No. 26-____

IN THE

Supreme Court of the United States

PAUL SEXTON, JACKSON T. FRIESEN, AND MIKE K. VELDHUIS,
Petitioners,

v.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a district court, having found that the evidence does not demonstrate receipt of funds by individual defendants, can nonetheless impose joint-and-several disgorgement based solely on "concerted wrongdoing," notwithstanding the strong presumption against joint-and-several liability and the absence of any of the relevant factors this Court identified in *Liu v. SEC*, 591 U.S. 71 (2020).

PARTIES TO THE PROCEEDING

Petitioners Paul Sexton, Mike K. Veldhuis, and Jackson T. Friesen were defendants in the district court and appellants in the court of appeals. Frederick L. Sharp, William T. Kaitz, Graham R. Taylor, Avtar S. Dhillon, Courtney Kelln, and Zhiying Yvonne Gasarch were additional defendants in the district court. Ms. Kelln and Ms. Gasarch were additional appellants below. No party to these proceedings is a nongovernmental corporate entity. The Securities and Exchange Commission is the Respondent.

RELATED PROCEEDINGS

United States District Court (D. Mass.):

SEC v. Sharp, No. 1:21-cv-11276 (June 20, 2024)

United States Court of Appeals (1st Cir.):

SEC v. Gasarch, Nos. 24-1770, 24-1771, 24-1772, 24-1773, 24-1774 (Feb. 19, 2026)

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JURISDICTION

The judgment of the court of appeals was entered on February 19, 2026. Petitioner Friesen's rehearing petition was denied on May 1, 2026. On May 14, 2026, Justice Jackson extended the deadline for the filing of a petition for a writ of certiorari up to and including August 31, 2026. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

15 U.S.C. § 78u(d)(3) provides:

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

15 U.S.C. § 78u(d)(7) provides:

> 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.

INTRODUCTION

This Court has cautioned that joint-and-several disgorgement in Securities and Exchange Commission ("SEC" or "Commission") cases is a "practice [that] could transform any equitable profits-focused remedy into a penalty" and that it "runs against the rule to not impose joint liability …." *Liu v. SEC*, 591 U.S. 71, 90 (2020). Such an award is proper, if at all, only in rare circumstances, and even then, it is "in considerable tension with equity practices." *Id.* at 85.

In disregard of this rule, the district court *sua sponte* imposed joint-and-several disgorgement, even though the Commission never requested it. It did so after expressly finding that the evidence "does not show that ill-gotten gains have been obtained and retained by the individual Defendants, much less in the amounts requested by the SEC." App. 133a. This was the first time post-*Liu* that a court imposed joint-and-several disgorgement against multiple individual defendants on similar facts.

So unconventional was the district court's application of joint-and-several disgorgement that, on appeal, the Commission attempted to cast aside this aspect of the judgment rather than meaningfully defend it. It argued instead that the judgment could be salvaged without the joint-and-several designation. The court of appeals, however, rejected the attempted concession, concluding that the district court's award cannot survive unless joint-and-several liability is available.

It then affirmed the disgorgement judgment, granting the Commission a form of relief it never requested and attempted to abandon.

The court of appeals' opinion turns the presumption against joint-and-several liability on its head. It does not cite, let alone apply, this Court's factors in evaluating joint-and-several liability. Instead, seizing on just a few words from *Liu*, it created a rule that joint-and-several liability is appropriate wherever there are "partners engaged in concerted wrongdoing," without any other requirements. App. 41a. This boundless principle would allow for joint-and-several liability in nearly every case the Commission brings against multiple defendants, transforming a rare exception into a default remedy.

The opinion below—the first post-*Liu* appellate decision to affirm the finding that multiple individual defendants are jointly and severally liable based solely on a naked assertion of concerted wrongdoing—marks an attempted return to the precedent that this Court squarely rejected in *Liu*. It also creates a circuit split with the Fifth Circuit and reinforces the need for guardrails against excesses in SEC disgorgement.

STATEMENT OF THE CASE

1. Petitioners are individual defendants below who were found liable, through a combination of a trial and consent orders, for violating the securities laws through participation in pump-and-dump trading. App. 3a. The defendants below were found to have played disparate roles in these violations and to have had varying degrees of business relationships with the mastermind of the scheme, Frederick Sharp. *Id.* at 2a-3a. Some were employed by Sharp, while others were found to have used his services to obscure their

connection to the transactions. *Id.* at 8a-9a. Petitioners were found to have played the latter role. *Id.* at 128a-129a. There are no familial connections among the Petitioners, nor are there any allegations that they commingled the proceeds of the violations. The Commission has consistently maintained that Petitioners profited individually from the violations and that the funds were not blended together in any way. *See, e.g.*, *id.* at 39a.

After the findings of liability, Petitioners (along with certain other defendants below) and the SEC proceeded to the remedies phase. In connection with the remedies proceedings, Petitioners reserved their rights to contest the amount of disgorgement requested by the Commission. *Id.* at 89a. In its submissions to the district court, the Commission sought disgorgement on an individualized basis against Petitioners based solely on data from the so-called Q system. *Id.* at 39a.

Q is a third-party database that the Commission alleges demonstrates Petitioners' unlawful network of trading. The system purports to serve two different purposes: (1) logging trades and (2) allocating profits. *Id.* at 11a. Only the second function is at issue in this petition. Mr. Sharp created and maintained the Q database, and he had the authority to edit the data contained in the system. *Id.* at 19a.

Although the Commission verified portions of the first function of the Q system by comparing trades reflected in the database against brokerage records, it did not attempt to verify that the profits reflected in the Q system were ever actually distributed to Petitioners. *Id.* at 126a. According to the Commission, each Petitioner had an "account" within Q, into which funds were allocated. *Id.* at 38a. But the SEC offered no evidence that the quantum allocated to Petitioners

was ever distributed to them. *Id.* at 133a. Indeed, there is no evidence that the funds were available for Petitioners to access—*or even that the money existed*.

Q is not a bank; it is a private database run by someone who never testified or participated in this matter. Nobody can walk into a Q branch and withdraw funds, as no such thing exists. Nor does a Q bank account exist. Rather, Q purports to be a digital record of funds available for distribution, possibly from a completely different location in the name of an unknown party. The Commission, however, offered no evidence of any such transfer from any account, nor did it demonstrate that enough money to fulfill withdrawal requests for the at-issue amounts even existed. *Id.* at 126a. The Q system (and the evidence relied upon by the SEC) lacks any record of actual transfers of funds to actual bank accounts controlled by Petitioners or anyone else.[1]

Although the Commission has known from the outset of the case about bank accounts it believes belong to Petitioners, it never attempted to request records from those institutions. Oral Argument at 29:12-16, *SEC v. Gasarch*, Nos. 24-1770, 24-1771, 24-1772, 24-1773, 24-1774 (1st Cir. Sept. 9, 2025), https://www.ca1.uscourts.gov/sites/ca1/files/oralargs/2

[1] At most, the Commission introduced non-bank record evidence, such as text messages, that was intended to corroborate that a *de minimis* amount of funds had been disbursed to Petitioners. App. 126a. Even to the extent that this demonstrates that a small amount was received, it says nothing about whether those funds related to the specific conduct for which disgorgement was ordered. Specifically, the Commission did not obtain disgorgement related to every security traded by Petitioners.

