NUTMEG GROUP LASALLE ACCT 6182
5/27/2005	$ 159.54		NUTMEG GROUP LASALLE ACCT 6182
5/31/2005	$ 10,000.00		NUTMEG GROUP LASALLE ACCT 6182
6/3/2005	$ 7,000.00		NUTMEG GROUP LASALLE ACCT 6182
6/3/2005		$ 74,000.00	NUTMEG GROUP LASALLE ACCT 6182
6/10/2005	$ 10,000.00		NUTMEG GROUP LASALLE ACCT 6182
6/10/2005		$ 1,201.48	NUTMEG GROUP LASALLE ACCT 7723

6/15/2005		$ 270,000.00	NUTMEG GROUP LASALLE ACCT 6182
6/20/2005		$ 4,000.00	NUTMEG GROUP LASALLE ACCT 6182
6/23/2005	$ 500.00		NUTMEG GROUP LASALLE ACCT 6182
6/24/2005	$ 20,000.00		THE NUT-MEG GROUP - US BANK ACCT 9685
6/29/2005	$ 10,000.00		THE NUT-MEG GROUP - US BANK ACCT 9685
6/30/2005	$ 250.00		NUTMEG GROUP LASALLE ACCT 6182
7/6/2005	$ 200.00		NUTMEG GROUP LASALLE ACCT 6182
7/12/2005	$ 10,000.00		THE NUT-MEG GROUP - US BANK ACCT 9685

7/13/2005	$ 5,000.00		THE NUT-MEG GROUP - US BANK ACCT 9685
7/18/2005	$ 1,000.00		THE NUT-MEG GROUP - US BANK ACCT 9685
7/19/2005	$5,000.00		THE NUT-MEG GROUP - US BANK ACCT 9685
7/20/2005	$ 1,000.00		THE NUT-MEG GROUP - US BANK ACCT 9685
7/28/2005	$ 10,000.00		THE NUT-MEG GROUP - US BANK ACCT 9685
8/1/2005	$ 8,000.00		THE NUT-MEG GROUP - US BANK ACCT 9685
8/2/2005	$ 1,000.00		THE NUT-MEG GROUP - US BANK ACCT 9685

8/4/2005	$ 2,000.00		THE NUT-MEG GROUP - US BANK ACCT 9685
8/9/2005	$ 25,000.00		THE NUT-MEG GROUP - US BANK ACCT 9685
8/18/2005	$ 5,000.00		THE NUT-MEG GROUP - US BANK ACCT 9685
8/23/2005	$ 5,000.00		THE NUT-MEG GROUP - US BANK ACCT 9685
8/24/2005	$ 15,000.00		THE NUT-MEG GROUP - US BANK ACCT 9685
9/2/2005	$ 7,500.00		THE NUT-MEG GROUP - US BANK ACCT 9685
9/9/2005	$ 200,000.00		THE NUT-MEG GROUP - US BANK ACCT 9685

9/9/2005		$ 577.68	THE NUT-MEG GROUP - US BANK ACCT 9685
10/6/2005	$ 5,000.00		THE NUT-MEG GROUP - US BANK ACCT 9685
10/11/2005	$ 5,000.00		THE NUT-MEG GROUP - US BANK ACCT 9685
10/11/2005	$ 40,000.00		THE NUT-MEG GROUP - US BANK ACCT 9685
10/24/2005	$ 6,000.00		THE NUT-MEG GROUP - US BANK ACCT 9685
10/24/2005		$ 1,500.00	THE NUT-MEG GROUP - US BANK ACCT 9685
10/26/2005	$ 15,000.00		THE NUT-MEG GROUP - US BANK ACCT 9685

10/31/2005		$ 265,000.00	THE NUT-MEG GROUP - US BANK ACCT 9685
11/912005	$ 5,000.00		THE NUT-MEG GROUP - US BANK ACCT 9685
11/10/2005		$ 8,000.00	THE NUT-MEG GROUP - US BANK ACCT 9685
11/14/2005	$ 20.00		THE NUT-MEG GROUP - US BANK ACCT 9685
11/15/2005	$ 17,000.00		THE NUT-MEG GROUP - US BANK ACCT 9685
11/15/2005	$ 15.00		THE NUT-MEG GROUP - US BANK ACCT 9685
11/21/2005	$ 2,000.00		THE NUT-MEG GROUP - US BANK ACCT 9685

11/28/2005	$ 12,000.00		THE NUT-MEG GROUP - US BANK ACCT 9685
12/1/2005		$ 8,200.00	THE NUT-MEG GROUP - US BANK ACCT 9685
12/6/2005	$ 2,000.00		THE NUT-MEG GROUP - US BANK ACCT 9685
12/16/2005	$ 25,000.00		THE NUT-MEG GROUP - US BANK ACCT 9685
12/21/2005	$ 3,000.00		THE NUT-MEG GROUP - US BANK ACCT 9885
12/21/2005	$ 1,298.25		THE NUT-MEG GROUP - US BANK ACCT 9685
12/23/2005		$ 13,870.75	THE NUT-MEG GROUP - US BANK ACCT 9685

