APPENDIX

APPENDIX

TABLE OF CONTENTS

Appendix A Opinion in the United States Court of Appeals for the Second Circuit (June 28, 2023) . . . . App. 1

Appendix B Redetermination of Defendant's Disgorgement Obligation in the United States District Court for the District of Connecticut (June 16, 2021) . . . . App. 53

Appendix C Redetermined Final Amended Judgment in the United States District Court for the District of Connecticut (July 6, 2021). . . . . App. 73

Appendix D Ruling on Plaintiff's Motion for Remedies and Judgment in the United States District Court for the District of Connecticut (September 6, 2018) . . . . App. 75

Appendix E Ruling on All Parties' Motions for Summary Judgment on Liability in the United States District Court for the District of Connecticut (March 29, 2018) . . . . App. 116

Appendix F Order Denying Iftikar A. Ahmed's Petition for Panel Rehearing, or, in the Alternative, for Rehearing *En Banc*, in the United States Court of Appeals for the Second Circuit (October 12, 2023) . . . . App. 203

Appendix G Relevant Provisions . . . . App. 205
Fed. R. App. P. 3(a) . . . . App. 205
Fed. R. App. P. 4(a) . . . . App. 206
28 U.S.C. § 2462 . . . . App. 211
15 U.S.C. § 78u(d)(3)(A) . . . . . . App. 212
15 U.S.C. § 78u(d)(5) . . . . App. 213
15 U.S.C. § 78u(d)(7) . . . . App. 213
15 U.S.C. § 78u(d)(8) . . . . App. 213
Pub. L. No. 116-283, § 6501 . . . App. 215

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Nos. 21-1686, 21-1712

[Filed June 28, 2023]

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,)
Plaintiff-Appellee,)
)
v.)
)
IFTIKAR A. AHMED, SHALINI AHMED, I.I. 1, A MINOR CHILD, BY AND THROUGH HIS NEXT FRIENDS IFTIKAR AND SHALINI AHMED, HIS PARENTS, I.I. 2, A MINOR CHILD, BY AND THROUGH HIS NEXT FRIENDS IFTIKAR AND SHALINI AHMED, HIS PARENTS, I.I. 3, A MINOR CHILD, BY AND THROUGH HIS NEXT FRIENDS IFTIKAR AND SHALINI AHMED, HIS PARENTS, I-CUBED DOMAINS, LLC, SHALINI AHMED 2014 GRANTOR RETAINED ANNUITY TRUST, DIYA HOLDINGS, LLC, DIYA REAL HOLDINGS, LLC,)
Defendants-Appellants,)
)
v.)
)
JED HORWITT,)

Receiver-Appellee.[*])
)

August Term 2022
Argued: January 18, 2023
Decided: June 28, 2023

On Appeal from the United States District Court for the District of Connecticut

Before: WALKER, RAGGI, and PARK, *Circuit Judges*.

Defendant Iftikar Ahmed defrauded his former employer and its investors of some $65 million over the span of a decade. His scheme ended in 2015 when he was indicted on unrelated insider-trading charges and a subsequent internal investigation revealed the full breadth of his wrongdoing. The Securities and Exchange Commission ("SEC") brought this civil enforcement action against Ahmed for various violations of the securities laws.

To secure a potential disgorgement judgment, the SEC joined Ahmed's family and related entities as Relief Defendants, and the district court (Arterton, *J.*) froze Ahmed's and the Relief Defendants' assets. Ahmed is currently a fugitive from justice, apparently residing in India, so the district court excluded him from discovery of the SEC's investigative file. Due to a lack of excess frozen funds, the district court also denied Ahmed access to funds to hire counsel. The district court granted the SEC's motion for summary

[*] The Clerk of Court is respectfully directed to amend the caption accordingly.

judgment and awarded disgorgement, supplemental enrichment (including prejudgment interest and actual gains), and civil penalties against Ahmed. The district court also adopted the SEC's theory that Ahmed is the equitable owner of assets held in the name of the Relief Defendants as "nominees."

On appeal, Ahmed and the Relief Defendants challenge the district court's judgment and calculation of disgorgement. The Relief Defendants also move to stay the liquidation of frozen assets by the Receiver-Appellee pending resolution of these consolidated appeals. We affirm the district court's (1) exclusion of Ahmed from discovery and denial of his access to frozen funds to hire counsel; (2) calculation of Ahmed's disgorgement obligation; and (3) retroactive application of the 2021 amendments to the Securities Exchange Act of 1934 to Ahmed's disgorgement obligation. We conclude, however, that the district court (4) failed to assess whether actual gains on the frozen assets were unduly remote from Ahmed's fraud, and (5) should have applied an asset-by-asset approach to determine whether the Relief Defendants are in fact only nominal owners of their frozen assets.

The district court's order is **AFFIRMED** in part and **VACATED AND REMANDED** in part. In a separate order, we dismiss as moot Defendants' appeals from the district court's liquidation orders. The Relief Defendants' motion for a stay is **DENIED** as moot, and all stays are **VACATED**.

VINCENT LEVY (Gregory Dubinsky, Andrew C. Indorf, *on the brief*), Holwell Shuster &

Goldberg LLP, New York, NY, *for Defendant-Appellant Iftikar A. Ahmed.*

ADAM G. UNIKOWSKY (Zachary C. Schauf, *on the brief*), Jenner & Block LLP, Washington, DC, *for Defendants-Appellants Shalini Ahmed, I.I. 1, a minor child, by and through his next friends Iftikar and Shalini Ahmed, his parents, I.I. 2, a minor child, by and through his next friends Iftikar and Shalini Ahmed, his parents, I.I. 3, a minor child, by and through his next friends Iftikar and Shalini Ahmed, his parents, I-Cubed Domains, LLC, Shalini Ahmed 2014 Grantor Retained Annuity Trust, DIYA Holdings, LLC, DIYA Real Holdings, LLC.*

STEPHEN G. YODER, Senior Litigation Counsel, *for* Dan M. Berkovitz, General Counsel, and John W. Avery, Deputy Solicitor, Securities and Exchange Commission, Washington, DC, *for Plaintiff-Appellee Securities and Exchange Commission.*

John L. Cesaroni, Christopher H. Blau, Stephen M. Kindseth, Zeisler & Zeisler, P.C., Bridgeport, CT, *for Receiver-Appellee Jed Horwitt.*

PARK, *Circuit Judge*:

Defendant Iftikar Ahmed defrauded his former employer and its investors of some $65 million over the span of a decade. His scheme ended in 2015 when he was indicted on unrelated insider-trading charges and

a subsequent internal investigation revealed the full breadth of his wrongdoing. The Securities and Exchange Commission ("SEC") brought this civil enforcement action against Ahmed for various violations of the securities laws.

To secure a potential disgorgement judgment, the SEC joined Ahmed's family and related entities as Relief Defendants, and the district court (Arterton, *J.*) froze Ahmed's and the Relief Defendants' assets. Ahmed is currently a fugitive from justice, apparently residing in India, so the district court excluded him from discovery of the SEC's investigative file. Due to a lack of excess frozen funds, the district court also denied Ahmed access to funds to hire counsel. The district court granted the SEC's motion for summary judgment and awarded disgorgement, supplemental enrichment (including prejudgment interest and actual gains), and civil penalties against Ahmed. The district court also adopted the SEC's theory that Ahmed is the equitable owner of assets held in the name of the Relief Defendants as "nominees."

On appeal, Ahmed and the Relief Defendants challenge the district court's judgment and calculation of disgorgement. The Relief Defendants also move to stay the liquidation of frozen assets by the Receiver-Appellee pending resolution of these consolidated appeals. We affirm the district court's (1) exclusion of Ahmed from discovery and denial of his access to frozen funds to hire counsel; (2) calculation of Ahmed's disgorgement obligation; and (3) retroactive application of the 2021 amendments to the Securities Exchange Act of 1934 to Ahmed's disgorgement obligation. We

conclude, however, that the district court (4) failed to assess whether actual gains on the frozen assets were unduly remote from Ahmed's fraud, and (5) should have applied an asset-by-asset approach to determine whether the Relief Defendants are in fact only nominal owners of their frozen assets.

I. BACKGROUND

A. Factual Background

In 2004, Ahmed joined Oak Management Corporation ("Oak"), a venture-capital firm. Ahmed was responsible for identifying and recommending "portfolio companies" in which Oak might invest and negotiating the terms of those investments.

Over the course of a decade, Ahmed stole over $65 million from Oak and ten portfolio companies, identified as Companies A to J in the pleadings, using the same basic scheme in each fraudulent transaction. First, Ahmed opened bank accounts that he personally controlled ostensibly in the name of Oak and its portfolio companies. Second, he used those accounts to divert monies intended for Oak funds and portfolio companies into bank accounts that he and his wife controlled. To cover his tracks, Ahmed submitted fraudulent invoices and contracts to Oak, misrepresenting things like the size of investments, the currency exchange rates applicable to transactions, and the need to make payments to tax authorities or to reimburse legal and other fees. As one example of Ahmed's fraud, in 2013, he negotiated an Oak entity's investment in Company C that was conditioned on Company C redeeming shares of an entity that,

unbeknownst to Oak, was owned by Ahmed. Ahmed pocketed more than $8 million from this particular scheme.[1]

In April 2015, Ahmed was arrested on criminal charges in an insider-trading case. *See United States v. Kanodia*, No. 15-cr-10131 (D. Mass. Apr. 21, 2015), ECF 19.[2] Following his arrest, Oak conducted an

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[1] This transaction is described more fully in Section II.B.3.a, *infra*.

[2] Ahmed has been involved in at least four other cases relating to his conduct at Oak. First, Ahmed and a codefendant were indicted for the aforementioned insider trading, which remains pending against Ahmed given his fugitive status. *See United States v. Kanodia*, No. 15-cr-10131 (D. Mass.). The First Circuit affirmed the conviction of Ahmed's codefendant, *see United States v. Kanodia*, 943 F.3d 499 (1st Cir. 2019), as well as the district court's order of a default judgment of forfeiture on Ahmed's appearance bond, *see United States v. Ahmed*, Nos. 21-1193, 21-1194, 2022 WL 18717740, at *1 (1st Cir. Nov. 1, 2022). Second, the SEC and Ahmed settled a civil enforcement action based on the same insider-trading conduct in 2019, and the district court entered a corresponding consent judgment. *See* Final J. as to Def. Iftikar Ahmed & Relief Def. Rakitfi Holdings, LLC, *SEC v. Kanodia*, No. 15-cv-13042 (D. Mass. July 8, 2019), ECF 198. Third, Ahmed was indicted in a separate fraud and criminal money-laundering prosecution, which remains pending. *See* Indictment, *United States v. Ahmed*, No. 16-cr-10154 (D. Mass. June 1, 2016), ECF 34. Fourth, Oak's former client NMR E-Tailing LLC sued Oak and Ahmed. *See* Decision After Trial on Damages at 3, *NMR E-Tailing LLC v. Oak Inv. Partners*, No. 656450/2017 (N.Y. Sup. Ct. June 21, 2021), ECF 406. Oak and NMR settled, but Ahmed proceeded to trial on damages (with liability established by default) *pro se* and as a fugitive, resulting in a judgment against him for $7.5 million in compensatory damages, $500,000 in punitive damages, and prejudgment interest. *See id.* at 1-3, 11. On appeal, the trial court's judgment was affirmed. *See* Decision and Order, *NMR E-Tailing*

internal investigation, which revealed that Ahmed had misappropriated approximately $67 million between 2005 and 2015. Oak terminated Ahmed for cause and denied Ahmed "carried interest"—effectively a bonus tied to Oak's performance—based on a provision of its General Partnership Agreement.

B. Procedural Background

1. *Preliminary Injunction*

On May 6, 2015, the SEC filed a civil complaint against Ahmed, alleging violations of the Securities Exchange Act of 1934, the Securities Act of 1933, and the Investment Advisers Act of 1940. The SEC also named the Relief Defendants[3] as the recipients of ill-gotten gains and joint owners of accounts receiving such gains. To secure a potential judgment, the district court granted a temporary restraining order, freezing $55 million in assets. After the SEC moved for a preliminary injunction to continue the TRO, Ahmed fled the United States and remains a fugitive.

After a two-day hearing, the district court granted a preliminary injunction, freezing approximately $65 million for disgorgement, $9.3 million for potential

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LLC v. Oak Inv. Partners, No. 2021-1883 (N.Y. App. Div. 1st Dep't May 25, 2023), ECF 53.

[3] The Relief Defendants are Shalini Ahmed (Ahmed's wife), Ahmed's three minor sons, and several companies held in the Ahmeds' names or for their benefit: Iftikar Ali Ahmed Sole Proprietorship; I-Cubed Domains, LLC; Shalini Ahmed 2014 Grantor Retained Annuity Trust; DIYA Holdings, LLC; and DIYA Real Holdings, LLC.

prejudgment interest, and $44 million for potential civil penalties ($118.3 million in total). We affirmed the order. *See SEC v. I-Cubed Domains, LLC*, 664 F. App'x 53, 55-56 (2d Cir. 2016). The district court later denied Ahmed's request for $6 million from frozen funds to hire counsel. In addition, during discovery, Ahmed requested access to confidential information in the SEC's possession, but the district court denied his request, citing the fugitive-disentitlement doctrine.

2. *Summary Judgment*

Although Ahmed's fugitive status has remained unchanged, the legal landscape has not. Before proceeding to summary judgment, the district court held the case pending the Supreme Court's decision in *Kokesh v. SEC*, 137 S. Ct. 1635 (2017). *Kokesh* held that "[d]isgorgement in the securities-enforcement context is a 'penalty' within the meaning of [28 U.S.C.] § 2462, and so disgorgement actions must be commenced within five years of the date the claim accrues." *Id.* at 1639. *Kokesh* did not address, however, "whether courts possess authority to order disgorgement in SEC enforcement proceedings." *Id.* at 1642 n.3. After the decision, the parties proceeded to summary judgment, and Ahmed moved once more to modify the asset freeze. The district court bifurcated the case into liability and remedy stages, and applying *Kokesh*'s five-year bar, modified the asset freeze to freeze assets up to $89 million.

At the liability stage, the district court entered summary judgment for the SEC. At the remedies stage, the district court awarded a permanent injunction, $41,920,639 in disgorgement, $21 million in civil

penalties, $1,520,953 in prejudgment interest for the period before the asset freeze at the IRS underpayment rate, and "actual returns on the frozen assets" during the pendency of the asset freeze. Special App'x at SPA-98 to -109. The district court rejected Ahmed's argument that *Kokesh* barred disgorgement, and it denied an offset for the "carried interest" that Ahmed forfeited to Oak upon his termination for "Disabling Conduct" within the meaning of his contract with Oak.

The district court also adopted the "nominee" theory as to the assets held in the name of the Relief Defendants. Applying a six-factor test, the district court concluded that these frozen assets were equitably owned by Ahmed and that the Relief Defendants had failed to refute the SEC's supporting evidence. Although the district court permitted liquidation of frozen assets to proceed under the supervision of Receiver-Appellee Jed Horwitt (the "Receiver"), it stayed distribution pending appeal. In a ruling issued in conjunction with an amended final judgment, the district court clarified that the judgment did "not extinguish the SEC's remaining alternative theory of liability against the Relief Defendants" under *SEC v. Cavanagh* (*Cavanagh I*), 155 F.3d 129 (2d Cir. 1998). Special App'x at SPA-162.

3. *Initial Appeal*

After Ahmed filed a notice of appeal, we held the case in abeyance pending the Supreme Court's decision in *Liu v. SEC*, 140 S. Ct. 1936 (2020).[4] Although the

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[4] Ahmed also moved for the release of funds to pay for counsel. A motions panel of this Court construed Ahmed's motion as seeking

Exchange Act did not explicitly authorize a "disgorgement" remedy, *Liu* held that disgorgement is a form of "equitable relief" authorized under 15 U.S.C. § 78u(d)(5)—answering the question left open by *Kokesh*. *Liu*, 140 S. Ct. at 1940.

Shortly after *Liu*, Congress enacted the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 ("NDAA"), Pub. L. No. 116-283, § 6501(a)-(b), 134 Stat. 3388, 4625-26 (codified at 15 U.S.C. § 78u(d)(3), (7)-(8)). The NDAA amended the Exchange Act in three ways relevant here. First, the NDAA explicitly authorized the SEC to pursue disgorgement in civil actions. *See* NDAA § 6501(a), 134 Stat. at 4625-26 (codified at 15 U.S.C. § 78u(d)(7)). Second, the NDAA extended the statute of limitations for "a claim for disgorgement" to "not later than 10 years after the latest date of the violation" for conduct under certain securities laws. *Id.* at 4626 (codified at 15 U.S.C. § 78u(d)(8)). Finally, the NDAA provided that its amendments "shall apply with respect to any action or proceeding that is pending on, or commenced on or after, the date of enactment of this Act." *Id.*

The SEC moved to remand for recalculation of Ahmed's disgorgement obligation under the NDAA. Ahmed opposed, arguing that (1) this Court lacked jurisdiction to remand because the SEC failed to cross-appeal; (2) application of the NDAA would reopen a final judgment; (3) the NDAA lacks a clear retroactivity

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mandamus relief directing the district court to rule on a similar motion then before it and denied Ahmed's motion as moot after the district court denied the motion.

command, and retroactive application would violate the Ex Post Facto Clause; and (4) the NDAA does not apply to disgorgement under 15 U.S.C. § 78u(d)(5). A motions panel granted the SEC's motion and remanded "for a determination of Appellant's disgorgement obligation consistent with § 6501 of the [NDAA], and, if appropriate, entry of an amended judgment." *SEC v. Ahmed*, Nos. 18-2903, 18-2932, 19-102, 19-103, 19-355, 19-2974, 19-3375, 19-3610, 19-3721, 2021 WL 1171712, at *1 (2d Cir. Mar. 11, 2021).

4. *Remand and Liquidation*

On remand, the district court found that the NDAA's ten-year statute of limitations applied and increased the disgorgement amount from $41,920,639 to $64,171,646.14, with $9,755,798.34 in prejudgment interest. The district court also rejected the same arguments Ahmed raised before the motions panel. Ahmed and the Relief Defendants appealed again, giving rise to this action.

The district court also approved the Receiver's proposed liquidation plan, which was divided into two phases ("First Liquidation Order"). Phase 1 would liquidate non-unique assets, and phase 2 would liquidate unique assets as needed to satisfy the judgment. The district court denied the Relief Defendants' motion for a stay pending appeal. Defendants then appealed the First Liquidation Order, which this Court held in abeyance pending resolution of the merits of this appeal.

Phase 1 ended with $118 million in the receivership estate, which was insufficient to secure the total

judgment, then estimated to be in excess of $125 million. The district court approved most of the Receiver's phase 2 plan and rejected the Relief Defendants' motion to stay liquidation of the unique assets pending appeal ("Second Liquidation Order"). Defendants appealed the Second Liquidation Order, with the Relief Defendants moving to stay liquidation of the unique assets. This Court held the appeals of the Second Liquidation Order in abeyance pending our decision in these appeals from the redetermined amended final judgment. While the Relief Defendants' stay motion was pending, the Receiver indicated that he would begin phase 2 by liquidating a MetLife life-insurance policy on December 28, 2022, and listing the Ahmeds' two Park Avenue apartments for sale on May 8, 2023. We granted temporary administrative stays pending our decision on the Relief Defendants' motion for a stay of liquidation.

II. DISCUSSION

Ahmed first argues that summary judgment was improper because he was excluded from discovery and denied access to funds to hire counsel. Ahmed also argues that the district court miscalculated disgorgement by incorrectly approximating net profits and erroneously applying the NDAA. The Relief Defendants raise two additional arguments: first, the district court improperly calculated prejudgment interest and actual gains, and second, it misapplied the "nominee" doctrine. Although we are not persuaded by Ahmed's arguments, we find merit in some of the Relief Defendants' arguments.

A. Summary-Judgment Challenges

Ahmed challenges the district court's summary-judgment order, arguing that the district court erred by limiting his access to discovery and by denying his request to unfreeze assets to hire counsel. Neither argument is persuasive.

1. *Discovery Limitations*

The district court did not abuse its discretion by denying Ahmed extraterritorial access to confidential records in the SEC's possession. Drawing on the fugitive-disentitlement doctrine, the district court reasoned that Ahmed had "removed himself from the jurisdiction of the [district court]," so the district court had "no ability to enforce" an "appropriate protective order limiting his use of the documents produced." Endorsement Order Denying Def.'s Mot. for Full Access to the SEC's Investigative File at 3, *SEC v. Ahmed*, No. 15-cv-675 (D. Conn. Aug. 22, 2016), ECF 286. The district court thus denied Ahmed access to SEC discovery materials. Ahmed argues that this denied him "any practical means of defending himself" in violation of "the adversarial process set forth in the Federal Rules of [Civil] Procedure" and the Due Process Clause. Appellant's Br. at 53, 60-61. We disagree.

Federal Rule of Civil Procedure 26(c)(1) permits a district court to "issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." *See Degen v. United States*, 517 U.S. 820, 826 (1996) (explaining that district courts have broad authority "to manage discovery in a civil suit, including the power to enter protective orders

limiting discovery as the interests of justice require"); *accord Empire Blue Cross & Blue Shield v. Finkelstein*, 111 F.3d 278, 281 (2d Cir. 1997). We review discovery orders for abuse of discretion. *See Lederman v. N.Y.C. Dep't of Parks & Recreation*, 731 F.3d 199, 202 (2d Cir. 2013); *United States v. Technodyne LLC*, 753 F.3d 368, 378 (2d Cir. 2014).

The district court's discovery restrictions here were a reasonable exercise of its broad power to enforce protective orders. "Courts invested with the judicial power of the United States have certain inherent authority to protect their proceedings and judgments in the course of discharging their traditional responsibilities." *Degen*, 517 U.S. at 823. A district court retains "authority to manage discovery," including "limit[ing] discovery in the interests of justice." *Finkelstein*, 111 F.3d at 281; *see also Degen*, 517 U.S. at 827 ("A federal court has at its disposal an array of means to enforce its orders."). The discovery material at issue was subject to a protective order under Rule 26 based on the confidential and sensitive nature of the documents, and the district court determined that the court could not enforce such an order because Ahmed had removed himself from the court's jurisdiction. The district court's limitation of Ahmed's extraterritorial access to the protected materials thus constituted a reasonable exercise of the court's "inherent authority to protect" its own discovery orders to limit Ahmed's access to civil discovery in light of his status as a fugitive. *Degen*, 517 U.S. at 823. Ahmed's proposed alternatives, like monetary sanctions, would not ensure the adequate protection of confidential information in this case.

We affirm the discovery limitations as a reasonable means of enforcing a protective order, so we do not decide whether the fugitive-disentitlement doctrine might apply in this case consistent with due process.[5] *See Wells Fargo Advisors, LLC v. Sappington*, 884 F.3d 392, 396 n.2 (2d Cir. 2018) ("We are free to affirm on any ground that finds support in the record, even if it was not the ground upon which the trial court relied." (cleaned up)).

2. *Denial of Funds to Hire Counsel*

The district court did not abuse its discretion by declining to unfreeze assets for Ahmed to hire counsel. Ahmed argues that the district court "over-froze [his] liquid assets, and thus improperly deprived him of the ability to use *his money* to hire counsel." Appellant's Br. at 61. For the reasons stated *infra*, the district

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[5] Under the fugitive-disentitlement doctrine, "a person who is a fugitive from justice may not use the resources of the civil legal system while disregarding its lawful orders in a related criminal action." *United States v. Eng*, 951 F.2d 461, 464 (2d Cir. 1991), *abrogated on other grounds by Degen*, 517 U.S. 820. A blunt instrument, the fugitive-disentitlement doctrine "forbid[s] *all* participation by the absent claimant." *Degen*, 517 U.S. at 826 (emphasis added). Although we do not decide whether the doctrine applies here, we note that the purposes underlying it are served by the district court's order. Disentitlement is rooted in a court's ability to enforce a "judgment on review," "discourage[] the felony of escape," "encourage[] voluntary surrenders," and "promote[] the efficient, dignified operation of the courts." *Id.* at 824 (cleaned up). Ahmed faces several criminal charges, *see supra* note 2, and granting him full access to discovery could further discourage his voluntary return to the United States and grant him an unfair advantage in those proceedings to the extent they are based on the same or related underlying conduct.

court properly calculated disgorgement, so it did not abuse its discretion by concluding that there were no frozen funds available for Ahmed to hire counsel.[6] It is well-settled that a defendant has no right to use tainted assets for his legal defense. *See Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 626 (1989) ("A defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney."). Moreover, Ahmed has no constitutional right to counsel in this civil enforcement action. *See United States v. Coven*, 662 F.2d 162, 176 (2d Cir. 1981). In any event, the Relief Defendants have hired able counsel who have also represented Ahmed's interests throughout these proceedings.

B. Disgorgement

The district court did not abuse its discretion in calculating disgorgement. First, the district court accurately estimated net profits and reasonably declined to offset Ahmed's forfeited "carried interest." Second, the district court properly gave retroactive effect to the NDAA.

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[6] Our decision to vacate and remand the district court's award of "actual gains" has no bearing on the denial of Ahmed's motion to unfreeze funds for two reasons. First, the "actual gains" calculation is part of the post-judgment liquidation process, whereas Ahmed's motion to unfreeze funds relates to the scope of the preliminary injunction. Second, "actual gains" are calculated based on the growth of disgorged assets regardless of the size of the judgment. So "actual gains" and disgorgement are independent for present purposes.

1. *Legal Standard*

The Exchange Act, as amended, states that "[i]n 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." 15 U.S.C. § 78u(d)(7). "Disgorgement serves to remedy securities law violations by depriving violators of the fruits of their illegal conduct." *SEC v. Contorinis*, 743 F.3d 296, 301 (2d Cir. 2014). We review disgorgement orders for abuse of discretion. *SEC v. Warde*, 151 F.3d 42, 49 (2d Cir. 1998). "We review *de novo* questions of a statute's interpretation and constitutionality." *United States v. al Kassar*, 660 F.3d 108, 129 (2d Cir. 2011).

2. *Equitable Disgorgement After the NDAA*

As a preliminary matter, the parties assume, and we agree, that *Liu*'s equitable limitations on disgorgement survive the NDAA. In *Liu*, the Supreme Court held that although the Exchange Act did not (at the time) explicitly authorize "disgorgement," "equitable relief" under § 78u(d)(5) includes disgorgement. 140 S. Ct. at 1940. The Court thus held that any disgorgement award must be consistent with traditional principles of equity. *See id.* at 1947. Shortly after *Liu*, Congress enacted the NDAA, which specifically added "disgorgement" as a remedy under § 78u(d)(7) while leaving untouched "equitable relief" available via § 78u(d)(5). We read "disgorgement" in

§ 78u(d)(7) to refer to equitable disgorgement as recognized in *Liu*.[7]

First, § 78u(d)(7) authorizes "disgorgement," which we have long understood to refer to "the chancellor's discretion to prevent unjust enrichment" at equity. *SEC v. Commonwealth Chem. Sec., Inc.*, 574 F.2d 90, 95 (2d Cir. 1978); *see* 15 U.S.C. § 78u(d)(3)(A)(ii) (explaining that the SEC may seek and courts have jurisdiction to "require disgorgement . . . of any unjust enrichment by the person who received such unjust enrichment" as a result of violating the Exchange Act). This terminology is "consistent with a remedy rooted in equity, given that 'unjust enrichment' is another term of art—the basis for all restitution, which is often equitable." *Hallam*, 42 F.4th at 340. Indeed, as the Supreme Court has observed, "'statutory reference[s]' to a remedy grounded in equity 'must, absent other indication, be deemed to contain the limitations upon its availability that equity typically imposes.'" *Liu*, 140 S. Ct. at 1947 (alteration in original) (quoting *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 211 n.1 (2002)); *see also Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) ("Congress is understood to legislate against a background of common-law adjudicatory principles."). The NDAA's text evinces no intent to contradict *Liu* or to strip

[7] The Fifth Circuit recently held that § 78u(d)(7) "authorize[s] legal 'disgorgement' apart from the equitable 'disgorgement' permitted by *Liu*" and questioned "whether equitable disgorgement . . . survived the 2021 Exchange Act amendments." *SEC v. Hallam*, 42 F.4th 316, 341, 343 (5th Cir. 2022). We decline to follow the Fifth Circuit's approach.

disgorgement of "limit[s] established by longstanding principles of equity" in favor of an unbounded "legal" form of disgorgement. *Liu*, 140 S. Ct. at 1947. We thus apply "the strong presumption that repeals by implication are disfavored and that Congress will specifically address preexisting law when it wishes to suspend its normal operations in a later statute." *SEC v. Alpine Sec. Corp.*, 982 F.3d 68, 78 (2d Cir. 2020) (brackets omitted) (quoting *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018)).

Second, reading "disgorgement" under § 78u(d)(7) as equitable disgorgement is consistent with the statutory history. Before the NDAA, "Congress did not define what falls under the umbrella of 'equitable relief,'" so "courts . . . had to consider which remedies the SEC may impose as part of its § 78u(d)(5) powers." *Liu*, 140 S. Ct. at 1940. This created some uncertainty about whether, for example, the Exchange Act authorized disgorgement and the applicable statute of limitations. *See, e.g.*, *Kokesh*, 581 U.S. at 461-62 & n.3. The NDAA then clarified some aspects of this uncertainty. The express addition of "disgorgement" as a remedy specified under § 78u(d)(7) is thus best read, not as superfluity, but as a "belt and suspenders" clarification that equitable disgorgement is available under the Exchange Act. Moreover, the authorization of a ten-year statute of limitations under § 78u(d)(8)(A)(ii) is best understood as expressly overruling *Kokesh*'s five-year statute of limitations as to certain securities violations. So we conclude that disgorgement under § 78u(d)(7) must comport with traditional equitable limitations as recognized in *Liu*.

3. *Disgorgement Calculation*

The district court properly calculated Ahmed's disgorgement obligation. Ahmed argues that the district court (1) miscalculated "net profits" from two fraudulent transactions involving Company C ("C1" and "C2") and (2) failed to account for the "carried interest" forfeited to Oak upon his termination for "Disabling Conduct." He further argues that any reduction in the district court's disgorgement award should also reduce the district court's civil penalty. We conclude that both arguments are meritless, so we decline to disturb the district court's rulings as to either disgorgement or civil penalties.

a. Net Profits Calculation

The district court did not abuse its discretion in its calculation of net profits. Disgorgement must "not exceed a wrongdoer's net profits and is awarded for victims," *Liu*, 140 S. Ct. at 1940, "that is, the gain made upon any business or investment, when both the receipts and payments are taken into account," *id.* at 1945 (cleaned up). We have held that the "amount of disgorgement ordered need only be a reasonable approximation of profits causally connected to the violation." *SEC v. Fowler*, 6 F.4th 255, 267 (2d Cir. 2021) (cleaned up).

Here, the district court reasonably approximated net profits based on the difference between the sale and purchase prices involved in the tainted Company C transactions. As to C1, Ahmed—in his capacity as a member of BVI Company's board of directors—"personally negotiated" a $2 million investment in

Company C without BVI Company's knowledge. When the unapproved investment was uncovered, Ahmed "purposefully lied to his fellow BVI Company directors" that the purchase was a "mistake." Special App'x at SPA-35. Ahmed then bought the shares himself, ostensibly to correct for the "mistake," but left them in the BVI Company's name. Ahmed later negotiated another investment by an Oak entity in Company C that was conditioned on Company C paying nearly $11 million to redeem BVI Company's shares—which, unbeknownst to the Oak entity, were owned by Ahmed. Ahmed profited more than $8 million on the sale.

As to C2, Ahmed had invested in Company C via Relief Defendant I-Cubed Domains, LLC, of which Ahmed was founder and sole member, without disclosure to Oak. Ahmed then pitched Oak on a $7.5 million stock-purchase agreement for I-Cubed's Company C shares without disclosing his personal stake, even going so far as to forge the signature of I-Cubed's former manager on the transaction paperwork to conceal his personal interest. Ahmed's fraud may not have driven Company C's entire growth, but it permitted him to realize profits driven by that growth. So it was a reasonable approximation of net profits to take the difference between "gross sales revenues from the sale of Company C shares" and Ahmed's "initial cost of purchasing the Company C shares." *Id.* at SPA-103; *see Fowler*, 6 F.4th at 267.

Ahmed's arguments to the contrary are unavailing. Ahmed argues that, in calculating net profits, the district court should have credited him an offset based on C1 and C2 because there was no evidence that Oak

paid inflated prices as opposed to fair market value. Specifically, as to C1, Ahmed argues that any difference between the purchase and sale prices of Company C stock was based on "an increase in the market price of the shares," not Ahmed's "unlawful activity." Appellant's Br. at 41. As to C2, Ahmed argues that the district court failed to account for the fact that the market value of Company C shares was likely well above the price Oak actually paid.

These arguments fail. Ahmed's misconduct with respect to these transactions was not in misrepresenting the purchase prices but in failing to disclose his conflicts of interest, which violated the Advisers Act. *See* 15 U.S.C. § 80b-6(3). The C1 and C2 transactions were thus entirely tainted, and Ahmed's $14.4 million in profits from the transactions constituted his "net profits from wrongdoing" under *Liu*. *See Contorinis*, 743 F.3d at 301 ("Because disgorgement's underlying purpose is to make lawbreaking unprofitable for the lawbreaker, it satisfies its design when the lawbreaker returns the fruits of his misdeeds, regardless of any other ends it may or may not accomplish.").

Moreover, Ahmed bears the risk of uncertainty affecting the size of disgorgement. "A wrongdoer's unlawful action may create illicit benefits for the wrongdoer that are indirect or intangible. . . . [T]o require precise articulation of such rewards in calculating disgorgement amounts would allow the wrongdoer to benefit from such uncertainty." *Id.* at 306; *see also Fowler*, 6 F.4th at 267 ("If the disgorgement amount is generally reasonable, any risk of uncertainty

about the amount falls on the wrongdoer whose illegal conduct created that uncertainty." (cleaned up)). The fact that Oak, a victim of Ahmed's fraud, might have gotten a "bargain" on the share purchase should not redound to the fraudster's benefit. We thus find no abuse of discretion in the disgorgement calculation.

b. Carried-Interest Offset

Ahmed next argues that the district court should have offset the disgorgement award by the "carried interest" he forfeited to Oak because this forfeiture was "on account of the [unlawful] conduct at issue in this case." Appellant's Br. at 50. We disagree.

Ahmed's General Partnership Agreement with Oak stated that "any Member who is removed by reason of having engaged in Disabling Conduct shall forfeit for no consideration such Member's entire membership interest, Percentage Interest and Capital Account and shall not become, or shall cease to be, as applicable, a Class B member." Special App'x at SPA-120. Part of Ahmed's "membership interest" was a "carried interest" bonus based on "the performance of the Oak Funds." *Id.* at SPA-120 n.24. So Ahmed's forfeited "carried interest" is not an ill-gotten gain from his fraud but rather was his *expectancy* to a portion of Oak's profits conferred by the General Partnership Agreement. But disgorgement does not protect the wrongdoer's expectancy interests; it attempts to "restor[e] the status quo" by "tak[ing] money out of the wrongdoer's hands." *Liu*, 140 S. Ct. at 1943 (cleaned up). Equity does not require an offset for the carried interest, which was contingent on Ahmed's relationship with Oak and was not derived directly from his fraud.

Ahmed's argument to the contrary is unpersuasive. He contends that the Court should follow the approach of *SEC v. Penn*, in which a district court ordered an evidentiary hearing to determine "the value of [the defendant's] forfeited interest in the fund" of his former employer to offset his disgorgement obligation. No. 14-cv-581, 2017 WL 5515855, at *3-4 (S.D.N.Y. Aug. 22, 2017). But in that case, the "SEC d[id] not dispute that Penn's carried interest in the Fund . . . could offset his disgorgement obligation," in accordance with the terms of Penn's plea agreement. *Id.* at *4. *Penn* did not conclude that forfeited carried interest generally should offset a disgorgement obligation.[8]

We thus affirm the district court's calculation of Ahmed's disgorgement obligation and decline to revisit its calculation of civil penalties.

4. *Application of the NDAA*

The district court did not err by applying the NDAA's expanded statute of limitations to Ahmed's disgorgement obligation. Ahmed argues that the district court's application of the NDAA was incorrect for four reasons: (1) the SEC failed to cross-appeal; (2) the district court reopened a final judgment; (3) the NDAA does not apply retroactively; and (4) application of the NDAA violates the Ex Post Facto Clause. Although the SEC argues that Ahmed's first three

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[8] Ahmed also requests that the district court on remand offset his disgorgement obligation by the amount of civil judgments obtained against him by his victims. This could be appropriate if Ahmed were to prove that he paid restitution. *See, e.g.*, *SEC v. Palmisano*, 135 F.3d 860, 863-64 (2d Cir. 1998).

arguments are barred by the law-of-the-case doctrine, we do not decide whether that doctrine applies because all four of Ahmed's arguments are without merit.

a. Cross-Appeal Rule

The SEC's failure to cross-appeal did not prevent the district court from recalculating disgorgement under the NDAA. Under the cross-appeal rule, "an appellate court may not alter a judgment to benefit a nonappealing party." *Greenlaw v. United States*, 554 U.S. 237, 244 (2008). Ahmed argues that the cross-appeal rule is jurisdictional, so the SEC's failure to cross-appeal from the amended final judgment deprived the district court of jurisdiction to enlarge disgorgement under the NDAA. This argument fails.