4-1770_20250909.mp3 (hereinafter "Oral Arg.").[2] Instead, the SEC made a strategic—and, Petitioners submit, legally fatal—decision not to try to prove whether the funds were ever actually received by Petitioners. In doing so, the Commission, for tactical reasons, provided the district court with an all-or-nothing calculus: either award disgorgement in the unverified amount reflected in the Q system, or award nothing, as there was no backup calculation.

2. The district court quickly identified problems with the Commission's request. Most significantly, because the purported allocation records in Q were not verified, the district court found that the evidence "does not show that ill-gotten gains have been obtained and retained by the individual Defendants, much less in the amounts requested by the SEC." App. 133a. Going even further, the district court allowed for the possibility that Petitioners did not actually receive any funds from the violations, concluding that it was possible that the profits "may have partially *or entirely* accrued to Sharp." *Id.* at 129a (emphasis added). Reiterating these determinations, the district court wrote that "accrual to each of the Defendants cannot be shown," that it is "entirely possible" that certain funds allocated to them in Q were never received, and that it is "not possible to speak with any reasonable

[2] The Commission requested bank records from Petitioners, who invoked their rights under the Fifth Amendment due to parallel criminal proceedings against certain defendants below. The Commission never attempted to obtain records from the banks, despite conceding it had the authority to do so. Oral Arg. at 29:12-16. The district court found, in a decision undisturbed by the appeal, that no adverse inference could be drawn based on the invocation of the Fifth Amendment.

degree of certainty" about actual receipt of funds. *Id.* at 133a-134a.

Nonetheless, the district court proceeded to do something that not even the Commission had requested: it awarded joint-and-several disgorgement. It found that this remedy was available even though it "cannot be shown" that Petitioners profited from the violations in the alleged amounts. *Id.* at 133a. On the basis of this determination, it awarded joint-and-several disgorgement against Messrs. Sexton, Velhduis, Friesen, and Sharp in the amount of $42,503,547, with the amount to be collected from Mr. Sexton capped at $17,367,474, the amount to be collected from Mr. Veldhuis capped at $13,289,897, and the amount to be collected from Mr. Friesen capped at $11,846,176. *Id.* at 135a. As described below, the references to Mr. Sharp are unenforceable because the district court never actually entered a joint-and-several judgment against him and instead only referenced him in judgments issued against Petitioners.

These caps reflected the allocations attributed to Petitioners in the Q system. *Id.* at 119a-120a. However, as described above, the district court found that the record "does not show that ill-gotten gains have been obtained and retained by the individual Defendants, much less in the amounts requested by the SEC." *Id.* at 133a. In other words, the caps were not based on funds that the district court actually determined Petitioners had received. Instead, the caps reflected the very calculations that the district court found to be inadequate to support the SEC's request for individualized disgorgement.

3. Having never requested joint-and-several disgorgement, the Commission quickly attempted to

distance itself from that remedy on appeal. Specifically, the Commission contended in its brief that the "joint-and-several designations were unnecessary" and that the judgments could stand without them. Brief of the Securities and Exchange Commission, *SEC v. Gasarch*, Nos. 24-1770, 24-1771, 24-1772, 24-1773, 24-1774, Doc. No. 00118287583 at 74 (1st Cir. May 19, 2025). Only in a single paragraph did the SEC argue, in the alternative, that joint-and-several disgorgement could be appropriate. *Id.* at 75-76.

At oral argument, the SEC repeated numerous times its attempt to cast aside joint-and-several liability. For instance, the SEC's counsel acknowledged that the "Commission didn't ask for these amounts to be joint-and-several." Oral Arg. at 30:30-38. She added that "we don't believe that the disgorgement award ultimately hinges on" the joint-and-several designation. *Id.* at 31:10-16. And she conceded that the Commission's policy is not to request joint-and-several liability when it believes that individual calculations are available. *Id.* at 31:48-32:04.

The court of appeals disagreed with the argument "that the joint and several liability designations are unnecessary, and that we could strike them while leaving the disgorgement awards otherwise intact." App. 39a-40. The opinion below instead found that joint-and-several liability was integral to the district court's decision. *See id.* at 40a ("After careful review of the court's decision, we take the court to mean that the evidence produced by the SEC was insufficient to award disgorgement on a purely individualized basis beyond what the SEC had proven was actually distributed to each appellant and, therefore, it would

not have awarded disgorgement but for the joint and several liability designations.").[3]

4. Even though the Commission never requested—and indeed attempted to abandon—joint-and-several disgorgement, the court of appeals rejected "the SEC's attempted olive branch." *Id.* at 39a. The court of appeals then proceeded to analyze the propriety of joint-and-several disgorgement. Finding that Petitioners engaged in "concerted wrongdoing," the court of appeals affirmed the remedy notwithstanding the SEC's attempted concession. *Id.* at 41a. In reaching that conclusion, the court of appeals concluded that, despite the district court's determination that individualized disgorgement was impossible, "the district court did the appropriate leg work to determine that each appellant enjoyed the fruits of the scheme based on the amounts allocated to their individual Q accounts." *Id.* at 43a. These are the same amounts the district court declined to find that Petitioners received.

REASONS FOR GRANTING THE PETITION

This petition relates to an important area of recent interest for this Court: the limitations on the Commission's ability to obtain disgorgement. In addition to *Liu*, this Court has granted certiorari on two other occasions in recent years to explore this issue. *See Stripetch v. SEC*, 608 U.S. —, 146 S. Ct. 1403 (2026); *Kokesh v. SEC*, 581 U.S. 455 (2017).

The decision below blows through this Court's carefully constructed disgorgement guardrails and represents an unprecedented expansion of the remedy in the post-*Liu* world. Unless reined in, this boundless

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[3] The "actual[] distribut[ions]" are the *de minimis* amounts described in n.1, *supra*.

expansion of disgorgement could herald a return to the state of affairs this Court rejected in *Liu*. This petition also presents an opportunity to resolve a circuit split between the First and Fifth Circuits.

