No. 22-687

In The
Supreme Court of the United States

RANDALL S. GOULDING,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit**

**PETITION FOR REHEARING
SEEKING SUMMARY REVERSAL**

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QUESTIONS PRESENTED

1. Whether the District Court committed clear error in equating net benefits to the Defendant to net unjustified proceeds in determining the disgorgement award, particularly given how easy it is to determine the defendant's income unrelated to any wrongdoing, thus failing to satisfy the net profits calculation required by *Liu v. SEC*, 140 S. Ct. 1936 (2020), when the business was legitimate and engaged in non-fraudulent activities.

2. Whether the District Court committed clear error by awarding the US Treasury disgorgement, rightfully belonging to either the Defendant or the investors, when the government made no attempt in 12 years, to distribute any of the 5 different disgorgement awards to the supposed victims, claiming "The government could pay this money to investors at any time."

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INTRODUCTION

This motion prays the Court will reconsider its denial of certiorari and reverse, perhaps summarily, particularly given the additional unrefuted evidence, principally presented by the SEC:

1. in accordance with the SEC's own exhibits, including its expert witness, Goulding had substantial earnings unrelated to any wrongdoing –
    a. the 4% upfront fee charged to investors in all funds (including $369,002 of management fees (administrative fees) (PX 61 p. 7, 11) and
    b. very profitable investments, Goulding personally financed (including net profit of $2,522,512 in 2005) (PX 61 pp. 30, 31[1]),
2. evidence of a pattern of conduct by the SEC in this case alone, since 2011, of 5 other "disgorgement" assessments which were retained by the government with no attempt to disburse it to investors (ECF No. 314, ECF No.1007, ECF No.1112).

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[1] McGovern Greene's (Greene) report (DX 67, ECF No. 1032-2 Dkt. 307 pp. 13, 22, 23, 43, 44, 93, 98, 103, 105), establishes the same facts, although in far more detail, while identifying and detailing payments from Goulding to Nutmeg made the same day as the investments. Neither the SEC nor its expert permitted credit therefor.

This sets a dangerous precedent for lower court departure from *Liu v. SEC*, 140 S. Ct. 1936 (2020), and prior to *Liu*, it was *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), in which lower courts merely make excuses to not comply, effectively nullifying important U.S. Supreme Court decisions, and long-standing principles of equity. This departure is even more evident given the additional trial evidence identified herein.

WAS IT PUNITIVE OR WAS IT RESTORATIVE?

Besides the equity, there is an inherent wisdom and value to requiring that amounts disgorged be paid to victims and not merely retained by the government. Mandating that the victims receive the awards for their loss preserves the equitable nature of the relief, *i.e.*, providing additional assurance of the existence of wrongfully obtained profits.

This case illustrates that wisdom and value. Disgorgement is supposed to be an equitable remedy to restore the amount wrongfully taken from the victim, who here could only be the investors, not the government. One logical flaw in the SEC's case is the absence of a loss to investors from any wrongdoing. The SEC failed to demonstrate that the investors lost money as a consequence of any wrongdoing. Here, instead, there is no victim of wrongdoing, only a government beneficiary. Such circumstances further assure departure

from each bedrock principle underlying the *Liu* decision –

1. That the amount of any disgorgement must be tethered to wrongdoing – disgorgement awards depriving the defendant of amounts exceeding entitlements[2] are penal in nature; they are not disgorgement;

2. The amount awarded as disgorgement should go to the investors to remedy their losses.

The SEC posits that it could distribute this "at any time." However, this is the sixth "disgorgement" award in this case, starting on June 14, 2011 (ECF No. 314). The next 3 occurred more than 5 years ago, ECF No. 1007: January 16, 2018. The most recent was assessed on April 1, 2020 (ECF No. 1112). Instead of promising to pay these amounts to investors, the government suggests that " . . . it could pay this money to investors at any time." Yet, after more than 12 years, and receiving multiple "disgorgements," it retains the money.

The government's claim at p. 11 that it would be done "if such a distribution is feasible" is equally disingenuous. On July 1, 2011, the Receiver, nominated by the SEC, moved for a court order to distribute $200,000 to the investors,[3] articulating how this would

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[2] "Entitlements" is in reference to amounts earned not associated with and not earned through any wrongdoing.