First, the cross-appeal rule did not deprive the district court of jurisdiction to recalculate disgorgement. It is well-settled that "the requirement of a cross-appeal is a rule of practice which is not jurisdictional and in appropriate circumstances may be disregarded." *Finkielstain v. Seidel*, 857 F.2d 893, 895 (2d Cir. 1988); *accord Texport Oil Co. v. M/V Amolyntos*, 11 F.3d 361, 366 (2d Cir. 1993) (explaining that "there has been some conflict in our Court as to whether the late filing of a notice of cross-appeal is a matter of practice or is a jurisdictional bar" and "adher[ing]" to *Finkielstain*); *see also Carlson v. Principal Fin. Grp.*, 320 F.3d 301, 309 (2d Cir. 2003) (relying on *Finkielstain* and *Texport* and treating the

cross-appeal rule as non-jurisdictional); *Clubside, Inc. v. Valentin*, 468 F.3d 144, 162 (2d Cir. 2006) (same).[9]

Second, the cross-appeal rule is inapplicable to Ahmed's case because the SEC did not seek to "enlarge its rights under the judgment by enlarging the . . . scope of equitable relief," *Int'l Ore & Fertilizer Corp. v. SGS Control Servs., Inc.*, 38 F.3d 1279, 1286 (2d Cir. 1994)—*i.e.*, the outcome that the cross-appeal rule forbids—but rather sought to remand the case to present its NDAA arguments to the district court in the first instance. Critically, the SEC could not have presented these arguments in a timely cross-appeal because the NDAA was enacted *after* the deadline to file a cross-appeal had passed. It would make little sense if the cross-appeal rule prevented nonappealing parties from receiving the benefit of intervening retroactive statutes. As this Court explained in *Litton Systems, Inc. v. American Telephone & Telegraph Co.*, 746 F.2d 168 (2d Cir. 1984), albeit under somewhat different circumstances,

> No party to an appeal should be held to a standard that permits consideration of an intervening statute only when issues affected by the statute are already pending on appeal. Such a standard would require either anticipation of statutes not yet enacted or the assertion of frivolous grounds in appeals and cross-appeals

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[9] *Swatch Group Management Services Ltd. v. Bloomberg L.P.*, 756 F.3d 73 (2d Cir. 2014), is not to the contrary. There, we characterized as "jurisdictional" only Federal Rule of Appellate Procedure 3(c)(1)(B)'s requirement that a notice of cross-appeal identify the challenged district-court order. *Id.* at 93.

> in the hope that a new statute might affect their resolution favorably.

Id. at 171. We decline to apply the cross-appeal rule in Ahmed's case because it would frustrate congressional intent and judicial economy.

b. Reopening a Final Judgment

Nor would application of the NDAA reopen a final judgment. "When a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 226 (1995). The Supreme Court has taken care to distinguish "judgments from which all appeals have been forgone or completed" and "judgments that remain on appeal." *Id.* at 227.

Here, the district court's grant of summary judgment is not "final" within the meaning of *Plaut* because appeals are ongoing. *See Miller v. French*, 530 U.S. 327, 347 (2000) ("[W]hen Congress changes the law underlying a judgment awarding . . . relief, that relief is no longer enforceable to the extent it is inconsistent with the new law. Although the remedial injunction . . . is a final judgment for purposes of *appeal*, it is not the last word of the judicial department . . . [because it] is subject to the continuing supervisory jurisdiction of the court, and therefore may be altered according to subsequent changes in the law." (emphasis added) (cleaned up)). Application of the NDAA thus does not reopen a final judgment.

c. Retroactivity of the NDAA

The district court also did not err by giving retroactive effect to the NDAA's disgorgement amendments. In *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), the Supreme Court explained that "[s]ince the early days of this Court, we have declined to give retroactive effect to statutes burdening private rights unless Congress had made clear its intent." *Id.* at 270. To overcome this presumption against retroactivity, a "court must ask whether the new provision attaches new legal consequences to events completed before its enactment," thereby suggesting "clear congressional intent authorizing retroactivity." *Id.* at 269-70, 272.

The NDAA's disgorgement amendments explicitly apply to cases pending at the time of enactment. Section 6501(b) provides that the NDAA's disgorgement amendments "shall apply with respect to any action or proceeding that is pending on, or commenced on or after, the date of enactment of this Act." Pub. L. No. 116-283, § 6501(b), 134 Stat. 3388, 4626 (2021). The Supreme Court has, in *dicta*, interpreted nearly identical language as a retroactivity command. *See, e.g.*, *Landgraf*, 511 U.S. at 255 & n.8, 256 (construing the phrase "shall apply to all proceedings pending on or commenced after the date of enactment of this Act" as an "explicit retroactivity command"); *Martin v. Hadix*, 527 U.S. 343, 354-55 (1999) (same). If Congress enacts a provision containing a phrase to which the Supreme Court has previously ascribed a particular meaning, we will presumptively confer that meaning to the provision.

See generally Siebert v. Conservative Party of N.Y. State, 724 F.2d 334, 337 (2d Cir. 1983) (recounting the "canon of statutory construction that Congress is presumed to be aware of the judicial background against which it legislates"). We thus conclude that the NDAA's disgorgement amendments apply retroactively to Ahmed's case.

We are not persuaded by Ahmed's contrary arguments. First, we reject Ahmed's argument that the SEC may not receive the benefit of the ten-year statute of limitations because the SEC initially brought this enforcement action under 15 U.S.C. § 78u(d)(5), not § 78u(d)(7). Section 78u(d)(7) did not exist at the time the SEC filed suit, so it would have been impossible to invoke that provision. In any event, the SEC brought the action "pursuant to the authority conferred upon it by . . . 15 U.S.C. § 78u(d)" generally, Second Am. Compl. at 4, *SEC v. Ahmed*, No. 15-cv-675 (D. Conn. Apr. 1, 2016), ECF 208, and, as the district court explained, it "relied on the common law injunctive," *i.e.*, equitable, "power of the district court[]," Special App'x at SPA-245. Similarly, the district court itself "did not rely solely on [15 U.S.C. § 78u(d)(5)] to authorize disgorgement in its initial ruling" and instead exercised its inherent equitable power to do so. *Id.*

Second, Ahmed's argument that the NDAA eviscerated his "*vested and adjudicated* limitation defense" is meritless. Appellant's Br. at 33 (emphasis in original). The Supreme Court imposed a five-year statute of limitations on disgorgement in *Kokesh*, 137 S. Ct. 1635, which was decided over two years after the SEC brought this action. So Ahmed could not have had

a reliance interest in *Kokesh*'s statute of limitations before the SEC brought this action. We thus interpret the NDAA to contain an effective retroactivity command applicable to Ahmed's case.

d. Ex Post Facto Clause

Finally, the district court's application of the NDAA to Ahmed's disgorgement award did not violate the Ex Post Facto Clause. Ahmed argues that disgorgement under the NDAA is punitive, so retroactive application to his case would run afoul of the Ex Post Facto Clause's guarantee. We are not persuaded.

The Constitution provides, "No . . . ex post facto Law shall be passed." U.S. Const. art. I, § 9, cl. 3. "To violate the Ex Post Facto Clause . . . a law must be retrospective—that is, it must apply to events occurring before its enactment—and it must disadvantage the offender affected by it, by altering the definition of criminal conduct or increasing the punishment for the crime." *Abed v. Armstrong*, 209 F.3d 63, 66 (2d Cir. 2000) (cleaned up). A two-step framework governs Ex Post Facto Clause challenges. At step one, "[w]e must ascertain whether the legislature meant the statute to establish 'civil' proceedings." *Smith v. Doe*, 538 U.S. 84, 92 (2003) (cleaned up). If Congress's intention "was to impose punishment, that ends the inquiry." *Id.* "If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive," we must proceed to step two and "further examine whether the statutory scheme is 'so punitive either in purpose or effect as to negate . . . [that] intention' to deem it civil." *Id.* (quoting *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997)). But we typically

"defer to the legislature's stated intent," and "only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Id.* (cleaned up). That is not this case.

First, in enacting 15 U.S.C. § 78u(d)(7), Congress clearly intended to provide a civil remedy. To determine whether a statutory scheme is civil or criminal, we "ask whether the legislature, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other." *Hudson v. United States*, 522 U.S. 93, 99 (1997) (cleaned up). Disgorgement under § 78u(d) is designated as providing "[c]ivil money penalties," and we have previously characterized "disgorgement" as a civil remedy. 15 U.S.C. § 78u(d)(3); *see Contorinis*, 743 F.3d at 306 ("Disgorgement . . . is a civil remedy . . . preventing unjust enrichment.").

Second, Ahmed does not provide "the clearest proof" that disgorgement under § 78u(d)(7) is "so punitive either in purpose or effect" as to "transform what has been denominated a civil remedy into a criminal penalty." *Smith*, 538 U.S. at 92 (cleaned up). Ahmed argues that disgorgement is in practice a criminal penalty because its "'primary purpose . . . is to deter violations of the securities laws,' which is 'inherently punitive'" according to *Kokesh*. Appellant's Br. at 36 (quoting *Kokesh*, 137 S. Ct. at 1643). Ahmed also contends the NDAA is punitive because it has a longer limitations period for violations committed with scienter than for those without.

But Ahmed misreads *Kokesh*. In *Liu*, the Supreme Court recognized that *Kokesh* "expressly declined to pass on the question" of whether "disgorgement is *necessarily* a penalty, and thus not the kind of relief available at equity." *Liu*, 140 S. Ct. at 1946 (emphasis added). The disgorgement award in *Kokesh* was deemed a "penalty" because it "exceed[ed] the bounds of traditional equitable principles" in awarding disgorgement "as a consequence of violating public laws" and to deter the wrongdoer, not to compensate victims. *Id.* at 1941, 1946. But *Kokesh* "ha[d] no bearing on the SEC's ability to conform future requests for a defendant's profits to the limits outlined in common-law cases awarding a wrongdoer's net gains." *Id.* at 1946. In other words, *Liu* approved disgorgement as long as the award conforms to traditional equitable limitations—*i.e.*, "restoring the status quo and ordering the return of that which rightfully belongs to the purchaser or tenant." *Tull v. United States*, 481 U.S. 412, 424 (1987) (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 402 (1946)).

Moreover, the longer limitations period for violations committed with scienter does not render disgorgement punitive. The more plausible inference is a nonpunitive one—*i.e.*, scienter is an element of fraud, which may be harder to detect and investigate because fraud is usually committed with deception. *Cf. Merck & Co., Inc. v. Reynolds*, 559 U.S. 633, 644 (2010) ("[I]n the case of fraud, . . . a defendant's deceptive conduct may prevent a plaintiff from even *knowing* that he or she has been defrauded."). We thus hold that the district

court's application of the NDAA did not violate the Ex Post Facto Clause.[10]

* * *

In sum, we find no abuse of discretion in the district court's calculation of disgorgement or error in its application of the NDAA.

C. Calculation of Interest and Actual Gains

We affirm the district court's award of prejudgment interest but vacate and remand the award of "actual gains" because it is broader than equity permits.[11]

1. *Legal Standard*

The district court's prejudgment-interest and actual-gains awards were incident to disgorgement, so we consider whether they "fall[] into those categories of relief that were *typically* available in equity." *Liu*, 140 S. Ct. at 1942 (cleaned up). One such category of relief is "supplemental enrichment," which encompasses the opportunity cost or time value of money lost by victims,

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[10] Our decision to vacate and remand the actual-gains award, *see infra* Section II.C, does not bear on our Ex Post Facto Clause analysis. The district court did not increase the actual-gains award following the NDAA nor do Defendants raise a related Ex Post Facto Clause challenge.

[11] The parties disagree about the calculation of post-judgment interest. In a December 2, 2022 order, the district court took a different approach from what either party argues here. Ahmed appealed from this order, and the appeal was consolidated with other appeals from liquidation, all of which were held in abeyance pending this appeal. As explained *infra*, those appeals are dismissed as moot.

including "interest, rent, and other measures of use value, proceeds, and consequential gains" on ill-gotten assets. 2 Restatement (Third) of Restitution and Unjust Enrichment ("Restatement") § 53(1) & cmt. a (Am. L. Inst. 2011); *see* 1 Dan B. Dobbs, Law of Remedies: Damages–Equity–Restitution § 3.6(2), at 342-43 (2d ed. 1993) ("When the defendant is under a duty to pay the plaintiff as damages or otherwise, and during the period of nonpayment the defendant has a legally recognized benefit from use of the money retained, he is under an obligation to make restitution of that benefit to the plaintiff, whether the benefit is measured in profits or interest or some other form of use value."). Supplemental enrichment may thus reflect passive gains on ill-gotten funds, without the direct manipulation of a fraudster. We review a district court's "choice of remedies" for abuse of discretion. *SEC v. Frohling*, 851 F.3d 132, 139 (2d Cir. 2016).

2. *Prejudgment Interest*

The district court did not abuse its discretion by awarding prejudgment interest at the IRS underpayment rate for the period before the asset freeze. The Relief Defendants argue that prejudgment interest was inappropriate because they did not act wrongfully or know of Ahmed's wrongful actions and, even if appropriate, the IRS underpayment rate was punitive and thus contrary to traditional equitable principles. The SEC counters that the Relief Defendants' alleged good faith is irrelevant to prejudgment interest on *Ahmed*'s disgorgement obligation. Moreover, the Relief Defendants present no evidence that the IRS underpayment rate would

overcompensate Ahmed's victims and thus be punitive. We agree with the SEC.

"The decision whether to grant prejudgment interest and the rate used if such interest is granted are matters confided to the district court's broad discretion, and will not be overturned on appeal absent an abuse of that discretion." *Endico Potatoes, Inc. v. CIT Grp./Factoring, Inc.*, 67 F.3d 1063, 1071-72 (2d Cir. 1995) (cleaned up). In assessing prejudgment-interest awards, a court should consider "(i) the need to fully compensate the wronged party for actual damages suffered, (ii) considerations of fairness and the relative equities of the award, (iii) the remedial purpose of the statute involved, and/or (iv) such other general principles as are deemed relevant by the court." *Wickham Contracting Co. v. Loc. Union No. 3, Int'l Bhd. of Elec. Workers, AFL-CIO*, 955 F.2d 831, 834 (2d Cir. 1992).

The district court did not abuse its discretion by awarding prejudgment interest at the IRS underpayment rate. First, the good faith of the Relief Defendants is immaterial because a prejudgment award concerns the amount that Ahmed, the primary defendant, must disgorge. *Cf. Morales v. Freund*, 163 F.3d 763, 767 (2d Cir. 1999) (upholding the decision not to award prejudgment interest when the "district court suggested that the defendants, though liable, might well have acted in good faith"). *See generally CFTC v. Walsh*, 618 F.3d 218, 225 (2d Cir. 2010) ("A relief defendant is a person who holds the subject matter of the litigation in a subordinate or possessory capacity . . . [and] may be joined in a securities enforcement

action to aid the recovery of relief." (cleaned up)). The district court found that Ahmed committed securities fraud, so there is no question that he lacked good faith. Even though, as explained *infra*, relief-defendant liability may be inappropriate as against a particular asset, that does not bear on the propriety or size of prejudgment interest against the primary defendant. *See SEC v. Miller*, 808 F.3d 623, 635 (2d Cir. 2015) ("Equitable relief against a third-party non-wrongdoer may be entered where such an individual (1) has received ill-gotten funds; and (2) does not have a legitimate claim to those funds." (cleaned up)).

Second, the district court did not abuse its discretion by awarding prejudgment interest at the IRS underpayment rate. That rate "reflects what it would have cost to borrow the money from the government and therefore reasonably approximates one of the benefits the defendant derived from its fraud." *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1476 (2d Cir. 1996) (affirming use of the IRS underpayment rate). This rate thus reflects "use value," or unearned interest that the rightful owner of the funds could have received but for the fraud. In *First Jersey*, we squarely rejected the argument that the district court should have applied the one-year treasury-bill rate—*i.e.*, "the rate at which one lends money to the government rather than borrows money from it"—because "defendants have had the use of the money." *Id.* at 1476-77. Here, Ahmed held the ill-gotten gains before the asset freeze, so the IRS underpayment rate was appropriate.[12] We

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[12] The Relief Defendants have not put forth any evidence that the investment return from the Oak funds was less than the IRS

thus affirm the district court's award of prejudgment interest.

3. *Actual Gains*

We vacate and remand the district court's award of actual gains because it failed to account for traditional equitable limitations. The parties dispute the proper equity analog for actual gains. On one hand, the Relief Defendants argue that we should look to constructive trust, which requires that gains come from assets traceable to the fraud. On the other hand, the SEC argues that the proper equity analog is "accounting" or "accounting for profits," forms of restitution by money judgment.

Both constructive trust and accounting may be appropriate analogs for a primary disgorgement award, but neither is helpful here. Our review is limited to the scope of actual gains on disgorged assets—*i.e.*, "supplemental or collateral benefits derived by the recipient from an initial transaction with the claimant." 2 Restatement § 53 cmt. a; *see* 1 Dobbs, Law of Remedies, *supra* at 31, § 4.5(3), at 637 ("[I]f a consequential benefit measure is justified, it need not be pursued under either a trust or an accounting theory.").

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underpayment rate. Their concerns about overcompensation are thus unfounded or, at the very least, premature before distribution. *See* 2 Restatement § 53(1) ("[Supplemental] [e]nrichment . . . may be presumed in the case of a recipient who is enriched by misconduct.").

The most appropriate equity analog for the actual-gains award here appears to be "consequential gains." Consequential gains "result from a profitable investment, use, or other disposition of the [plaintiff's] property, distinct from the transaction by which the defendant was originally enriched." 2 Restatement § 53 cmt. d; *see also* 1 Dobbs, Law of Remedies, *supra* at 31, § 4.5(3), at 637 ("In the case of restitution, courts can take the measure of *consequential benefits*, not the value of the thing itself but the value it produces in the hands of defendant." (emphasis in original)).

One equitable limitation on consequential gains is that a "conscious wrongdoer" is liable for "consequential gains that are not unduly remote." 2 Restatement § 53(3). As the Restatement commentary suggests, "[t]he object of the disgorgement remedy—to eliminate the possibility of profit from conscious wrongdoing"—is measured by the "net increase in the assets of the wrongdoer, to the extent that this increase is *attributable* to the underlying wrong." *Id.* § 51 cmt. e (emphasis added). And treatises confirm:

> Even the willful wrongdoer should not be made to give up that which is his own; the principle is disgorgement, not plunder. . . . [S]ome apportionment must be made between those profits attributable to the plaintiff's property and those earned by the defendant's efforts and investment, limiting the plaintiff to the profits *fairly attributable to his share.*

1 Dobbs, Law of Remedies, *supra* at 31, § 4.5(3), at 642 (emphasis added). So consequential gains on assets

subject to disgorgement must not be unduly remote from the fraud.[13]

Here, the district court did not consider whether consequential gains on frozen assets were unduly remote from Ahmed's fraud. Its September 6, 2018 ruling simply awarded "actual returns on the frozen assets" without elaboration or limitation based on Ahmed's profitable uses of the frozen assets. Special App'x at SPA-106.[14] And its December 14, 2018 ruling,

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[13] The Restatement provides "scant guidance on how to determine wealth legally attributable to a wrong for purposes of disgorgement" and remoteness. Mark P. Gergen, *Causation in Disgorgement*, 92 B.U. L. Rev. 827, 827 (2012); *see also* George E. Palmer, Law of Restitution § 2.13 (3d ed. 2023) (noting a "recurring problem[] in the law of restitution" is calculating "the defendant's gain [that] is the product not solely of the plaintiff's interest but also of contributions made by the defendant"). But several factors may guide courts awarding consequential gains, including "general considerations of fairness, . . . the nature of the defendant's wrong, the relative extent of his contribution, and the feasibility of separating [gains] from the contribution traceable to the plaintiff's interest." Palmer, Law of Restitution, *supra*, § 2.13; *see* 1 Dobbs, Law of Remedies, *supra* at 31, § 4.5(3), at 646 (providing factors governing "[r]ecovery of the defendant's consequential gains").

[14] District courts have discretion in awarding supplemental enrichment, which could include "actual returns on the frozen assets." Special App'x at SPA-106. We have previously limited the availability of prejudgment interest during the period of an asset freeze when the defendant has "been denied the use of those assets." *SEC v. Razmilovic*, 738 F.3d 14, 36 (2d Cir. 2013). But it may be appropriate for a district court to award an alternative measure of supplemental enrichment, such as a fixed interest rate that approximates "fair compensation to the person wronged" within the equitable limits set forth in *Liu*. 140 S. Ct. at 1943.

which sought to clarify the previous ruling, again imposed no limitation on actual gains and instead ordered disgorgement of "any actual interest accrued or gains earned on the frozen assets used to satisfy that disgorgement amount." *Id.* at SPA-151. Indeed, at oral argument, the SEC conceded that these 2018 orders failed to address any equitable limitation on actual gains. Moreover, the district court's September 4, 2019 ruling on Ahmed's motion to alter the judgment merely clarified that (1) "interest or gains are owed only on the frozen assets used to satisfy the disgorgement amount"; and (2) "interest or gains should be calculated by determining the actual interest accrued or gains earned and not by using the checking account interest rate." *Id.* at SPA-207 (cleaned up). After this Court remanded for the district court to recalculate Ahmed's disgorgement obligation under the NDAA, the district court stated it would award "any interest or gains accrued on disgorged frozen assets from the date of the [district court's] freeze order," again without restriction. *Id.* at SPA-251. The district court should have ensured that consequential gains on frozen assets were not unduly remote from Ahmed's wrongdoing or, in other words, were attributable to the fraud.

We disagree with the SEC's argument that the district court's award of actual gains is authorized by *SEC v. Razmilovic*, 738 F.3d 14 (2d Cir. 2013). In *Razmilovic*, we held that prejudgment interest was inappropriate during the period of an asset freeze because "the defendant has already, for that period, been denied the use of those assets." *Id.* at 36. In passing, we also noted, "[i]n such a case, after a final order of disgorgement, the funds previously frozen

would presumably be turned over to the government in complete or partial satisfaction of the disgorgement order, along with any interest that has accrued on them during the freeze period." *Id.* We do not read *Razmilovic* to give the district court blanket permission to award actual gains without limitations. Rather, under *Liu*, any such award must be consistent with equity, and the use of the word "presumably" in *Razmilovic* suggests that its discussion of supplemental enrichment (*i.e.*, "interest that has accrued") was *dicta*. *Id.*

The Relief Defendants argue that our decision in *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082 (2d Cir. 1972), bars the award of actual gains. This, too, is inapposite. The district court in *Manor Nursing* ordered disgorgement of "proceeds received in connection" with the defendants' fraud and "profits and income earned on such proceeds." *Id.* at 1104 (emphasis omitted). We affirmed disgorgement of "proceeds" as "a proper exercise of the district court's equity powers" but vacated the district court's award "of profits and income earned on the proceeds" as "a penalty assessment." *Id.* We reasoned that an award of "profits" would "arbitrarily requir[e] those [defendants] who invested wisely to refund substantially more than other [defendants]." *Id.* at 1104-05. The "only plausible justification" for disgorgement of "profits and income" was "the deterrent force," but we found the district court's orders of injunctive relief and disgorgement of "proceeds" were "sufficient deterrence to further violations" of the federal securities laws. *Id.* at 1104. Instead of "profits and income," we ordered "interest

[on the proceeds] at the New York legal rate from the date [defendants] received the proceeds." *Id.* at 1105.

But any suggestion in *Manor Nursing* that consequential gains are generally impermissible is in tension with *Liu*. Under *Liu*, if supplemental enrichment is consistent with traditional principles of equity, it is not a "penalty." Supplemental enrichment is governed by restitutionary principles—*i.e.*, "restor[ing] the status quo," *Liu*, 140 S. Ct. at 1943 (internal quotation marks omitted)—not deterrence of "further violations" of the securities laws, *Manor Nursing*, 458 F.2d at 1104. Moreover, district courts retain broad discretion as to the appropriate measure of supplemental enrichment, whether it is a form of profits or interest. *See, e.g.*, 1 Dobbs, Law of Remedies, *supra* at 31, § 3.6(2), at 343 ("The profits of the fiduciary in this [disgorgement] example represent one measure of use value of the money. It is capable of earning interest and it is capable of earning profits. In this kind of case the plaintiff is entitled to the profits measure if he prefers.").

We thus remand for the district court to reassess actual gains in light of *Liu*. On remand, the district court retains discretion over the appropriate measure of supplemental enrichment. *Liu* offers general guideposts for equitable relief: namely, wrongdoers should (1) be deprived of their net profits from unlawful activity; and (2) "not be punished by paying more than a fair compensation to the person wronged." 140 S. Ct. at 1942-43 (cleaned up). If the district court reimposes an actual-gains award on disgorged assets, it should ensure that consequential gains on the frozen

assets are not "unduly remote." *See supra* note 13. The district court may also elect a different measure of supplemental enrichment consistent with "fair compensation," such as a fixed-interest rate for the period of the asset freeze.[15]

D. Nominee Doctrine

Finally, the district court's analysis in support of its conclusion that the Relief Defendants are merely nominal owners of all the frozen assets held in their names was inadequate. The Relief Defendants argue that the district court should have applied an asset-by-asset approach to the nominee theory and the SEC failed to satisfy its burden of proving that the Relief Defendants were mere nominees of Ahmed as to each asset when they held legal title to, controlled, and received benefits from those assets. The SEC argues that the district court correctly characterized the "nominee" doctrine, did not shift the burden of persuasion to the Relief Defendants, and could not have applied an asset-by-asset approach because the Relief Defendants failed to meet their burden to produce evidence of their legitimate ownership of each of the disputed assets. Furthermore, if the Court remands, the SEC seeks permission to pursue alternative theories of recovery, including under *Cavanagh I*, 155 F.3d 129.

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[15] The parties dispute the district court's method of calculating actual gains, but we decline to reach this issue given our vacatur of the actual-gains award.

1. *Legal Standard*

Equitable limits on disgorgement differ between assets held by the primary wrongdoer (*i.e.*, Ahmed) and those held by third-party non-wrongdoers (*i.e.*, Relief Defendants). *See Miller*, 808 F.3d at 635. As to primary defendants, "[t]he amount of disgorgement ordered need only be a reasonable approximation of profits causally connected to the violation." *Razmilovic*, 738 F.3d at 31 (cleaned up). District courts need not "apply equitable tracing rules to identify specific funds in the defendant's possession that are subject to return." *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 373 (2d Cir. 2011); *see, e.g.*, *Contorinis*, 743 F.3d at 303 (explaining, in the context of an insider-trading violation, "the insider would unquestionably be liable to disgorge the profit . . . whether the insider trader has put his profits into a bank account, dissipated them on transient pleasures, or given them away to others"). So the district court is not required to "trace" ill-gotten gains to specific assets in Ahmed's possession—any of his own assets may be liquidated to satisfy his disgorgement obligation.[16]

For relief defendants, however, equity imposes different rules. "A court of equity will wrest property fraudulently acquired, not only from the perpetrator of the fraud, but . . . from his children and his children's children, or, as elsewhere said, from any persons

[16] Since *Liu*, this Court has affirmed the lack of a tracing requirement as to primary-defendant disgorgement. *See, e.g.*, *SEC v. de Maison*, No. 18-2564, 2021 WL 5936385, at *2 (2d Cir. Dec. 16, 2021).

amongst whom he may have parceled out the fruits of his fraud." 3 John Norton Pomeroy, Equity Jurisprudence § 918, at 601 (5th ed. 1994) (cleaned up). But third parties, like the Relief Defendants, have a bona fide purchase defense according to which "[a] purchaser for value and without notice acquires the legal interest that the grantor holds and purports to convey, free of equitable interests that a restitution claimant might have asserted against the property in the hands of the grantor." 2 Restatement § 66; *see also id.* § 58(2) ("A claimant entitled to restitution from property or its traceable product may assert the same rights against any subsequent transferee who is not a bona fide purchaser . . . or bona fide payee."). A bona fide purchase defense is inherently asset specific, requiring a court to determine whether a third party (1) gave value in exchange for an asset in particular and (2) lacked notice as to that asset's true provenance.

In *Cavanagh I*, we recognized third-party liability in a securities-enforcement action when a relief defendant "(1) has received ill-gotten funds; and (2) does not have a legitimate claim to those funds." 155 F.3d at 136. Although *Cavanagh I* was decided in the asset-freeze context, it is based on the same background principles of equity, including the bona fide purchase rule. *See* Palmer, Law of Restitution, *supra* at 36 n.13, § 19.7 ("Courts are generally agreed that an innocent person who obtains a benefit through the wrongful act of a third person will be required to make restitution to the one at whose expense the benefit was obtained, unless, in addition to his innocence, the recipient is protected because he gave value."). So

relief-defendant liability under *Cavanagh I* applies to disgorgement.[17]

But equity also recognizes a third way: the so-called "nominee" theory. A "nominee" holds bare legal title to an asset but is not its true equitable owner. Such an asset may be disgorged to satisfy a judgment against a third party deemed to be the asset's true equitable owner.[18] This doctrine reflects the principle that "equity looks to the intent, rather than to the form," and is thus "able to treat that as done which in good conscience ought to be done." 2 Pomeroy, Equity Jurisprudence, *supra* at 41, §§ 363, 378, at 8, 41 (emphasis omitted). "Equity's advantage in fashioning restitutionary remedies was . . . sidestepping title problems . . . . to act against the person rather than against the property." 1 Dobbs, Law of Remedies, *supra* at 31, § 4.3(1), at 587. The principle undergirding the nominee theory has been widely applied. *See, e.g.*, *Nat'l Bank v. Case*, 99 U.S. 628, 632 (1878) ("A transfer for the mere purpose of avoiding his liability to the company or its creditors is fraudulent and void, and he

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[17] Several sister circuits also have continued to recognize relief-defendant liability after *Liu*. *See, e.g.*, *SEC v. Berkeley Healthcare Dynamics, LLC*, No. 20-16754, 2022 WL 42807, at *2 (9th Cir. Jan. 5, 2022); *SEC v. Camarco*, No. 19-1486, 2021 WL 5985058, at *13-17 (10th Cir. Dec. 16, 2021).

[18] Relief Defendants argue that state law governs the "nominee" doctrine. We disagree. Federal courts are courts of law and equity, *see* U.S. Const. art. III, § 2, cl. 1, and to deduce equitable limits, we may look to the practices of the state and federal courts and "the ordinary principles and practice of courts of chancery." *Liu*, 140 S. Ct. at 1950 (cleaned up).

remains still liable. . . . [I]f, in fact, the transferee is a mere tool or nominee of the transferrer, so that, as between themselves, there has been no real transfer, . . . the transfer will be held for nought." (cleaned up)); *Higgins v. Smith*, 308 U.S. 473, 475 (1940) ("[T]he jury was instructed to find whether these sales by the taxpayer . . . were actual transfers of property . . . or whether they were to be regarded as simply 'a transfer by Mr. Smith's left hand, being his individual hand, into his right hand, being his corporate hand, so that in truth and fact there was no transfer at all.'"). We thus agree with the district court that the nominee theory, as a reflection of background equitable principles, may be used to determine the owner of an asset for disgorgement purposes. If a relief defendant is deemed a mere nominal owner of an asset that is equitably owned by the primary defendant, the equitable rules governing primary-defendant disgorgement apply. Like the bona fide purchase defense, the nominee doctrine is necessarily an asset-specific inquiry. The inquiry turns on a third party's behavior toward a *particular* asset, such as whether the third party controlled, benefitted from, and/or transferred a particular asset held in a nominee's name. We review a district court's exercise of equitable power to fashion a disgorgement remedy for abuse of discretion. *Frohling*, 851 F.3d at 139.

2. *Application*

The district court's application of the nominee doctrine was inadequate as to most of the assets in question because it failed to determine whether the SEC proved that these particular assets (or groups of

similar assets) were held by the Relief Defendants as mere nominees of Ahmed. The district court invoked a six-factor nominee test but did not apply it on an asset-by-asset basis. Instead, it deemed the Relief Defendants nominal owners of a large swathe of assets without finding that Ahmed is in fact the equitable owner. This erroneously shifted the burden to the Relief Defendants to show that Ahmed is *not* the equitable owner of assets to which the Relief Defendants hold legal title.[19] *See* Dan B. Dobbs & Caprice L. Roberts, Law of Remedies: Damages–Equity–Restitution § 4.4(3), at 446 (3d ed. 2018) ("The law of unjust enrichment places the burden of production on the party seeking disgorgement.").

Specifically, the district court's analysis regarding the Iftikar A. Ahmed Family Trust, MetLife Policy (which was owned by the Iftikar A. Ahmed Family Trust), and Fidelity x7540 account was sufficient because the district court weighed the SEC's evidence and considered the Relief Defendants' counter-evidence as to each asset and made findings on the record. But as to other assets, the district court's analysis was insufficient. For many of the disputed assets, the district court simply rejected the Relief Defendants' request for an asset-by-asset approach by noting that the Relief Defendants "made this same argument

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[19] We note, however, that relief defendants carry the burden of proof with respect to affirmative defenses such as bona fide purchase. *See CFTC v. Kimberlynn Creek Ranch, Inc.*, 276 F.3d 187, 192 n.5 (4th Cir. 2002). We also note that courts in civil cases can draw adverse inferences against relief defendants should they invoke their Fifth Amendment privilege not to testify. *See SEC v. Colello*, 139 F.3d 674, 677-78 (9th Cir. 1998).

before the Second Circuit and it was soundly rejected." Special App'x at SPA-110 (citing *I-Cubed*, 664 F. App'x at 56-57). But *I-Cubed* concerned the asset freeze, which required "a lesser showing than is necessary for other forms of equitable relief," like disgorgement. *I-Cubed*, 664 F. App'x at 55. Moreover, for certain assets, such as the contents of the safety deposit box and the Ahmeds' two Park Avenue apartments, the district court made findings only at the preliminary-injunction stage. And the district court was silent as to other assets, such as Shalini Ahmed's earrings and designer handbags, but it nevertheless authorized disgorgement of those assets.

As a result, the district court erroneously shifted the burden to the Relief Defendants to present evidence that they were the true owners of these assets. But the burden remained with the SEC to prove that Ahmed was the true owner of each asset (or group of similar assets), and the district court should have made specific findings accordingly. Furthermore, the district court discussed Ahmed's invocation of his Fifth Amendment right against self-incrimination and Shalini Ahmed's invocation of her marital privilege but failed to discuss what, if any, adverse inference should be drawn.

So, with the exception of the district court's findings that Ahmed is the equitable owner of the Iftikar A. Ahmed Family Trust, MetLife Policy, and Fidelity x7540 account, we vacate and remand the district court's disgorgement order as to the Relief Defendants' assets. On remand, the SEC, as the party seeking disgorgement, must prove that the Relief Defendants

are nominees for each asset or class of assets.[20] If the district court finds that an asset is nominally owned by one of the Relief Defendants (and actually owned by Ahmed), it may be disgorged. If the district court finds that an asset is not nominally owned by one of the Relief Defendants, then the district court may consider whether an alternative theory of relief-defendant liability permits disgorgement of the asset. For example, the district court may apply *Cavanagh I* liability or a joint-ownership theory.[21] Moreover, consistent with the burden of proof, the district court should state on the record what, if any, adverse inferences it draws from the Relief Defendants' failure to testify if the SEC offers that evidence.

III. CONCLUSION

We conclude that the district court (1) reasonably excluded Ahmed from parts of discovery and denied him access to frozen funds to hire counsel; (2) accurately calculated disgorgement by approximating the "net profits" of Ahmed's fraud; and (3) properly gave retroactive effect to the NDAA's disgorgement amendments. But applying traditional principles of equity under *Liu*, we also conclude that (4) the district court's award of actual gains exceeded

[20] We agree with the Relief Defendants' suggestion at argument that "in some cases assets can be grouped if the same analysis applies to multiple assets" or "[c]lasses of assets." Oral Arg. Tr. at 12-13.

[21] The parties dispute whether the district court's joint-ownership analysis was *dicta* or an alternative holding. The record is unclear, and the district court is best positioned to clarify on remand.

equitable limitations by failing to ensure that no unduly remote consequential gains are awarded; and (5) the "nominee" doctrine—though well-established in equity and applicable to disgorgement—must be applied on an asset-by-asset basis. For the foregoing reasons, we affirm in part and vacate and remand in part the district court's judgment.