I. The Decision Below Conflicts with This Court's Precedent

A. The Default Rule Against Joint-and-Several Disgorgement Resolves This Case

1. There is a "rule against joint-and-several liability for profits that have accrued to another," and it "appears throughout equity cases awarding profits." *Liu*, 591 U.S. at 83. The reason for this is that "disgorgement liability on a wrongdoer for benefits that accrue to his affiliates" runs counter to the notion that there should be "individual liability for wrongful profits," and it "could transform any equitable profits-focused remedy into a penalty." *Id.* at 90.

The court of appeals never cites this "rule." Instead, it attributes to *Liu* the incomplete proposition that joint-and-several disgorgement "risks transforming such remedies into penalties by holding defendants liable for profits 'accrued to another, and in which they have no participation.'" App. 41a. But this is actually a quote to whcih *Liu* cites from another case, *Belknap v. Schild*, 161 U.S. 10 (1896), and the court of appeals wrongly treats it as a complete statement of the law rather than adressing the numerous other factors identified in *Liu*. By so framing the issue, the court of appeals incorrectly implies that the "rule" is limited to cases where a defendant did not participate in the relevant conduct. To the contrary, it is the very existence of joint-and-several liability, in any form whatsoever, that is "in considerable tension with equity practices." *Liu*, 591 U.S. at 85.

2. This Court has nonetheless left open the possibility that joint-and-several disgorgement can be available, notwithstanding the fact that it "test[s] the bounds of equity practice." *Id.* Specifically, this Court identified various factors that can guide the determination of whether joint-and-several liability is appropriate. These include whether finances were "commingled," whether the defendants "enjoy[ed] the fruits of the scheme," whether someone was a "mere passive recipient of profits," and whether "other circumstances would render a joint-and-several disgorgement order unjust." *Id.* at 91. But the court of appeals never attempted to apply these factors.

The only time the word "commingled" appears in the decision is to describe the facts of a prior First Circuit case. App. 42a. There was no discussion of whether the funds in this case were commingled. Nor has the Commission ever even alleged that there was commingling. Meanwhile, the terms "passive recipient" and "other circumstances" are nowhere to be found in the disgorgement discussion in the opinion below.

The only factor even tangentially addressed relates to the fruits of the scheme, with the court of appeals concluding that "the district court did the appropriate leg work to determine that each appellant enjoyed the fruits of the scheme based on the amounts allocated to their individual Q accounts." *Id.* at 43a. But that assessment flatly contradicts the district court's express finding that the evidence "does not show that ill-gotten gains have been obtained and retained by the individual Defendants, much less in the amounts requested by the SEC." *Id.* at 133a.

Even setting aside the fact that the district court found that those Q allocations could not form the basis for individualized disgorgement, this analysis is a red

herring. In virtually every case with multiple defendants, more than one person will have received "fruits" from the scheme. If that were enough to justify joint-and-several liability, it would be available as a routine matter. Here, there was no "sharing" in any meaningful sense. Each Petitioner is alleged to have received individual compensation for his role in the scheme, and that compensation was not commingled or otherwise shared. That the Commission's tactical litigation decisions resulted in there being no reliable record of individual compensation does not mean that the funds were shared.

B. The Decision Below Is Unprecedented Post-*Liu* and Marks a Return to Rejected Pre-*Liu* Principles

1. Even as the opinion below departs drastically from *Liu* itself and post-*Liu* cases, it does bear a striking resemblance to other opinions: namely, the very exemplars this Court in *Liu* rejected as being "seemingly at odds with the common-law rule requiring individual liability for wrongful profits." 591 U.S. at 90. For instance, in *SEC v. Whittemore*, the court awarded joint-and-several disgorgement in the factually indistinguishable scenario where the defendants "collaborated…in the fraudulent 'pump and dump' scheme." 659 F.3d 1, 12 (D.C. Cir. 2011). Specifically, the court concluded that "[o]nce the Commission established the close collaboration between [the defendants] in the fraudulent scheme," the burden shifted to the defendants to refute joint-and-several liability. *Id.* at 11. In *Liu*, this Court criticized the *Whittemore* decision, noting that joint-and-several liability even where "there is a close relationship between the defendants and collaboration in executing the wrongdoing" is "at odds with the

common law rule requiring individual liability for wrongful profits." *Liu*, 591 U.S. at 90.

This Court in *Liu* likewise criticized the holdings from two other cases. In the first, the court held that a defendant "could be forced to disgorge not only what he 'personally enjoyed from his exploitation of inside information, but also the profits of such exploitation that he channeled to friends, family, or clients.'" *Id.* (quoting *SEC v. Contorinis*, 743 F.3d 296, 302 (2d Cir. 2014)). And in the second, the court determined that "a tipper can be required to disgorge his tippee's profits." *Id.* (quoting *SEC v. Clark*, 915 F.2d 439, 454 (9th Cir. 1990)). Both of these holdings, like *Whittemore*, run afoul of traditional limitations on disgorgement. *Id.*

These rejected principles form the only basis for the decision below. Just as *Whittemore* imposed joint-and-several liability on individuals who "collaborated…in the fraudulent 'pump and dump' scheme," the decision below cites as its sole basis the fact that "each appellant had conspired with Sharp to commit securities fraud and had received illicit gains as a result." App. 41a. And just as a tipper and tippee may closely coordinate and conspire to commit insider trading, that is not sufficient for joint-and-several liability.

2. Although it is true that *Liu* and the decision below both use the term "partners engaged in concerted wrongdoing," this Court has never suggested that such a nebulous concept, standing alone, is sufficient to justify joint-and-several disgorgement. Indeed, consideration of the various factors, including commingling, identified in *Liu* would be unnecessary if "concerted wrongdoing" were sufficient. And this Court's criticism of *Whittemore* would be out of place if mere "collaboration" were enough.

The case this Court cited in *Liu* regarding "partners engaged in concerted wrongdoing" is instructive. In *Ambler v. Whipple*, two defendants jointly defrauded a plaintiff out of his intellectual property, resulting in fraudulent patents from which both defendants profited. 87 U.S. 546, 558-59 (1874). Requiring codefendants to be jointly responsible for the value of a single asset that they jointly misappropriated is a far cry from ordering joint-and-several disgorgement against multiple defendants involved in disparate activities involving multiple securities in a course of conduct in which they each played different roles and allegedly received different compensation. Additionally, in *Ambler*, the "liability…was premised on the law of partnership," which is inapplicable here given the absence of a legal partnership. *Liu*, 591 U.S. at 101 (Thomas, J., dissenting).