12/28/2005	$ 15,000.00		THE NUT-MEG GROUP - US BANK ACCT 9685
1/3/2006	$ 35,000.00		THE NUT-MEG GROUP - US BANK ACCT 9685
1/6/2006	$ 7,000.00		THE NUT-MEG GROUP - US BANK ACCT 9685
1/10/2006	$ 2,000.00		THE NUT-MEG GROUP - US BANK ACCT 9685
1/17/2006	$ 5,000.00		THE NUT-MEG GROUP - US BANK ACCT 9685
1/17/2006	$ 2,000.00		THE NUT-MEG GROUP - US BANK ACCT 9685
1/24/2006	$ 2,500.00		THE NUT-MEG GROUP - US BANK ACCT 9685

1/27/2006	$ 30,000.00		THE NUT-MEG GROUP - US BANK ACCT 9685
1/27/2006	$ 15,000.00		THE NUT-MEG GROUP - US BANK ACCT 9685
2/2/2006		$ 275,000.00	THE NUT-MEG GROUP - US BANK ACCT 9685
2/2/2006	$ 280,000.00		THE NUT-MEG GROUP - US BANK ACCT 9685
2/9/2006	$ 5,000.00		THE NUT-MEG GROUP - US BANK ACCT 9685
2/10/2006		$ 200,000.00	THE NUT-MEG GROUP - US BANK ACCT 9685
2/16/2006	$ 10,000.00		THE NUT-MEG GROUP - US BANK ACCT 9685

2/21/2006	$ 10,000.00		THE NUT-MEG GROUP - US BANK ACCT 9685
2/27/2006	$ 10,000.00		THE NUT-MEG GROUP - US BANK ACCT 9685
3/7/2006		$ 7,450.00	THE NUT-MEG GROUP - US BANK ACCT 9685
3/7/2006		$ 3,000.00	THE NUT-MEG GROUP - US BANK ACCT 9685
3/7/2006	$ 10,000.00		THE NUT-MEG GROUP - US BANK ACCT 9685
3/13/2006	$ 135,000.00		THE NUT-MEG GROUP - US BANK ACCT 9685
3/13/2006	$ 33,750.00		THE NUT-MEG GROUP - US BANK ACCT 9685

4/10/2006	$ 10,000.00		THE NUT-MEG GROUP - US BANK ACCT 9685
5/2/2006	$ 25,000.00		THE NUT-MEG GROUP - US BANK ACCT 9685
5/4/2006	$ 82,000.00		THE NUT-MEG GROUP - US BANK ACCT 9685
5/4/2006	$ 10,000.00		THE NUT-MEG GROUP - US BANK ACCT 9685
5/25/2006	$ 10,000.00		THE NUT-MEG GROUP - US BANK ACCT 9685
6/14/2006	$ 5,000.00		THE NUT-MEG GROUP - US BANK ACCT 9685
3/12/2007	$ 1,500.00		THE NUT-MEG GROUP - NATL CITY ACCT

4/23/2007	$ 4,000.00		THE NUT-MEG GROUP - NATL CITY ACCT
5/9/2007	$ 5,000.00		THE NUT-MEG GROUP - NATL CITY ACCT
6/4/2007	$ 2,000.00		THE NUT-MEG GROUP - NATL CITY ACCT
7/5/2007	$ 2,000.00		THE NUT-MEG GROUP - NATL. CITY ACCT
7/11/2007	$ 2,000.00		THE NUT-MEG GROUP - NATL CITY ACCT
8/14/2007	$ 2,000.00		THE NUT-MEG GROUP - NATL CITY ACCT
8/17/2007	$ 3,700.00		THE NUT-MEG GROUP - NATL CITY ACCT

1/2/2009	$ 406.00		THE NUT-MEG GROUP - NATL CITY ACCT
	$ 4,152,330.13	$2,762,272.33	

* * *

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

November 28, 2022

Mr. Bradley Joseph Bondi
Cahill Gordon & Reindel LLP
1990 K Street, N.W.
Suite 950
Washington, DC 20006

Re: Randall S. Goulding
v. Securities and Exchange Commission
Application No. 22A461

Dear Mr. Bondi:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Barrett, who on November 28, 2022, extended the time to and including January 20, 2023.

This letter has been sent to those designated on the attached notification list.

Sincerely,

Scott S. Harris, Clerk

by /s/ Clayton Higgins

Clayton Higgins
Case Analyst

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

NOTIFICATION LIST

Mr. Bradley Joseph Bondi
Cahill Gordon & Reindel LLP
1990 K Street, N.W.
Suite 950
Washington, DC 20006

Mrs. Elizabeth B. Prelogar
Solicitor General
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Clerk
United States Court of Appeals for the Seventh Circuit
219 S. Dearborn Street, Room 2722
Chicago, IL 60604