Our vacatur of the actual-gains award and application of the nominee doctrine affects the scope of the district court's liquidation orders. In a separate order, we thus *sua sponte* dismiss as moot Defendants' appeals from those orders, 22-135, 22-184, 22-3077, 22-3148. We also deny as moot Relief Defendants' motions for a stay of liquidation, and all stays are vacated.

A True Copy
Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals, Second Circuit
[SEAL]

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil No. 3:15cv675 (JBA)

[Filed June 16, 2021
incorrectly dated as June 16, 2020]

UNITED STATES SECURITIES)
AND EXCHANGE COMMISSION,)
Plaintiff,)
)
v.)
)
IFTIKAR AHMED,)
Defendant, and)
)
IFTIKAR ALI AHMED SOLE PROP;)
I-CUBED DOMAINS, LLC; SHALINI AHMED;)
SHALINI AHMED 2014 GRANTOR)
RETAINED ANNUNITY TRUST; DIYA)
HOLDINGS LLC; DIYA REAL HOLDINGS,)
LLC; I.I. 1, a minor child, by and through his)
next friends IFTIKAR and SHALINI AHMED,)
his parents; I.I. 2, a minor child, by and)
through his next friends IFTIKAR and)
SHALINI AHMED, his parents; and I.I. 3,)
a minor child, by and through his next friends)
IFTIKAR and SHALINI AHMED, his parents,)
Relief Defendants.)
)

REDETERMINATION OF DEFENDANT'S DISGORGEMENT OBLIGATION

On March 11, 2021, the Second Circuit remanded to this Court determination of Appellant's disgorgement obligation "consistent with § 6501 of the National Defense Authorization Act, and, if appropriate, entry of an amended judgment." (Mandate of USCA [Doc. # 1810] at 2.) After full briefing and oral argument, the Court's determination of Defendant's increased disgorgement obligation is set forth below.

I. Background

On May 6, 2015, the Securities and Exchange Commission (SEC) filed a complaint against Defendant alleging numerous violations of Sections 10(b) and 17(a) of the Securities Exchange Act and Sections 206(1) and 206(2) of the Advisers Act and requested equitable disgorgement of the proceeds from these fraudulent transactions. (Compl. [Doc. # 1] ¶¶ 65-88.) On August 12, 2015, after a hearing, the Court ordered that Defendant and Relief Defendants' assets be frozen "up to the amount of $118,246,186," accounting for "approximately $65 million in illicit profits to be disgorged plus prejudgment interest ($9.3 million) and civil penalties ($44 million)." (Ruling and Order Granting Preliminary Injunc. [Doc. # 113] at 3.) Under the law at that time, the SEC was authorized to seek the entirety of illegally obtained profits for disgorgement as the applicable statutes did not have temporal limitations.

On June 5, 2017, the U.S. Supreme Court held in *Kokesh v. SEC* that disgorgement sought by the SEC

pursuant to the Securities and Exchange Act is subject to the five-year statute of limitations imposed by 28 U.S.C. § 2462 because it constitutes a penalty, but expressly declined to reach the question of "whether courts possess authority to order disgorgement in SEC enforcement proceedings or [] whether courts have properly applied disgorgement principles in this context." *Kokesh v. SEC*, 137 S. Ct. 1635, 1642 n.3 (2017). In response to *Kokesh* and with consent of all parties, this Court reduced the amount of Defendant's assets frozen from $118,246,186 to $89,000,000 to exclude the calculation of illegally obtained profits beyond the newly imposed five-year statute of limitations, but declined to release any funds as it found the judgment to be undersecured because the actual value of the frozen assets amounted to, at best, $87 million. (Order on Def.'s Mot. for Mod. of the Asset Freeze [Doc. # 829] at 3, 5 (representing $44 million in disgorgement, 1.5 million in prejudgment interest, and $44 million in civil penalties).)

On March 29, 2018, the Court granted the SEC's motion for summary judgment, finding Defendant liable for violations of sections 206(1) through (4) of the Advisers Act, section 10(b) of the Exchange Act, and section 17(a)(1) of the Securities Act. (Ruling on All Parties' Mots. for Summ. J. on Liability [Doc. # 835] at 34, 38, 40.) While Defendant argued for dismissal of all claims stemming from his actions prior to May 6, 2010, the Court held that, because the SEC sought equitable disgorgement *and* injunctive relief as remedies for Defendant's pre-2010 actions, *Kokesh* did not limit the Court's authority to find Defendant *liable* for his earlier actions. (*Id.* at 31 ("Because this stage of the

proceedings deals with liability, and the question of whether injunctive relief is appropriate as it relates to the otherwise time-barred conduct deals with the remedy, this question must be left to be addressed in the next phase of the proceedings. The Court therefore will not dismiss any claims under *Kokesh* at this liability stage, however it earlier modified the Asset Freeze Order [Doc. # 113] to reflect this change in law.").) The Court found that "the SEC has met its burden on summary judgment of establishing [that] Defendant acted with the requisite scienter *with respect to each act of fraud*," including those that occurred prior to May 6, 2010. (*Id.* at 42 (emphasis added).)

Thereafter, on December 14, 2018, the Court entered judgment against Defendant

> (1) permanently enjoin[ing] Defendant from violating Section 17(a) of the Securities Act [], Section 10(b) of the Securities Exchange Act [], and Sections 206(1), 206(2), 206(3), and 206(4) of the Advisers Act[]; (2) order[ing] the Defendant to disgorge $41,920,639 plus prejudgment interest for the period of time prior to the asset freeze, and interest and gains returned on the frozen assets during the pendency of the freeze; and (3) impos[ing] a civil penalty of $21,000,000 against Defendant.

(Am.. Final J. Against Def. and Relief Defs. [Doc. # 1054] at 2; *see* Ruling on Pl.'s Mot. for Remedies and J. [Doc. # 955] at 17 (finding that "a civil penalty in the amount of $21 million . . . is reasonable and justified").) As required by *Kokesh*, the Court limited disgorgement

to the sum of profits Defendant illegally obtained after 2010. *Kokesh*, 137 S. Ct. at 1645. Both Defendant and Relief Defendants immediately appealed the judgment. (Relief Defs.' Notice of Appeal [Doc. # 1100]; Def.'s Notice of Appeal [Doc. # 1101].)

After the Supreme Court granted certiorari on *Liu v. SEC*, 140 S. Ct. 451 (2019), to decide whether a disgorgement award greater than the net profits from the defendant's wrongdoing was appropriate under the Securities Exchange Act, this Court stayed liquidation of the frozen assets because the "irreparable harm" that could be caused by prematurely liquidating Relief Defendants' and Defendant's unique assets outweighed the "potential harm asserted by the SEC and the Receiver [that] the assets of the Receivership Estate [could] decline in value to a degree which jeopardizes the security of the judgment." (Ruling on Def.'s Mot. to Stay [Doc. # 1346] at 7.) The Supreme Court ultimately held in *Liu* that § 78u(d)(5) of the Act authorizes courts to order disgorgement that "does not exceed a wrongdoer's net profits and is awarded for victims." *Liu v. SEC*, 140 S. Ct. 1936, 1940 (2020).

Once *Liu* was decided, this Court anticipated that "the liquidation of assets will soon proceed such that the judgment will be fully secured and residual assets, if any, will be unfrozen." (Ruling Denying Relief Defs.' Mots. for Funds [Doc. # 1597].) Relief Defendants requested "clarification that the assets under this Court's asset freeze order will stay frozen with no liquidation of assets pending appeals," maintaining that liquidation prior to the resolution of all appeals would be inappropriate. (Mot. for Clarification [Doc.

1602] at 2-3.) The Court denied Relief Defendants' motion, stating,

> Following the remand by the Second Circuit, the Court will determine Defendant's disgorgement obligation in accordance with § 6501 of the National Defense Authorization Act. Thereafter, a liquidation schedule will be issued. Separately, the asset freeze order remains in effect until appeals are decided.

(Order Denying Clarification [Doc. # 1868].)

Codifying the SEC's disgorgement power, Congress passed the National Defense Authorization Act (NDAA), which modifies the Securities Exchange Act to expressly permit courts to, "[i]n any action or proceeding brought by the Commission under any provision of the securities laws, [] order [] disgorgement." 15 U.S.C. § 78u(d)(7) ("paragraph (7)").[1] The NDAA also requires that the SEC

> bring a claim for disgorgement under paragraph (7) . . . 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 10(b);
>
> (II) section 17(a)(1) of the Securities Act of

[1] *See also* Avi Weitzman & Tina Samanta, *Congress Codifies SEC Disgorgement Remedy in Military Spending Bill*, 25 WALL ST. LAWYER 1, 1 (Feb. 2021) (noting that § 6501 of the NDAA was intended to codify the rule announced in *Liu*).

> 1933 (15 U.S.C. 77q(a)(1));
> (III) section 206(1) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-6(1))
> (IV) any other provision of the securities laws for which scienter must be established.

15 U.S.C. § 78u(d)(8)(A). These amendments "apply with respect to any action or proceeding that is pending on, or commenced on or after" January 1, 2021. *William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021*, H.R. 6395, 116th Cong. (2020) (NDAA) § 6501(b), https://www.congress.gov/bill/116th-congress/house-bill/6395.

Upon passage of the NDAA and because the judgment remained on appeal, the SEC moved the Second Circuit

> to remand the captioned consolidated appeals for the limited purpose of recalculating Defendant-Appellant Iftikar Ahmed's disgorgement obligation consistent with recent amendments to Section 21(d) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78u(d), [because] these recent amendments expand the statute of limitations from five (5) to ten (10) years with respect to disgorgement as a remedy for fraud in the Commission's enforcement actions, and they expressly apply to any action pending as of their date of enactment.

Pl. SEC's Mot. for Limited Remand at 1-2, *SEC v. Ahmed*, No. 18-2903 (2d Cir. Jan. 13, 2021), ECF No. 475. The motion for remand was granted on March 11, 2021, and the Second Circuit directed this

Court to "determin[e] Appellant's disgorgement obligation consistent with § 6501 of the National Defense Authorization Act, and, if appropriate, ent[er] an amended judgment." (Mandate by USCA [Doc. # 1810] at 2.)

The SEC seeks an amended judgment that includes the entirety of illegally obtained profits within the ten-year period prior to May 6, 2015. (Pl. SEC's Mem. Concerning Def.'s Disgorgement Obligation and Request for Entry of an Am. J. [Doc. # 1904] at 2.) Defendant and Relief Defendants oppose increasing the disgorgement amount and further request that the Court stay liquidation of assets pending final determination of the Second Circuit. (Def.'s Mem. of Law Addressing the Impact of § 6501 of the NDAA on the Final Disgorgement J. [Doc. # 1906] at 1, 21; Relief Defs.' Mem. of Law in Opp. to Pl.'s Request to Recalculate Disgorgement Obligation [Doc. # 1901] at 3.) The Receiver takes no position. (Receiver Mem. Regarding the Def.'s Disgorgement Obligation [Doc. # 1899] at 1-2.)[2]

[2] The SEC argues that, in remanding the matter to the District Court, the Second Circuit necessarily held that the modifications of the Act applied to Defendant's case and the District Court's only responsibility is to calculate the change in disgorgement obligation. In contrast, Defendant Parties argue that the Second Circuit intended for this Court to determine the applicability of the NDAA, as well as recalculate Defendant's disgorgement obligation. In an abundance of caution, this Court analyzes both the applicability of the NDAA and the scope of Defendant's new disgorgement obligation.

II. Discussion

a. Application of Amendments to a "Pending" Case

The modifications authorized by the NDAA apply to "any action or proceeding that is pending on" January 1, 2021. NDAA § 6501(b). Given that a case is pending until "the last court in the hierarchy [of Article III courts] rules," *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 227 (1995),[3] and the Second Circuit had not yet ruled on Defendant Parties' appeals as of January 1, 2021, this case is "pending" and the NDAA and its attendant modifications therefore apply.[4] *See*

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[3] This extended reasoning from the Supreme Court in *Plaut* is instructive:

> [A] distinction between judgments from which all appeals have been forgone or completed, and judgments that remain on appeal (or subject to being appealed), is implicit in what Article III creates: not a batch of unconnected courts, but a judicial department composed of "inferior Courts" and "one supreme Court." Within that hierarchy, the decision of an inferior court is not (unless the time for appeal has expired) the final word of the department as a whole. It is the obligation of the last court in the hierarchy that rules on the case to give effect to Congress's latest enactment, even when that has the effect of overturning the judgment of an inferior court, since each court, at every level, must decide according to existing laws.

514 U.S. 211, 227 (1995).

[4] The First Circuit recently noted in an analogous pending SEC case that although "[w]hen the district court ruled, a five-year limitation period applied to the SEC's claims[,] . . . [t]he changed statute of limitations [as authorized by the NDAA] does not impact

also Landgraf v. USI Film Prod., 511 U.S. 244, 273-74 (1994) ("[A] court should apply the law in effect at the time it renders its decision, even though that law was enacted after the events that gave rise to the suit.").

The amendments permit disgorgement to be sought for up to ten years prior to the Government's filing of the complaint for "conduct that violates—(I) section 10(b); (II) section 17(a)(1) of the Securities Act of 1933 (15 U.S.C. 77q(a)(1)); (III) section 206(1) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-6(1)); and (IV) any other provision of the securities laws for which scienter must be established." 15 U.S.C. § 78u(d)(8)(A). In its Ruling on Liability, the Court found that Defendant "acted with the requisite scienter with respect to each act of fraud" in violating Section 10(b) of the Exchange Act. (Ruling on Liability at 42.) With the exception of $650,000 in illegal profits obtained from Company D in January of 2005, each of Defendant's acts of fraud occurred after May 2005, (*see* Ruling on Liability at 15-24), and thus are subject to disgorgement under § 6401 of the NDAA. As such, Defendant's new disgorgement obligation is $64,171,646.14. (*Id.*)

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this case." *SEC v. Morrone*, No. 19-2006 at 6 n.3 (1st Cir. 2021). However, because the issue on appeal to the First Circuit does not appear to reach disgorgement, the First Circuit declined to analyze the application of the NDAA beyond that which is quoted above. *Id.* This Court, squarely addressing disgorgement, concludes that the NDAA does apply to this case.

b. Defendant and Relief Defendant's Arguments

Defendant Parties offer a number of reasons why the NDAA should not apply to this case, all of which are defeated by the Court's finding that this judgment remains "pending." (*See* Relief Defs.' Mem. at 1-3; Def.'s Mem. at 6-7.)

First, Relief Defendants argue that the Court may not increase the amount of disgorgement because the Second Circuit does not permit "an appellee who has not cross-appealed [to] enlarge the amount of damages or scope of equitable relief," (Relief Defs.' Mem. at 7 (quoting *Int'l Ore & Fertilizer Corp. v. SGS Control Servs.*, 38 F.3d 1279, 1286 (2d Cir. 1994)); *see also* Def.'s Mem. at 6). At the time it moved the Second Circuit for a limited remand in January 2021, the SEC had not entered a cross-appeal in this case. However, "the requirement of a cross-appeal is a rule of practice which is not jurisdictional and in appropriate circumstances may be disregarded." *Finkielstain v. Seidel*, 857 F.2d 893, 895 (2d Cir. 1988); *see also Carlson v. Principal Fin. Grp.*, 320 F.3d 301, 309 (2d Cir. 2003) (holding the same); *Rangolan v. Cty. of Nassau*, 370 F.3d 239, 254 (2d Cir. 2004) (noting that the cross-appeal rule is one of practice but also observing that "exercise of the power to disregard the failure to cross-appeal has been rare, requiring a showing of exceptional circumstances") (internal quotations omitted). To decide whether to disregard the cross-appeal requirement, this Court applies a factor test balancing "(1) the interrelatedness of the issues on appeal and cross-appeal; (2) whether the nature of the district court opinion should have put the appellee on

notice of the need to file a cross-appeal; and (3) the extent of any prejudice to the appellant caused by the absence of notice." *Lee v. Burlington N. Santa Fe Ry. Co.,* 245 F.3d 1102, 1107 (9th Cir. 2001). Here, since the amount of the judgment was directly appealed by Defendant Parties, the District Court's opinion could not have put the appellee on notice of any grounds for cross appeal because the NDAA had not yet passed, and no prejudice resulted to the appellant as the Parties had ample opportunity to brief the issue on remand. Thus, the SEC's failure to submit a cross-appeal will not limit the scope of its disgorgement remedy.

Second, Defendant and Relief Defendants argue that expanding disgorgement necessarily would either reopen a final judgment or unconstitutionally attempt to revive time-barred claims as prohibited by the ex post facto clause. (Def.'s Mem. at 10-13, Relief Defs. Mem. at 17-18.)

Mem. at 11-14, 18-19.) However, as discussed above, the NDAA applies to *pending* cases, the judgments of which are not yet considered final under *Plaut*, but the substance of which have already been brought before the Court. *See Plaut*, 514 U.S. at 227 (noting the constitutionally important "distinction between judgments from which all appeals have been forgone or completed, and judgments that remain on appeal (or subject to being appealed)").[5] Because the SEC does not

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[5] Defendant Parties argue that, because the SEC consented to the five-year limitation and declined to appeal the judgment, the judgment should be viewed as "final" as applied to the SEC;

seek permission to initiate suit against Defendant for previously time-barred claims, but rather intends only to obtain disgorgement of proceeds obtained from violations for which Defendant has already been found liable and the judgment of which is still pending, the ex post facto clause does not apply to this case. The Court does not therefore address the punitive nature of the disgorgement and its interaction with the ex post facto clause. (*See* Relief Defs.' Mem. at 18-19; Def.'s Mem. at 17-18); *see also SEC v. Sidoti*, 2021 WL 1593253 at *6-*7 (C.D. Cal. Mar. 19, 2021) (holding that the five-year limitation of 28 U.S.C. § 2462 applies to disgorgement sought for non-scienter-based violations of the Securities Exchange Act because of its penal nature).

Third, Relief Defendants and Defendant argue that the amendments do not apply to this case because the NDAA "left § 21(d)(5) unaltered, while creating a new subparagraph – § 21(d)(7)" and thus this action, which they argue granted remedial action only pursuant to § 21(d)(5), is unaffected by the modifications because the new "limitations period [] governs only claims for disgorgement under paragraph (7)" and "'paragraph (7)' did not exist before January 2021." (Relief Defs.' Mem at 3, 19-20; *see also* Def.'s Mem. at 18-19.) However, the Court did not rely solely on § 21(d)(5) of the Act to authorize disgorgement in its initial ruling. (*See* Ruling on Pl.'s Mot. for Remedies and J. at 10 ("Second Circuit precedent [recognizes] that disgorgement is a proper equitable remedy.") (citing *SEC v. Cavanaugh*, 445

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however, no Defendant Parties support this contention with any legal authority or meritorious rationale. (Def.'s Mem. at 10-13; Relief Defs.' Mem. at 12-14.)

F.3d 105, 116 (2d Cir. 2006))). Moreover, the SEC did not, as Defendant claims "ma[k]e it clear that it was bringing its claims for disgorgement, and had authority to do so, only under § 21(d)(5)," (Def.'s Mem. at 19 n.14), but rather relied on the common law injunctive power of the district courts, (Pl. SEC's Opp. to Def.'s Emerg. Mot. to Stay in Light of *Kokesh* [Doc. # 684] at 6-7 ("[D]istrict courts in Commission actions have for decades used their injunctive authority under Section 21(d)(1) of the Exchange Act to order defendants to disgorge profits that they acquired through violations of the securities laws. . . . Disgorgement is *also* authorized by Section 21(d)(5). . . .") (emphasis added)). Thus, Relief Defendants' contention that the amendments do not reach the subsection on which this Court grounded its decision is incorrect. Moreover, as discussed above, even though paragraph (7) did not exist until January 2021, because the litigation was still pending at that time, the Court must apply the new law to the present case and may therefore order disgorgement in accordance with the newly-minted paragraph (7).[6]

Because the judgment was still pending at the time the NDAA went into effect, disgorgement is properly ordered to be $64,171,646.14.

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[6] Defendant and Relief Defendants further argue that "§ 21(d)(8)(A)(ii)'s ten-year limitations period, if it were applicable, can only apply to conduct and transactions occurring after January 2011 given that Congress enacted the NDAA in January 2021. However, the statute itself states that actions must be brought "not later than 10 years *after the latest date of the violation* that gives rise to the action" and thus the argument is without merit. 15 U.S.C. § 78u(d)(8)(A) (emphasis added).

c. Prejudgment Interest

In its Amended Final Judgment, the Court awarded $1,491,064.01 of "prejudgment interest [on the disgorgement award] for the period of time prior to the asset freeze." (Am. J. [Doc. # 1054] at 2, 4.) The SEC now seeks an increased prejudgment interest award of $9,755,798.34 to reflect the increased disgorgement amount. (SEC's Mem. at 9; Disgorgement and Prejudgment Interest Summary, Ex. A to SEC's Mem [Doc. # 1904-1] at 1-4.) Relief Defendants request that, to the extent the Court decides to award prejudgment interest on any increased disgorgement award, such interest "not be computed using the IRS underpayment rate or compounded at a quarterly rate" as requested by the SEC, but instead be computed using "the one-year Treasury Bill rate." (Relief Defs.' Mem. at 7, 8.)

The Court has already determined that an award of prejudgment interest on disgorged assets calculated using the SEC's methodology is appropriate, and there is no reason why it should not similarly award prejudgment interest on the increased disgorgement award. (*See* Order Granting Pl.'s Mot. for J. and Remedies at 13.) Although Relief Defendants contend that the SEC's proposed method for calculating prejudgment interest is "punitive" and would overcompensate the SEC, (*id.* at 8-9), no court has found prejudgment interest compounded quarterly based on the same interest rate the IRS uses to be "punitive" or to otherwise result in overcompensation to the plaintiff. To the contrary, numerous courts have affirmed, even after *Liu*, that this method is appropriate because the IRS's "rate of interest 'reflects

what it would have cost to borrow the money from the government and therefore reasonably approximates one of the benefits the defendant derived from its fraud.'" *SEC v. Faulkner*, No. 3:16-CV-1735-D, 2021 WL 75551, at *10 (N.D. Tex. Jan. 8, 2021) (quoting *SEC v. First Jersey Secs., Inc.*, 101 F.3d 1450, 1476 (2d Cir. 1996)); *see also SEC v. Skelley*, No. 18cv8803 (LGS) (DF), 2021 WL 863298, at *7-*8 (S.D.N.Y. Feb. 25, 2021) (holding that prejudgment interest calculations should apply the IRS underpayment rate and compound quarterly); *SEC v. Owings Group, LLC*, No. RDB-18-2046, 2021 WL 1909606, at *5-*6 (D. Md. May 12, 2021) (holding that a prejudgment interest award in accordance with "the SEC's prejudgment interest calculator[,] which uses the same rate as the Internal Revenue Service, 26 U.S.C. § 6621(a)(2), and compounds interest quarterly" is appropriate); *SEC v. Dang*, No. 3:20-cv-01353 (JAM), 2021 WL 1550593, at *7 (D. Conn. Apr. 19, 2021) (holding that an award of prejudgment interest calculated in the same manner the IRS uses for tax underpayments is appropriate); *SEC v. Premier Holding Corp.*, No. SACV 18-00813-CJC(KESx), 2021 WL 1048565, at *3 (C.D. Cal. Jan. 20, 2021) (same); *SEC v. Montgomery*, No. SA-20-CA-598-FB, 2021 WL 210749 (W.D. Tex. Jan. 20, 2021) (same); *SEC v. Blockest, LLC*, No. 18CV2287-GPB(MSB), 2020 WL 7488067, at *4 (S.D. Cal. Dec. 15, 2020) (same); *SEC v. Erwin*, No. 13-cv-03363-CMA-KMT, 2020 WL 7310584, at *5 (D. Colo. Dec. 11, 2020) (same); *SEC v. Curatives Biosciences, Inc.*, No. 8:18-cv-00925-SVW, 2020 WL 7345681, at *6 (C.D. Cal. Oct. 22, 2020) (same); *SEC v. Mizrahi*, No. CV 19-2284 PA (JEMx), 2020 WL 6114913, at *4 (C.D. Cal. Oct. 5, 2020) (same).

Consistent with the Court's prior award of prejudgment interest on disgorgement, the judgment is hereby amended to reflect an increased prejudgment interest award of $9,755,798.34.

d. Liquidation

Despite the fact that the Court had already explained that liquidation would proceed following recalculation of the disgorgement award, (Order Denying Clarification), Defendant and Relief Defendants elected to argue again in their briefs that a liquidation schedule should not issue, (*see* Relief Defs.' Mem. at 21; Def's Mem. at 29-32). The Court construes Defendant and Relief Defendants' request to stay liquidation pending appeal as a motion for reconsideration. Because Defendant and Relief Defendants filed their briefs twelve days after the Court issued its Order Denying Clarification on April 7, 2021, their motions for reconsideration are untimely and must be denied. *See* D. Conn. L. R. Civ. P. 7(c) (Motions for reconsideration must be filed "within seven days of the filing of the decision or order from which such relief is sought."). Moreover, Defendant and Relief Defendants have not identified any "controlling decisions or data that the court overlooked in the initial decision or order," as the Court issued its prior order after the Second Circuit issued its limited remand in light of the NDAA. *See id.*

Regardless, Defendant and Relief Defendants' arguments that liquidation should be stayed pending appeal are unavailing. Given the enlarged disgorgement award of $64,171,646.14 and the corresponding increased prejudgment interest award of

$9,755,798.34, the asset freeze no longer serves the same function as a *supersedeas* bond, which is designed to protect judgment creditors as fully as possible where there is a reasonable likelihood that the judgment debtor will unable or unwilling to satisfy the judgment in full. *See Rand-Whitney Containerboard Ltd. Partnership v. Town of Montville*, 245 F.R.D. 65, 67 (D. Conn. 2007).

The total judgment against Defendant now stands at $94,927,444.40, exclusive of gains on any assets used to satisfy the judgment since the asset freeze order. Although the most recent valuation by the Receiver estimates that the Receivership Estate is worth $123,771,402.92, that amount has fluctuated over the course of the Receivership, initially reflecting a value of $89,377,509.22 on May 5, 2019, (First Mot. for Atty Fees [Doc. # 1160-5] at 6), and decreasing to a low of $84,959,536.01 on May 15, 2020, (Fifth Mot. for Atty Fees [Doc. # 1555-11] at 4), before reaching the present valuation. Given the relatively illiquid nature of some assets in the Receivership Estate and the documented fluctuations in value (the lowest of which would leave the judgment undersecured by approximately $10 million), the unliquidated Receivership Estate does not adequately secure judgment. While Defendant "strongly believes the value of the invested assets will continue to increase" and thereby fully secure the judgment, (Def.'s Mem. at 31), there is no guarantee that this is the case, and the risk of a decrease in value should not be borne by the victims of Defendant's fraudulent scheme.

Defendant and Relief Defendants insist that pre-appeal liquidation will result in irreparable harm since "certain assets are real assets that can never be recovered if monetized," "there will be sizable capital gains taxes on any stock or bond sales," and "actions with respect to any irrevocable trusts and/or UGMAs may not be reversible." (Relief Defs.' Mem. at 22; *see also* Def.'s Mem. at 29.) Although it is possible that irreversible harm could be borne by Defendant and Relief Defendants should any decision by this Court be reversed by the Second Circuit, this risk can be substantially mitigated through a carefully timed liquidation plan that, *inter alia*, liquidates unique assets last and only if necessary to satisfy the judgment.

Liquidation is also favored as it will allow full security of the judgment and permit release of any excess frozen assets to Defendant and Relief Defendants. After excess assets are returned, there will be no further need to continually litigate over the release of frozen assets for Defendant and Relief Defendants' various purposes. Liquidation thus promotes judicial economy.

Accordingly, the Receiver is directed to propose a liquidation schedule upon which all Parties may comment. The Receiver is directed to file this proposed schedule with the Court no later than July 15, 2021. Comments will be received until July 29, 2021.

III. Conclusion

For the foregoing reasons and in accordance with the Second Circuit's directive on remand [Doc. # 1801],

Defendant's disgorgement obligation is increased to $64,171,646.14 with a prejudgment interest award of $9,755,798.34. The Clerk shall amend the judgment accordingly.

IT IS SO ORDERED.
_________/s/__________________
Janet Bond Arterton, U.S.D.J.

Dated at New Haven, Connecticut this 16th day of June 2021.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil No. 3:15cv675 (JBA)

[Filed July 6, 2021]

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,

v.

IFTIKAR AHMED,
Defendant, and

IFTIKAR ALI AHMED SOLE PROP; I-CUBED DOMAINS, LLC; SHALINI AHMED; SHALINI AHMED 2014 GRANTOR RETAINED ANNUNITY TRUST; DIYA HOLDINGS LLC; DIYA REAL HOLDINGS, LLC; I.I. 1, a minor child, by and through his next friends IFTIKAR and SHALINI AHMED, his parents; I.I. 2, a minor child, by and through his next friends IFTIKAR and SHALINI AHMED, his parents; and I.I. 3, a minor child, by and through his next friends IFTIKAR and SHALINI AHMED, his parents,
Relief Defendants.

REDETERMINED FINAL AMENDED JUDGMENT

It is hereby ordered that the Amended Final Judgment [Doc. # 1054] entered by this Court in the above-entitled case on December 14, 2018, be amended as follows:

> (4) IT IS HEREBY FURTHER ORDERED that Defendant is liable for disgorgement of **$64,171,646.14**, representing profits gained as a result of the conduct alleged in the Second Amended Complaint that occurred within ten years of the initiation of this case, together with an increased prejudgment interest award in the amount of **$9,755,798.34** and any interest or gains accrued on disgorged frozen assets from the date of the Court's freeze order.

In all other respects the Amended Judgment [Doc. # 1054] entered by this Court on December 14, 2018 remains in effect.

IT IS SO ORDERED.
_________/s/__________________
Janet Bond Arterton, U.S.D.J.

Dated at New Haven, Connecticut this 6th day of July 2021.

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil No. 3:15cv675 (JBA)

[Filed September 6, 2018]

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,

v.

IFTIKAR AHMED,
Defendant, and

IFTIKAR ALI AHMED SOLE PROP; I-CUBED DOMAINS, LLC; SHALINI AHMED; SHALINI AHMED 2014 GRANTOR RETAINED ANNUNITY TRUST; DIYA HOLDINGS LLC; DIYA REAL HOLDINGS, LLC; I.I. 1, a minor child, by and through his next friends IFTIKAR and SHALINI AHMED, his parents; I.I. 2, a minor child, by and through his next friends IFTIKAR and SHALINI AHMED, his parents; and I.I. 3, a minor child, by and through his next friends IFTIKAR and SHALINI AHMED, his parents,
Relief Defendants.

RULING ON PLAINTIFF'S MOTION FOR REMEDIES AND JUDGMENT

This Court found [Doc. # 835] on summary judgment that Defendant Iftikar Ahmed was liable for violations of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 thereunder, Section 17(a) of the Securities Act of 1933 ("Securities Act"), and Section 206 of the Investment Advisers Act ("Advisers Act"). *See SEC v. Ahmed*, 308 F. Supp. 3d 628, 636-37 (D. Conn. 2018) (hereinafter "*Ahmed II*"). Plaintiff, the United States Securities and Exchange Commission ("SEC") now moves [Doc. # 886] for Remedies and Judgment against Defendant, seeking: (1) a permanent injunction; (2) disgorgement of Defendant's fraudulent proceeds in the amount of $43,920,639; (3) disgorgement of prejudgment interest on those proceeds in the amount of $1,520,953 along with interest earned on all frozen assets during the pendency of freeze; (4) civil penalties in the amount of $43,920,639; (5) an Order specifically finding that the assets listed on the Asset Schedule (Ex. 1 [Doc. # 888-1] to Pl.'s Mem. Supp. Mot. for Judgment) belong to Defendant and can be used to satisfy a judgment against him; (6) the appointment of a receiver; (7) the establishment of a Fair Fund; and (8) any other relief that the Court may deem appropriate. (Pl.'s Mem. Supp. Mot. for Judgment [Doc.# 888] at 2.)

For the following reasons, the Court grants the SEC's Motion, with modification.

I. Background

The Court assumes the parties' familiarity with the facts and procedural history of this case. A detailed discussion of the facts underlying Defendant's violations can be found in the Court's Ruling granting summary judgment on the issue of Defendant's liability. *See Ahmed II*, 308 F. Supp. 3d 628. A brief summary of relevant facts and findings relating to Relief Defendants' claims of ownership over assets listed in the Asset Schedule follows.

In opposition to the SEC's request for a preliminary injunction freezing assets, Relief Defendant Shalini Ahmed and her children made a claim to only three assets: (1) $7.5 million in proceeds from the Company C transaction that was held by I-Cubed and placed into the 2014 Grantor Retained Annuity Trust (the "GRAT"); (2) income earned from a Park Avenue condominium held in the name of DIYA that was purchased for approximately $9.5 million ("Unit 12A"); and (3) any income earned from a second Park Avenue condominium held in the name of DIYA Real that was purchased for approximately $8.7 million ("Unit 12F"). (*See, e.g.*, [Docs. ## 69, 96].) The Court rejected Ms. Ahmed's request, finding that she was a nominal owner for each requested asset and thus her ownership claims were not credible. *See SEC v. Ahmed*, 123 F. Supp. 3d 301, 313 (D. Conn. 2015) (hereinafter "*Ahmed I*"), *aff'd sub nom. Sec. & Exch. Comm'n v. I-Cubed Domains, LLC*, 664 F. App'x 53 (2d Cir. 2016). However, the Court agreed to "entertain any application to release assets identifiable as [Ms. Ahmed's], and not tainted." *Sec. & Exch. Comm'n v. I-Cubed Domains, LLC*, 664

F. App'x 53, 57 (2d Cir. 2016) (internal quotations omitted)

Relief Defendants chose to take an interlocutory appeal of the Asset Freeze Order, arguing, *inter alia*, that the asset freeze was overbroad as to assets in Ms. Ahmed's name that the Court had not individually analyzed. *See I-Cubed Domains, LLC,* 664 F. App'x at 55. The Second Circuit deemed the argument "meritless" and instructed that, even with assets held in their name, Relief Defendants needed to first "identify any improperly frozen assets" and apply for their release before the SEC would be "required to carry its burden of demonstrating that any such identified assets are either ill-gotten gains to which Relief Defendants do not have a legitimate claim or that Iftikar in fact owns the assets in question." *Id.* at 57 (citing *Smith v. SEC*, 653 F.3d 121, 128 (2d Cir. 2011)). "If Relief Defendants cannot prove that any frozen assets legitimately belong to them, then necessarily none of their assets are being improperly frozen to satisfy the civil penalties alleged to apply to Iftikar's conduct." *Id.* at 57 n.3. Relief Defendants subsequently hired an expert "to counter the Commission's argument that the Relief Defendants are mere nominees." ([Doc. # 340] at 7.)

Since the Second Circuit's ruling, Ms. Ahmed has identified only two allegedly improperly frozen assets: 1) $250,000.00 in rental proceeds from Unit 12A that was previously placed in Fidelity x7540; and (2) nine 1-kilogram gold bars discovered in jointly-owned safety deposit boxes. (*See* [Doc. # 442].) The Court rejected these requests, finding that neither asset belonged to

her: "Ms. Ahmed is not entitled to proceeds of Unit 12A because she was only a nominal owner of the condominium" and "[e]ven Relief Defendants' Motion does not contain an explicit allegation of Ms. Ahmed's ownership of the Gold Bars, and the SEC has pointed to testimony which demonstrates that Ms. Ahmed had no knowledge of the existence of the bars." ([Doc.# 658] at 3-5.)

Following the Court's Summary Judgment Ruling on Liability, Relief Defendants were ordered to—and agreed to—"provide a list identifying all assets they claim belong to them, and the reasons why they claim such ownership." ([Doc. # 842] at 3.) On April 27, 2018, Relief Defendants filed the required list. (*See* Relief Defendant's Asset List [Doc.# 862]). Despite having made claims to only five frozen assets during the preceding three years of litigation (all of which were rejected), Ms. Ahmed and her young children now claim to own more than $85 million in frozen assets. *Id.* Neither Relief Defendants' Asset List, nor any other submissions to the Court, explain how Relief Defendants controlled the assets or how they were acquired. Nor do they provide any argument that goods or services were provided in exchange for the assets, or any expert analysis demonstrating the SEC' s nominee allegations are inaccurate.

II. Discussion

A. Plaintiff's Motion is Procedurally Sound

Defendants fault the SEC for filing a Motion for Judgment instead of a motion for summary judgment

on damages.[1] The SEC responds that summary judgment is not appropriate given that it is not seeking damages, but rather is requesting that the Court enter judgment against Defendant awarding certain equitable remedies, which cannot be decided at a trial. *See, e.g.*, *Broadnax v. City of New Haven*, 415 F.3d 265, 271 (2d Cir. 2005). Relief Defendants cry foul, claiming entitlement to a jury on the question of whether specific assets belong to them, or are in fact owned by Mr. Ahmed.