Equally telling are the cases that this Court cited alongside *Ambler*. *See, e.g.*, *City of Elizabeth v. Am. Nicholson Pavement Co.*, 97 U.S. 126, 140 (1877) (recovery of profit viable only against the "party who made the profit"); *Penhallow v. Doane's Adm'rs*, 3 Dall. 54, 88, 1 L.Ed. 507 (1795) ("It is objected, that the damages awarded are joint; whereas they ought to have been several. This objection is a sound one. … George Wentworth received a moiety only; he is liable for that, and no more."). These cases all make clear that something more than mere "concerted action" is required.

3. Post-*Liu* cases confirm these significant restrictions on joint-and-several liability. Indeed, with the exception of the opinion below, undersigned counsel has not identified a single post-*Liu* case where a court has imposed joint-and-several liability on multiple

individuals without any showing that they received, or even had access to, the funds.

In the rare instances that courts have blessed joint-and-several liability against individuals, the facts have been markedly different. For instance, in *Liu* itself, the petitioners were married and did not deny commingling their assets. 591 U.S. at 91. Although this Court did not resolve the question of joint-and-several liability, the Ninth Circuit on remand concluded that it was proper under those particular circumstances. *See SEC v. Liu*, No. 21-56090, 2022 WL 3645063, at *3 (9th Cir. Aug. 24, 2022). More recently, a court in Texas imposed joint-and-several disgorgement against two brothers because "the funds were commingled in jointly controlled accounts," making "individual attribution…impossible." *SEC v. Aras Inv. Bus. Grp. S.A.P.I. De C.V.*, No. EP-23-CV-00353-KC, 2026 WL 1981432, at *6 (W.D. Tex. June 18, 2026), *report and recommendation adopted*, 2026 WL 1978942 (W.D. Tex. July 8, 2026). None of those circumstances is present here. Petitioners are not related, they did not commingle funds, and the only reason there are not individualized calculations is that the Commission made a strategic decision to forgo the effort.

More common post-*Liu*, but still rare, is joint-and-several liability against an individual and a corporate entity. *See, e.g.*, *SEC v. Navellier & Assocs., Inc.*, 108 F.4th 19, 43 (1st Cir. 2024); *SEC v. Bronson*, 602 F. Supp. 3d 599, 618-19 (S.D.N.Y. 2022), *aff'd*, No. 22-1045-CV, 2022 WL 5237474 (2d Cir. Oct. 6, 2022). But as these cases tacitly acknowledge, joint-and-several liability for an individual defendant and the entity that the defendant controls is significantly different from joint-and-several liability against multiple individuals just because they happen to be co-

defendants. *See, e.g.*, *Bronson*, 602 F. Supp. 3d at 619 (agreeing that "imposing joint and several liability on individual and entity defendants was not inconsistent with *Liu*," noting that the individual defendant ran the scheme "through the companies that he controlled," observing that he had roles in the entities such as sole employee and owner, and concluding that he directly profited from the entities' actions).

Even cases involving individuals and entities recognize restrictions on joint-and-several liability. And in affirming the district court, the First Circuit violated its own precedent in that area. *See BioPoint, Inc. v. Dickhaut*, 110 F.4th 337, 351 (1st Cir. 2024). Like this Court in *Liu*, the First Circuit in *BioPoint* declined to "define all the facts and relationships that would render defendants 'partners engaged in concerted wrongdoing' such that joint-and-several liability would be appropriate." *Id.* at 353. And in that case, the First Circuit concluded: "It is sufficient, for today, to decide that the district court exceeded its equitable powers when it imposed joint-and-several liability on an individual, non-owner, nondirector employee, without concluding whether or how much the employee benefited from the scheme, merely because the employee 'collaborated with and ranks high' in the entity that profited from the wrongdoing." *Id.* That holding should have resolved the instant case.

The opinion below attempts to distinguish *BioPoint* on the basis that Petitioners "enjoyed the fruits of the scheme based on the amounts allocated to their individual Q accounts," App. 43a, but as described above, that distinction is belied by the record. The opinion below then tries to find refuge in *Navellier*, but it is likewise unavailing, as that case involved joint-

and-several liability between an entity and its majority owner, who had an "authoritative role" in the entity, "shared in profits received by [the entity]," and owed a fiduciary duty to the entity's clients. 108 F.4th at 43.

4. In short, the opinion below is unprecedented. It is the first post-*Liu* appellate decision to impose joint-and-several disgorgement on multiple defendants who are not related and who did not commingle, share, or even receive the relevant funds, solely by virtue of their joint participation as co-defendants in the offense conduct. It did so in a case in which the Commission had every opportunity to come up with actual, individualized disgorgement calculations, but made the tactical decision not to do so. This was error, and unless it is corrected, it risks a dramatic expansion of a disfavored remedy.

C. The Opinion Below Cannot Be Limited to Its Facts

1. The opinion below makes one attempt to portray its holding as something other than an extraordinary expansion of joint-and-several liability, but that effort is squarely foreclosed by the district court's undisturbed factual findings. Specifically, the district court capped each defendant's payment under the joint-and-several liability judgment "based on the amounts allocated to their individual Q accounts." App. 43a. The opinion below finds this "meaningful" because it purportedly "ensure[d] that each appellant only pays up to the amount allocated in their individual Q account and, thus, 'not [profits] which have accrued to another, and in which they have no participation.'" *Id.* (quoting *Liu*, 591 U.S. at 90).

This attempt to cabin the holding, however, overlooks the district court's express finding that there is no basis to conclude that the defendants ever received the funds allocated to their Q accounts. Indeed, these caps reflect the very same numbers the Commission sought to use for individualized judgments before the district court rejected that remedy for lack of evidence. Specifically, the district court concluded that the record "does not show that ill-gotten gains have been obtained and retained by the individual Defendants, much less in the amounts requested by the SEC." *Id.* at 133a. And the district court found that the profits "may have partially *or entirely* accrued to Sharp." *Id.* at 129a (emphasis added). The district court further determined that "accrual to each of the Defendants cannot be shown," that it is "entirely possible" that certain funds allocated to them in Q were never received, and that it is "not possible to speak with any reasonable degree of certainty" about actual receipt of funds. *Id.* at 133a-134a.

Simply put, if the district court believed that the amounts reflected in the Q system constituted a reasonable approximation of ill-gotten gains, there would have been no need to order joint-and-several liability, whether capped or otherwise. And there would have been no reason for the court of appeals to reject "the SEC's attempted olive branch" and to reiterate that the district court found the evidence of Q allocations "insufficient to award disgorgement on a purely individualized basis." *See id.* at 39a-40a.