[3] This was the approximate amount of bounced investor distribution checks issued immediately prior to the filing of this litigation and the freezing of Nutmeg's bank accounts in March 2009.

be disbursed (Dkt. 316). The SEC never objected. The Receiver stated – "the Nutmeg Investment Schedules properly recorded and reflected cash investments, roll-overs and distributions." Since all the money, other than the administrative fee, was invested, 4% of the cash investments would be approximately equal to the administrative fee.

While the motion was later withdrawn, if distribution was not feasible, why was it pursued without objection?

There is no incentive to pay these awards to investors, the identities of which are well-known. Moreover, the investors have no process to enforce such rights. Effectively, the Securities and Exchange Commission (SEC) acknowledges obligations imposed by *Liu*, but does not adhere to its principles.[4] The government should not be able to enrich itself with funds belonging to others – either Goulding or the investors. There was never a claim by any investor of receiving less than that to which they were entitled, at least until the initiation of litigation and freezing of the bank accounts, causing investor distribution checks to bounce.

[4] A defendant's earnings not traceable to a violation, such as a misuse of offering proceeds, are not subject to disgorgement. The SEC proved only record-keeping violations, inadequate segregation of accounts, failure to promptly audit following registration, and in at least one quarter, mis-valued securities by 5.5% or 6%. However, the SEC has not shown that these violations caused investors to lose any money or Goulding to profit as a consequence.

Goulding was not enriched by any violations; the amounts he received were substantially less than his entitlements, less than the amounts earned, all unrelated to any violations. Nor did his earnings diminish payments due to investors. This fundamental premise becomes particularly evident, and telling, when one considers that the SEC never established that investors received less than their entitlements, let alone as a result of payments to Goulding.

THE EXCUSE FOR NOT CONSIDERING ENTITLEMENTS IS A NON SEQUITUR - THE AMOUNTS OF WHICH WERE CLEAR, EASILY CALCULABLE, INDISPUTABLE AND PART OF THE RECORD. MUCH OF GOULDING'S LEGITIMATE EARNINGS ARE ESTABLISHED BY THE SEC'S OWN EXHIBITS. THESE ENTITLEMENTS WERE SIMPLY IGNORED TO CREATE THE APPEARANCE OF A JUSTICIABLE PREMISE TO IMPOSE A PENALTY MASQUERADING AS DISGORGEMENT.

The one-time 4% administrative fee, deducted from the investors' original investment, is easy to calculate. The failure to consider the legitimately earned amounts is merely a nonviable excuse for not complying with *Liu v. SEC*, 140 S. Ct. 1936 (2020).

Nutmeg managed 15 different funds. Each charged a 4% up front administrative fee (District Court opinion ("Opinion") ¶65 pp. 8-9), unaffected by valuations (only one of the 15 funds, the Mercury Fund, earned

valuation-based fees and only for part of its existence[5]). The alleged overvaluation was only 5.5% to 6%, Opinion ¶¶205-6, p. 26. The SEC's expert calculated the Mercury Fund's administrative fees at $369,002 (PX 61, ECF No. 239, pp. 7, 11).[6] This amount was legitimately earned, determined without regard to any violation. This also clearly demonstrates that the administrative fees are readily susceptible to determination.

The SEC failed to prove that Goulding was enriched by any violation; none enhanced his receipts or diminished payments to investors.[7]

Relying on a pre-*Liu v. SEC*, 140 S. Ct. 1936 (2020) burden-shifting framework, the District Court reasoned that this calculation was the "cleanest" way to measure Goulding's allegedly ill-gotten gains because he commingled his funds with Nutmeg's (¶51 of the Opinion). Yet, the other 96% of the funds were properly invested on behalf of the investors. The Seventh Circuit ruled that the total net amount received should be

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[5] Mercury Offering Memorandum.

[6] PX 61 p. 7 states that the management fees/administrative fees of the Mercury Fund alone were $869,750. However, in fairness, this was an error by Crowe. It was only $369,002.