Relief Defendants provide no convincing authority supporting their position that ownership of the assets in this context is a question of fact that must be determined by a jury. They attempt to characterize the SEC's theory of recovery against Relief Defendants as one of fraudulent conveyance, a question of common law rather than equity, in order to show entitlement to a jury trial. However, their sole cited case involves a private lawsuit in which the government intervened to enforce tax liens against two defendants by proceeding against a third defendant under the theory that it was a nominee for the first two. *See Iantosca v. Benistar Admin. Svcs., Inc*, 843 F. Supp. 2d 148, 153-54 (D. Mass. 2012). The court reasoned that "suits seeking . . . to compel the defendant to pay a sum of money to the plaintiff are suits for money damages . . . [a]nd money damages are, of course, the classic form of legal relief," therefore finding that the defendants were entitled to

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[1] The Court's April 5, 2018 endorsement order [Doc. # 842], following a discussion on the record with all parties, specifically ordered that the SEC file a Motion for Judgment.

a jury trial with respect to the government's nominee claim. *Id.* at 153.

Iantosca, which unlike here was a private lawsuit, is not persuasive in light of the overwhelming case law cited by the SEC in which district courts have used their equitable power in the context of securities enforcement actions to order the turnover of assets nominally held by third parties. *See SEC v. Soflpoint, Inc.*, No. 95-CV-2951, 2012 WL 1681167 at* 3 (S.D.N.Y. May 9, 2012) (where the defendant could use corporation's money at will and "attributed the assets to [the corporation] in order to retain their use while fraudulently protecting them from creditors[,]" the court found that the corporation's assets belonged to the defendant); *SEC v. Zubkis*, No. 97 Civ. 8086 (JGK), 2005 WL 1560489 at *4 (S.D.N.Y. June 30, 2005) ("The Court may use [its] broad equitable power to order the turnover of assets nominally held by third parties where the third party lacks a legitimate claim to the assets."); *SEC v. Martino*, 255 F. Supp. 2d 268, 288 (S.D.N.Y. 2003) (ordering the sale of a yacht placed in the name of a relief defendant but paid for by the defendant because "the disgorgement of unjustly retained wealth is a long-standing remed[y] that [is] within a court's equity powers" and this inherent equitable power "certainly extends to a person who, although not accused of wrongdoing, received ill-gotten funds and does not have a legitimate claim to those funds" (internal quotation marks and citations omitted)).[2, 3]

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[2] Several Circuits have similarly found that district courts have broad equitable powers which include the ability to determine

B. Remedies

1. Permanent Injunction

Section 21(d)(1) of the Exchange Act, Section 20(b) of the Securities Act, and Section 209(d) of the Advisers Act allow the Commission to obtain permanent injunctive relief upon a showing that the defendant has

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ownership of assets. *See SEC v. Coello*, 139 F.3d 674, 676 (9th Cir. 1998) ("[A]mple authority supports the proposition that the broad equitable powers of the federal courts can be employed to recover ill gotten gains for the benefit of the victims of wrongdoing, whether held by the original wrongdoer or by one who has received the proceeds after the wrong."); *SEC v. Cherif*, 933 F.2d 403, 414 n. 11 (7th Cir. 1991) ("A court can obtain equitable relief from a non-party against whom no wrongdoing is alleged if it is established that the non-party possesses illegally obtained profits but has no legitimate claim to them. Courts have jurisdiction to decide the legitimacy of ownership claims made by non-parties to assets alleged to be proceeds from securities laws violations.").

[3] Accordingly, Defendant's Motion [Doc. # 884] for Summary Judgment on Damages is denied because the SEC is not seeking damages, but only equitable remedies, and therefore there are no issues which remain for a jury. In his Motion, Defendant makes many of the same arguments he makes in his Opposition [Doc. # 902] to the SEC's Motion for Remedies and Judgment, including that after *Kokesh* the SEC is not authorized to seek disgorgement, that Defendant obtained no ill-gotten gains with regard to the two Company C transactions, that Oak already holds assets belonging to Defendant that must be accounted for, and that no civil penalty or injunction should be imposed. His Motion for Summary Judgment also argues the right to a jury trial to decide the amount of disgorgement. (Def.'s Mot. for Summ. J. at 11-12.) The Court incorporates Defendant's Motion for Summary Judgment into his Opposition to the SEC's Motion for Judgment and thus considers those arguments made in support of summary judgment as part of Defendant's rebuttal to the SEC's Motion.

violated the securities laws and there is a reasonable likelihood that the defendant will violate the securities laws in the future. *See SEC v. Commonwealth Chemical Secs., Inc.*, 574 F.2d 90, 99 (2d Cir. 1978) (injunction should be granted if the defendant's past conduct indicates "a reasonable likelihood of further violation in the future"); *see also S.E.C. v. Rabinovich & Assocs., LP*, No. 07-cv-10547(GEL), 2008 WL 4937360, at *5 (S.D.N.Y. Nov. 18, 2008). In evaluating that likelihood, a court may consider such factors as the degree of scienter involved; the sincerity of the defendant's assurances against future violations; the recurrent or isolated nature of the infraction; the defendant's recognition of the wrongful nature of his conduct; and the likelihood, given defendant's occupation, that future violations may occur. *SEC v. Universal Major Indus. Corp.*, 546 F.2d 1044, 1048 (2d Cir. 1976).

Defendant claims that "[g]iven the very public nature of this case, which has already been widely reported both by the print, television and online media, it is implausible that Defendant will be employed in the securities industry ever again." He further "disavows any interest in ever returning to the securities industry[,]" and complains that an injunction would only serve to stigmatize his current educational, charitable, and non-profit activities. (Def.'s Opp'n at 40.) Despite these noble proclamations, the above factors weigh in favor of issuing an injunction here.

Defendant's violation was not an isolated incident, rather he continuously violated the securities laws for nearly a decade while employed at Oak. Moreover,

Defendant committed these violations with the highest degree of scienter—"Defendant opened bank accounts he alone controlled that were deceptively titled in the name of Oak and its portfolio companies, which he then used to divert monies intended for Oak funds or its portfolio companies into his and his wife's personal bank accounts." *Ahmed II*, 308 F. Supp. 3d at 638. Defendant has never admitted his wrongful conduct or accepted any responsibility whatsoever for his fraud, and indeed fled the country shortly after this case began, prior to the July 2015 Preliminary Injunction hearing. Although his current employment may not at all be related to the securities industry, he nonetheless retains the skills and capacity to work in that field if given the opportunity.

On these facts, the Court finds that there is a "reasonable likelihood" that Defendant will violate the securities laws in the future. *See SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1477 (2d Cir. 1996) (An "injunction is particularly within the court's discretion where a violation was founded on systematic wrongdoing, rather than an isolated occurrence, and where the court views the defendant's degree of culpability and continued protestations of innocence as indications that injunctive relief is warranted . . ."). Thus, Defendant is permanently enjoined from violating Section 17(a) of the Securities Act (15 U.S.C. § 77q(a)), Section 10(b) of the Exchange Act (15 U.S.C. § 78j(b)) and Rule 10b-5 thereunder (17 C.F.R. § 240.10b-5), and Sections 206(1), 206(2), 206(3), and 206(4) of the Advisers Act (15 U.S.C. §§ 80b-6(1), 80b-6(2), and 80b-6(3)) and Rule 206(4)-8 thereunder (17 C.F.R. § 275.206(4)-8).

2. Disgorgement

"Once the district court has found federal securities law violations, it has broad equitable power to fashion appropriate remedies, including ordering that culpable defendants disgorge their profits." *S.E.C. v. Razmilovic*, 738 F.3d 14, 31 (2d Cir. 2013), as amended (Nov. 26, 2013). The equitable remedy of disgorgement "consists of fact finding by a district court to determine the amount of money acquired through wrongdoing – a process sometimes called 'accounting' – and an order compelling the wrongdoer to pay that amount plus interest to the court." *SEC v. Cavanagh*, 445 F.3d 105, 116 (2d Cir. 2006) ("*Cavanagh II*") (footnote omitted); *see also SEC v. Commonwealth Chemical Securities, Inc.*, 574 F.2d 90, 102 (2d Cir. 1978) (Disgorgement "is a method of forcing a defendant to give up the amount by which he was unjustly enriched.").

Courts may only order disgorgement for profits which were illegally derived, but given the difficulty in determining exactly which of a defendant's gains resulted from his frauds, "'[t]he amount of disgorgement ordered need only be a reasonable approximation of profits causally connected to the violation.'" *Razmilovic*, 738 F.3d at 31 (quoting *First Jersey*, 101 F.3d at 1475). Thus, courts have found that "[s]o long as the measure of disgorgement is reasonable, any risk of uncertainty should fall on the wrongdoer whose illegal conduct created that uncertainty." *SEC v. Warde*, 151 F.3d 42, 50 (2d Cir. 1998) (internal quotation marks omitted). Obviously, as discussed above, disgorgement cannot be avoided by transferring ill-gotten gains to third parties. *See, e.g.*,

Cavanagh I, 155 F.3d at 137 ("Allowing [Defendant's wife] to now claim valid ownership of those proceeds would allow almost any defendant to circumvent the SEC's power to recapture fraud proceeds, by the simple procedure of giving stock to friends and relatives, without even their knowledge.")

a. The Court's Authority to Order Disgorgement

Defendants contend that after *Kokesh v. SEC*, 137 S. Ct. 1635, 1644 (2017) the SEC cannot seek disgorgement against any party because it is a penalty for all purposes. However, *Kokesh* made clear it was addressing a narrow issue—whether disgorgement is a "penalty within the meaning" of the statute of limitations in § 2462—and explicitly warned that "[n]othing in this opinion should be interpreted as an opinion on whether courts possess authority to order disgorgement in SEC enforcement proceedings . . ." *Kokesh*, 137 S. Ct. at 1643, 1642 n.3. Since *Kokesh* was decided, courts have declined to endorse similar arguments as here, that the SEC has no authority to seek disgorgement at all. As one district court explained in rejecting that same argument, "*Kokesh* is best seen as a decision clarifying the statutory scope of § 2462, rather than one redefining the essential attributes of disgorgement." *SEC v. Jammin Java Corp.*, 2017 WL 4286180, at *3 (C.D. Cal. Sept. 14, 2017). That is because "at every step of the analysis, the Court reinforce[d] [that] it [was] discussing penalties in the context of a specific provision and for statute of limitations purposes." *SEC v. Brooks*, 2017 WL 3315137, at *6-8 (S.D. Fla. Aug. 3, 2017) (reasoning

that "*Kokesh's* holding cannot be plucked from the statutory context that gives it force" and determining that, despite *Kokesh*, disgorgement is an equitable remedy that is remedial for purposes of determining whether a claim survives the defendant's death). Consistent with this view, the Second Circuit has upheld a disgorgement award post-*Kokesh*, holding that courts have "broad discretion" in ordering disgorgement. *SEC v. Metter*, 706 Fed. Appx. 699, 702 (2d Cir. 2017).

Thus, nothing in *Kokesh* disturbed Second Circuit precedent that disgorgement is a proper equitable remedy. *See SEC v. Cope et al.*, No. 14CV7575 (DLC), 2018 WL 3628899, at *4 (S.D.N.Y. July 30, 2018); *see also Cavanagh II*, 445 F.3d at 118 (explaining that disgorgement serves the equitable purpose of "prevent[ing] wrongdoers from unjustly enriching themselves through violations" and that "[t]he emphasis on public protection, as opposed to simple compensatory relief, illustrates the equitable nature of the remedy" (citing *SEC v. Commonwealth Chem. Sec., Inc.*, 574 F.2d 90, 102 (2d Cir. 1978))).[4]

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[4] Relief Defendants argue that the Court cannot order disgorgement of their assets because they are not accused of any wrongdoing and therefore penalties may not be imposed against them. However, the SEC is not seeking disgorgement against Relief Defendants, only against Defendant himself. It is only because the SEC claims Relief Defendants are holding assets that are, in reality, Mr. Ahmed's, that assets in Relief Defendants' possession may be subject to the order of disgorgement against Defendant.

b. The Total Amount to be Disgorged

Contrary to Relief Defendants' argument, the SEC has not conflated disgorgement with restitution. The Court's findings in the Summary Judgment Ruling on Liability focused on Defendant's fraudulent gains and did not address Oak's losses from Defendant's conduct. The Court's findings detail the specific sums Defendant diverted into his and his wife's bank accounts, totaling approximately $67 million, $43,920,639.00 of which was acquired within five years of the initiation of this case. *See Ahmed*, 308 F. Supp. 3d at 638-48.

That being said, with respect to the second Company C transaction ("C2"), the Ruling on Summary Judgment, which focused specifically on liability, only calculated gross sales revenues from the sale of Company C shares and did not address Defendant's initial cost of purchasing the Company C shares through I-Cubed, which was $2 million. (*See* Ex. 4 (Ames' Decl.) ¶ 29(b).) Thus, Defendants appropriately dispute the amount that should be disgorged relating to this transaction. Their argument that the first Company C transaction ("C1") similarly was not properly calculated though, is meritless.

Relief Defendants claim that the SEC's overall disgorgement request must be reduced by $8.9 million because Mr. Ahmed had no ill-gotten gains relating to the C1 transaction. (R. Def.'s Opp'n at 8.) As the SEC notes, Defendant's conflict of interest in the transaction, where he concealed from both parties "that he (as opposed to the BVI Company, which was an Oak portfolio company) was the seller of [the] Company C shares and that he would personally profit by more

than $8 million upon Oak Fund XIII's $25 million investment" in Company C violates Advisers Act Section 206(3). Accordingly, it is appropriate for the Court to order disgorged "all profits reaped through [t]his securities law violation[]," which is the $8.9 million Defendant made by selling the shares for nearly $11 million after he purchased them for only $2 million, *Ahmed II*, 308 F. Supp. at 640-41. *See SEC v. Cavanaugh*, 445 F.3d 105, 109 (2d Cir. 2006).

The C2 transaction is another instance in which Mr. Ahmed concealed the fact that he was on both sides of the deal—as the sole member of Relief Defendant I-Cubed, Defendant sold shares of Company C (which had previously been purchased by I-Cubed, i.e., Mr. Ahmed) to an Oak Fund. *Ahmed*, 308 F. Supp. 3d at 641-42. In its Ruling, the Court found that the gross revenue from the $7.5 million sale was then distributed into an account on which Mr. Ahmed is listed as the sole signatory, which he had opened by representing that he was a member of I-Cubed. *See id.* at 642 n.9.

Because the Court is authorized to disgorge only "*profits* reaped through [Defendant's] securities law violations," the Court concludes that $5.5 million is the appropriate amount of disgorgement for the C2 transaction. *See Cavanaugh*, 445 F.3d at 109 (emphasis added). Accordingly, the total amount the SEC seeks to have disgorged of $43,920,639.00 must be reduced by $2 million. Defendants have not established with respect to any other transaction that the Court's Ruling on Liability improperly calculated profits Defendant derived from his misconduct, and therefore the Court

orders Defendant to disgorge $41,920,639.00, representing his ill-gotten profits.

3. Prejudgment Interest and Interest/ Gains Accrued on Frozen Assets

As with disgorgement, an award of prejudgment interest lies within the discretion of the court. *See First Jersey*, 101 F.3d at 1476. Generally, "an award of prejudgment interest may be needed in order to ensure that the defendant not enjoy a windfall as a result of its wrongdoing." *Slupinski v. First Unum Life Ins. Co.*, 554 F.3d 38, 54 (2d Cir. 2009). In deciding whether an award of prejudgment interest is warranted, a court should consider (i) the need to fully compensate the wronged party for actual damages suffered, (ii) considerations of fairness and the relative equities of the award, (iii) the remedial purpose of the statute involved, and/or (iv) such other general principles as are deemed relevant by the court. *First Jersey*, 101 F.3d at 1476 (internal citation omitted). It is within the "discretion of a court to award prejudgment interest on the disgorgement amount for the period during which a defendant had use of [its] illegal profits." *Razmilovic*, 738 F.3d at 36.[5]

[5] Mr. Ahmed contends that the SEC is not entitled to an award of prejudgment interest after *Kokesh* because, in his view, disgorgement now constitutes a penalty for all purposes and the SEC cannot seek prejudgment interest on any penalty. (Def.'s Opp'n at 9.) Because, as discussed below in footnote 8, the Court disagrees with the basic premise that all disgorgement orders are now penalties, this argument lacks merit.

Here, prejudgment interest on the amount to be disgorged is appropriate for the period prior to the asset freeze, since without it Defendant would be allowed to "obtain[ ] the benefit of what amounts to an interest free loan procured as a result of illegal activity." *SEC v. Moran*, 944 F.Supp. 286, 295 (S.D.N.Y. 1996). The SEC represents, and Defendants do not dispute, that this amounts to $1,520,953.00.[6]

What is disputed, however, is the SEC's additional request that the Court order Defendant to turn over all interest and returns from frozen assets from the time this Court entered [Doc. # 9] a Temporary Restraining Order on May 9, 2015. The SEC is not requesting that Mr. Ahmed pay prejudgment interest on frozen assets during the pendency of the asset freeze, but it contends that conversely, he is not entitled to interest or gains on assets while they were frozen, and those moneys should be disgorged and returned to Defendant's victims. Thus, while recognizing that it can be improper to collect prejudgment interest on "funds [that] have been frozen in connection with an enforcement action," the SEC claims it is entitled to disgorge the accumulated returns on frozen funds: "[F]rozen funds 'turned over to the government in complete or partial satisfaction of the disgorgement order' should be turned over 'along with any interest that has accrued on them during the freeze period.'" *Tavella*, 77 F. Supp. 3d at 361 (quoting *Razmilovic*, 738 F.3d at 36). "Otherwise, a defendant might perversely

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[6] The SEC is directed to provide a revised calculation for the prejudgment interest based on the revised disgorgement figure, discussed above.

benefit from the asset freeze by pocketing accumulated returns on the frozen principal." *Id.*

Defendants have not shown entitlement to interest and gains accrued during the pendency of the asset freeze and therefore the Court, as instructed by the Second Circuit in *Razmilovic*, orders the actual returns on the frozen assets, the amount of which have not yet been determined, must also be disgorged.

4. Civil Penalty[7]

Civil penalties are designed to punish the individual violator and deter future violations of the securities laws. *SEC v. Moran*, 944 F. Supp. 286, 296 (S.D.N.Y. 1996). The Securities Act and the Exchange Act authorize three tiers of civil penalties. *See* 15 U.S.C. § 77t(d); 15 U.S.C. § 78u(d)(3). Third tier penalties are appropriate where "the violation involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement" and "directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons." *Razmilovic*, 738 F.3d at 38 (citation omitted). At each tier, "for each violation, the amount of penalty 'shall not exceed *the greater of*' a specified monetary amount or the

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[7] Defendant offers no argument as to how imposing a civil penalty here violates the Eighth Amendment's Excessive Fines Clause, and therefore his citation to *SEC v. Metter* is puzzling. (*See* Def.'s Mot. for Summ. J. at 36 (quoting *SEC v. Metter*, 706 F. App'x 699, 703 (2d Cir. 2017) (The Second Circuit, "assume[d] without deciding that, in light of the Supreme Court's recent decision in *Kokesh* . . . the disgorgement liability imposed in this matter was essentially punitive in nature and thus was a fine within the meaning of the Excessive Fines Clause of the Eighth Amendment.")).)

defendant's 'gross amount of pecuniary gain.'" *Id.* (quoting 15 U.S.C. §§ 77t(d)(2), 78u(d)(3)(B)).

The actual amount of the penalty, within the bounds of the statute, is left to the discretion of the district court. *Id.* When making this determination, courts consider

> (1) the egregiousness of the defendant's conduct; (2) the degree of the defendant's scienter; (3) whether the defendant's conduct created substantial losses or the risk of substantial losses to other persons; (4) whether the defendant's conduct was isolated or recurrent; and (5) whether the penalty should be reduced due to the defendant's demonstrated current and future financial condition.

SEC v. Haligiannis, 470 F. Supp. 2d 373, 386 (S.D.N.Y. 2007).

The SEC asks the Court to impose a third-tier penalty equal to the amount of disgorgement, here roughly $41 million, based upon what it considers Defendant's egregious conduct. It argues that "Defendant engaged in premeditated, extensive, and continual fraud . . . that was intended to (and did) inflict harm on those he was entrusted to help, so he could personally profit." (Pl.'s Mot. for Judgment at 16.) Relief Defendants maintain that there is no support in this Circuit for imposition of a penalty that is 100% of

the total disgorgement, and instead that the penalty should be restricted to only 10-20%.[8]

Despite Defendants' protestations, there is no dispute that the Court is authorized, should it so choose, to impose a civil penalty equal to the amount ordered disgorged, representing Defendant's gross pecuniary gain. *See* 15 U.S.C. §§ 77t(d)(2), 78u(d)(3)(B)). Other district courts have done so. *See, e.g., S.E.C. v. Haligiannis*, 470 F. Supp. 2d 373, 386 (S.D.N.Y. 2007) (ordering the "defendants to pay a penalty in the approximate amount of his ill-gotten gains: $15,000,000."); *SEC v. BIC Real Estate Dev. Corp.*, 2017 WL 1740136, at *6 (E.D. Cal. May 4, 2017) ("ordering the defendant to pay a penalty of $12,132,370, equal to his profit from wrongdoing"); *SEC v. Zada*, 787 F.3d 375, 383 (6th Cir. 2015) (upholding imposition of civil penalty, equal to the amount of ill-gotten gains, of over $56 million). On the other hand, some courts have declined to impose the maximum penalty. *See, e.g.*, *Sec. & Exch. Comm'n v. Nadel*, No. CV110215WFKAKT, 2016 WL 639063, at *26 (E.D.N.Y. Feb. 11, 2016), *report and*

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[8] Defendants do not attempt to persuade the Court not to impose a third-tier penalty, although Relief Defendants maintain that the SEC's request for civil penalty should be denied outright because disgorgement is already a penalty. However, as the Court noted in the context of the asset freeze, since "[d]isgorgement merely requires the return of wrongfully obtained profits; it does not result in any actual economic penalty or act as a financial disincentive to engage in securities fraud" and therefore civil penalties are required in order to deter and punish fraud. *Ahmed I*, 123 F. Supp. 3d at 313 (quoting *S.E.C. v. Moran*, 944 F. Supp. 286, 296 (S.D.N.Y. 1996)).

recommendation adopted, 206 F. Supp. 3d 782 (E.D.N.Y. 2016) (imposing third-tier penalty in the amount of $1 million where the disgorgement award was nearly $11 million); *Razmilovic*, 822 F. Supp. 2d at 281-82 (declining to impose maximum civil penalty of over $41 million, and instead imposing civil penalty of over $20 million, equal to one-half of the disgorgement amount).[9]

The Court finds that the circumstances and consequences of Defendant's conduct warrant a significant penalty. Defendant's solo, flagrant, fraudulent conduct took place over many years, it was undoubtedly willful, with the sole motivation being to personally profit at the expense of his victims, whose resulting losses were immense. Defendant not only fled the country following his indictment on criminal charges in Massachusetts, but he has consistently and indignantly denied any wrongdoing whatsoever throughout the course of this litigation. There is no doubt Defendant utilized his professional talents and position to commandeer investors' funds purely for personal gain. Additionally, Defendant has not demonstrated that his financial condition warrants any downward adjustment, and his contention that the fine

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[9] The facts of this case bear a striking resemblance to those in *Razmilovic*, where the defendant similarly perpetuated a pervasive fraudulent scheme spanning a number of years that involved "fraud, deceit, manipulation and deliberate, or at least, reckless disregard of regulatory requirements," which resulted in substantial losses to investors. "Yet instead of responding to the charges against him, the defendant fled the country, continue[d] to refuse to admit any wrongdoing, and . . . never expressed any remorse for his conduct." 822 F. Supp. 2d at 280.

should be reduced based upon his inability to pay deserves little attention given that the SEC has already secured assets which are likely sufficient to satisfy the total award.

The Court is of the view that a civil penalty in the amount of $21 million, representing just over half of the total disgorgement amount, is reasonable and justified on the facts of this case, which is far from a mere slap on the wrist, and is sufficient to effectuate the punitive and deterrent purposes of such penalties, while not being greater than necessary. *See Razmilovic* 822 F. Supp. 2d at 281-82.[10]

C. Assets Available to Satisfy the Judgment

The SEC asks the Court to find that the assets listed on the Asset Schedule (Ex. 1 to Pl.'s Mot. for Judgment) belong to Defendant and can be used to satisfy a judgment against him. Relief Defendants object to the process being used by the Court, arguing that it "would, among other things, improperly shift the burden of proof to Relief Defendants, requiring them to establish ownership over assets held in their names."

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[10] The SEC also reasons that this civil penalty is appropriate given that the disgorgement award "will be insufficient to fully compensate victims from whom [Defendant] stole approximately $67 million" because Defendant's fraud extended beyond the five-year statute of limitations for the SEC's claims (Pl.'s Mot. for Judgment at 16), leading Relief Defendants to complain that the SEC's civil penalty is simply an attempt to circumvent the holding in *Kokesh* (R. Def.'s Opp'n at 33). However, the SEC has not asked for a penalty in excess of the *Kokesh* limits; it seeks a civil penalty that is limited to the total amount that may be disgorged under *Kokesh*.

([Doc. # 862 at 1.]) According to Relief Defendants, the SEC is asking the Court to find that Relief Defendants are nominal owners of Mr. Ahmed's assets without providing an asset-by-asset analysis, which they claim is required under state law. (R. Def.'s Opp'n at 15 (citing *McMahon v. United States*, No. 3:09-CV-00046 PCD, 2010 WL 4430512, at *4 (D. Conn. Oct. 29, 2010) (requiring an asset-by-asset analysis to determine "whether property is held by a taxpayer's nominee.")).)

However, Relief Defendants made this same argument before the Second Circuit and it was soundly rejected. The Second Circuit noted "Relief Defendants['] argu[ment] that insufficient evidence of nominee status renders the asset freeze overbroad[,]" and held that this "argument fails because Relief Defendants have been unable to point to any improperly frozen assets . . . . Relief Defendants do not allege that the referenced assets—a Fidelity account in Shalini's name and several trust accounts—properly belong to Relief Defendants, much less that they do not include proceeds of Iftikar's fraud." *I-Cubed Domains*, 664 Fed. App'x. at 56-7. Explicitly rejecting Relief Defendants' argument, the Second Circuit explained "[i]f Relief Defendants cannot prove that any frozen assets legitimately belong to them, then necessarily none of their assets are being improperly frozen to satisfy the civil penalties alleged to apply to Iftikar's conduct." *Id.* at 57, n.3.[11]

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[11] *See also SEC v. Colello*, 139 F.3d 674, 677-8 (9th Cir. 1998) (rejecting relief defendant's argument "that the district court improperly placed the burden on him to show that he had a legitimate claim to the funds" and affirming summary judgment

Thereafter, Relief Defendants conceded that "the Second Circuit's ruling on Relief Defendants' interlocutory appeal indicate[s] a significantly expanded task for Relief Defendants' expert in the attempt to trace funds in order to rebut the SEC's argument that the Relief Defendants are mere nominees[,]" which, they recognized, is a burden "[t]he Second Circuit's decision clearly places . . . on the Relief Defendants." ([Doc. # 339 at 6-7].) That Relief Defendants now pivot and attempt to avoid the burden of establishing ownership of frozen assets can only be explained by their inability to put forth any convincing evidence rebutting the SEC's contention that the assets belong to Defendant.[12]

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order because Relief Defendant "refused to give information necessary to determine whether he still possessed any of the funds or whether he had a legitimate claim to them."); *Commodity Futures Trading Comm'n v. Kimberlynn Creek Ranch, Inc.*, 276 F.3d 187, 192, n.5 (4th Cir. 2002) ("We have no doubt that the district court will provide the Relief Defendants with an opportunity to demonstrate the existence of a legally and factually valid ownership interest to some or all of the assets prior to ordering disgorgement." (citing *Cavanagh I* at 136-37)); *U.S. Commodity Futures Trading Comm'n v. EJS Capital Mgmt., LLC*, 2015 WL 5679688, at *4 (S.D.N.Y. Sept. 24, 2015) ("Should [relief defendant] assert some legitimate interest in [disputed] funds, she must offer evidence of her entitlement; more than unsupported, conclusory assertions need to be proffered."); *F.T.C. v. Bronson Partners, LLC*, 674 F. Supp. 2d 373, 394 (D. Conn. 2009), *aff'd*, 654 F.3d 359 (2d Cir. 2011) ("Relief defendant . . . met her burden of demonstrating that she provided a legitimate service in exchange for monies paid to her by defendants. Accordingly, [she] is not liable for any portion of the restitution award.").

[12] The Court has given Relief Defendants multiple opportunities to present evidence establishing their ownership of specific assets

The Court previously detailed the factors it would consider in determining ownership as to assets held in the name of Relief Defendants: "'[1] a defendant's control over the asset, [2] the length of time the asset had been held, [3] whether the defendant had an interest in and benefitted from the asset, [4] whether the defendant had transferred assets from his name into the asset, [5] whether he or she contributed to acquire the asset initially, and [6] whether the defendant ever withdrew any funds from the asset.'" *Ahmed I*, 123 F. Supp. 3d at 308 (quoting *SEC v. McGinn Smith & Co.*, 752 F. Supp. 2d 194, 307-08 (N.D.N.Y. 2010)).

1. Evidence That Relief Defendants are Nominal Owners of Defendant's Assets

Relief Defendants maintain that the SEC has failed to introduce evidence that Mr. Ahmed "dominated and controlled" any specific asset that a Relief Defendant is allegedly holding as his nominee, or shown that Mr. Ahmed enjoyed any monetary benefit from assets that were titled to the Relief Defendants, such as the UTMA trusts created for the sole benefit of their children. The Court rejects this attempt to avoid the burden of

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over the course of this litigation. Not only were Relief Defendants ordered to provide a list of assets to which they claim ownership, with "a fairly detailed analysis of why those identified assets are on a list claimed to be exempt from satisfaction of a judgment either against the Relief Defendants or Mr. Ahmed" (Ex. 12 to SEC's Mot. For Judgment at 17:5-18:14), they also had the opportunity to, and did, present evidence through their Opposition to the SEC's Motion for Judgment.

presenting evidence establishing Relief Defendants' ownership.

Relief Defendants have had every opportunity to refute the SEC's claim that Defendant actually owns all of the frozen assets throughout the course of this litigation, and yet have failed to do so. They cannot establish ownership of these assets simply by again complaining that the SEC has to prove that Mr. Ahmed controlled and benefited from assets in Relief Defendants' names, without offering any evidence that Relief Defendants in fact controlled and owned these assets. On the other hand, the SEC does put forth evidence that the seized assets belong to Mr. Ahmed and were placed in the names of Relief Defendants as nominees only, in an effort to protect and hide the fraudulently obtained assets.

Even Relief Defendant's own expert report found that from 2004 through 2014, Ms. Shalini Ahmed earned just over $1.9 million in gross income, and that all other "non-suspect" sources of income, totaling $62,758,960.96, belonged to Mr. Ahmed. (Ex. 15 (R. Def.'s Expert Report [Doc. # 888-15]) to SEC's Mot. for Judgment ¶ 20.) Thus, 98.8% of all funds that the Ahmeds received during the past fourteen years came from Defendant. In light of these facts, it is difficult to see, and neither Defendant nor Relief Defendants provide any argument, much less a credible explanation, how Ms. Ahmed and her children could own more than $85 million in assets while Defendant owns less than $6 million in liquid assets. (*See* [Doc. 862-1] at 4.) Furthermore, the Ahmeds' lavish lifestyle greatly exceeded Ms. Ahmed's earnings over

this ten year period, as Ms. Ahmed admitted her living expenses exceeded $46,000 per month. (*See* [Doc. # 69] at 14.)

Moreover, in her interrogatory responses, Ms. Ahmed claimed only to own a few assets,[13] and never supplemented this response to assert ownership of anywhere near the $85 million of assets she now claims belong to her and her children.[14] Further undermining her claim, Ms. Ahmed was unable to remember receiving more than $25 million in checks from Defendant, money she now claims to have managed (as

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[13] Ms. Ahmed asserted an ownership over only Unit 12A, Unit 12F, and the GRAT:

> Notwithstanding these objections, Ms. Ahmed states that the asset freeze is inappropriate with respect to compensation she earned over the course of her employment, including grants of stock and retirement account contributions; her personal contributions to the marital estate; the Shalini Ahmed 2014 Grantor Retained Annuity Trust; the assets of DIYA Holdings, LLC; the assets of DIYA Real Holdings, LLC; her and her children's reasonable legal expenses; her and her children's reasonable living expenses; and any other assets that the Commission cannot legally demonstrate should be subject to the asset freeze.

(Ex. 16 (Interrogatory Responses) to Pl.'s Mot. for Judgment at 7.)

[14] Ms. Ahmed also previously admitted it was Defendant who purchased both the 2009 Cadillac Escalade and 2009 Porsche Cayenne and that she did not know how he funded the purchases. (Ex. 7 (Ms. Ahmed Depo.) at 50:11-22.)

discussed below).[15] Both Defendant and Ms. Ahmed refused to testify about the transfer and placement of assets into her name (aside from those that were nominally placed into Ms. Ahmed's name as a contingency plan). Defendant invoked his Fifth Amendment right against self-incrimination,[16] and Ms. Ahmed invoked the marital privilege.[17]

2. Relief Defendants' Claimed Assets

Relief Defendants now claim to own the vast majority of the frozen assets, yet fail to provide evidence of this ownership or to meaningfully challenge the SEC's evidence that Defendant owned and

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[15] (*See* Ex. 7 (Ms. Ahmed Depo.) at 60:16-18 ("Q. Okay. Why did Iftikar Ahmed write you a check for $500,000 on January 7th, 2013? A. I don't remember."); *Id.* at 61:24-62:1 ("Q: And why did your husband write you a $2 million check on August 15, 2014? A: "I don't remember."); *Id.* at 64:16-18 (Q: "Why did your husband write you a $500,000 check on September 23rd, 2014?" A: "I don't remember."); *Id.* at 69:5-7 (Q: "Why did Ahmed write you a $1.2 million check on November 6th, 2014?" A: "I don't remember."); *Id.* at 70:14-16 (Q: "Why did Iftikar Ahmed write you a $1.5 million check on November 17th, 2014?" A: "I don't remember."); *Id.* at 74:17-19 ("Why did your husband write you a $750,000 check on December 15th, 2014? A. I don't remember.); *Id.* at 78:12-14 (Q: Why did Ahmed Iftikar write you an $18 million check on January 12th, 2015? A: I don't know.").

[16] (*See e.g.*, Ex. 17 (Def.'s Depo. [Doc. # 888-17]) to Pl.'s Mot. for Judgment at 21:3-16; 25:13-26:7; 28:18-29:10; 32:3-20; 36:11-37:3; 40:7-25; 43:24-44:19; 47:21-48:14; 52:6-23; 57:1-8; 58:12-59:8; 61: 13-62:8; 65:22-66:20; 69:5-70:2; 72:9-73:6; 77:25-78:18; 82:22-83: 15; 89:5-90:9; 96:18-98:1; 102:3-23; 108:22-110:4.)

[17] (*See, e.g.*, Ex. 10 (Ms. Ahmed Depo. [Doc. # 888-10] at 476:13-16).)

controlled the currently frozen assets. Rather than explain why the factors above demonstrate that specific assets are indeed Relief Defendants' and should not be used to satisfy any judgment, Relief Defendants' Schedule A [Doc. # 862-1] offers as the basis for ownership only four "additional reasons for Relief Defendants' ownership," three of which the SEC correctly argues, even if taken as true, do not prevent the SEC from using the asset to satisfy a judgment against Defendant.[18]

First, Relief Defendants' contention that the SEC cannot collect any assets acquired more than five-years before the SEC commenced the action is incorrect. Although after *Kokesh* the SEC is no longer able to seek a disgorgement award for fraudulent conduct that occurred more than five years before the initiation of an action, it remains free to collect against all of Defendant's assets, no matter when they were acquired, in order to satisfy a judgment. *See, e.g.*, *SEC v. Banner Fund Int'l*, 211 F.3d 602, 617 (D.C. Cir. 2000) (recognizing "disgorgement is an equitable obligation to return a sum equal to the amount wrongfully obtained, rather than a requirement to replevy a specific asset," and that "an order to disgorge establishes a personal liability, which the defendant must satisfy regardless

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[18] Defendant argues only that the contents of the safe deposit boxes belong to his wife and the UTMA accounts belong to his children (discussed below). (Def.'s Opp.'n at 24-25.) With respect to the items in the safety deposit boxes, Ms. Ahmed did not even know of their contents until after the boxes were inventoried. (*See, e.g.*, [Doc. # 465-2 ("THE COURT: . . . Is it still accurate that nobody knows what is in these safe deposit boxes? Mr. Deitch? MR. DEITCH: That's correct, your Honor").)

whether he retains the selfsame proceeds of his wrongdoing" (*citing SEC v. Shapiro*, 494 F.2d 1301, 1309 (2d Cir. 1974))).