2. Moreover, there is no basis to portray the caps as a limitation on the holding or as something that "could only benefit appellants." *Id.* at 45a. To the contrary, the caps were little more than the apocryphal "spoonful of

sugar" to "help[] the medicine go down." *See* Julie Andrews, *A Spoonful of Sugar* (1964). They created the appearance that the judgments were tethered to actual ill-gotten gains, and this conclusion was expressly used to portray the judgment as operating within recognized bounds. But because there is an undisturbed finding that these caps do not reflect a reasonable approximation of funds received, their inclusion is arbitrary. At the end of the day, even with the caps, Petitioners were ordered to pay funds that the district court could not conclude "with any reasonable degree of certainty" that they ever received. App. 133a-134a.

Additionally, the portrayal of joint-and-several liability as something that "could only benefit appellants," *id.* at 45a, is based on a legal impossibility. Mathematically, the only way that each Petitioner's liability could be reduced below the concededly unreliable Q allocations is if "Sharp picks up any balance left on the remedial tab." *Id.* But the only judgment against Mr. Sharp is an *individual* default judgment in the amount of $21,760,936, plus interest and penalties. Judgment, *SEC v. Sharp*, No. 1:21-cv-11276, ECF No. 211 at 6 (D. Mass. May 12, 2022). Even if that judgment is collected, Petitioners will not get credit for the amounts paid.

More than two years after the default judgment against Mr. Sharp, the district court attempted to add new joint-and-several liability against him in the amount of $42,503,547—almost double his initial judgment—even though he received no notice and the Commission never requested this relief. App. 131a. The court of appeals attempted to brush this aside by noting that the default judgment "remained amendable by the district court." *Id.* at 43a-44a n.21.

But that misses the mark, as the district court never amended the judgment against Mr. Sharp. The only references to Mr. Sharp's additional liability are in the judgments issued against Petitioners. As a result, the references to Mr. Sharp's joint-and-several liability are plainly not enforceable against him.

This was not, as the decision below implies, a choice between capped joint-and-several liability versus uncapped liability, such that the election of the former benefits Petitioners. It is the Commission's burden to present a reasonable approximation of disgorgement. *Id.* at 36a. If the Commission cannot do so, no disgorgement can be awarded. The use of artificial caps, which have no basis in the factual record, actively harms Petitioners, as it provides an unjustified alternative to the only conclusion actually supported by the record: that, due to the Commission's litigating decisions, no disgorgement can be awarded. That is, after all, the outcome the court of appeals previewed if joint-and-several liability were unavailable. *Id.* at 40a.

D. The District Court Should Not Have Acted *Sua Sponte*

1. Finally, at a minimum, it was a significant error for the court of appeals to affirm the judgment after the district court entered the joint-and-several liability order *sua sponte* and the Commission attempted to abandon it on appeal. *Sua sponte* relief, much like joint-and-several liability itself, is highly disfavored. *See, e.g.*, *McCoy v. Town of Pittsfield, NH*, 59 F.4th 497, 504-05 (1st Cir. 2023) (noting, in the context of *sua sponte* summary judgment, that the "power should be exercised sparingly and with great circumspection," and only after providing notice of the "grounds that the district court will consider") (internal quotation marks omitted). The court of appeals acknowledged this rule

but found it inapplicable based on its assessment that Petitioners were not prejudiced and that the "*sua sponte* decision could only benefit appellants to the extent Sharp picks up any balance left on the remedial tab." App. 45a. For the reasons addressed above, this is factually inaccurate and provides no basis for salvaging the *sua sponte* order.

2. Moreover, requests for remedies are waivable, and the Commission effectuated a waiver here. *See SEC v. Stack*, No. 23-50327, 2024 WL 4199017, at *4 (5th Cir. Sept. 16, 2024). As the court of appeals found, the SEC "concedes that it never asked the district court to *find* appellants jointly and severally liable and that it would not object to striking these designations while keeping appellants individually liable for the same amounts." App. 39a. This was an abandonment on a waivable issue.

Although the Commission offered a bare-bones, one-paragraph argument in the alternative in its brief about the propriety of joint-and-several disgorgement, it was clear throughout the appeal that it sought to remove the label from the judgment. As counsel for the Commission conceded during argument, the basis for doing so is that the joint-and-several award contravened the SEC's policy of seeking individualized disgorgement when such calculations can be made. Oral Arg. at 31:48-32:04. Nonetheless, the court of appeals found that it "cannot accept" the SEC's attempted concession. App. 39a. This was doubly wrong. It was neither the district court's role to *sua sponte* order the relief, nor the court of appeals' role to reject a concession. Joint-and-several liability, which is extremely prejudicial to Petitioners, was neither available nor appropriate.

II. The Decision Below Creates a Circuit Split and Reinforces the Need to Constrain SEC Disgorgement

A. There Is a Circuit Split Between the First and Fifth Circuits

The decision below squarely conflicts with a decision from the Fifth Circuit on both the scope of disgorgement and the propriety of ordering joint-and-several disgorgement *sua sponte* after the SEC failed to request it and effectively disclaimed it. Specifically, the Fifth Circuit has rejected holding a defendant liable for funds that have accrued, if at all, to others, and it has rejected the imposition of joint-and-several liability when the Commission has abandoned the issue. *See Stack*, 2024 WL 4199017, at *3 ("Holding Stack liable for funds he did not keep or benefit from does not constitute a reasonable approximation of a defendant's unjust enrichment, as required by *Liu* and our precedent."); *id.* at *4 ("In sum, counsel affirmatively waived SEC's reliance on the theory of joint and several liability, so we need not discuss that theory, and the record and precedent contradict the district court's assessment of disgorgement far exceeding the amount by which Stack himself was unjustly enriched.").

Here, the opinion below unquestionably attempts to *sua sponte* hold Petitioners responsible for funds where there is no evidence that they kept or benefitted from them. The district court's finding—that the evidence "does not show that ill-gotten gains have been obtained and retained by the individual Defendants, much less in the amounts requested by the SEC," App. 133a—makes that clear. Indeed, the opinion below is even more problematic than the facts in *Stack*, which involved a defendant who at least possessed the funds

at one point before transferring them. 2024 WL 4199017, at *1. Although *Stack* is an unpublished opinion, it is based on an interpretation of this Court's ruling in *Liu*, and it confirms that the opinion below is not the appropriate application of that case.

B. This Case Presents an Opportunity to Reinforce the Outer Limits of Disgorgement

1. This case is an ideal vehicle for clarifying the outer bounds of the Commission's equitable disgorgement authority. In *Liu*, the petitioners did not introduce evidence that "would render a joint-and-several disgorgement order unjust." 591 U.S. at 91. This Court therefore opted not to consider whether the remedy was appropriate in that case, leaving the decision to the court of appeals on remand. And this Court expressly declined to "wade into all the circumstances where an equitable profits remedy might be punitive when applied to multiple individuals." *Id.* Justice Thomas would have reached that question and found the remedy to be unavailable because it is "at odds with traditional equitable rules." *Id.* at 101 (Thomas, J., dissenting). This case squarely presents the question, and it involves litigants who have raised substantial arguments about the unjustness of the award.

