

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

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).

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 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 equitable limitations by failing to ensure that no unduly remote

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.

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.

Exhibit B

**UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT**

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.

ORDER

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

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.

Appellant, Shalini 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