Additionally, Relief Defendants' claims that certain assets were purchased or funded, in whole or in part, with untainted funds are also irrelevant.[19] The SEC is free to collect on any of Defendant's assets, whether or not he used his ill-gotten gains to acquire them. *Id.* As the D.C. Circuit noted, "the requirement of a causal relationship between a wrongful act and the property to be disgorged does not imply that a court may order a malefactor to disgorge only the actual property obtained by means of his wrongful act." *Id.* It went on to explain that "the causal connection required is between the amount by which the defendant was unjustly enriched and the amount he can be required to disgorge." *Id.* Thus, these reasons would be relevant only if Relief Defendants could show that the asset in question was purchased or funded with *their* untainted funds, as opposed to Mr. Ahmed's.[20]

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[19] For instance, Ms. Ahmed claims to own Fidelity x7540 (*see* [Doc. # 862-1] at 1, entry 3), which holds more than $13 million (Asset Schedule at 3, entry 75). As noted above, Ms. Ahmed did not recall receiving the $18 million check (the proceeds of Defendant's Company B fraud) that funded this account, and specifically testified the account was opened only so she could access assets "should anything happen to [Defendant]." (Ex. 7 at 80:9-14) (Q: "Why was the Fidelity account in your name opened?" A: "So my husband had a significant illness, and I believe it was opened so that I had some assets where I could take care of the children should anything happen to him.").

[20] Even if Ms. Ahmed purchased or funded assets with her own untainted funds, where ill-gotten funds are comingled with a relief

Accordingly, assets to which Relief Defendants claim ownership on any of these three grounds, and on no other basis, may be collected by the SEC to satisfy the judgment against Defendant.[21]

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defendant's legitimately obtained funds, the SEC is not required to trace specific funds to their ultimate recipients. *I-Cubed Domains*, 664 Fed. Appx. at 56. Because, as discussed below, the Court concludes that Relief Defendants are nominal owners of Defendant's assets, there is no need to apply the two part *Cavanagh* test. *See I-Cubed Domains, LLC*, 664 F. App'x at 55 ("the *Cavanagh* standard does not apply where an asset claimed to belong to a relief defendant is actually owned by a defendant, such that the relief defendant is a "nominee" for the defendant.).

[21] Relief Defendants argue that both the Iftikar A. Ahmed Family Trust and the children's Uniform Transfer to Minors Act ("UTMA") accounts cannot be used to satisfy a judgment against Defendant because the beneficiaries are Defendant's descendants and the SEC has not shown they were funded by Defendant's illicit gains. (R. Def.'s Opp'n at 5.) Relatedly, Relief Defendants maintain that the MetLife insurance policy is also exempt from collection because it is owned by the Family Trust for the benefit of the minor children. The SEC counters that the Family Trust was funded with Defendant's money, including approximately $1.577 million from the Company G fraud and approximately $2.0 million from the Company I fraud. (Ex. A) (Defendant writing checks deposited to Family Trust). Because the evidence establishes only that Defendant funded this Trust, and there is no indication that any other Relief Defendant also did so, the Court is satisfied that the Family Trust was funded and created using Defendant's money and therefore can be used to satisfy a judgment against him.

In addition, Relief Defendants contend that the Family Trust is entitled to a significant portion of the Rakitfi Holdings account at Northern Trust ending x5218 because Defendant assigned 99% of his interest in Rakitfi Holdings LLC to the Family Trust in exchange for a promissory note of $1,510,000 at 2.25% annual interest. (R. Def.'s Opp'n at 6.) However, even if the record

Relief Defendants' final reason for ownership, that an asset was a gift from a non-party, the SEC agrees is grounds for precluding the asset from being used to satisfy a judgment against Defendant. Still, Relief Defendants must offer some evidence that these were indeed gifts received from someone other than Mr. Ahmed, and have failed to do so here.

3. Ms. Ahmed's Claim of Managing Assets

In addition to the reasons listed in Relief Defendants' Schedule A, which as discussed above do not preclude a finding that those assets are available to satisfy a judgment against Defendant, Relief Defendants argue that most of the assets belong to them because Ms. Ahmed "contributed materially to developing and enhancing the corpus of marital property[,]" giving "her a cognizable right to that property." (R. Def.'s Opp'n at 19.) The SEC counters that Ms. Ahmed's "sudden management claim" is belied by the evidence and inconsistent with this Court's previous rejections of her claims to specific assets.

According to Relief Defendants, the fact that Mr. and Ms. Ahmed are married is critical because the quantum of proof needed to show that one spouse is the equitable owner of an asset titled to the other is meaningfully higher than where the primary defendant and relief defendant are not married. The sole case they cite in support of this contention, *In re Vebeliunas*,

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supported this claim, because the Court finds that Defendant controls the Family Trust, these funds are available for collection in either event.

deals with the question of whether the veil of an irrevocable trust could be pierced under New York State law based on the argument that the debtor was the equitable owner of the trust. 332 F.3d 85 (2d Cir. 2003). There, the court found that the trust's equitable owner was the debtor's spouse, who had funded the trust with her own assets earned by investing her inheritance. *Id.* at 92. The court observed that because spouses "routinely share certain financial assets, such as streams of income," and "routinely administer each other's assets and conduct business on behalf of each other," these facts did not evidence control by the debtor over the trust. *Id.* at 92-93. Here, though, Ms. Ahmed has not demonstrated that any of the assets were purchased or funded by her, and in fact the evidence is to the contrary, considering that nearly all of the funds acquired by the Ahmeds were earned or stolen by Defendant.

Specifically, as mentioned above, the Second Circuit held Defendant's salary belongs to him and was properly frozen to preserve his ability to pay an eventual judgment and, in the face of Ms. Ahmed's claims of managing certain assets, found that aside from her stock options and retirement accounts, which were unfrozen, she "failed to identify any other particular contributions to the marital estate." *I-Cubed Domains, LLC*, 664 Fed. Appx. at 57. To the extent Ms. Ahmed now attempts to argue that she acted as the "family CIO" and that this contribution entitles her to

at least a portion of the marital estate, her argument misses the mark.[22]

Even if Ms. Ahmed legitimately managed the family assets, Relief Defendants provide no authority that where a spouse manages assets which were fraudulently acquired by the other spouse, the spouse managing those assets somehow gains an ownership interest in them such that the assets cannot be used to satisfy a judgment against the other spouse. Further, assuming Ms. Ahmed managed assets which were not fraudulently obtained, those jointly controlled assets can nevertheless be used to satisfy Defendant's judgment. *See, e.g.*, *SEC v. Smith*, 646 Fed. Appx. 42, 43 (2d Cir. 2016) (rejecting the relief defendant's argument that the district court erred in applying all assets in a jointly controlled account – held only in the name of relief defendant – to satisfy final judgment against defendant); *Sarasota CCM, Inc. v. Golf Mktg., LLC*, 94 Conn. App. 34, 38, 891 A.2d 72, 74 (2006) (recognizing that Connecticut's "legislature's intent [is] to allow a judgment creditor to execute against all forms of a judgment debtor's assets" and therefore a creditor is "entitled to reach any property in which the judgment debtor had a cognizable interest" including the full amount of funds held in a joint account.)

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[22] Relief Defendants offer emails which they claim demonstrate Ms. Ahmed's management of the family assets. (*See* Exs. 29-34 to R. Def.'s Opp'n.) The SEC vehemently disputes that Ms. Ahmed in fact managed the family's assets, but the Court need not make this determination given its conclusion, discussed below, that the Court can reach jointly owned assets to satisfy a judgment against Defendant.

In sum, Relief Defendants have not established ownership over any of the assets they identified on their Schedule A. Accordingly, the SEC may collect against all of the assets listed on the Asset Schdule.

4. Assets Defendants Claim Oak Already Recovered from Mr. Ahmed

Relief Defendants maintain that any disgorgement ordered to compensate Mr. Ahmed's alleged victims must be offset by the carried interest, which Oak has already taken, and by other assets belonging to Defendant that Oak holds, including capital contributions and K-1 distributions that Oak has seized or withheld. The SEC disagrees, citing contract provisions which provide that upon being terminated for cause, Defendant forfeited many of his interests relating to the Oak Funds, thus justifying the SEC's listing these assets as having a current value of $0 in the Asset Schedule.

The Ames declaration explains, and the contracts substantiate, that Defendant was forced to forfeit his interests in the General Partners, but retained the portion of his Class B membership interests in each of the Limited Partners that had vested by March 31, 2015 (while forfeiting the unvested portion of such membership interests).[23] (2018 Ames Decl. ¶¶ 7-9, 14-

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[23] The SEC's Asset Schedule accounts for these frozen distributions which it agrees belong to Defendant. (*See* Asset Schedule at 2, entry # 36.) The vested portion of Mr. Ahmed's interests in the Limited Partners totals $683,172.00—$525,297.00 for 2015, $4,769.00 for 2016, and $153,106.00 for 2017. (2018 Ames Decl. [Doc. # 890] ¶ 20.)

17.) Specifically, Ms. Ames asserts that "in contrast to his interests in the Limited Partners, Mr. Ahmed's interests in the General Partners were not converted into Class B memberships" and "[i]nstead, because Mr. Ahmed was terminated for "Disabling Conduct", he was removed as a member of each of the General Partners and forfeited, for no consideration, the entirety of each of his interests in each of the General Partners." (*Id.* ¶ 15.)

Defendant concedes that the Oak Associates XIII-A, LLC operating agreement stipulated that on removal for cause or disabling conduct, all of a member's membership interest would be forfeited, but insists that this is the only agreement which so stipulated. (Def.'s Opp'n at 23.) However, the contracts support Ms. Ames' declaration—each General Partners contract including amendments thereto, specifies that "any Member who is removed by reason of having engaged in Disabling Conduct shall forfeit for no consideration such Member's entire membership interest, Percentage Interest and Capital Account and shall not become, or shall cease to be, as applicable, a Class B Member." (*See* Ex. J (Amendment to Oak Associates X, LLC Operating Agreement) to Ames' Decl. [Doc. # 890-10] ¶ 14; Ex. L (Amendment to Oak Associates XI, LLC Operating Agreement) to *id.* [Doc. # 890-12] ¶ 14; Ex. N (Amendment to Oak Associates XII, LLC Operating Agreement) to *id.* [Doc. #890-14] ¶ 14; Ex. O (Operating Agreement of Oak Associates XIII, LLC) to *id.* [Doc. #890-15] ¶ 7.4(a).)

Defendants do not dispute that Mr. Ahmed was terminated for "Disabling Conduct." Therefore, based

on the language in the contracts, it is clear that Defendant forfeited his rights to any carried interest,[24] capital contributions, or K-1 distributions from Oak Management Corporation, and accordingly they are appropriately assigned no value by the SEC.

Contrary to Relief Defendants' contention, this will not result in a double recovery by the Oak Funds because these forfeited interests are not ill-gotten gains that Oak is recovering from Defendant at all, but rather were sacrificed by Defendants upon his termination for "Disabling Conduct." Thus, Defendants' reliance on *SEC v. Penn*, 2017 WL 5515855, at *4 (S.D.N.Y. Aug. 22, 2017) for the proposition that the amount of disgorgement must be offset by the forfeited carried interest in the fund is misplaced. Because the *Penn* court reasoned that the defendant "is not required to disgorge amounts that he has already repaid [to the fund,]" it ordered an evidentiary hearing to determine what, if any, value was received by the fund from Penn's forfeiture. But, unlike in this case, Penn had a right to this "carried interest" prior to the criminal court forfeiting the asset. *Id.* Consequently, the Oak Funds here have not recovered from Mr. Ahmed by withholding and/or seizing his forfeited interests, and there is no resulting double recovery. *Cf SEC v. Levin*, 849 F.3d 995, 1007 (11th Cir. 2017) ("[I]f

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[24] Ms. Ames explains that "Mr. Ahmed's ownership interests in the General Partners . . . provided for participation in the performance of the Oak Funds in which such General Partners invested on a basis comparable to other investors in the Oak Funds, which includes payment to the General Partner of a 'carried interest.'" (2018 Ames Decl. ¶ 13.)

any investor does ultimately recover from Levin, then Levin could petition the court for a reduction in the disgorgement award because the recovery would constitute a partial return of Levin's ill-gotten gains.").

D. Appointment of a Receiver and Establishment of a Fair Fund

The authority of the district court to appoint a receiver to marshal, collect, and maintain assets, including judgments, with a view to distribution is well-established and appropriate where necessary to effectuate the purposes of the securities laws. *See, e.g.*, *SEC v. Manor Nursing Centers*, 458 F.2d 1082, 1105 (2d Cir. 1972); *SEC v. Investors Security Corp., et al.*, 560 F.2d 561, 567 (3d Cir. 1977) (appointment of a receiver is an appropriate exercise of power and discretion of a district court). The SEC requests that a receiver be appointed to take control of all Defendant's assets, held in his name and the name of nominees, with the goal of repatriating the assets to victims. Plaintiff suggests that a receiver is necessary to oversee the sale of illiquid (and difficult to value) assets. Defendants protest that a receivership is not necessary here, arguing that since there is only one victim, Oak, there is no need to appoint a receiver to sort through competing claims, and that appointing a receiver would also result in unneeded costs.[25]

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[25] Defendants' argument that the appointment of a receiver is a "drastic remedy" to be imposed "only where no lesser relief will be effective" carries little weight here, since the cases they rely upon deal with appointing a receiver during the pendency of litigation, where liability is still not established, as opposed to here where the receiver's role would be to effectuate collection of a judgment after

It will likely be necessary to appoint a receiver to hold the currently frozen funds and who will then effectuate a mechanism for distribution of assets to victims in accordance with this Ruling. The receiver would then ensure the return of any frozen assets to Defendant in excess of the amount required to satisfy the judgment against him. The appointment and scope of the receiver's duties will be determined post judgment. The SEC may submit a proposed receivership order for consideration by the Court.

Moreover, the SEC requests that the Court place Defendant's assets into a Fair Fund to compensate the victims of his fraud. A "fair fund for investors" is provided for by law:

> If, in any judicial or administrative action brought by the Commission under the securities laws, the Commission obtains a civil penalty against any person for a violation of such laws, or such person agrees, in settlement of any such action, to such civil penalty, the amount of such civil penalty shall, on the motion or at the direction of the Commission, be added to and become part of a disgorgement fund or other fund established for the benefit of the victims of such violation.

15 U.S.C. § 7246(a). Thus, a Fair Fund affords "the SEC . . . flexibility by permitting it to distribute civil penalties among defrauded investors by adding the

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liability has been found. *See e.g.*, *Ferguson v. Tabah*, 288 F.2d 665, 674 (2d Cir. 1961); *Commodity Futures Trading Comm. v. Comvest Trading Corp.*, 481 F. Supp. 438, 441 (D. Mass. 1979).

civil penalties to the disgorgement fund." *Official Comm. of Unsecured Creditors of WorldCom, Inc. v. SEC*, 467 F.3d 73, 82 (2d Cir. 2006). The SEC claims that because Defendant's fraud was long-running and concealed, and netted him more than he will be ordered to disgorge, a Fair Fund is especially appropriate.[26]

The Court recognizes that a Fair Fund may be a useful vehicle to make any distributions of civil penalties to victims, if appropriate, but at this juncture is not sufficiently informed such that it can understand how this would function in the context of this case. The parties will be given an opportunity post-judgment to address the propriety and necessity of establishing a Fair Fund under these facts and circumstances.

III. Conclusion

For the foregoing reasons, the SEC's Motion for Remedy and Judgment is GRANTED with modification, for a total of $62,920,639.00 plus prejudgment interest for the period of time prior to the asset freeze,[27] and all interest and gains returned on the frozen assets during the pendency of the freeze. This total includes disgorgement of $41,920,639.00 and a civil penalty of $21,000,000.00 million. All of the

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[26] The only argument regarding the Fair Fund made by Relief Defendants is that one may only be created with assets that fall within Section 2462's five-year statute of limitations, but the regulations to which they cite do not so provide. *See* 17 C.F.R. §§ 201.1100, 201.1102(b).

[27] The SEC's revised calculation, discussed above at footnote 6, shall be provided no later than three days from the date of this Ruling.

assets listed on the SEC's Asset Schedule, which are currently frozen, are available to satisfy this judgment against Defendant. Moreover, Defendant is permanently enjoined from violating Section 17(a) of the Securities Act (15 U.S.C. § 77q(a)), Section 10(b) of the Exchange Act (15 U.S.C. § 78j(b)) and Rule 10b-5 thereunder (17 C.F.R. § 240.10b-5), and Sections 206(1), 206(2), 206(3), and 206(4) of the Advisers Act (15 U.S.C. §§ 80b-6(1), 80b-6(2), and 80b-6(3)) and Rule 206(4)-8 thereunder (17 C.F.R. § 275.206(4)-8).[28]

IT IS SO ORDERED.
________/s/________________
Janet Bond Arterton, U.S.D.J.

Dated at New Haven, Connecticut this 6th day of September 2018.

[28] The SEC shall file a proposed Order of Final Judgment within seven days of the date of this Ruling.

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil No. 3:15cv675 (JBA)

[Filed March 29, 2018,
incorrectly dated as March 29, 2017]

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,

v.

IFTIKAR AHMED,
Defendant, and

IFTIKAR ALI AHMED SOLE PROP; I-CUBED DOMAINS, LLC; SHALINI AHMED; SHALINI AHMED 2014 GRANTOR RETAINED ANNUNITY TRUST; DIYA HOLDINGS LLC; DIYA REAL HOLDINGS, LLC; I.I. 1, a minor child, by and through his next friends IFTIKAR and SHALINI AHMED, his parents; I.I. 2, a minor child, by and through his next friends IFTIKAR and SHALINI AHMED, his parents; and I.I. 3, a minor child, by and through his next friends IFTIKAR and SHALINI AHMED, his parents,
Relief Defendants.

RULING ON ALL PARTIES' MOTIONS FOR SUMMARY JUDGMENT ON LIABILITY

[*Table of Contents Omitted in Printing of this Appendix.*]

I. Introduction

Plaintiff, the United States Securities and Exchange Commission ("SEC") alleges that Defendant Iftikar Ahmed ("Mr. Ahmed") violated Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 (Count One), Section 17(a) of the Securities Act of 1933 ("Securities Act") (Count Two), and Section 206 of the Investment Advisers Act ("Advisers Act") (Counts Three, Four, and Five).[1] (Second Am. Compl. ("SAC") [Doc. # 208].) In Counts Six through Fourteen, the SEC seeks equitable disgorgement against each respective Relief Defendant.

The Court bifurcated summary judgment, with this first stage addressing only liability, and a second stage addressing the appropriate relief, if needed, or in the alternative, a trial on liability will be held. All three

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[1] The SEC initially filed this action on May 6, 2015, with allegations arising out of transactions involving Companies A, B, and C and naming as Relief Defendants only Iftikar Ali Ahmed Sole Prop and I-Cubed Domains, LLC. (Compl. [Doc. # 1].) On June 16, 2015, the SEC filed its Amended Complaint [Doc. # 33] in which it added the remaining Relief Defendants as parties and asserted additional claims against Defendant arising out of transactions associated with Companies D, E, F, G, H, and I. Finally, on April 1, 2016, the SEC filed a Second Amended Complaint [Doc. # 208] in which it added claims involving Company J.

parties move for summary judgment.[2] (*See* Def.'s Mot. for Summ. J. [Doc. #616]; Relief Defs.' ("RD") Mot. for Summ. J. [Doc. # 618-2]; Pl.'s Mot. for Summary Judgment [Doc. #622].) The Court held oral argument on February 28, 2018.

The SEC alleges that Defendant "systematically used fraudulent and deceptive means to divert more than $67 million from funds he advised" while employed by venture capital firm Oak Investment Partners ("Oak") "into his personal bank accounts, before funneling much of his ill-gotten gains into assets and accounts in the name of his wife in order to conceal his fraud and protect the assets from confiscation." (Pl.'s Mot. for Summ. J. at 1.) In response, neither Defendant nor Relief Defendants argue that Defendant did not commit the alleged frauds, instead contending primarily that Defendant should not be held liable because (1) certain fraudulent acts are time-barred by the statute of limitations, (2) the fraud was not sufficiently connected to securities transactions, and (3) the underlying securities transactions are not sufficiently domestic to be within the reach of the United States securities laws.

For the reasons that follow, the SEC's Motion for Summary Judgment is granted. Defendant and Relief Defendants' Motions for Summary Judgment are denied.

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[2] Although there are nine Relief Defendants, the Court refers to them throughout as a single party, in light of their uniform and joint defense.

II. Background

A. Overarching Facts[3]

[3] While Defendant purports to deny many of the facts in the SEC's Local Rule 56(a)1 Statement, he fails to support his denials with any evidence, in violation of Local Rule 56(a)(3). See D. Conn. L. Civ. R. 56(a)(3); *Garden Catering-Hamilton Ave., LLC v. Wally's Chicken Coop, LLC,* 30 F. Supp. 3d 117, 127 (D. Conn. 2014). Defendant was specifically made aware of this rule in the Notice to Self-Represented Litigant that the SEC served on him. (*See* Doc. # 626 at 2, 19-20.) Defendant also denies certain facts because certain documents were not shared with him. But the relevant evidence consisted of confidential documents filed under seal that the Court ruled Defendant would not be permitted to receive, having fled the jurisdiction of the United States, because no protective orders could be enforced against him in India, and the documents would only be shared with him in the United States. (*See e.g.*, Doc. # 286.) Since Defendant has submitted no evidence to support his denials, and since the record does not support those denials, the facts set forth in the SEC's Rule 56(a)1 Statement have been established as true for purposes of summary judgment. *See Henderson v. Wells Fargo Bank, N.A.*, 2017 WL 731780, *4 (D. Conn. Feb. 21, 2017). Moreover, Defendant's own Local Rule 56(a)1 Statement offers only unauthenticated exhibits—which he failed to disclose in discovery—as support for his statement of facts, which does not change the Court's assessment of the facts. *See Haughton v. Town of Cromwell*, No. 3:14-CV-1974 (VLB), 2017 WL 2873047, at *4 (D. Conn. July 5, 2017) (declining to consider evidence on summary judgment that was "not disclosed during discovery;" and was not "properly authenticated").

In Relief Defendants' Local Rule 56(a)2 Statement they do not admit or deny several of the SEC's facts, instead claiming that the "asserted fact is not material to any issue raised in the SEC's motion." (*See, e.g.*, RD LR 56(a)2 [Doc.# 659] ¶ X-14.) The Court considers these facts admitted, and will make its own determination as to whether or not these facts are material.

Oak Management Corporation ("OMC") is the investment manager for various venture capital investment funds, which raise money from investors (ranging from state and municipal pension funds to individual investors) and, in turn, invest those monies in various types of securities. (SEC Loc. R. 56(a)1 Statement of Facts ("SOF") at X-4.) Defendant joined Oak in 2004 where he worked as an investment professional and a managing member of entities that serve as general partners of certain Oak funds. (SOF ¶ X-5.) Defendant was responsible for, among other things, identifying companies in which Oak funds might invest ("portfolio companies"), recommending investments, and negotiating the terms of investments with portfolio companies. (*Id.* ¶¶ X-6 to X-9.)

To enter into a securities transaction, Oak entities memorialized an agreement to consummate a purchase or sale in written agreements, typically share purchase agreements ("SPAs"), merger agreements or tender offer agreements. (*Id.* ¶ X-25.) The SEC's allegations focus on a series of such transactions relating to ten companies, described in the Second Amended Complaint as Companies A through J, all of which involved Defendant. In essence, and as described *infra* in detail with respect to each transaction, Defendant opened bank accounts he alone controlled that were deceptively titled in the name of Oak and its portfolio companies, which he then used to divert monies intended for Oak funds or its portfolio companies into his and his wife's personal bank accounts.

B. Procedural History

On April 2, 2015, before the SEC initiated this action and unrelated to this action, Defendant was arrested and charged with insider trading. *See United States v. Kanodia,* et al., No. 1:15-cr-10131-NMG-MBB (D. Mass. Apr. 1, 2015) (Docs. ## 3-4). Defendant's bond was set at $9 million and, as a condition of release pending his criminal trial, his travel was restricted to Connecticut, New York, and Massachusetts. *See United States v. Ahmed*, No. 3:15-mj-00052-WIG (D. Conn. Apr. 2, 2015) (ECF 4 & 8 at ¶ 7(f)); *United States v. Kanodia, et al.*, No. 1:15-cr-10131-NMG-MBB (D. Mass. Apr. 21, 2015) (ECF 19).

On May 6, 2015, the SEC filed its Complaint [Doc. # 1] and an emergency motion [Doc. # 2] for a temporary restraining order freezing assets and asking for a preliminary injunction. The following day, the Court entered [Doc. # 9] a temporary restraining order freezing assets of Defendant and certain Relief Defendants up to approximately $55 million, and scheduled a preliminary injunction hearing. At some point in May, prior to the preliminary injunction hearing, Defendant fled from the United States to his native country— India—where he remains to this day.

On August 12, 2015, after a two day evidentiary hearing, the Court granted [Doc. # 113] the SEC's motion for a preliminary injunction. This hearing transcript is posted on the docket, to which Defendant has access.

C. Defendant's Assertion of his Fifth Amendment Right

Defendant answered [Doc. # 218] the SEC's Second Amended Complaint on April 22, while represented by counsel, "assert[ing] his right under the Fifth Amendment to the Constitution of the United States and applicable laws and statutes not to be compelled to be a witness against himself . . ." in response to the SEC's allegation of fraud. (*See* SEC Ex. 1; SOF ¶ X-1.) In discovery, among other things, the SEC requested "all communications . . . with any of the Relief Defendants regarding any of the allegations in the Complaint," "all communications . . . with any individuals from Companies A-I regarding any of the allegations in the Complaint," and "all communications . . . with any individual from Oak, and Oak Fund, Oak Funds investors, or an Oak Fund portfolio company regarding any of the allegations in the Complaint." (SEC Ex. 12 at 11-13.) In response to the SEC's Requests for Admission and Interrogatories, Defendant invoked his Fifth Amendment right against self-incrimination. (SOF ¶¶ X-1, X-16.) In response to the SEC's Document Requests, Defendant claimed to have no responsive documents. (*Id.* ¶ X-16.)

D. Defendant's Fraudulent Conduct

1. Company A

In August 2014, Defendant proposed via email that Oak Fund XIII purchase 124,378 Series A shares of Company A from Company A's holding company, the "BVI Company," at a price of $28.50 per share, for a total purchase price of $3,544,773. (SOF ¶ A-1.) He

buttressed his proposal with favorable comments on Company A's financial condition, but before Oak Fund XIII purchased the shares, Defendant received a copy of Company A's most recent board package, which included lower estimated financial results for Company A than the figures Defendant reported in his proposal to Oak. (*Id.* ¶ A-2.) On August 11, Oak approved Defendant's proposed purchase of Company A shares and executed the stock purchase agreement on behalf of Oak Fund XIII. (*Id.* ¶ A-6.)

Defendant then induced Oak Fund XIII to pay an inflated purchase price by emailing Oak what appeared to be the deal documents already executed by the seller with the purchase price of $3,544,733. (*Id.* ¶ A-7.) However, the versions sent to the seller contained a price of $1.5 million. (*Id.*) Thus, the seller agreed to a purchase price of $ 1.5 million for the Company A shares, but Defendant's fraud caused Oak Fund XIII to pay $3,544,733 for those same shares.

Finally, Defendant provided Oak instructions for Oak Fund XIII to wire the $3,544,773 purchase price to a Bank of America account in the name of "Iftikar Ali Ahmed Sole Prop, DBA [BVI Company]" (the "BOA BVI Company Account"),[4] which the Oak Fund followed. (*Id.*¶¶ A- 6, A-8.) Defendant then wired the $1.5 million actual purchase price from this account to the seller. (*Id.* ¶ A-8.) Rather than returning the excess purchase price to Oak Fund XIII, Defendant transferred the

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[4] Defendant had opened this account October 10, 2013, in connection with the Company C transactions, discussed *infra.* (SOF ¶ C-11.)

remaining balance of just over $2 million into a joint account he owned with his wife, Relief Defendant Shalini Ahmed. (*Id.*)

2. Company B

Company B was a joint venture formed by two parties, denoted here as JV Party 1 and JV Party 2. (SOF ¶ B-1.) JV Party 2 was a subsidiary of the BVI Company from which Oak Fund XIII purchased its Company A shares. (*Id.*) In December 2014, Defendant recommended that Oak Fund XII purchase JV Party 1's shares in Company B for $20 million. (*Id.* ¶ B-2.) Financial documents Defendant received prior to his recommendation, on November 22, 2014, reveal that the projected results for Company B were lower than the projections Defendant included in his presentation recommending the investment. (*Id.* ¶ B-10.) After the investment was approved, Defendant told Oak that the $20 million purchase price should be split between two accounts, with $2 million wired to JV Party 1 and $18 million wired to an account that Defendant claimed belonged to the BVI Company, but was in fact Defendant's BOA BVI Company Account. (*Id* ¶¶ B-3, B-8.)

Oak Fund XII wired the payments as Defendant directed. (*Id.* ¶ B-7.) Defendant also forwarded to Oak personnel what he claimed were the final deal documents reflecting a $20 million purchase price. (*Id.* ¶ B-4.) The actual purchase price for the Company B shares was $2 million, not $20 million. (*Id.* ¶ B-5.) Examination of Defendant's personal directory at Oak after his arrest, which is generally inaccessible to other Oak personnel, revealed a Word version of the SPA

that is identical to the SPA that Defendant received as a Word document on December 16, with the exception of Section 3.1, which reflects a $20 million purchase price. (*Id.* ¶ B-6.)[5]

After the $18 million was wired by Oak Fund XII into Defendant's BOA BVI Company account, Defendant transferred approximately $18 million into a joint bank account that he held with his wife, Relief Defendant Shalini Ahmed. (*Id.* ¶ B-9.)

3. Company C[6]

Defendant engaged in deceptive conduct by misrepresenting Company C's financial performance and concealing and misrepresenting his ownership of Company C shares, while he recommended and advised Oak Fund XIII to make two separate investments in Company C.

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[5] Relief Defendant's dispute this fact, arguing that it is not supported by admissible evidence because "[a]lthough [Ms. Ames's Declaration] references a document, the allegation is not supported by documentary evidence attached to either Plaintiff's motion or to the referenced Declaration." (RDs' Loc. R. 56(a)2 [Doc. # 659] ¶ B-6.) Relief Defendants make this same objection with respect to several other of the SEC' s asserted facts, but fail to articulate what Rule of Evidence they rely on. In each instance, Ms. Ames, as Oak's witness, testifies to things within Oak's own knowledge, and even absent production of the underlying documents, the Court sees no reason her testimony should be considered inadmissible.

[6] Relief Defendants do not challenge any aspect of this transaction in their Motion for Summary Judgment on Liability or Opposition to the SEC's Motion.

<u>$10,896,193.59 Redemption of Company C Shares.</u>

In November 2012, Company C—an e-commerce business based in the United States—sold its Series A shares to several investors including I-Cubed Domains, LLC (discussed more fully below), and the BVI Company, an Oak portfolio company.[7] (SOF ¶ C-1.) At the time, Defendant was one of three people on the BVI Company's board of directors and was responsible for identifying and negotiating the transaction involving BVI Company's purchase of Company C Series A Preferred Stock for $150,000. (*Id.* ¶¶ C-2, C-3, C-4.) On November 13, 2013, the BVI Company wired $150,000 from a BVI Company Fidelity account to Company C. (*Id.* ¶ C-5.)

Shortly after the BVI Company's $150,000 investment in Company C, Defendant represented that an additional $2 million investment by the BVI Company was necessary because Defendant was getting pressure from Oak for being on the Board of the Company without a bigger investment. (SEC Ex. 145.) He then requested via email that Company C "lawyers . . . wrap up the incremental $2MM funding," which the Company C representative confirmed would be done "right away." (SEC Ex. 146.) On November 26, 2012, $2,000,000 was wired from the same BVI Company Fidelity account for the purchase of additional Company C shares. (SOF ¶ C-6.) When he was subsequently confronted by the BVI Company about the $2 million that was missing from the BVI

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[7] The Court understands this to mean a company in which any Oak Fund holds an investment.

Company's Fidelity account, Defendant claimed the $2 million purchase was a mistake on the part of the "finance team." (*Id.* ¶ C-7.) Continuing to conceal that he negotiated the $2 million investment, Defendant told BVI he would "take full responsibility" for the "mistake" and would personally purchase the shares, which he did on or about June 21, 2013. (*Id.* ¶ C-8.)

Meanwhile, on Defendant's recommendation, in October 2013 Oak Fund XIII invested $25 million into Company C Series B shares, while Defendant simultaneously negotiated with Company C (purportedly on behalf of Oak Fund XIII), an investment by Oak Fund XIII that would be conditioned on Company C redeeming the BVI's Company's Company C shares (now secretly owned by Defendant) for $10,896,193.59. (*Id.* ¶¶ C-9, C-15.) Essentially, Defendant was pretending to act on behalf of Oak Fund XIII in negotiating its investment in Company C, while actually seeking to profit (by more than $8 million) by redeeming the Company C shares he was holding in the name of the BVI Company. Prior to Oak Fund XIII making its $25 million investment into Company C—which triggered Company C's obligation to redeem Defendant's Company C shares held in the name of the BVI Company for $10,896,193.59—Defendant was specifically asked if he had invested in Company C. Defendant falsely stated that he had "no personal investment or any other direct beneficial interest or investment" in Company C. (*Id.* ¶ C-10.)

Ms. Ames, OMC's Chief Operating Officer and designated witness in this case (*id.* ¶ X-3), asked

Defendant about any ownership of Company C shares because each Oak Fund is prohibited, absent proper consent, from investing in the securities of any entity in which any of the Managing Members of its general partner (including Defendant) have, or have had within the preceding ninety days, any investment or any other material financial interest. (SOF ¶ C-16.) Oak funds also are prohibited, absent the proper consent, from purchasing or selling securities to or from any Managing Members of the general partner of the Oak Funds (including Defendant) or any of their respective affiliates. (*Id.*)

To further conceal that he was holding Company C shares and would personally profit from their redemption (triggered by Oak Fund XIII's investment in Company C), Defendant opened the BOA BVI Company Account on October 10, 2013, and directed, through an attorney, Company C to wire the redemption proceeds into this account. (*Id.* ¶¶ C-11-13.) After he received the funds in his BOA BVI Company Account, Defendant transferred the funds into a joint bank account that he held with his wife, Relief Defendant Shalini Ahmed. (*Id* ¶ C-14.)

In sum, Defendant purposefully lied to his fellow BVI Company directors when he told them the $2 million purchase of Company C shares was a mistake, as he had personally negotiated the purchase of those shares in the name of the BVI Company. Defendant then bought the shares, left them in the name of the BVI Company, and negotiated their redemption for a price that was substantially greater than the $2 million originally paid by leveraging the

redemption on Oak Fund XIII's $25 million investment in Company C. While recommending that Oak Fund XIII purchase $25 million of Company C's Series B shares, Defendant concealed from Oak Fund XIII and Company C that he (as opposed to the BVI Company, which was an Oak portfolio company) was the seller of those Company C shares and that he would personally profit by more than $8 million upon Oak Fund XIII's $25 million investment. Defendant told Oak that he did not have any personal investment or direct beneficial interest in Company C, which was false because Defendant was: (1) holding the Company C shares in the name of BVI Company that were redeemed upon Oak Fund XIII's investment; and (2) holding Company C shares in the name of I-Cubed, as explained below.

$7,500.000 I-Cubed Sale

I-Cubed is a single member Delaware LLC formed on October 24, 2012 whose sole member (and owner) was Defendant. (*Id.* ¶ C-22.) In November 2012, Defendant, through I-Cubed, invested in Company C. (*Id.* ¶ C-24.)[8]

On October 30, 2014 Oak Fund XIII entered into a Stock Purchase Agreement with I-Cubed to purchase its Company C shares for $7.5 million. (SOF ¶ C-18.) That agreement was executed by Defendant on behalf

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[8] Later on, in May 2013, Defendant transferred his I-Cubed interest to Ms. Ahmed. (SOF C-25.) Although Defendant moved I-Cubed into the name of his wife, she merely served as a nominee. Ms. Ahmed testified that despite being the "owner" of I-Cubed, she played no role in the sale negotiations. (Preliminary Injunction Order [Doc. # 113] at 8.)

of Oak Fund XIII and was purportedly executed on behalf of I-Cubed by Richard N. Kimball. (*Id.*) Defendant provided wire transfer instructions to Oak and directed that it wire $7.5 million to an account held by I-Cubed at Bank of America ending x8384 ("BOA I-Cubed Account"), which Oak followed.[9] (*Id.* ¶ C-19.) On November 3, 2014 Defendant wrote a $7,425,000 check from the BOA I-Cubed Account to the Shalini Ahmed 2014 Grantor Retained Annuity Trust (the "GRAT"). (SEC Ex. 160 at SEC-BOA-E-1355.)