2. This case also presents an opportunity to tether disgorgement to its equitable history. In *Liu*, this Court imposed guardrails on the Commission's disgorgement authority, including that it must be "awarded for victims." *Id.* at 74-75 (Maj. Op.). But since then, the SEC has consistently tested the outer limitations of its authority. Just this past term, this Court concluded that profits could be disgorged "without requiring a showing of pecuniary loss" by

those victims. *Stripetch*, 146 S. Ct. at 1411. As time goes on, SEC disgorgement increasingly "does not resemble any traditional equitable remedy." *Id.* at 1415 (Thomas, J., concurring).

This case illustrates the harms that result from loosening guardrails. The Commission, having made a strategic litigating decision not to attempt to trace ill-gotten gains, swung for the fences by asking the district court to order disgorgement based on an unverified database. Its evidence failed to persuade the district court, which should have ended the matter. But the district court came up with joint-and-several liability as a way to save the Commission from its self-inflicted wounds. And the court of appeals blessed the remedy in a way that makes it almost universally available. Unless the remedy is reined in, there is a substantial risk that the Commission's authority will become unrecognizable when compared to its intended historical limitations.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 31, 2026

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APPENDIX A

168 F.4th 11
United States Court of Appeals, First Circuit.

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff, Appellee,

v.

Zhiying Yvonne GASARCH; Mike K. Veldhuis; Paul Sexton; Courtney Kelln; Jackson T. Friesen, Defendants, Appellants, Frederick L. Sharp; William T. Kaitz; Avtar S. Dhillon; Graham R. Taylor,

Defendants.

Nos. 24-1770, 24-1771, 24-1772,24-1773, 24-1774

February 19, 2026

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS [Hon. William G. Young, U.S. District Judge]

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Before Gelpi, Thompson, and Montecalvo, Circuit Judges.

Opinion

THOMPSON, Circuit Judge.

The prospect of buying low on a stock just before it shoots the moon has enamored investors for centuries. But, as commonsense suggests and history has proven, not every start-up becomes a blue chip and not every investment reaps retirement-worthy profits. So, rather than taking a risk in search of the next big bonanza, some underhanded financiers elect to rig the system in their favor and, to the unfortunate detriment of unsuspecting investors, profit off pure speculation that they deceitfully conjure up.

Appellants Zhiying Yvonne Gasarch, Jackson Friesen, Mike Veldhuis, Paul Sexton, and Courtney Kelln participated in a scheme to do just that before they ran headfirst into federal securities laws. For

nearly a decade, appellants -- led by a character named Frederick ("Fred") Sharp -- bought up cheap stocks in bulk, paid promoters to drum up misleading hype for their stocks, and then sold off their shares at artificially inflated prices. All the while, appellants went to great lengths to hide their ownership of these stocks and their involvement in this nefarious scheme.

When the music stopped and the lights came on, all five appellants found themselves subject to an SEC civil enforcement action and liable to pay back millions in ill-gotten gains. Appellants Gasarch and Friesen now appeal the results of their respective jury trials, and the remaining appellants appeal the remedies imposed by the district court after they waived their trial rights and conceded liability. For myriad reasons, each appellant claims error occurred below and that the district court abused its discretion in ordering the remedies it deemed fitting of the offenses. It will take us a minute to explain all of this, so hunker down and read on to learn why we mostly agree and affirm across the board, but for one remedy pertaining to appellant Sexton.

I. SCENE-SETTING

A. Statutory Background

Before explaining the sophisticated scheme devised by appellants, we lay some foundation on the federal securities laws and regulations at issue in this appeal. While we will attempt to do as much table setting as we can here, we will be supplementing our legal discussion throughout the course of this multi-faceted opinion.

[1] This appeal follows an SEC civil enforcement action that targeted a specific species of securities

violations related to stock registration and sale requirements. Securities (a broad category of financial instruments which stocks are a part of) must be registered before offering them for public sale pursuant to Section 5 of the Securities Act of 1933 ("Securities Act"), 15 U.S.C. § 77e, unless they (1) fall under certain exemptions, or (2) the security is a stock sold in accordance with the terms of SEC Rule 144, 17 C.F.R. § 240.144A. This registration requirement is the "linchpin" of the Securities Act and "protects investors by ensuring that companies issuing securities (known as 'issuers') make a 'full and fair disclosure of information' relevant to a public offering." *Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund*, 575 U.S. 175, 178, 135 S.Ct. 1318, 191 L.Ed.2d 253 (2015) (quoting *Pinter v. Dahl*, 486 U.S. 622, 646,108 S.Ct. 2063, 100 L.Ed.2d 658 (1988)).

[2] A few pages over in the U.S. Code lives Section 13(d) of the Securities Exchange Act of 1934 ("Exchange Act"). Of import here, that provision requires beneficial owners of more than five percent of certain classes of securities to disclose to the SEC their ownership interest in that security and other relevant information. 15 U.S.C. § 78m(d); 17 C.F.R. § 240.13d- I (a). A beneficial owner includes any person who has voting power to direct voting of a security or investment power to direct the disposition of a security. 17 C.F.R. § 240.13d-3(a). In essence, this disclosure requirement seeks to keep tabs on who owns a large chunk of a registered stock, how many shares they own, where they got the money to purchase the stock, and why they made the purchase. *See* *24 *Tax-Free Fixed Income Fund for P.R. Residents, Inc. v. Ocean Cap. LLC*, 137 F.4th 6, 18-19

(1st Cir. 2025) (citing *Gen. Aircraft Corp. v. Lampert*, 556 F.2d 90, 94 (1st Cir. 1977)).

We need to introduce one more genre of securities law pertaining to fraudulent conduct that artificially inflates demand for a certain security. First, under Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), it is unlawful to use or employ "any manipulative or deceptive device or contrivance" to circumvent the rules and regulations the SEC promulgates to protect investors and the public interest. Similarly, under Section 17(a)(1) and (a)(3) of the Securities Act, 15 U.S.C. § 77q(a)(1), (3), it is "unlawful for any person in the offer or sale of any securities" to "employ any device, scheme, or artifice to defraud," or "to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser." And if those terms sound expansive, that was the legislative idea. *United States v. Naftalin,* 441 U.S. 768, 773, 99 S.Ct. 2077, 60 L.Ed.2d 624 (1979) (explaining that "Congress expressly intended to define" fraud "in" the "offer" and "sale" broadly).