[7] Significantly, neither the District Court nor the Seventh Circuit ever contended that Nutmeg was an entirely fraudulent enterprise. It was not. Nor was it ever contended that the funds were not invested on behalf of the investors, because they were. Instead, the District Court and the Seventh Circuit justified not allowing legitimately earned income, alleging, falsely, that it was difficult to determine, even though the SEC's own witness calculated such fees, unrelated to any wrongdoing.

disgorged, not limiting it to net profits from wrongdoing. Instead, it asserts that Goulding's own actions made it difficult to calculate how much of Nutmeg's money was ill-gotten. *SEC v. Goulding*, 40 F.4th 558, 562 (7th Cir. 2022). And yet, the Seventh Circuit concluded that "Nutmeg was not an entirely fraudulent enterprise because it had 'real assets' and performed legitimate functions". *Id.* at 561-62. Thus, this was not "burden shifting," but entirely ignoring the *Liu* decision. It also ignores the conclusions of SEC's own expert witness, Mari Reidy of Crowe Horwath (Crowe), PX 61, ECF No. 239, identifying $369,002 of such administrative fees of the Mercury Fund alone.

This matter should be remanded to the trial court to see if this so-called "disgorgement" should be returned to Goulding or be paid to the investors/victims.

Also totally divorced from any wrongdoing, was income derived from the Morgan Wilbur transactions. Goulding personally funded more than $535,000 for the very profitable Grifco transaction.

The net profit from the Grifco transaction in 2005 alone, was $1,342,012 ($2,522,512 of sales proceeds in 2005 minus an investment of $1,180,500.00), per PX 61 pp. 30, 31. The initial investment of $400,000 into the Grifco project, occurred on June 15, 2005. On that same day, the SEC's Exhibits, PX 43 and PX 44, and the Greene report (DX 67, ECF No. 1032-2 Dkt. 307, pp. 13, 22, 23, 43, 44, 93, 98, 103, 105), reveal that

Goulding drew down on his HELOC and transferred $270,000 to Nutmeg to fund the initial Grifco investment. PX 43, p. 6. Greene calculated Goulding's portion of the gain from such sales at $797,000 (p. 103), as of December 31, 2005, reconciled with Nutmeg's QuickBooks. DX 67, ECF No. 1032-2 Dkt. 307, pp. 103, 105.

"As of December 31, 2005, Nutmeg enjoyed a positive cash and financial position of $2,090,470 with regard to all of the Morgan Wilbur transactions." (DX 67, ECF No. 1032-2 Dkt. 307 pp. 13, 22, 23, 43, 44, 93, 98, 103, 105) However, the District Court, the SEC and Crowe each ignored the fact that Goulding made substantial financial contributions to these transactions and ignored the timing of those contributions in reaching their conclusion to allow for no entitlements to Goulding.

On October 31, 2005, Goulding transferred an additional $265,000 from his HELOC to Nutmeg's account (PX 44), to fund Nutmeg's next installment of the Grifco investment. DX 67, ECF No. 1032-2 Dkt. 307, Exhibit 14, pp. 98, 103. Mysteriously, none of the SEC's exhibits, including the Crowe reports, identify the specific dates of these investments thus ignoring Goulding's contributions therefor. The far more comprehensive Greene report, by contrast, was able to conclude that "investor monies were not used to fund [the Morgan Wilbur deals]," that substantial profits from the Morgan Wilbur deals rightfully belonged to Goulding. [DX 67, ECF No. 1032 p. 4]. This is consistent with Crowe's conclusions, describing a lack of "uninvested funds." *See* PX 61, ECF No. 239, Exhibit 5, "Note 12

Uninvested Funds . . . the total amount invested [into transactions, exceeded investor] contribution[s] less Nutmeg's fees."[8]

Because neither the District Court nor the Seventh Circuit attempted to apply *Liu*'s net profits analysis, this Court should grant the Petition, summarily reverse the Seventh Circuit's opinion, and remand to the District Court for an opportunity to apply *Liu* in the first instance. *See, e.g.*, *SEC v. Team Res., Inc.*, 815 F. App'x 801 (5th Cir. 2020) (memorandum opinion) ("In this case, the district court did not have the benefit of *Liu*'s guidance when it determined the amount of disgorgement. Application of *Liu* to the facts of this case should be left in the first instance to the district court's sound judgment.").

Clearly, the "disgorgement" was not based on the net profits from Goulding's alleged wrongdoing, but rather on the net cash flows from Nutmeg's bank accounts to Goulding, consistent with PX 43, Schedule 1, specifically ignoring Goulding's contributions to the Grifco transaction, among other entitlements.

This "disgorgement" is Punitive, not restorative in nature.