When presenting this proposed investment to Oak's managing partners at their investment committee meeting held on or about October 27, 2014, Defendant described the seller of the shares, I-Cubed, as a "family office." (SOF ¶ C-17.) Defendant's written presentation included financials for Company C showing, among other things, that Company C's estimated revenues in 2014 were $515.6 million, a 65% increase over 2013 revenues of $311.81 million. (*Id.*) However, on October 8, 2014, Defendant had received Company C's financials showing $178.1 million in revenue for the first eight months of 2014, which was just 11.7% ahead of revenues for the first eight months of 2013. (*Id.* ¶ C-30.)

Defendant had recognized the declining value of Company C stock even before this. In August 2014, two months before I-Cubed sold the Company C stock to

[9] Unbeknownst to Ms. Ahmed (I-Cubed's nominal owner by this time), Defendant, representing that he was a member of I-Cubed, had opened this account, listing him as the sole signatory, on October 28. (SOF C-20.)

Oak Fund XIII for $7.5 million, a 99% interest in I-Cubed-which held only the Company C shares—was transferred into the GRAT. (*Id.* ¶¶ C-32-33.) According to the GRAT formation document, which the GRAT's 30(b)(6) witness confirmed was accurate, the market value of the 99% interest in I-Cubed was worth only $876,193.72. (*Id.* ¶ C-32.) Similarly, during the preliminary injunction hearing, Relief Defendant Shalini Ahmed testified that she believed the GRAT formation document was accurate and that I-Cubed's Company C shares were worth $876,193.72 as of August 29, 2014. (*Id.* ¶ C-33.) Thus, while Defendant represented to Oak that I-Cubed's Company C shares had increased in value by 375% (to $7.5 million) since their purchase, Defendant himself had acknowledged the shares had diminished in value by more than 50% to less than $1 million. (*Compare* SOF ¶ C-18 *with* ¶¶ C-32-33.)

Defendant misrepresented that he had no personal investment or any other direct beneficial interest or investment in Company C and did not disclose to Oak or its funds that he or his family owned or had an interest in I-Cubed despite recommending that Oak Fund XIII buy Company C shares directly from I-Cubed. (*Id.* ¶¶ C-10, C-27.) Thus, Defendant concealed that he was on both sides of the transaction, going so far as to forge the signature of Mr. Richard Kimball who had retired as I-Cubed's manager more than one month earlier and had no knowledge of the transaction.[10] (*Id.* ¶¶ C-27-29.)

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[10] On November 6, 2014, less than one week after Oak Fund XIII purchased the Company C shares from I-Cubed, Defendant

4. Company D

Oak Fund IX purchased and sold Company D shares through a special purpose vehicle based in the Netherlands named A. Bohl Praktiijk B.V. ("BPBV"), and Defendant had substantial responsibilities in connection with this investment. (SOF D-1, D-6.) The evidence, discussed below, shows that in connection with these transactions, Defendant misappropriated money from Oak Fund IX four different times by causing money to be transferred to his secret bank accounts and then transferring it to his personal accounts.

The first misappropriation occurred in connection with Oak Fund IX's December 2004, purchase of Company D shares. (*Id.* ¶ D-1.) Defendant negotiated a letter agreement with Company D that replaced the annual dividend provisions in the deal's term sheet with a one-time management fee of $600,000 to be paid to Oak Fund IX by Company D. (*Id.* ¶ D-2.) After receiving instructions from Defendant to wire the money to a Fleet Bank account number x9310 in the name of OIP Advisors, Company D confirmed in a January 5, 2005 email that it would wire $600,000 the following day. (*Id.* ¶ D-3.) On January 7, 2005, Defendant received a revised agreement reflecting a

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explained to an investor in Company C—responding to a suggestion that Oak participate in another financing round for Company C—that the company was performing so poorly Oak would not agree to invest: "With a flat to down year it is a non-starter at Oak unfortunately for me to even try and pitch." (*Id.* ¶ C-30.) Company C ceased operations less than two years later and Oak Fund XIII lost its entire investment. (*Id.* ¶ C-31.)

$50,000 increase in the management fee to be paid by Company D.[11] (*Id.* ¶ D-4.) On January 11, 2005, Defendant emailed Company D stating "[s]ame instructions as last time" and, three days later, Company D confirmed that it had wired $50K that day. (*Id.*) In fact, the account that Defendant provided Company D was not an Oak account. (*Id.* ¶ D-5.) Rather, Defendant had previously opened a Fleet Bank account ending in numbers x9310 in the name of "Ifitkar Ali Ahmed dba OIP Advisors," and after the two banks merged, that account became Bank of America account ending in numbers x9310 (the "BOA OIP Advisors Account"). (*Id.*)

The second misappropriation was in relation to Oak Fund IX's sale of a portion of its Company D shares in May 2006. (SOF ¶ D-6.) Defendant had substantial responsibilities in connection with Oak Fund IX's exit from the Company D investment in 2006 and 2007. (*Id.*) Pursuant to the Share Purchase Agreement, Oak Fund IX agreed to pay the broker's (the "Investment Bank") fees and expenses in connection with the transaction. (*Id.* ¶ D-7.)

On June 26, 2006, Defendant received a $1.2 million invoice from the Investment Bank for advisory services related to the sale of the shares. (*Id.* ¶¶ D-8, D-9.) That same day, Defendant opened a Bank of America account number x2349 in the name of Company D (the "BOA Company D Account"), on which he was listed as the sole authorized representative. (*Id.* ¶ D-10.) Company D did not actually have an account at Bank

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[11] It is not clear from whom Defendant received this agreement.

of America. (SOF ¶ D-6.) On July 3, 2006, BPBV wired $3 million to Defendant's BOA Company D Account, believing that to be the amount for advisory fees charged by the Investment Bank. (*Id.* ¶ D-11.) On that same day, $1.2 million was transferred to Defendant's BOA OIP Advisors Account, and $1.8 million was transferred to his joint bank account that he held with his wife, Relief Defendant Shalini Ahmed. (*Id.* ¶ D-11.) On July 5, 2006, $1.2 million was transferred from Defendant's BOA OIP Account to an account for the Investment Bank. (*Id.*)

Defendant again misappropriated funds when, in January 2007, he requested that Oak Fund IX make a $6.6 million payment for a Korean tax obligation related to the 2006 sale of Company D shares. (SOF ¶ D-13.) Defendant submitted a wire transfer request with an invoice on Company D letterhead and included that wire transfer instructions for Defendant's BOA Company D Account. (*Id.*) The Company D invoice was not from Company D. (*Id.* ¶ D-6.) On January 26, 2007, Oak Fund IX wired a total of $6.6 million to BPBV which, in turn, on January 29, 2007, wired $6.6 million to Defendant's BOA Company D Account. (*Id.* ¶ D-14.) On that same date, nearly $6.6 million was transferred from Defendant's BOA Company D Account to a joint bank account that he held with his wife, Relief Defendant Shalini Ahmed. (*Id.*) Contrary to Defendant's instructions, Oak is not aware of any document suggesting that Korean capital gains taxes were in fact assessed on the sale of the shares or that there was any legitimate reason for the $6.6 million payment that Defendant directed Oak Fund IX to make in January 2007. (*Id.* ¶ D-15.)

Lastly, on August 21, 2007, Defendant presented Oak Fund IX with a wire transfer request relating to another invoice on Company D letterhead seeking payment of $800,528.81 in "[t]ransaction fees to be paid to the Korean Tax Authority" in connection with Oak Fund IX's January and March 2007 distributions of Company D shares to its investors. (*Id.* ¶ D-16.) The invoice provided wire transfer instructions for payment to Defendant's BOA Company D Account. (*Id.*) Again, the Company D invoice was not from Company D. (*Id.* ¶ D-6.) On August 21, 2007, Oak Fund IX wired a total of $800,528.81 to Defendant's BOA Company D Account. (SOF ¶ D-17.) None of this money was transferred to Company D; rather, the money (minus a $30.00 wire transfer fee) was transferred to a joint bank account that Defendant held with his wife, Relief Defendant Shalini Ahmed. (*Id.* ¶ D-17.) Oak is not aware of any document or other evidence to suggest that Company D paid $800,528.81 (or any other amount) in securities transaction taxes to the Korean tax authorities in connection with Oak Fund IX's March 2007 distribution of Company D shares. (*Id.* ¶ D-18.)

5. Company E

Defendant recommended to Oak's Managing Partners that Oak Fund XI purchase Company E shares for 17 million Euros. (SOF ¶ E-1.)[12] In his

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[12] Relief Defendants claim the SEC's cited evidence does not show Defendant recommended this purchase because the report (used by Oak for its consideration of projects) reflects that Bandel Carano ("BLC") was the manager of the project and Edward Glassmeyer ("EFG") was a "buddy." (RDs' LR 56(a)2 Stmt. ¶ E-1.) They assert

recommendation, Defendant used an exchange rate of 1.3 U.S. Dollars to Euros to convert the purchase price to a total of $22.1 million. (*Id.* ¶ E-2.) Company E's bank account appears in the final version of the written agreement for the deal and in an email from Company E to Defendant providing payment instructions, while Defendant's BOA Company E Account[13] appears in neither. (*Id.* ¶ E-3.)

Defendant instructed Oak Fund XI to fund the $22.1 million purchase with two separate transfers: (1) $20.74 million to an account of Company E; and (2) $1.36 million to Defendant's BOA Company E Account. (*Id.*) In the written wiring instructions that Defendant sent Oak Fund XI, Defendant represented the account name as "[Company E] USA" and did not state in any manner that he owned or had a personal interest in the account. (SOF ¶ E-4.) Three days later, on July 29, 2005, Oak Fund XI made the transfers requested by Defendant. (SEC Exs. 44, 45.)

Although Defendant represented to Oak Fund XI that the purchase price of 17 million Euros was equivalent to $22.1 million – an exchange rate of 1.3 dollars to Euros – Defendant knew at the time that the exchange rate was actually closer to 1.2 dollars to Euros. Defendant stated as much in an email to Company E dated August 2, 2005, where he told

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that Defendant's name does not appear anywhere on the report, however, at the top of page one it clearly lists Defendant's initials ("IAA") under "Prepared by." (SEC Ex. 40 at OAK-SEC-1630.)

[13] The complete name on the BOA Company E Account was "Iftikar A. Ahmed d/b/a [Company E] USA." SOF E-4.

Company E that the actual exchange rate at the time of Oak Fund XI's transfer "was more like 1.21," and Defendant "did the calculations at 1.22 assuming some maring [sic] for movement" to arrive at the $20.74 million amount transferred by Oak Fund XI to the seller. (SEC Ex. 46 at OAK-SEC-1643.)

Thus, Company E agreed to a purchase price of $20.74 million but Oak Fund XI paid $22.1 million and Defendant diverted the difference of $1.36 million to Defendant's BOA "Company E" Account. (SOF ¶ E-6.) Over the next month, Defendant transferred a total of $1,358,188 from the BOA Company E Account to two of his personal accounts. (*Id.* ¶ E-7; SEC Ex. 47 at SEC-BOA-E-2141.)

Soon after the transaction, Company E notified Defendant of a shortfall in the purchase price and then accepted Defendant's suggestion that Oak Fund XI pay the shortfall of €19,486 as a setoff against the amount Company E owed Oak Fund XI for legal expenses under the Investment Agreement. (*Id.* ¶¶ E-5, E-8.) Unbeknownst to Oak Fund XI, Defendant then directed the seller to send the legal expense reimbursement (less the shortfall in the purchase price) to Defendant's BOA OIP Advisors Account. (*Id.* ¶ E-9.) The seller complied with Defendant's direction and transferred $92,285.15 to Defendant's OIP Account on November 11, 2005. (*Id.* ¶ E-10.) Two weeks later, Defendant transferred the funds from the BOA OIP Advisors Account to his personal account. (*Id.*)

6. Company F

In February 2007, Oak Fund XII invested in shares of Company F. (SOF ¶ F-1.) Company F was required to reimburse Oak Fund XII for its legal fees in connection with the share purchase, up to $250,000. (*Id.* ¶ F-2.) Defendant advised Company F to send the legal fees reimbursement to his BOA OIP Advisors Account, which Company F did. (*Id.* ¶¶ F-3 to F-4.) Defendant then wired those funds to a joint bank account that he held with Relief Defendant Shalini Ahmed. (*Id.* ¶ F-4.)

Later in 2007, Oak Fund XII sold its shares in Company F. (*Id.* ¶ F-5.) Similar to the initial share purchase agreement, the sale agreement related to this transaction provided that the acquiring company would pay the seller's transaction expenses, with a cap of $500,000. (*Id.*) Oak Fund XII paid its own legal fees, however, once again Defendant advised Company F to send Oak Fund XII's reimbursement of legal fees to his BOA OIP Advisors Account, which Company F did. (*Id.* ¶¶ F-6 to F-7.) Just as in June 2007, Defendant did not provide the legal fees to Oak Fund XII, but rather wired the $500,000 to a joint bank account that he held with Relief Defendant Shalini Ahmed. (*Id.* ¶ F-8.)

7. Company G

Oak Fund XII purchased and sold Company G shares through its affiliated entity Oak Asia Infrastructure, LLC. (SOF ¶ G-1.) Specifically, with respect to these transactions, Defendant recommended and/or signed the agreements on behalf of Oak Fund XII or its affiliate. (*Id.* ¶ G-2, G-7, G-10.) In connection

with these transactions, Defendant misappropriated money from Oak Fund XII five different times, as discussed below.

The first misrepresentation relates to Defendant's 2007 proposal that Oak Fund XII invest 40 billion Korean Won in Company G shares. (SOF ¶ G-2.) After the investment was approved, Defendant presented wire transfer instructions showing that Oak Fund XII was buying 2,348,904 shares for a total price of $47.5 million. (*Id.*) In accordance with Defendant's instructions, on December 18, 2007, Oak Fund XII wired $45 million to a Korea Exchange Bank account and the remaining $2.5 million to a Bank of America account ending in numbers x9887 in the name of "Company G" (the "BOA Company G Account 1"), which Defendant had opened earlier that same day. (*Id.* ¶¶ G-2, G-5.) The $2.5 million was immediately transferred to a joint bank account that Defendant held with his wife, Relief Defendant Shalini Ahmed. (*Id.* ¶ G-5.)

Defendant knew that the purchase price for the Company G shares would be less than $45 million, and he instructed that the excess funds be sent to his BOA OIP Advisors Account. (*Id.* ¶ G-3.) On January 9, 2008, Korea Exchange Bank wired $2,201,070.56 to Defendant's BOA OIP Advisors Account.[14] (*Id.*¶ G-4.) Oak has no record of receiving that money or any other amount back from the $45 million Oak Fund XII wired on December 18, 2007. (*Id.*) The next day that money

[14] The account received only $2,201,050.56, likely due to a transfer fee. (*See id.* ¶ G-6.)

was transferred to a joint bank account that Defendant held with his wife, Relief Defendant Shalini Ahmed. (*Id.* ¶¶ G-6.)

On four separate occasions from 2009 to 2013, Defendant presented requests for Oak Fund XII to make payments purportedly to Company G with an invoice that appeared to be on Company G letterhead. Each invoice was submitted with a wire request and contained wire transfer instructions directing that payment be remitted to one of two Bank of America accounts in the name of Company G. In each instance, Oak Fund XII made the payments as requested by Defendant. However, Defendant's BOA Company G Accounts did not belong to Company G, and Company G never received the funds mentioned above. (*Id.*¶¶ G-7-16.)

Defendant's second misrepresentation was in connection with Oak Fund XII's 2009 Tender Offer Agent Engagement Agreement for Company G that resulted in the company being taken private and delisted, which Defendant signed. (*Id.* ¶ G-7.) On October 29, 2009, Defendant submitted a wire request and Company G invoice for Oak Fund XII's payment of 2,490,325,000 Korean Won (or $2,101,185.45) to Company G for purported delisting fees and legal fees with wire instructions for Defendant's BOA Company G Account 1. (SOF ¶ G-8.) Oak Fund XII subsequently wired the $2,101,185.45 to the BOA Company G Account 1, of which $2,099,998 was transferred to a joint bank account Defendant held with his wife the following day. (*Id.* ¶ G-9.)

Defendant's third fraud associated with Company G centers on Oak Fund XII's sale of its Company G shares in October 2011, with a portion of the sales price remaining in escrow until 2013. (*Id.* ¶ G-10.) This agreement was also executed by Defendant. (*Id.*) The transaction was set up so that Oak Fund XII would receive a certain portion of the consideration for its shares at the initial closing and the remainder would be held in escrow until March 31, 2013, upon which time it would be released to Oak Fund XII. (*Id.*)

On November 25, 2011, Defendant submitted a wire request, along with an invoice, for Oak Fund XII's payment of a $3,113,981 "Management Incentive Payment" to Company G. (SOF ¶ G-11.) The wire request directed that $3,113,981 be paid to Company G, and the invoice contained wire transfer instructions for a Bank of America account number x6367 in the name of Company G (the "BOA Company G Account 2"), which Defendant had previously opened on October 17, 2011. (*Id.* ¶¶ G-11-12.) On November 28, 2011, Oak Fund XII wired $3,113,981 to that account, and the next day $3,000,000 was transferred to Defendant and his wife's joint bank account. (*Id.* ¶ G-12.)

Defendant made his fourth misrepresentation on April 10, 2013 when Defendant submitted a wire transfer request, along with an invoice and an email explanation of the fees for Oak Fund XII's payment of a $1,556,990 Management Incentive Payment to Company G, related to the sale of Company G shares. (*Id.* ¶ G-13.) The invoice contained wiring instructions for the BOA Company G Account 2. (*Id.*) On April 11, 2013, Oak Fund XII wired $1,556,990 to the BOA

Company G Account 2 and that same day the money was transferred to the joint bank account that Defendant held with his wife. (*Id.* ¶ G-14.)

Finally, on April 29, 2013, Defendant submitted a wire transfer request, along with an invoice, for Oak Fund XII's payment of a $622,796 Investment Banking Advisory Fees reimbursement to Company G, again containing wiring instructions for the BOA Company G Account 2. (*Id.* ¶ G-15.) On April 30, 2013, Oak Fund XII wired $622,796 to the BOA Company G Account 2, and $622,796 was immediately transferred to Defendant and Ms. Ahmed's joint bank account. (*Id.* ¶ G-16)

8. Company H

Oak Fund XII made several investments in Company H and its parent company, incurring fees from two law firms in connection with the investments and other legal matters related to Company H. (SOF ¶¶ H-1, H-2.) Purporting to act pursuant to agreements between Oak and Company H, Defendant directed Company H to transfer nearly 1.5 million British pounds to the BOA OIP Advisors Account as reimbursement for Oak's legal expenses. (*Id.* ¶ H-3.)

On June 17 and 18, 2009, Company H made three separate transfers to Defendant's BOA OIP Advisors Account in the amounts of $1,575,905.94, $118,578.60, and $535,025.04. (*Id.* ¶¶ H-4, H-5.) Shortly after the transfers, Defendant transferred $1,690,932.54 from the BOA OIP Advisors Account into Defendant's personal account. (*Id.* ¶¶ H-4, H-5.) Then, after Defendant had moved the funds paid by Company H

for reimbursement of Oak's legal fees into his own personal accounts, on July 7, 2009, Defendant sent Company H a letter on Oak letterhead explaining that Oak requested that Company H "reimburse Oak for legal expenses up to a maximum of UK £1,500,000." (*Id.* ¶ H-6.)

***9. Company** I*

In December 2010, Defendant recommended that two Oak funds—Oak Fund XII and Oak Fund XIII—invest 36.5 million British pounds in Company I. (SOF ¶ I-1.) Defendant represented to Oak that this purchase price translated into $3.6084 per share for a total of approximately 59 million U.S. dollars, and that this was based upon a fixed exchange rate of 1.62 dollars to the British pound, which had been reflected in a term sheet signed in November 2010. (*Id.* ¶¶ I-2, I-3.) These representations were not true—the November 2010 term sheet contained no such provision for a fixed exchange rate, and application of the correct exchange rate on the date of Oak Fund XII's investment would have resulted in a per share price of $3.49. (*Id.* ¶¶ I-4, I-5.)

As a result of these misrepresentations the Oak funds overpaid, and on December 17, 2010, shortly after Oak wired the $59 million, Company I contacted Defendant and informed him that it was wiring back to Oak the approximately £1.4 million that had been overpaid. (*Id.* ¶ I-6.) Defendant directed Company I to wire these surplus funds to his secret BOA OIP Advisors Account, which Company I did. (*Id.* ¶¶ I-7, I-8.) The next day, Defendant transferred these funds – which amounted to approximately $2.185 million – into

a joint bank account that he held with his wife, Relief Defendant Shalini Ahmed. (*Id.*¶ I-8.) Oak never received these funds. (*Id.* ¶ I-9.)

10. Company J

Oak Fund XI entered into a Stock Purchase Agreement dated April 7, 2006, in which it agreed to purchase from Company J (a Delaware corporation) 15,000,000 shares of its Series A Preferred Stock. (SEC Ex. 51 at OAK-SEC-5630, 5662.) Defendant worked on Oak Fund XI's purchase of Company J shares. (SOF ¶ J-2.) The Share Purchase Agreement stated that Company J would use the proceeds from the sale of the stock to, among other things, fund the payment of a one-time special dividend to Oak Fund XI in the amount of $0.12 per share, which equates to $1.8 million. (*See* SEC Ex. 53 § C(3)(a) at OAK-SEC-5610.)

On April 19, 2006 Defendant directed Company J to send the dividend to Defendant's BOA OIP Advisors Account. (SOF ¶ J-5.) Company J complied with Defendant's directives and transferred $1.8 million to Defendant's OIP Account on May 1, 2006. (*Id.* ¶ J-6.) Seven weeks later, Defendant transferred the $1.8 million from the BOA OIP Advisors Account to his and his wife's joint bank account. (*Id.*¶ J-7.)

III. Discussion

A. Standard on Summary Judgment and Effect of Adverse Inference

Summary judgment is appropriate where, "resolv[ing] all ambiguities and draw[ing] all

permissible factual inferences in favor of the party against whom summary judgment is sought," *Holcomb v. Iona Coll.*, 521 F.3d 130, 137 (2d Cir. 2008), "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(a). "A dispute regarding a material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Williams v. Utica Coll. of Syracuse Univ.*, 453 F.3d 112, 116 (2d Cir. 2006) (quotation marks omitted). "The substantive law governing the case will identify those facts that are material, and '[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.'" *Bouboulis v. Transp. Workers Union of Am.*, 442 F.3d 55, 59 (2d Cir. 2006) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). When considering a motion for summary judgment, the Court may consider depositions, documents, affidavits, interrogatory answers, and other exhibits in the record. Fed. R. Civ. P. 56(c). The same standard applies to cross-motions for summary judgment. *See Morales v. Quintel Entm't, Inc.*, 249 F.3d 115, 121 (2d Cir. 2001). The Court must examine the merits of each motion independently and in each case must consider the facts in the light most favorable to the non-moving party. *Id.* at 121.

In this case, Defendant has invoked the Fifth Amendment instead of responding to the SEC's Complaint, allegations, or discovery requests. (SEC SOF X-1.) It is Defendant's right to assert this privilege in a civil proceeding. *See, e.g., Baxter v. Palmigiano*,

425 U.S. 308, 316 (1976). However, "[a] court may draw an adverse inference against a party who asserts his Fifth Amendment privilege in a civil matter, because the invocation of the privilege results in a disadvantage to opposing parties by keeping them from obtaining information they could otherwise get." *S.E.C. v. Suman*, 684 F. Supp. 2d 378, 386 (S.D.N.Y.2010) (citing *Collazos v. United States*, 368 F.3d 190, 203-04 (2d Cir. 2004) (noting that where the defendant "deprives the government of the opportunity to conduct a deposition . . . [that] itself supports an adverse inference")); *see also S.E.C. v. Pittsford Capital Income Partners, L.L.C.*, 2007 WL 2455124, at *14 (W.D.N.Y. Aug. 23, 2007) ("[L]itigants denied discovery based upon an assertion of the privilege may ask the court to draw a negative inference from the invocation of that right.").

"An adverse inference may be given significant weight because silence when one would be expected to speak is a powerful persuader." *LiButti v. United States ("LiButti II")*, 178 F.3d 114, 120 (2d Cir. 1999). "While the strength and cogency of the adverse inference" must "be tested against the other evidence in the case, 'the claim of privilege will not prevent an adverse finding or even summary judgment if the litigant does not present sufficient evidence to satisfy the usual evidentiary burdens **in** the litigation.'" *LiButti v. United States ("LiButti I")*, 107 F.3d 110, 124 (2d Cir. 1997) (quoting *United States v. Certain Real Prop. & Premises Known as 4003-4005 5th Ave., Brooklyn, N. Y.*, 55 F.3d 78, 83 (2d Cir. 1995)); *see also Suman*, 684 F. Supp. 2d at 386 ("a motion for summary judgment cannot be granted on an adverse inference alone; rather, the inference must be weighed with other

evidence in the matter in determining whether genuine issues of fact exist."); *United States v. Inc. Vill. of Island Park*, 888 F. Supp. 419, 432 (E.D.N.Y. 1995) (finding that the moving party "must produce independent corroborative evidence of the matters to be inferred before liability will be imposed" (internal quotation marks omitted)).

B. Defendant's Claims That he was Treated Unfairly are Without Merit

Defendant claims that he has been treated unfairly, inappropriately denied access to evidence, and coerced into asserting his Fifth Amendment right against self-incrimination. (Def.'s Opp.'n at 1-8.)

Defendant chose to flee the United States shortly after this case was filed, in violation of his conditions of release in a criminal matter. (*See* Order Denying Def.'s Mot. for Full Access to the SEC's Investigative File [Doc. # 286] at 2.) It was as a result of this choice that the Court denied Defendant's requests for access to confidential information, reasoning that it could not enforce any protective order while Defendant remained outside of its jurisdiction. (*See, e.g.*, *id.* at 3; Order Denying Def.'s Mots. To Compel Oak to Produce Documents [Doc. # 477] at 3.)

Defendant also claims that he has been unfairly deprived of access to counsel, but as this Court has articulated in previous rulings in this case, Defendant has no Sixth Amendment right to counsel in this civil case nor the right to use tainted assets to retain counsel. (*See* Ruling on Defendant's Motion for Release of Funds [Doc. # 191] at 2-3; Ruling Denying

Defendant's Motion for Reconsideration to Modify the Asset Freeze Order to Release Funds for Legal Defense [Doc. # 392].) Since he consented to the withdrawal of his counsel, Defendant has actively participated in this litigation, and Relief Defendants, who have been continuously represented by counsel, have also litigated aspects of the merits of Defendant's claimed liability. (*See, e.g.*, RD's Mot. for Summ. J.)

Defendant further argues that he was "forced and coerced" to invoke his Fifth Amendment privilege when the SEC insisted that he appear for his deposition at the U.S. Consulate in India.[15] (Def.'s Opp'n at 6.) The record does not support this claim. Indeed, in initially objecting to his deposition—which was noticed in the United States—Defendant stated that he was "likely to assert his Fifth Amendment privileges," belying his argument that he ever intended to substantively testify. (*See* Def.'s Mot. for a Protective Order and to Quash Notice of Deposition [Doc. # 238] at 3.) And critically, Defendant's Fifth Amendment invocation was not made only at his deposition: Defendant also invoked his Fifth Amendment privilege in his Answer on advice of counsel and later when responding to written discovery. (*Id.*)

Defendant has received the benefit of the Fifth Amendment privilege at every stage of this proceeding,

[15] Defendant ignores that the Court ordered him to appear at either the Consulate in Hyderabad or Kolkata and refused his request for what it deemed "essentially a protective order preventing his deposition from being conducted in a U.S. Consulate or Embassy in India." (Order Denying Defendant's Motion for Specific Instructions for Deposition [Doc. # 365] at 4.)

and now he must also bear the consequences of that decision. *See United States v. 4003-4005 5th Ave., Brooklyn, N.Y.*, 55 F.3d 78, 82 (2d Cir. 1995) ("[A] civil litigant's invocation of the privilege against self-incrimination during the discovery process is far from costless.") Defendant's claims that he has been "muzzled, silenced and rendered deaf, dumb and blind" are simply not accurate. (Def.'s Opp'n at 1.) The Court has afforded Defendant every opportunity to participate in this litigation despite the circumstances he created for himself by leaving its jurisdiction, as evidenced by his prolific filings since the withdrawal of his attorney.

C. *Kokesh* Does not Require Dismissal of Claims Against Relief Defendants in the Pending Summary Judgment Proceedings

Relief Defendants and Mr. Ahmed respectively move for summary judgment in their favor on all claims arising from alleged frauds involving Companies D, E, F, H, and J, and those involving Company G (other than the frauds alleged to have occurred in November 2011 and April 2013) because each of these transactions took place more than five years prior to the filing of the SEC's claim and is therefore time-barred pursuant to 18 U.S.C. § 2462, as the Supreme Court recently held in *Kokesh v. SEC*, 137 S. Ct. 1635 (2017).[16] The SEC's Motion for Summary Judgment on

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[16] Relief Defendants initially argue—as Defendant does—that *Kokesh* requires dismissal of "each claim relating to a transaction that occurred more than 5 years before the SEC filed claims."

liability does not discuss the impact of *Kokesh*, and its Opposition to Defendants' Motion contends that *Kokesh* does not affect the question of whether Defendant is liable for the alleged violations, but only the extent of damages. It therefore argues that *Kokesh* should not be addressed until the next phase of the bifurcated summary judgment proceedings, if there is one.

Nonetheless, Plaintiff makes two arguments against dismissal of the claims arising out of events which occurred over five years before the SEC filed its Complaint: first, the SEC also seeks injunctive relief relating to those transactions, which does not carry the same statute of limitations; and second, even if the SEC could not seek any relief related to Defendant's conduct that occurred more than five years prior to the filing of this case, that conduct is still relevant to Defendant's subsequent liability and any ultimate remedies.

The SEC does not dispute that the claims for disgorgement tied to the transactions which occurred over five years before this case was filed are time-barred, however, it argues that Defendants' argument—that all relief is barred because some of the SEC's claims are based on pre-2010 conduct—ignores that the non-disgorgement relief the SEC seeks for these pre-2010 violations includes injunctive relief. (*See* Am. Compl. [Doc # 208] at 53-54.) In fact, Relief

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(RDs' Mot. for Summary Judgment at 4.) In their Opposition, however, they instead ask the Court to dismiss specific claims against Relief Defendants for equitable disgorgement. (RDs' Opp'n at 3.)

Defendants appear to admit as much, noting that "[t]he only remedy potentially available to the SEC for misconduct that accrued five years before this case was filed is injunctive relief that would prohibit the Defendant from violating the securities laws." (RDs' Opp'n to Pl.'s Mot. for Summ. J. (citing *S.E.C. v. Collyard*, 861 F.3d 760, 764 (8th Cir. 2017) (injunction barring defendant from violating Securities Exchange Act § 15(a) permitted under *Kokesh* because a properly imposed injunction is designed to protect the public, not to punish, and thus is not a penalty subject to § 2462.)).)[17] Accordingly, the SEC argues that "it would be premature to dismiss any of [its] claims at this stage, since this court's decision whether injunctive relief is appropriate should follow its disposition of the summary judgment motions on liability." (SEC Opp'n at 6.)

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[17] Defendant, however, does not concede this point, and offers an out of circuit district court ruling as support for his argument that the injunction is also punitive. *See S.E.C. v. Gentile*, No. CV 16-1619 (JLL), 2017 WL 6371301 (D.N.J. Dec. 13, 2017). There, the court found that the "obey-the-law" injunction was punitive in nature as it would "stigmatize Defendant in the eyes of the public" where it "simply require[d] Defendant to obey the already established federal laws and regulations relating to securities." *Id.* at *4. It further found there would be no retributive effect from such an order. Additionally, it held that the injunction which would prohibit Defendant from being involved in any "penny stock" offerings would only serve to punish Defendant: "it would merely restrict Defendant's business structure and methodology, in perpetuity, simply because he was alleged to have violated securities laws when he purportedly was involved in the [fraudulent] schemes." *Id.*

The SEC also claims that even if discrete acts fall outside of a statutory time period, those acts are competent background evidence for analyzing timely misconduct. *See e.g.*, *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 112-13 (2002) (quoting *United Airlines, Inc. v. Evans*, 431 U.S. 553, 558 (1977); *Chin v. Port Authority*, 685 F.3d 135, 150 (2d Cir. 2012) ("It is well established . . . that so long as at least 'one alleged [violation] . . . occurred within the applicable filing period[,] . . . evidence of an earlier alleged [violation] may constitute relevant background evidence in support of [that] timely claim.'" (quoting *Jute v. Hamilton Sundstrand Corp.*, 420 F.3d 166, 176 (2d Cir. 2005))). Moreover, the SEC argues evidence of Defendant's older conduct—which involved similar fraudulent acts as the more recent conduct, including misrepresenting the purchase price of shares and fabricating invoices for purported expenses—tends to prove his motive, opportunity, and intent, for his conduct that is indisputably timely. *See* Fed. R. Evid. 404(b); *see also U.S. v. Vilar*, No. 05 Cr. 621, 2008 WL 4178117, at *2 (S.D.N.Y. Sept. 5, 2008) (noting the Second Circuit has adopted an "inclusionary" approach to Rule 404(b) evidence).

The Court agrees the evidence may be relevant, regardless of whether it forms the basis of an independent claim. The crux of the issue, however, is whether there is any relief which this Court may grant with respect to the pre-2010 conduct alleged in the Complaint. Because this stage of the proceedings deals with liability, and the question of whether injunctive relief is appropriate as it relates to the otherwise time-barred conduct deals with the remedy, this question

must be left to be addressed in the next phase of the proceedings. The Court therefore will not dismiss any claims under *Kokesh* at this liability stage, however it earlier modified the Asset Freeze Order [Doc. # 113] to reflect this change in law. (*See* Order on Defendant's Motions for Modification of the Asset Freeze Order to Release Funds for his Legal Defense and for a Stay [Doc. # 829].)

D. Defendant's Conduct Violated the Advisers Act, Securities Act, and Exchange Act

1. Fraud Under the Advisers Act

The Advisers Act "'reflects . . . a congressional intent to eliminate, or at least to expose, all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which was not disinterested.'" *SEC v. Wall St. Transcript Corp.*, 422 F.2d 1371, 1376 (2d Cir. 1970) (quoting *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186 (1963)).

The SEC alleges violations of all four subsections of Section 206 and Rule 206(4)-8, although not with respect to each transaction.

a. Defendant is an Investment Adviser

Subject to certain exceptions not applicable to Defendant, Section 202(a)(11) of the Advisers Act defines "investment adviser" as follows:

> [A]ny person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities.

15 U.S.C.A. § 80b-2(11). This is a "broad definition," *Financial Planning Ass'n v. SEC*, 482 F.3d 481, 484 (D.C. Cir. 2007), and reaches persons who receive compensation for investing funds of their clients or who advise their "customers by exercising control over what purchases and sales are made with their clients' funds." *Abrahamson v. Fleschner*, 568 F.2d 862, 870-871 (2d Cir. 1977) (includes "persons who manage[] the funds of others for compensation.").

As a threshold matter, Defendant argues that he did not "advise anyone on the value of securities or . . . the advisability of investing in, purchasing, or selling any securities," instead claiming he was merely an "assistant" and "support staff." (Def.'s Opp. at 22-23 & n.36.) He further contends that he cannot be an "investment adviser" under the federal securities laws because he did not hold the requisite licenses and certifications and was not registered with any state or federal agency. (*See, e.g.*, Def.' s Mot. for Summ. J. at 44-47.) Lastly, he maintains that an investment

adviser must be compensated in certain ways. None of his arguments are availing.[18]

The record indisputably shows that Defendant was not simply some "assistant," but played a central role in the transactions at issue. From 2004 through 2015 he recommended and advised that Oak Funds IX, XI, XII, and XIII purchase or sell securities, and then monitored and managed those investments. (SOF ¶ X-8.) Specifically, Defendant's responsibilities at Oak included identifying, analyzing, and recommending investment opportunities for the various Oak Funds at issue in this case, which were typically investments in the securities of various "portfolio companies." *(Id.* ¶¶ X-6, X-7.) Defendant was also responsible for negotiating the terms of the investments and managing the relationships with the companies in which the Oak Funds invested. (*Id.* ¶ X-6.) Indeed, Defendant signed many of the agreements for the transactions at issue on behalf of Oak.[19] (*See, e.g.*, SEC Ex. 127 at Oak-SEC-

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[18] Aside from the fact that Defendant's arguments have no merit, his unsubstantiated assertions cannot create a genuine dispute of material fact. *See Rexnord Holdings, Inc. v. Bidermann*, 21 F.3d 522, 526 (2d Cir. 1994) (no genuine issue of fact where, although non-moving party "pointed to certain issues of fact in his memorandum of law," he "failed to provide evidentiary support for his contentions"). "A party asserting that a fact . . . [is] genuinely disputed must support the assertion by citing to particular parts of material in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . , admissions, interrogatory answers, or other materials." Fed. R. Civ. P. 56(c)(1)(A).