The relevancy of these three areas of securities law will become clearer as we explicate appellants' path to our court. But, for now, what we've laid out should give the reader a sufficient understanding of conduct prohibited by our Nation's securities laws to appreciate appellants' contravening scheme.

B. Factual Background

[3] Because this case comes to us following a jury trial and the entry of consent judgments, we recount the relevant facts in the light most favorable to the verdicts, *SEC v. Happ*, 392 F.3d 12, 17 (1st Cir. 2004), or otherwise as found by the district court,

consistent with record support, *BioPoint, Inc. v. Dickhaut*, 110 F.4th 337, 341 (1st Cir. 2024).

1. The Scheme

Between 2010 and 2019, appellants participated in an elaborate securities fraud scheme involving a series of separate (but functionally parallel) endeavors, colloquially referred to as pump and dump schemes. *SEC v. Sharp* (*Sharp I*), 626 F. Supp. 3d 345, 366 (D. Mass. 2022); *see also SEC v. Sharp (Sharp II)*, 737 F. Supp. 3d 66, 73 (D. Mass. 2024) (citing *Sharp I* for factual background). Each pump and dump here (fourteen at issue in this enforcement action) proceeded in three steps, with each appellant playing a different role (which we will dissect in detail shortly). First, certain appellants accumulated blocks of penny stocks in national micro-cap companies.[1] Second, the group aggressively promoted these companies' stocks using paid promotions to garner attention and the interest of unwitting investors. And third, after hyping the stocks (deceptively

[1] To minimize any head spinning, we will provide definitions for any finance jargon introduced along the way.

Here, a penny stock is a general term given to shares of a small company that trades at a low price, usually under $5 a share. Penny stocks are notoriously volatile and risky and are often traded directly "over the counter" as opposed to on large stock exchanges like the New York Stock Exchange or the NASDAQ. A micro-cap company is a company with a market capitalization between $50 million and $300 million. Micro-cap companies can be lucrative investments, with lots of room for growth, but also risky. For reference, the market capitalization of the behemoth Coca-Cola Corporation is over $300 billion. Yahoo! Finance, The Coca-Cola Company (KO), https://finance.yahoo.com/quote/KO/ (last visited Jan. 21, 2026), [https://perma.cc/E67X-K5ZF]. So appellants dealt in small peanuts by comparison.

pumping up their value), the group sold them to unsuspecting investors (dumped them) using shell or nominee companies and offshore brokerage accounts that they specifically set up to skirt federal securities laws. *Sharp II,* 737 F. Supp. 3d at 73. Over the years, appellants repeated this process to the tune of more than $1 billion in gross proceeds. *Sharp I,* 626 F. Supp. 3d at 366.

2. The Players

The just-described scheme began with the ideations of an individual named Fred Sharp (code name "BOND").[2] Sharp is not a party in this appeal,[3] but his spectre looms over many of the legal issues we must address. Sharp was a financial professional and the criminal mastermind directing a firm known as the Sharp Group. *Sharp I,* 626 F. Supp. 3d at 366. In exchange for a lucrative fee, the Sharp Group offered a white glove securities fraud service for wealthy individuals seeking to score big returns. The enterprise provided a bundle of services to its clients such as setting up shell companies to conceal their stock ownership, creating nominal beneficial shareholders,[4]

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[2] The reader will soon learn that Sharp (primarily running this scheme from Canada) worked hard to conceal his operation and transactions. Part of that process included encrypted communications and the use of code names (and sometimes more than one code name per person). Sharp dubbed himself "BOND" after novelist Ian Fleming's fictional British Secret Service agent with a propensity for high-speed chases, fine suits, and shaken -- not stirred -- martinis.

[3] Following Sharp's failure to appear and the SEC's motion for default, the district court entered a default judgment against Sharp. *Sharp I*, 626 F. Supp. 3d at 364.

[4] A nominal beneficial shareholder is a person or entity holding shares or assets on behalf of someone else, the latter of

offering offshore accounts, facilitating deceptive stock transfers and money transfers, offering encrypted accounts and communication systems, and producing fabricated documents (such as fugazi loan agreements) to aid in the pumping and dumping of their stocks. *Sharp I*, 626 F. Supp. 3d at 366. Sharp's services provided his clients with valuable anonymity and distance from SEC regulators, all with the goal of keeping them out of jail.[5] But, importantly, he didn't work alone.

Enter stage left appellants Gasarch and Kelln. Gasarch (code name "WIRES") was one of Sharp's employees and was described as "the master of finance." Gasarch handled the Sharp Group's wire transfers, making sure proceeds from fraudulent stock sales went to the right client and ensuring clients could access their funds when needed. *Sharp II*, 737 F. Supp. 3d at 73 (citing *Sharp I*, 626 F. Supp. 3d at 366-67). To do so, Gasarch helped maintain records in the Sharp Group's internal accounting system and routinely created false invoices to give the appearance of legitimate transactions. *Id.* (citing *Sharp I*, 626 F. Supp. 3d at 366-67). While Gasarch moved the money, Kelln (code name "CELT"), another Sharp Group employee, played the ownership shell game. Kelln collected, allocated, and distributed shares of penny stocks under the Sharp Group's common control to nominee entities to keep the ownership of record under five percent (the

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which typically remains anonymous -- a perk that prospective fraudsters would likely find appealing.

[5] Sharp also published a book titled Footloose; Charlie Smith's Offshore Chronicles that tells of a fictional character's masterful stock manipulations while working anonymously and far away from securities regulators.

threshold that triggers additional SEC disclosure and registration requirements). *Id.* at 73.

Lastly, we introduce the reader to appellants Veldhuis, Sexton, and Friesen (code names "ACCO" or "4", "HEAR" or "3", and "GARD" or "2" respectively) -- Sharp Group clients who operated together as a group for the purposes of acquiring, holding, and dumping shares of at least fourteen different stocks using the Sharp Group's services.[6] *Sharp I*, 626 F. Supp. 3d at 367. Each time the trio dumped their jacked-up stocks into the market, they reaped considerable profits.

C. Procedural Background

The SEC finally caught onto this scheme and brought an enforcement action on August 5, 2021, against nine defendants including Sharp and our current gallimaufry of appellants.[7] In its detailed complaint, the SEC alleged that Sharp, Kelln, Veldhuis, Sexton, and Friesen had violated Sections 17(a)(1) and (3), and Sections 5(a) and 5(c) of the

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[6] This trio acquired their shares in various ways including reverse mergers. See Sharp I, 626 F. Supp. 3d at 368 (describing the acquisition of shares in Stevia First/Vitality Biopharma Inc. through a reverse merger). A reverse merger is when a private company acquires a public company and its assets, and former shareholders of the private company swap their shares for shares of the newly-merged public company. So, it is effectively a way for a company to go public without having to make the disclosures about their business and ownership that typically accompany the transition to becoming a publicly-traded company. See United States v. Weed, 873 F.3d 68, 70 n.2 (1st Cir. 2017).