This case represents a perfect storm and clear departure from *Liu v. SEC*, 140 S. Ct. 1936 (2020),

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[8] This conclusion does not even consider Goulding's personal investments in every fund or account for any of his legitimate earnings thereon.

masquerading as "disgorgement," extracting the entirety of Goulding's net gains, ignoring legitimate earnings and without any attempt, even after 12 years since the first disgorgement awarded in this case, to pay any of it to investors.

REPLENISHING OR RESTORING THE AMOUNT OF DEPRIVATION CONSTITUTES EQUITABLE RELIEF. OTHERWISE, THE ASSESSMENT AND INTEREST THEREON IS PUNITIVE.

At best, readily available information, which the SEC, then the trial court, and then the Seventh Circuit Court of Appeals, chose to ignore, effectively transformed what was referred to as "disgorgement" into a penalty.

This assessment, without considering entitlements, does "not simply restore the status quo," but rather "leaves the defendant worse off," *Kokesh v. SEC* at 1645, thus making this penal in nature, without statutory authority. *Kokesh v. SEC*, 137 S. Ct. 1635 (2017).

Applying long-standing principles of equity, *Liu v. SEC*, 140 S. Ct. 1936, at 1946 (2020) holds that the equitable relief of disgorgement is proper under section 78u(d)(5) only if it: (1) does not exceed the defendant's net profit from wrongdoing, and (2) is awarded for the benefit of investors. A disgorgement award that does not comply with each such bedrock principle is a

"penalty" that is not equitable and cannot be awarded under 15 U.S.C. § 78u(d)(5).

Disgorgement is only available as an "award [of] "equitable relief" under 15 U.S.C. § 78u(d)(5) if it does not exceed the wrongdoer's net profits *from the fraud* and is "awarded for victims." Id. at 1940. "An equitable remedy [is available only if it restores] ill-gotten gains from the wrongdoer to his victims." Id. at 1940. In this case, however, there was never an attempt to demonstrate the existence of *ill-gotten* gains or that any investor received less than the amount due.

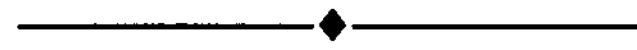
Disgorgement only applies to amounts received as a result of a violation. *Liu*, 140 S. Ct. at 1948, 1950. The SEC may procure disgorgement only upon producing "a reasonable approximation" of a defendant's *ill-gotten* gains. It does not suffice to merely interpose the excuse that it was difficult to do so, as so frequently occurs, including in this case. It must be only the unjust enrichment, not just the enrichment.

Clearly, the Seventh Circuit's claim that "as the wrongdoer Goulding bears the consequence of uncertainty" was nothing but an excuse for the trial court to avoid allowance for Goulding's legitimate income and expenses.

The essence of the *Liu* case, building upon *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), is that disgorgement is to restore the deprived victim of the amounts wrongfully taken. It takes the ill-gotten gain, or wrongfully obtained profits, away from the perpetrator, restoring it to the deprived victims. In this case, by contrast to

cases in which an equitable remedy is appropriate, (a) there was no wrongfully obtained profit demonstrated and (b) there were no victims who were shown to have been deprived of assets and who would be made whole through such a restoration.

By design, the District Court's award did nothing to provide relief to victims, if any, but instead, permitted the government to benefit at the expense of Goulding and/or the investors. This, by its very nature, was not restorative and is not designed to provide equitable relief.



CONCLUSION

This matter should be reversed and remanded to the District Court, including to permit the recognition of entitlements, many of which are demonstrably evident, or to permit a determination as to whether any investors received less than their entitlements. Unfortunately, the SEC has no incentive to determine what amount should be paid to the victims, refraining from doing so in all 5 other occasions over 12 years.

The government cannot enrich itself on the pretense that it constitutes disgorgement or benefit on the pretense of a burden shifting to petitioner for calculating legitimate net profits, claiming that somehow, Goulding's "wrongdoing makes it hard to determine his net unjustified withdrawals," when the entitlements

are evident and known to the SEC, including the 4% administrative fee (Opinion ¶65 pp. 8-9).

Respectfully submitted,

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June 30, 2023

CERTIFICATE OF PETITIONER

Pursuant to Rule 44.2, Petitioner certifies that the Petition for Rehearing is restricted to the grounds specified in the Rule with substantial grounds not previously presented. Petitioner certifies that this Petition for Rehearing is presented in good faith and not for delay.

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