[19] Thus, Defendant's claim that "[t]here is not one piece of paper that Defendant signed or that Oak issued that made the Defendant

747; SEC Ex. 135 at Oak-SEC-26.) Contrary to Defendant's contention, the fact that he was not licensed, certified, or registered with any state or federal agency does not preclude him from being considered an investment adviser under the Adviser's Act, as the Act's definition of an adviser turns on conduct, not certification or registration. *See, e.g.*, *U.S. v. Onsa*, 523 Fed. Appx. 63, 65 (2d Cir. 2013) ("[T]he Act defines investment adviser in a functional way, applying to 'any person' who engages in the specified conduct," and "the structure of the Act demonstrates that individuals need not register, or even be *required* to register, in order to be an 'investment adviser' within the meaning of the Act." (quoting 15 U.S.C. § 80b-2(a)(11))).

In addition, Defendant was clearly compensated for his work at Oak. (SOF ¶ X-9.) There is no requirement that an investment adviser be compensated in any particular way, and Defendant's citation to an SEC Investor Bulletin is unconvincing. (Def.'s Mot. for

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responsible for any [securities purchase or sale recommendation] or powers to recommend the purchase or sale of any security to any of the Oak funds . . . ." is demonstrably false. (*See* Def.'s Mot. for Summ. J. at 44.) Defendant's most recent employment agreement with Oak makes clear that one of his duties includes "recommending investment opportunities for one or more of the [Oak] Funds." (SOF ¶ X-7; *see also* SEC Ex. 7 (2014 Employment Agreement) § III(A) at OAK-RD-17513.) Indeed, even Defendant's 2004 employment agreement provided that he was eligible for a bonus plan designed for Oak employees whose employment responsibilities included the "identification of, recommendation of, monitoring of, eventual sale or distribution of stock from a portfolio company" (Ex. B (2004 Employment Agreement) to Oak's Opp'n to Def.'s Mot. for Sanctions [Doc. # 611-2] at B-1.)

Summm. J. at 47 & *id.* at n.57.) Even if the bulletin were binding on this Court, it says only that individuals "might" pay a broad range of financial professionals in certain ways. *See* https://www.sec.gov/investor/alerts/ib_top_tips.pdf at 2. It does not purport to exhaustively list the ways investments advisers are compensated. Defendant's misappropriation of investor funds is sufficient, by itself, to meet the "compensation" element of the definition. *See U.S. v. Ogale*, 378 Fed. Appx. 959, 960-61 (11th Cir. 2010).

Because Defendant received compensation to advise the Oak Funds as to the value of securities and recommended that Oak Funds purchase and sell securities at all times relevant to the SEC's claims in this case, Defendant was an "investment adviser" under Section 202(a)(11). *See Abrahamson*, 568 F.2d at 870-871.

b. Defendant Violated Sections 206(1), (2), (4), and Rule 206(4)-8

Section 206(1) prohibits investment advisers from employing "any device, scheme or artifice to defraud any client or prospective client." 15 U.S.C. § 80b-6(1). Section 206(2) prohibits an investment advisor 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). Section 206(4) prohibits advisers from engaging in "any act, practice, or course of business which is fraudulent, deceptive, or manipulative" as defined by rules promulgated by the SEC. For conduct after September 10, 2007, Rule 206(4)-8 prohibits advisers to "pooled investment vehicles" from engaging in

fraudulent acts or making material misrepresentations to investors or prospective investors.[20] 17 C.F.R. § 275.206(4)-8.

i. Defendant's Fraud was Directed Towards Clients and Investors

Defendant argues that certain of his misconduct related to Companies D, E, F, G, and H did not violate Sections 206(1) or 206(2) of the Advisers Act because he did not direct this fraud to any "clients." (Def.'s Mot. for Summ. J. at 40-41.) However, Defendant's clients were the various Oak Funds, and the record demonstrates without question that Defendant's fraud was directed towards these Funds.

With respect to Company D, Defendant fraudulently informed Company D that it was to pay $650,000 in a "management fee" to an Oak entity in exchange for removing a provision from the Oak Fund's investment agreement that would have required Company D to pay an annual dividend. (SOF ¶¶ D-1–D-2.) In other words, Defendant fraudulently bargained away a provision that would have benefitted his client in exchange for $650,000 that he misappropriated for himself. Similarly, with respect to Companies E, F, and G, Defendant fraudulently caused these companies to pay

[20] The SEC does not allege that Defendant violated Rule 206(4)-8 with respect to any conduct which occurred prior to September 2007, when the rule became operative. This includes all of the conduct associated with Companies D and E, the Company F June 2007 conduct, or the Company J conduct that occurred in April–June 2006.

legal fees that his clients (the Oak funds) were entitled to receive to an account that he personally controlled, and then further misappropriated these funds for his personal use. (*Id.* ¶¶ E-5, E-8–E-10, F-1–F-8, H-1–H-6.) And with respect to Company G, Defendant fraudulently induced his client – the Oak fund – to send money that it thought was paying to Company G for "delisting fees" to another account that he personally controlled, and again misappropriated these funds for his personal use. (*Id.* ¶¶ G-8–G-9.)

In each of these instances, Defendant either misappropriated a benefit his client was entitled to receive (Company D), intercepted funds his client was entitled to be paid (Companies E, F, and H), or caused his client to send him money it thought was destined for a portfolio company (Company G). Defendant's misconduct and resultant misappropriation of his clients' money plainly violated his "affirmative duty of utmost good faith, and full and fair disclosure" to his clients, therefore violating Sections 206(1) and (2) of the Advisers Act.

Defendant also argues that his conduct did not violate Advisers Act Section 206(4) and Rule 206(4)-8 because he did not direct any of his fraud to "investors." (Def.'s Mot. for Summ. J. at 42-43.) As discussed above, Rule 206(4)-8 provides that an investment adviser may not, among other things, "engage in any act, practice, or course of business that is fraudulent, deceptive, or manipulative with respect to any investor . . ." 17 C.F.R. § 275.206(4)-8(a)(2). Misappropriating investor funds plainly violates this provision. *See, e.g.*, *SEC v. Neman*, 2016 WL 6661174, at *6 (C.D. Cal. July 15,

2016) (violation of Rule 206(4)-8 where, "rather than pooling investor funds to purchase securities, [the adviser] pooled investor funds in his personal bank account"); *SEC v. Parrish*, 2012 WL 4378114, at *4-5 (D. Colo. Sept. 25, 2012) (violation of Rule 206(4)-8 where "Defendant pooled funds invested in his Ponzi scheme and transferred the comingled funds to brokerage accounts for trading").

This is precisely what occurred here. The money that the Oak Funds had—and that Defendant misappropriated—came from investors. (*See* SOF X-4.) Thus, even though Defendant may not have interacted directly with the Oak Funds' investors in connection with his fraud, the result of his fraud was to misappropriate their money.

ii. Negligence or Scienter

Scienter is necessary to violate Section 206(1), but is not required to prove violations of Sections 206(2) or (4). *Compare S.E.C. v. Batterman*, No. 00 CIV. 4835 (LAP), 2002 WL 31190171, at *8 (S.D.N.Y. Sept. 30, 2002) (Noting that both the D.C and Eleventh Circuits "have held that Section 206(1) requires a finding of fraudulent intent"), *and S.E.C. v. Moran*, 922 F. Supp. 867, 895 (S.D.N.Y. 1996) (scienter is required under Section 206(1)), *with SEC v. Pimco Advisors Fund Mgmt.*, LLC, 341 F. Supp. 2d 454, 470 (S.D.N.Y. 2004) ("Section 206(2) simply requires proof of negligence"), *and SEC v. Yorkville Advisors, LLC*, Case No. 12 Civ. 7728 (GBD), 2013 WL 3989054, at *3 (S.D.N.Y. Aug. 2, 2013) ("[T]he SEC must establish at least negligence to prove violations of Sections 206(2) and 206(4).").

The record contains ample evidence of Defendant's scienter, making a negligence determination unnecessary. Defendant opened bank accounts controlled solely by him, which he deceptively named such that they appeared to be related to Oak and its portfolio companies. He then instructed Oak and the Companies to wire funds into these accounts, after which he transferred the money into his personal accounts. He made representations that he was aware were false at the time he made them. Neither party contests Defendant's intent, and the Court finds this element is met with respect to each of the transactions in which the SEC alleges violation of Sections 206(1) and (2).

iii. Breach of Fiduciary Duties

Both Sections 206(1) and 206(2) impose a fiduciary duty on investment advisors that encompasses an affirmative obligation of good faith and a full and fair disclosure of all material facts to their clients, as a well as an affirmative obligation to employ reasonable care to avoid misleading their clients. *Capital Gains Research Bureau, Inc.*, 375 U.S. at 194-95. This fiduciary duty requires advisors to act for the benefit of their clients, and precludes them from using their clients' assets to benefit themselves. *SEC v. Moran*, 922 F. Supp. 867, 895-96 (S.D.N.Y. 1996).

Defendants do not argue the SEC cannot meet its burden of establishing Defendant breached his fiduciary duties, and for the same reasons discussed above regarding scienter, this cannot be reasonably disputed.

c. Section 206(3)

Section 206(3) makes it unlawful for an investment adviser,

> acting as the principal for his own account, knowingly to sell any security to or purchase any security from a client, or acting as broker for a person other than such client, knowingly to effect any sale or purchase of any security for the account of such client, without disclosing to such client in writing before the completion of such transaction the capacity in which he is acting and obtaining the consent of the client to such transaction.

15 U.S.C. § 80b-6(3). In other words, an investment advisor is prohibited from engaging in a "principal transaction"—e.g., a transaction in which the adviser, acting for his own account, sells securities to a client's account—without disclosing to the client the capacity in which the adviser is acting and obtaining the client's consent. *See Interpretation of Section 206(3) of the Investment Adviser's Act of 1940*, Rel. No. 1732, 1998 WL 400409, *1 (July 17, 1998); *see also In re Gintel Asset Mgmt., Inc. et al.*, Advisers Act Rel. No. 2079, 2002 WL 31499839 (Nov. 8, 2002) (finding respondent violated 206(3) by executing trades between a fund in which he owned a 1/3 interest and advisory client accounts). "Unlike Section 206(1) and (2) of the Act, Section 206(3) can be violated without a showing of fraud." *SEC v. Nadel*, 97 F. Supp. 3d 117, 127 (E.D.N.Y. 2015) (internal quotation marks omitted).

The SEC only alleges Defendant violated Section 206(3) with respect to the Company C transactions. Because it is evident that Defendant did not disclose his interest in I-Cubed to Oak or Oak Fund XIII when Oak Fund XIII bought Company C shares directly from I-Cubed, Oak Fund XIII did not have the opportunity to—and in fact did not—give its consent to the transaction knowing that, in effect, Defendant was on the other side. (*See* SOF ¶ C-27.)

Defendant argues that SEC's claim under Section 206(3) of the Adviser's Act must fail because Defendant was not "'acting as a principal for his *own account*,'" but rather "traded securities belonging to a company owned by his wife." (Def.'s Memo at 27 (emphasis in original).) Defendant's argument is meritless. As an initial matter, Defendant provides no evidentiary support, or even argument, that his wife in fact controlled I-Cubed and owned the Company C shares. Therefore, there is no basis for the Court to revisit its previous ruling rejecting this very argument. Following the preliminary injunction hearing, the Court explained

> Despite Mr. Ahmed's nominal transfer of this interest in I-Cubed before the October 2014 sale, the evidence shows that he continued to control the company's bank account and flow of funds and Mrs. Ahmed's testimony at the hearing demonstrated that she played little, if any, role in the sale negotiations with Oak and did not learn of the sale until after it took place.

([Doc.# 113] at 8.)

The record establishes that Defendant formed I-Cubed, purchased the Company C shares in the name of I-Cubed, and, despite transferring the entity into the name of his wife, subsequently negotiated the sale of the Company C shares, going so far as to forge the signature of the purported I-Cubed representative on the stock purchase agreement. (*See* SOF ¶¶ C-17–25, C-28–29.) Indeed, it was Defendant who opened the Bank of America account just days before the sale of I-Cubed's Company C shares to the Oak fund, certifying on that account opening document that he was a "member" of I-Cubed. (*Id.* ¶ C-20.) Ms. Ahmed was not even aware of this I-Cubed bank account until her deposition. (*Id.*) Defendant also wrote checks for the proceeds of the I-Cubed Company C shares from the Bank of America account to the Shalini Ahmed 2014 GRAT. (*Id.* ¶ C-21.)

Additionally, Ms. Ahmed admitted at the preliminary injunction hearing that while owning the Company C shares on paper, she played no role in their sale and in fact did not even learn of the sale until after it took place. (*See* Ruling and Order Granting Preliminary Injunction at 8; SEC Ex. 11 (Preliminary Injunction Hearing Transcript) at 301:11–304:12, 308:19–23, 314:3–315:5, 325:9–326:3.) Indeed, even I-Cubed's Rule 30(b)(6) representative disclaimed knowledge of this sale, and instead assumed Defendant negotiated this transaction. (SEC Ex. 162 (I-Cubed Depo. Transcript) at 41:22–42:20.) Mr. Ahmed's nominal transfer of I-Cubed into the name of his wife does not immunize him from liability under Section 206(3) of the Advisers Act. *See In re Asbell*, Rel. No. IA-3933, 2014 WL 4726475, *2-*3 (Sept. 24, 2014) (finding

violation of 206(3) where investment adviser caused client to purchase securities "from [the investment adviser], members of his family, and/or other advisory clients" and failed to provide required disclosures).

2. The Exchange Act and Securities Act[21]

Section 10(b) of the Exchange Act and Rule 10b-5 prohibit fraud by "any person" in connection with the purchase or sale of securities. To establish a violation, the SEC must show that Defendant (1) made a material misrepresentation or omission as to which he had a duty to speak, or used a fraudulent device; (2) with scienter; (3) in connection with the purchase or sale of securities. *Pentagon Capital Management PLC*, 725 F.3d at 285. In addition, the SEC also must establish that the transactions at issue were either listed on domestic exchanges, or that the purchase or sale occurred in the United States. *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 267 (2010).

A violation of Section 17(a)(1) of the Securities Act requires essentially the same elements as Section 10(b) of the Exchange Act but in connection with the *offer* or sale of securities. *Monarch Funding*, 192 F.3d at 308. Section 17(a)(2) makes it unlawful to obtain money or property through misstatements or omissions about material facts, and Section 17(a)(3) prohibits any transaction or course of business that operates as a

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[21] The facts discussed herein also support the Court's conclusion that Defendant is liable under Section 206. *See SEC v. Haligiannis*, 470 F. Supp. 2d 373, 383 (S.D.N.Y. 2007) ("Facts showing a violation of Section 17(a) or 10(b) by an investment adviser will also support a showing of a Section 206 violation.")..

fraud or deceit upon a securities buyer. 15 U.S.C. §§ 77q(a)(2) and (3). Only Section 17(a)(1) requires scienter; negligence is sufficient under Sections 17(a)(2) and 17(a)(3). *Monarch Funding*, 192 F.3d at 308.[22]

The SEC does not allege that Defendant violated Section 17(a) with respect to the Company F June 2007, Company G 2007 and 2009, or Company I conduct.

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[22] Unlike private litigants, "[t]he SEC does not need to prove investor reliance, loss causation, or damages in an action under Section 10(b) of the Exchange Act, Rule 10b–5, or Section 17(a) of the Securities Act." *SEC v. Credit Bancorp, Ltd.*, 195 F. Supp. 2d 475, 490–91 (S.D.N.Y. 2002) (collecting cases); *see also SEC v. Pirate Inv'r LLC*, 580 F.3d 233, 239, n.10 (4th Cir. 2009); *SEC v. Blavin*, 760 F.2d 706, 711 (6th Cir. 1985) ("Unlike private litigants seeking damages, the Commission is not required to prove that any investor actually relied on the misrepresentations or that the misrepresentations caused any investor to lose money."). Indeed, the Second Circuit has long recognized that the SEC need not prove loss causation because the "Commission's duty is to enforce the remedial and preventive terms of the statute in the public interest, and not merely to police those whose plain violations have already caused demonstrable loss or injury." *Berka v. SEC*, 316 F.2d 137, 143 (2d Cir. 1963). It is "legally irrelevant" in an SEC action whether a defendant's conduct results in loss, *id.*, and therefore Defendant's argument that he "is entitled to summary judgment on his affirmative defense of no loss causation to any party regarding all claims pertaining to transactions associated with Company C," is meritless (Def.'s Memo at 13 (internal quotation marks omitted)).

a. Material Misrepresentations/use of a Fraudulent Device

The facts, articulated above, make clear that Defendant made numerous misrepresentations and used fraudulent devices to perpetuate his schemes. He provided the companies at issue with fraudulent wiring instructions, provided Oak Fund IX with fraudulent invoices and fraudulent wiring instructions, directed funds to his secret BOA OIP Advisors Account and his secret BOA Company D Account, and transferred the funds to his personal accounts. No party disputes the SEC has established this element of its claims.

b. Scienter

Scienter under Section 10(b) of the Exchange Act and Section 17(a)(1) of the Securities Act can be established by Defendant's reckless disregard for the truth, *SEC v. McNulty*, 137 F.3d 732, 741 (2d Cir. 1998), or by showing that Defendant "did not have a genuine belief that . . . information [he provided] was accurate and complete in all material respects" *SEC v. Young*, No. 09 Civ. 1634, 2011 WL 1376045, at *6 (E.D. Pa. Apr. 12, 2011). *See also SEC v. Rabinovich & Assocs., L.P.*, No. 07 Civ. 10547 (GEL), 2008 WL 4937360, at *3 (S.D.N.Y. Nov. 18, 2008).

For the same reasons discussed *supra* with respect to the Advisers Act, the SEC has met its burden on summary judgment of establishing Defendant acted with the requisite scienter with respect to each act of fraud.

c. In Connection With a Purchase or Sale of Securities

In *SEC v. Zandford*, the Supreme Court made clear that Section 10(b) "should be construed not technically and restrictively, but flexibly to effectuate its remedial purposes." 535 U.S. 813, 819 (2002) (citations and quotations omitted). Thus, "[w]hile the statute must not be construed so broadly as to convert every common-law fraud that happens to involve securities into a violation of § 10(b)," it is enough that the misconduct and the securities transaction "coincide." *Id.* at 820-21. Courts have given broad reach to this "coincide" requirement, holding that the standard is met "where plaintiff's claims 'necessarily allege,' 'necessarily involve,' or 'rest on' the purchase or sale of securities." *Romanov. Kazacos*, 609 F.3d 512, 522 (2d Cir. 2010) (citation omitted).

The analysis "does not pivot on temporal limitations." *See id.* at 523 (misconduct that occurred eighteen months prior to securities transaction still "in connection with" the purchase or sale of securities; "We are persuaded that the time that lapsed is not determinative here because, as defendants argue, 'this was a string of events that were all intertwined.'"). Rather, the "in connection with" requirement is met when the misconduct "'somehow touches upon' or has 'some nexus' with 'any securities transaction.'" *SEC v. Ramoil Management, Ltd.*, 2007 WL 3146943, *8 (S.D.N.Y. Oct. 25, 2007) (quoting *SEC v. Rana Research, Inc.*, 8 F.3d 1358, 1362 (9th Cir. 1993)). Section 17(a)'s requirement that the misconduct occur in the "offer" or "sale" of securities is similarly

expansive. *See, e.g.*, *SEC v. Cole*, 2015 WL 5737275, at *7 (S.D.N.Y. Sept. 19, 2015) ("In addressing Section 17(a)'s requirements that fraud occur 'in' the 'offer' or 'sale' of securities, the Supreme Court has explained that 'Congress expressly intended to define [these statutory terms] broadly' and that these terms 'are expansive enough to encompass the entire selling process.'" (quoting *United States v. Naftalin*, 441 U.S. 768, 773, (1979))).

Defendants contend that a portion of Defendant's fraud with respect to Company D was not "in connection with" the purchase or sale of securities.[23] (RDs' Memo at 11-12, 22-23.) Relief Defendants maintain that aside from the fraudulent management fee included in the agreement, the three other frauds Defendant committed with respect to Company D are

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[23] For the Companies F, G, and H transactions, Defendant also claims that at least some of his conduct was not in connection with the purchase or sale of securities. (Def.' s Mot. for Summ. J. at 39.) The record does not support his argument. Defendant exploited provisions in the securities transaction agreements to induce Company F to pay him approximately $750,000 in legal fees that, per the transaction agreements, should have been paid to the relevant Oak Fund. (SOF ¶¶ F-1–F-8.) With respect to Company G, Defendant exploited a tender offer agreement in which Oak purchased Company G shares to induce an Oak fund to wire him $2.1 million in purported fees (*id.* ¶¶ G-7–G-9), and later exploited the sale of the Oak Fund's sale of Company G shares to induce the Oak Fund to wire him $3.1 million and $1.56 million, respectively, for purported management incentive payments (*id.* ¶¶ G-10–G-14). Finally, at least a portion of the approximately $2.2 million in legal fees Defendant illicitly caused Company H to send him related directly to the Oak Fund's investments in Company H shares. (*Id.* ¶ H-3.)

not sufficiently "in connection with" the securities transaction to subject them to Section 10(b) and Rule 10b-5.[24] These include: (1) the false representation in July 2006 that Oak Investment Partners IX, L.P. ("Oak IX") was required to pay $3 million to Company D to reimburse it for advisory services that an investment bank provided in connection with the sale of Company D shares; (2) the false representation in January 2007 that Oak IX was required to pay $6.6 million to reimburse Company D for capital gains taxes it paid in connection with the Company D transaction; and (3) the false representation in August 2007 that Oak IX was required to pay $800,528.81 to reimburse Company D for transaction fees owed to a foreign tax authority.

Relief Defendants first assert that these representations did not "relate[] to the nature or value of the securities that were transferred, nor did the purchaser rely on any of these alleged misrepresentations in choosing to purchase the securities," without citing any authority that these are relevant considerations. (RDs' Mot. for Summ. J. at 23.) They then contend that Defendant's misrepresentations occurred months, or even years, after the transaction, and thus the Court should find that the alleged fraudulent misrepresentations did not

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[24] Defendant also argues the SEC cannot meet this requirement with respect to the $650,000 management fee. (Def.'s Mot. for Summ. J. at 38.) This fee was directly connected to the December 2004 transaction—Defendant told Company D that Oak was willing to remove a dividend provision from the terms of the deal to purchase Company D securities in exchange for a (fraudulent) one-time management fee. (SOF ¶¶ D-1–D-5.)

"coincide" with the securities transaction, as required by *Zandford*, and therefore cannot form the basis for a claim under the federal securities laws. (*Id.*)

Relief Defendants mistakenly claim that Defendant's representations were made eighteen months after the transaction (the $3 million advisory services reimbursement), two years after the transaction (the $6.6 million reimbursement for capital gains taxes), and nearly three years after the transaction (the $800,528.81 reimbursement for Korean tax). Their math reveals they assumed these representations were made in connection with the December 2004 transaction, which none were. Rather, the evidence establishes that just months after the May 2006 securities purchase agreement, in July, Defendant fraudulently obtained $1.8 million by exploiting a provision in the agreement related to advisory fees that the relevant Oak fund was required to pay pursuant to the securities transaction. (SOF ¶¶ D-6–D-12.) Defendant later fraudulently obtained an additional $6.6 million (in January 2007) and $800,000 (in August 2007) by claiming these monies were owed to tax authorities as a result of the May 2006 sale and January/March 2007 distribution of Company D shares. (*Id.* ¶ D-6, D13–D-18.)

Thus, it is apparent that all of Defendant's misrepresentations were "in connection" with the Company D securities transactions. And, this is equally true with respect to all of the transactions.

d. Territorial Requirements

i. Morrison and Subsequent Case law

In *Morrison*, the Supreme Court limited Section 10(b)[25] to fraud connected to domestic transactions, finding that it "reaches the use of a manipulative or deceptive device or contrivance only in connection with [1] the purchase or sale of a security on an American stock exchange, and [2] the purchase or sale of any other security in the United States." 561 U.S. at 273. There, three Australian plaintiffs brought suit in the United States against an Australian bank for losses they allegedly suffered on stock purchases traded on Australian exchanges. *Id.* at 251. It was what Justice Breyer termed in his concurrence a "foreign-cubed" action, in which "(1) foreign plaintiffs [were] suing (2) a foreign issuer in an American court for violations of American securities laws based on securities transactions in (3) foreign countries." *Id.* at 283 n.11.

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[25] Courts have confirmed that the domesticity requirement of *Morrison* applies with equal force to Section 17(a) of the Securities Act of 1933. *See, e.g., SEC v. Tourre*, 2013 WL 2407172, at *4 (S.D.N.Y. June 4, 2013). However, *Morrison* does not apply to the SEC's claims under the Investment Advisers Act ("Advisers Act"). *See SEC v. Gruss*, 859 F. Supp. 2d 653, 662. 664-65 (S.D.N.Y. 2012) ("[T]he Exchange Act focuses upon purchases and sales of securities in the United States[,] whereas the [Advisers Act] focuses on the adviser." (internal quotation marks and citation omitted)); *see also Lay v. United States*, 623 F. App'x 790, 796 (6th Cir. 2015) ("[N]o court has extended Morrison's 'domestic' requirements to include the Investment Advisers Act.").

In *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60 (2d Cir. 2012), the Second Circuit elaborated on what it means for a purchase or sale of a security to occur "in the United States," as that phrase was used in *Morrison*. Under *Absolute Activist*, if a security is not traded on a United States exchange (as is the case here), the SEC must prove, as to each transaction at issue, any one of three things: (1) "that title to the shares was transferred within the United States"; (2) "that the purchaser incurred irrevocable liability within the United States to take and pay for a security," or (3) "that the seller incurred irrevocable liability within the United States to deliver a security." 677 F.3d at 68-69.

In making this determination the Court is directed to look at "facts concerning the formation of the contracts, the placement of purchase orders, the passing of title, or the exchange of money." *Id.* at 70. However, the Second Circuit noted that the location of the broker-dealer (except to the extent it "carries out tasks that irrevocably bind the parties to buy or sell securities"), the identity of the securities, the identity of the buyer or seller, and the residency or citizenship of the buyer or seller were no longer relevant to the determination of domesticity. *Id.* at 68-70; *see also In re Petrobras Sec.*, 862 F.3d 250, 262 (2d Cir. 2017). The Second Circuit emphasized that "the time when the parties to the transaction are committed to one another . . . in the classic contractual sense, [where] there was a meeting of the minds of the parties . . . marks the point at which the parties obligated themselves to perform what they had agreed to perform even if the

formal performance of their agreement is to be after a lapse of time." *Absolute Activist* 677 F.3d at 67–68.[26]

The Second Circuit also noted with respect to the passing of title that "a 'sale' is ordinarily defined as '[t]he transfer of property or title for a price.'" Thus, a sale of securities can be understood to take place at the location in which title is transferred. *Id.* at 68 (internal citations omitted). In so finding, it relied upon the Eleventh Circuit's decision in *Quail Cruises Ship Management Limited v. Agencia de Viagens CVC Tur Limitada*, 645 F.3d 1307, 1310–11 (11th Cir. 2011), in which that court found that the alleged transfer of title to shares in the United States was sufficient to allege domesticity under *Morrison. Id.*

In *Quail Cruises*, the parties to a share purchase agreement signed the agreement in the parties' respective offices located in Spain and Uruguay. *Id.* at 1349. The agreement required notices, consents, and waivers or other communications pursuant to the agreement to be sent and delivered to the parties' respective offices in Spain and Uruguay, *id.*, but the

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[26] In the modern era, securities transactions are not completed at one time and at one location. *Butler v. United States*, 992 F. Supp. 2d 165, 178 (E.D.N.Y. 2014) ("The execution of contracts where two parties physically sit in different cities, states, countries, or continents and exchange a document electronically is now a standard way of doing business."). Thus, when locating a transaction that was completed in different locations, it is sufficient that either the purchaser or the seller is located within the United States at the time it incurs irrevocable liability. In *Butler*, for example, the fact that the defendant executed the transaction documents from his New York office was sufficient to establish a domestic transaction. *Id.* at 178.

agreement also required the stock transfer documents to be delivered to an office in Miami, and the plaintiff alleged that "[t]he transaction for the acquisition of the Templeton stock closed in Miami, Florida . . . by means of the parties submitting the stock transfer documents by express courier into this District." *Id.* at 1310. The Eleventh Circuit pointed to the plaintiff's allegation "that the closing *actually* occurred in the United States," and noted that the agreement at issue "confirms that it was not until this domestic closing that title to the shares was transferred," thus satisfying *Morrison. Id.* (emphasis in original).

Subsequent case law builds upon the foundation laid in *Absolute Activist*. In *Loginovskaya v. Batratchenko*, the Second Circuit distinguished between actions needed to carry out a transaction, and the transaction itself. 764 F.3d 266, 273-74 (2d Cir. 2014). There, the plaintiff resided in Russia, her investment was solicited in Russia, the investment materials were written in Russian and the investment contracts were negotiated and signed there. *Id.* at 274. The Second Circuit held that although the defendant company that negotiated these contracts was incorporated in New York and funds were wired to the company's New York bank account, this did not establish a basis for the application of the federal securities laws. *Id.* at 274-275. Rather, it held that the transfers were merely "actions needed to carry out the transactions, and not the transactions themselves—which were previously entered into when the contracts were executed in Russia." *Id.* at 275. It thus confirmed that the direction to transfer money to the United States alone is insufficient to demonstrate a domestic

transaction. *Id.* (citing *United States v. Vilar*, 729 F.3d 62, 77 (2d Cir. 2013)).[27]

In an unpublished decision, the Ninth Circuit classified transactions as domestic because "the actual sales [of the securities] closed in Nevada when [one defendant] received completed stock purchase agreements and payments." *SEC v. Levine*, 462 Fed. Appx. 717, 719 (9th Cir. 2011). The Third Circuit has determined that "territoriality under *Morrison* turns on 'where, physically, the purchaser or seller committed him or herself to pay for or deliver a security.'" *United States v. Georgiou*, 777 F.3d 125, 136 (3d Cir. 2015).

A Southern District of New York court found in *Arco Capital Corps. Ltd. v. Deutsche Bank AG* that:

> the date beyond which the Issuer no longer had the discretion to revoke acceptance was the Closing Date, when the purchaser was to transmit the funds to HSBC in New York. Thus, the irrevocable sale of the Notes occurred with the parties' performance on the Closing Date, when Gramercy delivered the funds to HSBC in New York and the Issuer assigned the interest to the Trust in New York.

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[27] The Second Circuit in *Vilar* also found that irrevocable liability was incurred in the United States with respect to the transactions at issue based upon facts in the record "'concerning the formation of the contracts' and 'the exchange of money.'" *Id.* at 77 (quoting *Absolute Activist*, 677 F.3d at 70). Thus, although it made the point that under *Absolute Activist* the direction to wire funds to the United States alone does not render a transaction domestic, it also recognized the relevance of where the exchange of money took place.

949 F. Supp. 2d 532, 543 (S.D.N.Y. 2013). The court noted that unlike cases where the only domestic activity were allegations that the investors wired money to a United States bank account, the Subscription Agreements at issue in *Arco* specified that "the delivery of funds to HSBC automatically terminated or 'consummate[d]' the transaction because that act made the contract irrevocably binding." *Id.* at 543.

Another district court found on a summary judgment record that investors incurred irrevocable liability when they sent the completed, signed, subscription agreements from their foreign countries to the defendant, but that the seller did not incur irrevocable liability under the subscription agreements until the seller accepted the agreements and signed them, which occurred in the United States. *S.E.C. v. Yin Nan Michael Wang*, No. LACV1307553JAKSSX, 2015 WL 12656906, at *12 (C.D. Cal. Aug. 18, 2015). There, the plaintiff maintained that irrevocable liability was incurred when the subscription agreements were accepted by the defendant funds in their offices in the United States, while the defendant claimed that irrevocable liability attached when the foreign investors signed the agreements outside of the United States. *Id.* at 10. The agreements at issue specifically provided that the defendant funds could, at their sole discretion, choose to reject any subscription. *Id.* at 11. Accordingly, the court found that the sale of the securities did not close until the subscription agreements were accepted and signed by the seller in the United States and thus that the seller incurred irrevocable liability to sell the securities upon its

acceptance of the executed agreements and the receipt of payment in the United States. *Id.*

Additionally, the court in *SEC v. Gernaio* found that although solicitation of the foreign Investors took place overseas, "the sales were not final until the Investors remitted payment to U.S.-based escrow agents and sent signed subscription agreements to the Issuers directly in the United States." No. CV 12-04257 DMG, 2013 WL 12146516, at *5 (C.D. Cal. Jan. 29, 2013). It therefore held that "the agreements became irrevocable when the Issuers countersigned them in the United States and escrow released the funds." *Id.* (citing *Absolute Activist*, 677 F.3d at 67-68)).

A recent district court addressed a situation in which the complaint alleged that the defendant offered and the plaintiff accepted an agreement to purchase shares in a Bahamian corporation at a series of meetings in New York. *See Adderley v. Dingman*, No. 15 CIV. 9935 (NRB), 2017 WL 1319819, at *7 (S.D.N.Y. Mar. 29, 2017). The plaintiff alleged he then wired the money for the shares from his New York bank account to the defendant. *Id.* However, the agreement also required that the Bahamian government approve the issuance of the shares and the plaintiff agreed that "[i]f approval was not forthcoming, [the defendant] was bound to return to . . . all funds paid by" the plaintiff. *Id.* at *8.

The district court found that the approval of the Bahamian government was a condition precedent to the plaintiff's "right and ability to take title to the shares allegedly promised by [the defendant] in exchange for [the plaintiff's] investment." *Id.* Thus,

even assuming a contract had been formed between the parties, "the approval of the Bahamian authorities is best viewed as a condition that had to be satisfied before defendants became irrevocably bound to 'deliver' shares . . . to [the plaintiff], and before [the plaintiff] became irrevocably bound to 'take' or 'pay for' the same." *Id.* at *7 (quoting *Absolute Activist*, 677 F.3d at 68); *see also Stella v. Graham-Paige Motors Corp.*, 232 F.2d 299 (2d Cir. 1956) (where stock purchaser was, under purchase agreement, to make best efforts to borrow purchase amount from bank, and where bank's obligation to make the loan was on condition that another company would guaranty it, "irrevocable liability to take and pay for" stock was not incurred, for purposes of Section 16(b) of Exchange Act, until guarantee was executed). The court therefore concluded that the parties could not become irrevocably bound "unless and until" the condition was satisfied and therefore that the complaint did not allege a domestic claim. *Id.* at *7-*9.

The *Adderley* court distinguished its facts from *Atlantica Holdings, Inc. v. Sovereign Wealth Fund Samruk-Kazyna JSC*, 2 F. Supp. 3d 550 (S.D.N.Y. 2014), *aff'd in part, appeal dismissed in part sub nom. Atlantica Holdings v. Sovereign Wealth Fund Samruk-Kazyna JSC*, 813 F.3d 98 (2d Cir. 2016).[28] *Id.* at *9. In *Atlantica Holdings*, the plaintiff corporations were holders of notes issued by a bank, and they subsequently exchanged these notes for new notes issued by the bank as part of a restructuring. 2 F.

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[28] The Second Circuit did not address domesticity on this interlocutory appeal, which focused on a discreet unrelated issue.

Supp. 3d at 560. The form the plaintiffs "had to send" in order to purchase the new notes provided that the purchase was irrevocable except if the bank, "in its sole discretion, amends terminates or withdraws the Restructuring Plan . . . in a manner that is materially adverse to affected [holders of the former notes] . . . [then holders of the former notes] shall be permitted . . . to revoke" the agreement. *Id.* The court there concluded that the plaintiffs were bound upon submission because "as a practical matter," the plaintiffs' "liability was irrevocable *by them*." *Id.* at 561. In *Adderley*, the court noted that unlike in *Atlantica Holdings*, where the condition "was one that the bank had almost complete power to satisfy or frustrate unilaterally. . . . neither [the plaintiff] nor defendants appear to have had this level of control over the key condition—approval of the Bahamian regulators." *Adderley*, 2017 WL 1319819, at *9.

ii. The Intention of the Parties

Relief Defendants argue that the law is clear that where, as is the case in the contracts at issue here, the parties agree in the contract on the location of the closing, the courts will treat the closing as having occurred at that place, thereby suggesting that where the closing actually occurred is irrelevant. (RDs' Mot. for Summary Judgment at 13.) The SEC distinguishes Relief Defendants' cases and argues that although the intent of the parties may have been for the closing to "be deemed to have occurred at the offices of the Company," where irrevocable liability attached and title was *actually* delivered to Oak in the United States, the transaction is domestic. The SEC is correct.

Relief Defendants selectively cite *SEC v. Benger* as standing for the proposition that the question of where the buyer and seller respectively incurred irrevocable liability is "dictated by the terms of the Share Purchase Agreements, which oddly, the SEC ha[d] chosen not to examine." 2013 WL 593952, at *9 (N.D. Ill. Feb. 15, 2013). What Relief Defendants fail to include is that the *Benger* court then went on to observe that "[t]he evidence shows that in fact the sale was consummated in Brazil—where [the seller] became irrevocably bound—or, perhaps, in the investors' home countries where they received their stock certificates." *Id.* at *12.[29] In addition, although the SEC inexplicably fails to highlight it, there exists Second Circuit authority directly on point. *See United States v. Vilar*, 729 F.3d 62, 93 n.12 (2d Cir. 2013) ("When a securities transaction takes place in the United States, it is

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[29] Neither of the other two cases Relief Defendants cite involve the question of domesticity in the securities context. In the first case, an employment agreement defined a "performance period" by reference to a closing, and the court defined the period by reference to the date "the parties intended to treat the [c]losing as occurring[.]" *Handmaker v. Certusbank, N.A.*, 2016 WL 5660341, at *12-13 (W.D. Ky. Sept. 28, 2016). As the SEC notes, the court did not hold the parties *actually* closed on the date they *intended* to close, but only that the "performance period" had been defined by the parties by reference to the *intended* date. *Id.* The second case, *Leviton Manufacturing Co., Inc. v. Reeve*, involved an instance where the only evidence of the closing location was in the written agreement and neither party disputed the location of the actual closing. 942 F. Supp. 2d 244, 261 (E.D.N.Y. 2013). Thus, it is difficult to see how either of these cases support Defendants' contention that "the law is clear" courts will treat the closing as having occurred in the location specified by the contract, even in the face of evidence that the closing actually occurred elsewhere.

subject to regulation under Section 10(b), and when a securities transaction takes place abroad, it is not. The parties' intention to engage in foreign transactions is entirely irrelevant.").

iii. The SEC's Evidence is Sufficient to Establish Domesticity[30]

Defendants contend that the SEC cannot establish that the alleged frauds in connection with Companies A, B, D, E, F, G, H and I[31] were "domestic" as set out in *Morrison* and therefore claim that they are entitled to summary judgment on the SEC's claims relating to

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[30] The SEC bears the burden to prove that each transaction was domestic within the meaning of *Morrison*, and to prove that the alleged fraud occurred in connection with a domestic securities transaction. Accordingly, in Defendants' Motions for Summary Judgment, they "need only demonstrate that there is an absence of evidence to support the claims of the nonmoving party" that bears the burden of proof. *SEC v. Wang*, 2015 WL 12656906 at *6 (C.D. Calif. Aug. 18, 2015); *see also SEC v. Gonzalez de Castilla*, 184 F. Supp. 2d 365, 375 (S.D.N.Y. 2002) (where nonmoving party bears ultimate burden of proof, moving party's burden under Rule 56 "will be satisfied if he can point to an absence of evidence to support an essential element of the nonmoving party's claim"). The SEC must respond with "evidence on which the jury could reasonably find for" it on the issues in question. *See Gonzalez de Castilla*, 184 F. Supp. 2d at 376 (noting that the "mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient" (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986))).

[31] Neither Relief Defendants nor Defendant challenge the domesticity of transactions relating to Companies C, or J. Relief Defendants do not challenge the domesticity of the Company H transaction, but Defendant does.

those transactions.[32] The SEC maintains that the evidence demonstrates each transaction was domestic because in each case Oak both incurred irrevocable liability in the United States and title was actually delivered to, or sent from, Oak in the United States. As discussed above, under *Absolute Activist* the SEC need only show that either of these events occurred in the United States in order to establish domesticity.

The SEC claims the Oak funds formed contracts, incurred closing obligations, and transferred or received money while in the United States, thereby rendering the transactions domestic. (Pl.'s Mot. for Summ. J. at 18.) The SEC supports its claim of domesticity primarily with the testimony of Oak's designated witness, Ms. Grace Ames, bolstered by the adverse inference against Defendant arising from his invocation of his Fifth Amendment rights, and several emails and letters specific to transactions A, B, and E. For their part, Defendants rely entirely on the language of the contracts to argue that the transactions occurred abroad, without offering any extrinsic

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[32] The SEC argues that it need only meet the "conducts-or-effects test," codified in the Dodd-Frank Act, which it claims supplants *Morrison's* domesticity requirement for conduct after July 21, 2010, which was five years before the filing of this action. *See, e.g.,* SEC v. Traffic Monsoon, LLC, No. 2:16-CV00832-JNP, 2017 WL 1166333, at *10-12 (D. Utah Mar. 28, 2017). The Court need not address this argument because, as discussed *infra*, it finds that the SEC has met the more stringent *Morrison* test.

evidence indicating where in actuality irrevocable liability attached and transfer of title took place.[33]

1. Oak is a United States Company and Generally Acted from the United States

While the residency of the buyer or seller is not controlling, it still provides some evidence of the location of that party when it acts. *See Absolute Activist*, 677 F.3d at 69 (recognizing that it "may be more likely for domestic transactions to involve parties residing in the United States"). Here, the Oak funds at issue—Oak Fund IX, XI, XII, and XIII—are all limited partnerships registered in Delaware (SOF ¶ X-19), and the offices of Oak's managing members responsible for approving investments during the relevant time period were all in the United States (Ames Depo. at 282:10-4). All Oak email addresses ended with@OakVC.Com and the Oak servers housing these email addresses are located in the United States. (*Id.* at 296:8-297:5.) In addition, the legal counsel Oak used to help negotiate the stock purchase and other agreements for the transactions at issue, Finn Dixon & Herling, is also based in Connecticut.[34] (Ames Depo. at 290:5-291:22.)

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[33] Recognizing that it must determine the domesticity of each transaction individually, the Court finds, as discussed below, that taking the evidence in its totality, the SEC has shown the absence of a material disputed fact as to the domesticity of each transaction.

[34] On occasion Oak utilized foreign counsel in connection transactions. (*See e.g.*, RD Ex. 17 at SEC-5137 (defining "Oak's UK Solicitors" as "Simmons & Simmons of CityPoint, . . . London").)

Although not sufficient on its own, the fact that Oak is a United States company which functioned out of United States offices during the relevant time period, lends some support for the SEC's claim that the transactions themselves also occurred domestically.

Moreover, Ms. Ames attested that when an Oak Fund was a purchaser, Oak transferred the purchase payment from its bank in the U.S, and the Oak representatives who directed the Oak Funds' bank to transfer money were similarly based out of the U.S. (*Id*. at 309:3-10.) When an Oak fund was a seller, Oak received the purchase payment in a bank account located in the United States. (*Id*. at 309:25-310:11.) Furthermore, she specifically testified that Oak did not have a practice of traveling outside the United States for the formation of, or to enter into, contracts for the purchase or sale of an investment, nor did it do so to exchange signatures or funds or to obtain share certificates. (Ames. Depo. at 331:3-333:22.) Rather, these actions all generally occurred from the Oak offices. (*Id*.) She also confirmed that Oak followed its general practices with respect to the transactions

associated with Companies A through J.[35] (Ames Depo. at 334:16-338:21.)

2. The Court Applies an Adverse Inference

Defendant asserted his Fifth Amendment privilege and declined to answer when the SEC asked him with respect to each Company where the respective investment, purchase, or sale, was "negotiated, approved, and transacted." (*See, e.g.*, SEC Ex. 2 (Def.'s Depo.) at 16:5-8, 22:4-6, 79:7-25.) As a result of Defendant's choice to remain silent on this point, the Court draws an adverse inference against Defendant, meaning that the Court infers that his response to the question would have affirmed the domesticity of the transactions. As discussed *supra*, this inference can be

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[35] Ms. Ames explained that when she testified at her deposition about the way something "would" happen she was "describing a general practice and not a specific recollection of what actually happened in each of these transactions." (Ames Depo. at 356:14-23.) Relief Defendants argue general practices testimony alone is insufficient for a party to carry its burden on a motion for summary judgment. *See, e.g.*, *Dawson v. Litton Loan Svcg.*, LP, 2017 WL 695910, at **2* (10th Cir. Feb. 22, 2017) (testimony about loan servicing company's general practices, without personal knowledge of company's interaction with plaintiffs, insufficient to carry burden on summary judgment); *Moore v. Firstsource Advantage LLC*, 2011 WL 4345703, at *11 (W.D.N.Y. Sept. 15, 2011) (testimony about company's general practices with respect to obtaining client contact information insufficient to prove prior express consent to call particular telephone number). First, not all of Ms. Ames' testimony was stated in such terms. Second, as discussed below, the SEC offers additional evidence of domesticity, and third, Ms. Ames specifically affirmed that Oak had followed its general practices with respect to these transactions.

applied at the summary judgment phase, balanced against the other evidence in the record. *See, e.g.*, *LiButti I*, 107 F.3d at 124.

3. The Transfer of Title

The focus in *Absolute Activist* is on where title was transferred, i.e. where the buyer was located when it received title to the securities. 677 F.3d at 68. Black's Law Dictionary defines title as "[l]egal evidence of a person's ownership rights in property." TITLE, Black's Law Dictionary (10th ed. 2014). Subsequent cases (discussed *supra*) focus primarily on irrevocable liability and do not expand upon the *Absolute Activist* language, but the Second Circuit's reliance on the Eleventh Circuit's opinion in *Quail Cruises* is telling because there the Eleventh Circuit found that the complaint's allegations that share transfer documents[36] were delivered to the United States was sufficient to

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[36] "Share transfer documents" might refer to forms in which the seller purports to transfer its interest to the Buyer (*see, e.g*. SEC Ex. 135 at SEC-47 (the Seller "for value received, does hereby transfer to Oak . . . the following shares . . . [,]")) stock/share certificates, or both. According to the SEC, "[s]tock certificates are title—the documents prove that Oak owns the shares it purchases. It does not matter whether Oak receives title on or after a closing date—the location of the transaction occurs at the place title is delivered regardless of when it is delivered." (Pl.'s Reply at 9.) Given that title is evidence of ownership, an executed document which specifically expresses the buyer's ownership interest would constitute the transfer of title, even where the stock certificates are to be transferred at a later time. In either event, in this case this is a distinction without a difference, for as discussed below, the evidence supports finding that Oak received transfer instrument documents as well as the actual stock certificates in the US.

allege title was transferred domestically. Accordingly, the point at which title is transferred is when it is delivered to the location of the buyer.[37]

The SEC maintains all of the transactions are domestic because either Oak wired funds from the United States to purchase securities, ownership of which it then received while located in the United States, or it received funds and sent title from within the United States when acting as the seller. Defendants urge the court to enforce the language in the parties' contracts, contending that in each transaction title was to be transferred at the closing, and these closings were intended to take place in foreign countries.[38]

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[37] The Court does not comment on whether and to what extent the location from which funds are transferred is relevant to the transfer of title, for in this case the funds were sent and received from the same location as title. However, it does find that where Oak was the seller and delivered title in the form of the transfer instruments and/or actual stock certificates to a foreign country, title was not transferred domestically. Title can be transferred only once, and the SEC cannot have it both ways–i.e, that when Oak was the buyer it was transferred in the United States upon delivery, but when it was the seller it was transferred when Oak sent it from the United States to a foreign country. Oak was the seller in only three of the contested transactions–the 2006 Company D transaction, the July 2007 Company F transaction, and the 2011 Company G transaction.

[38] In all but three of the agreements (the Company E transaction, the 2007 Company F transaction, and the 2007 Company G transaction) the contracts specifically provided that the parties could agree to close in another location. (*See e.g.*, RD's Ex. 9 § 2.2 at OAK-SEC-00001242 ("The closing of the sale and transfer of the Purchased Shares" was to take place at the offices of the South

Ms. Ames stated that "in this electronic age . . . there's not a case where the Oaks all travel to . . . a location for a closing and people sit around the []table . . . that's just not how our business is done." (298:15-21.) She testified that Oak was "never in a room giving a check in one hand and receiving share certificates in the other hand" (*id*. at 327:20-328:2), nor was it ever in the same room as its counterparty when signatures were exchanged (*id*. at 319:14-25). Original stock certificates representing Oak's ownership in the respective Company would generally be physically mailed to Oak's counsel after the closing took place, and vice versa where Oak was the seller. (*Id*. at 322:13-324:3, 326:19-327:5.) Oak's project managers generally signed and received signed documents from Oak's offices. (*Id*. at 320:2-16.) Moreover, the evidence the SEC puts forth for both transactions A and B demonstrates that although the parties may have agreed in the contract that the closing would take place at a certain foreign location, they did not necessarily act in accordance with that language, undercutting Defendants' argument that title was transferred abroad at closing.

The Share Purchase Agreement involving Company A states that "[t]he closing hereunder, including payment for and delivery of the Shares, shall be deemed to have occurred at the offices of the Company, immediately following the execution of this Agreement, or at such other time and place as Seller and Purchaser

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Korean operations of the U.S. entity named in the agreement in Seoul, Korea "or such other date and time as the parties may agree.") .)

may mutually agree . . . ." (Defs.' 56(a) 1 Stmt. ¶ 7; RD Ex. 1, at OAK-SEC-00000742; SEC SOF A-7; SEC Ex. 127.) The offices of Company A are located in Shanghai, China. (*See* RD's Ex. 2 at OAK-SEC-00000715; Ames Depo. at 41:11-42:17.) The Agreement further required the Purchaser (an Oak fund) to "deliver [payment for the shares] on the Closing Date to Seller, by wire transfer of immediately available funds . . . ." (RD Ex. 1 §2(b) at OAK-SEC-00000742.) Relief Defendants acknowledge that Oak's designated witness testified that Oak's representatives were not present at Company A's offices at the time of the closing (Defs.' 56(a)1 Stmt. ¶ 9; Ex. 3, Ames Depo. 22:15-23:13), but argue that is not significant based upon their contention that the Court "must enforce the words of the parties establishing that the closing—and passing of title—took place in Shanghai, China." (RDs' Mot. for Summ. J. at 14.)

However, the SEC points to the email that Defendant, acting on behalf of Oak, sent the seller, requesting the seller "please send me scanned and signed signature pages as soon as you can. I leave for vacation tomorrow and hence getting these out to you before I leave." (SEC Ex. 124 at SEC-686.) The seller signed the deal documents with a purchase price of $1.5 million and delivered the signature pages and share transfer form to Defendant's Oak email address. (SOF A-5; SEC Exs. 125; 126.) The share transfer form stated that the seller "for value received, does hereby transfer to Oak Investment Partners XIII . . . the . . . Series A Preference Shares." (SEC Ex. 127 at SEC-749.) On behalf of Oak Fund XIII, Defendant signed a copy of the signature page for the Share Purchase

Agreement that had already been signed by the seller. (Compare SEC Ex. 127 at OAK-SEC-747, with SEC Ex. 125 at OAK-SEC-705.) Subsequently, Defendant sent an e-mail to the purchasers from his U.S.-based email address, saying that "[a]ll signed docs are in. Good to wire and close the purchase." (SEC Ex. 127.)

The Company B Agreement provides that "[c]ompletion shall take place at the offices of the Seller's solicitors (or any other location as agreed by the Seller and the Buyer) on the Completion Date." (RD LR 56 ¶ 11; Ex. 4, at OAK-SEC-00000477.) The Seller's "solicitors" are not identified in the agreement and Oak's designated witness was unable to testify as to the location of the offices of the Seller's solicitors, but other evidence indicates it is in Shanghai, China. (R. Defs.' 56(a)1 Stmt. ¶¶ 13-14; Ex. 3, Ames Depo. 63:3-66:24, 344:22-345:21; Ex. 5, at OAK-SEC-000000008.) According to the agreement, the seller was to provide a written instrument of transfer and "the original share certificates" to Oak at the closing. (RD.'s Ex. 4 § 5.2 at OAK-SEC-00000477 and Schedule 2, Part 1 at OAK-SEC00000484.)

In contrast with this language, in an email exchange regarding the Company B transaction, Counsel for Oak explicitly stated that "[t]o be clear, the closing will not yet have occurred and requires the completion of the [O]ak wire. Oak can't wire until it is confirmed that the signing of the SPA has occurred." (SEC Ex. 135 at OAK-SEC-8.) The Seller emailed Oak's counsel the signed SPA and "Instrument of Transfer," to be held in escrow until Oak wired the funds, upon which the transaction closed. (*Id.* at OAK-SEC-8.)

The Court is not persuaded by Defendants' argument that it should enforce the language of the contracts, given that both the testimony of Ms. Ames and the emails concerning transactions A and B illustrate that the parties did not act in accordance with those terms. Defendants have therefore offered no evidence of where title was actually transferred.[39]

On the other hand, the emails offered by the SEC establish title was transferred in the United States in both transactions A and B, since in each instance the signed transfer instruments were electronically sent to Oak's United States registered email addresses as part of the closing, rather than at the locations for closing identified in each respective agreement. Additionally, these emails tend to support Ms. Ames' testimony that the parties were never exchanging documents, such as the share transfer forms and stock certificates, while in the same room, but instead Oak received these documents in the United States.[40] Thus, where Oak

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[39] Defendant makes the additional argument that the transfer of title took place outside the United States because in accordance with each respective countries' securities laws, title was maintained in book entries in a depository located inside the country. (Def.'s Mot. for Summ. J. at 6-11.) He offers no evidence supporting this argument and therefore the Court affords it no weight.

[40] Extrinsic evidence associated with the Companies B and E transactions establish that original stock certificates were to be mailed to Oak's counsel in the United States following the respective closings. (*See* SEC Ex. 135 at OAK-SEC-7 (Oak's attorney requested in an email that the Seller "kindly mail the original stock certificate to [his] attention as follows," listing Finn, Dixon, & Herling's Stamford, Connecticut address.); RD's Ex. 14

was the purchaser, there is no genuine dispute of fact on this record that it obtained title to the respective securities in the United States, and accordingly no rational jury could find these transactions were entirely foreign.[41]

4. *Irrevocable Liability*

With respect to irrevocable liability, there are several points at which parties might be bound, and the parties may become bound at two separate times and locations. *See Butler*, 992 F. Supp. 2d at 178. On this record, the Court cannot determine the exact point at which irrevocable liability attached for each respective transaction. Nonetheless, for each potential point at which the parties may have been irrevocably bound, the evidence demonstrates that at least one party (Oak) was acting from the United States, and therefore all of the transactions are domestic under *Morrison*.

a. Contract Formation

The first opportunity at which the parties could have incurred an irrevocable obligation to perform was the point at which they formed the agreements—where

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at SEC-1321 (Counsel for Oak indicates in a letter addressed to Defendant's Connecticut address at Oak that "Company [E] counsel" informed him that it would deliver the original stock certificates to Defendant "shortly.").)

[41] By contrast, when Oak was *seller* title passed abroad However, as discussed below, because Oak incurred irrevocable liability to sell the respective shares while located in the United States, the remaining three transactions are also domestic under *Morrison*.

there was a meeting of the minds. *See Absolute Activist*, 677 F.3d at 68.

According to Oak's designated witness, Oak's partners evaluated and discussed investments at weekly partner meetings held in Oak's United States offices and it was often at these meeting that individuals would both seek and gain approval of investments.[42] (Ames. Depo. at 283:14-285:9.) Ms. Ames confirmed that Oak did not have a practice of traveling outside the US to form contracts for the purchase or sale of investments. (*Id*. at 330:20-331:2.) She further testified that the Oak project manager and Oak's counsel (Finn Dixon & Herling), both based out of the United States, generally worked together to negotiate agreements on behalf of Oak with respect to the purchase, sale or disposition of investments—i.e. to form the contracts. (*Id*. at 291:3-22.) Defendants offer no evidence of where the contracts were formed.

b. Conditions Precedent

Subsequently, irrevocable liability might be incurred upon completion of the final closing condition, thereby obligating the parties to close the transaction. The SEC argues that "the Oak funds had no obligation to close until they received (as a buyer) or sent (as a seller) the required notice" indicating that necessary closing conditions had been satisfied, which were sent from and received in Connecticut. (Pl.'s Mot. for Summ.

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[42] Although rare, approvals were sometimes made at meetings other than the weekly partners meetings, and these discussions took place by telephone from wherever the partners were located at that time. (Ames Depo. at 285:5-23.)

J. at 17.) It concludes that "incurring the obligation to close a transaction while located in the United States . . . is sufficient to locate the transactions in the United States under *Absolute Activist* and *Morrison*." (*Id.*) Relief Defendants, for their part, contend that "the SEC must present evidence that the last condition precedent that was satisfied for each transaction occurred in the United States," which they maintain it cannot do. (RDs' Opp'n at 10.)[43]

Relief Defendants' basic contention is that in each of the agreements there were multiple conditions which had to occur before the closing could take place, some of which would have had to occur outside of the United States, and because the SEC has not presented the Court with evidence as to which of the conditions occurred last, it cannot establish each transaction is domestic. For instance, they argue that conditions requiring certain documents and certificates be delivered to investors or the buyer at the closing indicates these conditions were satisfied in the foreign location designated as the closing location in the respective agreements.[44] Relief Defendants also point

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[43] Defendant makes an identical argument. (Def.' s Mot. for Summ. J. at 6-11.)

[44] Relief Defendants make this argument with respect to the Companies E, G (2006), and I transactions. (*See* RD's Ex. 14 § 1.11(v) at OAK-SEC-00001335 (requiring that "[a]n officer of the Company . . . deliver to the Series-B Investors at the Closing [in Lugano, Switzerland] a certificate" regarding certain specified matters); (RDs' Ex. 19 §§ 5.4-5.5 at OAK-SEC-1163-64 (the Company "shall deliver to the Investors at the Closing" certain certificates); RD's Ex. 22 at OAK-SEC-00006422 ("At Completion

to conditions in the July Company F agreement requiring that in order for the closing to proceed the buyer was required to have a certain resolution filed and registered by the Target's Register of Parma, Italy. (Defs.' 56(a)1 Stmt. ¶ 64; Ex. 18 § 11.1 at OAK-SEC-00005336-37.)

The Court affords Relief Defendants' first argument little weight, given that as discussed above, Ms. Ames's testimony that closings never occurred with the parties in the same room, and the email exchanges illustrating both the closings for Companies A and B occurred remotely with Oak acting from its United States based email accounts, undermine the language in the contracts providing that closing was to occur in these foreign locations. With respect to Relief Defendants' second argument, there are several flaws.

First, there is no support in existing case law for the proposition that irrevocable liability attaches abroad for a party located in the United States simply because the last condition precedent was completed in a foreign country. Relief Defendants rely upon *Adderley*, discussed *supra*, but there the court merely held that the formation of an agreement to purchase securities did not create irrevocable liability because a necessary condition was never satisfied. No. 15 CIV. 9935 (NRB), 2017 WL 1319819, at *7-8 (S.D.N.Y. Mar. 29, 2017) ("[I]rrevocable liability for purposes of Section 10(b) was not incurred."). The condition required the approval of the Bahamian authorities, but nothing in

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[in London, England] the Sellers shall deliver to the Purchaser" certain documents described in Schedule 2 of the agreement).)

Adderley suggests that the buyer (located in New York) would have incurred irrevocable liability inside of a Bahamian clerk's office without the buyer's knowledge if the deal had received government approval.

Second, and relatedly, the agreements almost uniformly contained a final condition requiring delivery of notice to Oak, and/or that Oak send notice to its counterparty, confirming that all other conditions to closing had been satisfied or waived. (*See, e.g.*, RDs' Ex. 14 § 1.10 at SEC-1334-35 (the investors, including Oak "shall confirm to the Company that the conditions to Closing set forth in Section 1.11 below . . . have been met or have been waived . . . ."); RD's Ex. 18 §§ 5.1.2 and 5.1.3 at SEC-5296 (requiring both that the Buyer send written evidence of the satisfaction of the conditions precedent referred to in Clause 11 to the Seller and that "[t]he Sellers . . . give to Buyer . . . written evidence of the satisfaction of the conditions precedent . . .").[45] Ms. Ames stated that the Oak representatives (counsel and project managers) would

[45] The SEC urges that even if the agreement did not specifically provide the condition that the parties notify their counterparties of completion of all other conditions precedent, a party cannot "incur the obligation to consummate a transaction without even knowing it did so." (Pl.'s Opp'n at 9.) Based on the record and facts in this case, the Court agrees. For instance, the Company A agreement provides as a condition to closing that the Seller and Purchaser, respectively, "shall have performed all obligations and conditions herein required to be performed or observed by it on or prior to the Closing Date." (RDs' Ex. 1 §§ 5(a)(iii), 5(b)(iii).) It does not specifically require the parties to notify one another once they have completed all of their obligations, however, absent such notification, a party would have no way of knowing when this occurred.

be notified the closing conditions had been met while located in their Connecticut offices either by email or telephonically. (Ames Depo. at 294:23-296:7; 299:21-300:3.)

Absent any evidence or language in the contracts tying the completion of the final condition precedent to the point at which the parties became bound, the Court cannot determine on this record if this was in fact the point at which the parties were irrevocably obligated to perform. Although it is true that the transactions could not close absent completion of all conditions precedent, nothing in the contracts suggest that was also sufficient to commit the parties to perform. That being said, if indeed this is the point at which irrevocable liability attached, the record demonstrates that in each case Oak sent and received notice that closing conditions had been satisfied while located in the United States, and Defendants again offer nothing outside of the language of the contracts themselves, which is unavailing at the summary judgment stage.

c. Execution of the Agreement

Finally, the parties might not become irrevocably bound until they sign the agreement and obligate themselves to either deliver the securities or wire the funds to purchase the securities. *See, e.g.*, *Liberty Media Corp. v. Vivendi Universal, S.A.*, 861 F. Supp. 2d 262, 269 (S.D.N.Y. 2012) ("Irrevocable liability was incurred when the Merger Agreement was executed . . . . [t]he binding obligation to effectuate the merger and the exchange for . . . securities occurred" on that date); *Wang*, 2015 WL 12656906, at *12 (investors

incurred irrevocable liability abroad when they sent the agreements from their foreign countries, but defendant did not incur irrevocable liability until he accepted the agreements and signed them while located in the United States); *Arco Capital*, 949 F. Supp. 2d at 542-43 (language in the contract indicated that the parties became irrevocably bound to execute the securities sale upon payment of the purchase price).

Ms. Ames stated that, depending on the agreements' terms, signatures would be held in escrow until closing and then at closing those would be released "insofar as, you know . . . Oak has the obligation now to fulfill whatever it had committed to in the document and to proceed with the security transaction." (Ames Depo. at 302:3-18.) She further testified that counterparties' signatures would be sent to Oak offices so the respective project manager could sign the document (*id*. at 320:2-16) and that Oak project managers signed written agreements while located at the Oak offices in the United States (*id* at 292:12-292:4).[46]

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[46] Relief Defendants assert that Ms. Ames had not reviewed the calendars for any of the Oak partners aside from Mr. Ahmed to confirm whether they were in the United States for the relevant transactions. (*See* Deitch Decl. [Doc. # 660] ¶¶ 2-6.) Even so, Mr. Ahmed signed on behalf of Oak for more than half of the transactions, and Relief Defendants provide no rebuttal evidence to Ms. Ames's testimony that Oak's project managers signed agreements from the Oak offices.

Conclusion

Defendants' objection that Ms. Ames' testimony is "general practices" evidence that cannot alone satisfy the SEC's burden is unpersuasive here, where Ms. Ames not only testified that Oak followed its general practices with respect to the transactions associated with Companies A through J (Ames Depo. at 334:16-338:21), but also buttresses this evidence with the adverse inference against Defendant, as well as the evidence relating to the Companies A and B transactions, which support Ms. Ames' testimony. In contrast, Defendants proffer only the language of the contracts, without identifying a single piece of extrinsic evidence indicating that any of these transactions actually occurred abroad, or even addressing the SEC's evidence establishing that the language of the contracts was ignored. As the Court has noted already, Defendants' reliance on the language of the contracts is insufficient. The mere fact that the parties may have intended for their conduct to occur outside of the United States carries no significance, for the question is not where the parties desired the transaction to take place, but where in fact it did take place. *See Vilar*, 729 F.3d at 93 n.12.[47]

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[47] Relief Defendants argue it is significant that the SEC did not present any travel records or other documents which would establish conduct took place in the United States or did not take place in a foreign jurisdiction. (RDs' Opp'n at 12.) However, the SEC is not required to make its showing using any particular types of evidence, so long as it has demonstrated an absence of a material dispute of fact. Moreover, Relief Defendants similarly have not offered any such evidence–and given the extent of discovery in this case, they had every opportunity to uncover

In sum, in all but three of the disputed transactions, Oak was the buyer, and the SEC proffered evidence that title was delivered either electronically to its United States email accounts, or physically to its offices located in the United States. Moreover, in all of the transactions, the SEC established that Oak incurred irrevocable liability in the United States, as the unrebutted testimony of Oak's designated witness was that Oak acted from the United States at all potentially relevant stages of the transaction.[48]

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documents establishing that the transactions occurred outside of the United States. That they presented no such evidence only confirms the Court's conclusion that the transactions took place in the United States consistent with the testimony of Oak's designated witness.

[48] Relief Defendants argue that the Company D transactions are impermissibly foreign under *Parkcentral Global Hub Ltd. V. Porshe Auto Holdings SE,* 763 F.3d 198 (2d Cir. 2014). They contend that the transaction was a purchase and sale of shares in a Korean company from a Dutch company and that to the extent that particular Oak funds were involved, they participated through foreign-based entities in which the Oak funds had investment interests.

In *Parkcentral* the transaction in question involved "securities-based swap agreements" relating to the stock of Volkswagen AG, a German corporation whose stock was traded on foreign exchanges. *Id.* at 201. There was no question that the swap agreements were concluded domestically, but the Court found that the domination of foreign elements in the transaction made it impermissibly extraterritorial. *Id.* at 216. In doing so, the Second Circuit noted that Morrison held that the existence of a domestic transaction was a necessary predicate to application of the securities laws, but that the *Morrison* court never said that the existence of a domestic transaction would necessarily be sufficient to warrant the application of those laws. *Id.* at 215. The Second

IV. Conclusion

For the foregoing reasons, the SEC's Motion for Summary Judgment on Liability is GRANTED. Defendant and Relief Defendants' Motions for Summary Judgment on Liability are DENIED.

IT IS SO ORDERED.
__________/s/____________________
Janet Bond Arterton, U.S.D.J.

Dated at New Haven, Connecticut this 29th day of March 2017.

Circuit further found that a predominantly foreign transaction poses the risk of conflict with foreign securities laws, and that fact places it outside the scope of domestic securities laws. *Id.* at 216-18. The court in *Parkcentral* explained at length that its holding should have limited application in future cases because of the unique nature of the transaction and claims at issue in the case, and warned that a transaction is not impermissibly foreign because it contains some foreign elements. *Id.* at 216. Here, a United States entity purchased the actual securities not traded on an exchange for the benefit of United States investors and with the intent to hold title to the actual securities in the United States, and Defendant, working from the United States, had direct involvement in the transactions. The fact that Oak engaged foreign service providers to facilitate the deal does not render the transaction impermissibly foreign.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

Docket Nos: 21-1686 (Lead)
21-1712 (Con)

[Filed October 12, 2023]

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 12th day of October, two thousand twenty-three.

United States Securities and)
Exchange Commission,)
Plaintiff - Appellee,)
)
v.)
)
Iftikar A. Ahmed, Shalini Ahmed, I.I. 1,)
a minor child, by and through his next friends)
Ifikar and Shalini Ahmed, his parents, I.I. 2,)
a minor child, by and through his next friends)
Iftikar and Shalani Ahmed, his parents, I.I. 3,)
a minor child, by and through his next friends)
Iftikar and Shalini Ahmed, his parents, I-Cubed)
Domains, LLC, Shalini Ahmed 2014 Grantor)
Retained Annuity Trust, DIYA Holdings, LLC,)

DIYA Real Holdings, LLC,	)
Defendants - Appellants,	)
	)
v.	)
	)
Jed Horwitt,	)
Receiver - Appellee.	)
	)

ORDER

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

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk
[SEAL]

APPENDIX G

Relevant Provisions

Fed. R. App. P. 3(a)

(a) Filing the Notice of Appeal.

(1) An appeal permitted by law as of right from a district court to a court of appeals may be taken only by filing a notice of appeal with the district clerk within the time allowed by Rule 4. At the time of filing, the appellant must furnish the clerk with enough copies of the notice to enable the clerk to comply with Rule 3(d).

(2) An appellant's failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for the court of appeals to act as it considers appropriate, including dismissing the appeal.

(3) An appeal from a judgment by a magistrate judge in a civil case is taken in the same way as an appeal from any other district court judgment.

(4) An appeal by permission under 28 U.S.C. §1292(b) or an appeal in a bankruptcy case may be taken only in the manner prescribed by Rules 5 and 6, respectively.

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Fed. R. App. P. 4(a)

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from.

(B) The notice of appeal may be filed by any party within 60 days after entry of the judgment or order appealed from if one of the parties is:

(i) the United States;

(ii) a United States agency;

(iii) a United States officer or employee sued in an official capacity; or

(iv) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf — including all instances in which the United States represents that person when the judgment or order is entered or files the appeal for that person.

(C) An appeal from an order granting or denying an application for a writ of error coram nobis is an appeal in a civil case for purposes of Rule 4(a).

(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.

(3) Multiple Appeals. If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

(4) Effect of a Motion on a Notice of Appeal.

(A) If a party files in the district court any of the following motions under the Federal Rules of Civil Procedure—and does so within the time allowed by those rules—the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed within the time allowed for filing a motion under Rule 59.

(B)(i) If a party files a notice of appeal after the court announces or enters a judgment—but before it disposes of any motion listed in Rule 4(a)(4)(A)—the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment's alteration or amendment upon such a motion, must file a notice of appeal, or an amended notice of appeal—in compliance with Rule 3(c)—within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

(iii) No additional fee is required to file an amended notice.

(5) Motion for Extension of Time.

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

(B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 14 days after the date when the order granting the motion is entered, whichever is later.

(6) Reopening the Time to File an Appeal. The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

(B) the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and

(C) the court finds that no party would be prejudiced.

(7) Entry Defined.

(A) A judgment or order is entered for purposes of this Rule 4(a):

(i) if Federal Rule of Civil Procedure 58(a) does not require a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a); or

(ii) if Federal Rule of Civil Procedure 58(a) requires a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs:

- the judgment or order is set forth on a separate document, or
- 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79(a).

(B) A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58(a) does not affect the validity of an appeal from that judgment or order.

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28 U.S.C. § 2462 - Time for commencing proceedings

Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

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

15 U.S.C. § 78u(d)(3)(A)

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

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(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.

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15 U.S.C. § 78u(d)(5)

(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.

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15 U.S.C. § 78u(d)(7)

(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.

15 U.S.C. § 78u(d)(8)

(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.

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Pub. L. No. 116-283, § 6501 - Investigations and Prosecution of Offenses for Violations of the Securities Laws.

(a) IN GENERAL.—Section 21(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78u(d)) is amended—

(1) in paragraph (3)—

(A) in the paragraph heading—

(i) by inserting "CIVIL" before "MONEY PENALTIES"; and

(ii) by striking "IN CIVIL ACTIONS" and inserting "AND AUTHORITY TO SEEK DISGORGEMENT";

(B) in subparagraph (A), by striking "jurisdiction to impose" and all that follows through the period at the end and inserting the following: "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."; and

(C) in subparagraph (B)—

(i) in clause (i), in the first sentence, by striking "the penalty" and inserting "a civil penalty imposed under subparagraph (A)(i)";

(ii) in clause (ii), by striking "amount of penalty" and inserting "amount of a civil penalty imposed under subparagraph (A)(i)"; and

(iii) in clause (iii), in the matter preceding item (aa), by striking "amount of penalty for each such violation" and inserting "amount of a civil penalty imposed under subparagraph (A)(i) for each violation described in that subparagraph";

(2) in paragraph (4), by inserting "under paragraph (7)" after "funds disgorged"; and

(3) by adding at the end the following:

"(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 10(b);

"(II) section 17(a)(1) of the Securities Act of 1933 (15 U.S.C. 77q(a)(1));

"(III) section 206(1) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–6(1)); 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 Act.".

(b) APPLICABILITY.—The amendments made by subsection (a) shall apply with respect to any action or proceeding that is pending on, or commenced on or after, the date of enactment of this Act.