[7] The other three original defendants have left the picture and, unlike Sharp, their involvement is tangential to the present appeal. Therefore, we need not prolong this already lengthy matter with their backstory.

Securities Act, Section 10(b) of the Exchange Act, and that Sharp and Kelln had aided and abetted the primary violations of Veldhuis, Sexton, and Friesen. The complaint also alleged that Gasarch had violated Section 17(a)(3) of the Securities Act and aided and abetted her compatriots in accomplishing their own primary violations. (These violations fall under the registration, ownership disclosure, and anti-fraud securities laws set forth earlier.)

On the same day the complaint was filed, the SEC filed an emergency ex parte motion for a temporary restraining order freezing assets of the named defendants and requesting equitable relief from them all. *Sharp I*, 626 F. Supp. 3d at 363. The district court granted the TRO, along with a series of preliminary injunctions over the course of the following month to keep those assets frozen. *Id.*

After fully entertaining a barrage of motions to dismiss filed by each of our current appellants, *id.* at 364, the district court denied them in full. *Id.* at 403. At this point, appellants Veldhuis, Sexton, and Kelln abandoned ship and conceded liability, agreeing not to "contest liability under the claims filed by the SEC" at the remedies stage. *Sharp II*, 737 F. Supp. 3d at 72. Appellants Gasarch and Friesen, on the other hand, proceeded to trial. So, let's talk about that and we'll loop Veldhuis, Sexton, and Kelln back into the discussion when we get to remedies.

H. ACT ONE

A ten-day jury trial culminated in a series of unanimous jury verdicts finding both Gasarch and Friesen liable for all securities violations charged. Both appellants say the district court whiffed on multiple fronts, beginning with the court's decision to

admit a critical piece of evidence we alluded to earlier: the Sharp Group's internal accounting system known as the Q system.[8] Next, Gasarch alone claims the district court erred in instructing the jury when it came to the charges against her. Finally, Gasarch mounts a challenge to the sufficiency of the evidence used to hold her liable for violating multiple securities laws.

With the trial-related claims mapped out, we embark on our review of these appellate contentions -- starting with the admission of the Q system evidence.

A. Admission of the Q System Evidence

Anonymity was one of the Sharp Group's primary goals, but at the end of the day, Fred Sharp had a business to run efficiently and a service to provide his clients. He couldn't afford to take his eye off the ball while he orchestrated the ownership shell game with his clients' investments. So, he asked his IT specialist (a character we will introduce soon) to create an encrypted internal ledger, and he dubbed it the Q system. The Q system kept track of all Sharp Group clients' stock holdings, the nominee companies being utilized, the purchases and sales of Sharp Group clients' stocks through those nominee companies, and all transactions for the business -- including payments to clients from their trade proceeds and commissions charged by the Sharp Group.

[4] [5] [6] Gasarch and Friesen argue that evidence pulle from the Q system was admitted without proper

[8] Sharp got this name from the fictional James Bond character "Q" who led the research and development division of the British Secret Service and equipped 007 with gadgets and top-secret tech.

foundation or authentication, or was otherwise inadmissible hearsay.[9] We review these evidentiary challenges for abuse of discretion, *United States v. Paulin,* 13 F.3d 20, 23 (1st Cir. 1994), and "may affirm the district court ruling on any ground apparent from the appellate record," *United States v. Alzanki,* 54 F.3d 994, 1008 (1st Cir. 1995). But before getting into the details of each argument, we mark an important distinction. The authentication of the Q system evidence is a separate and distinct inquiry from the question of admissibility. *Paulin,* 13 F.3d at 24. In other words, "[t]he mere fact that a document is authentic does not necessarily mean that it is admissible in evidence." *Id.* Since an inauthentic document has no basis for being treated as evidence, we treat that question as the logical starting point for our analysis.

1. Authentication

[7] [8] When we say evidence must be authenticated, we mean "the proponent must produce evidence sufficient to support a finding that the item is what its proponent claims it is." *United States v. Blanchard,* 867 F.3d 1, 5 (1st Cir. 2017) (quoting Fed. R Evid. 901(a)). Evidence of authenticity may come from "direct testimony of either a custodian or percipient witness," or from elements of the item itself, such as "[t]he appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circum-

[9] To be sure, appellants Veldhuis, Sexton, and Kelln also think the Q system evidence is problematic because it served as the basis for the district court's disgorgement calculations. In our consideration of the Q system's admissibility, as raised by Gasarch and Friesen, we are likewise responding to the other appellants' similar arguments.

stances." *Id.* (first quoting *Paulin,* 13 F.3d at 23, and then quoting Fed. R Evid. 901(b)(4)).

[9] So, here, appellants claim that the SEC did not provide enough evidentiary information for the court to find that the Q system was indeed the Sharp Group's internal ledger that recorded the alleged fraudulent dealings and subsequent distributions. Specifically, Gasarch and Friesen take aim at the fact that the SEC may have presented a witness who created the Q system but did not present one who personally entered information into the Q system. Additionally, appellants argue that the SEC failed to provide evidence of the method, timing, basis for, or reliability of the entries within the Q system. By contrast, the SEC says it produced multiple witnesses whose testimony laid a proper foundation for finding that the Q system was exactly what the SEC said it was. Draw near as we walk through the testimony of those witnesses to decide whether the district court discretionarily erred in deeming the Q system authentic.

The SEC first names Fedir Nikolayev, the Q system's creator, as an authenticating witness.[10] Nikolayev, a Ukrainian software engineer residing in the Dominican Republic, worked as Fred Sharp's IT guru. In his testimony, Nikolayev explained how Sharp complained to him that Sharp's people struggled using Microsoft Excel, so Nikolayev suggested that he create a unique, web-based accounting system that Sharp could use to keep track of all his transactions. Nikolayev was one of two people (Sharp

[10] Nikolayev did not appear at trial, but his deposition -- which took place earlier in the Dominican Republic -- was recorded and played for the jury.

being the other) who had full access to the Q system. Nikolayev used his Q system credentials to monitor the system and make alterations at Sharp's request -- typically adding other users (like employees and customers) to the system and giving them limited access. Nikolayev testified that the Q system was designed, and used, to record all of the Sharp Group's transactions and monetary proceeds. He also mentioned that Sharp kept the Q system servers in Curaçao, a factoid that segues us to the SEC's next foundational witness.

At trial, the SEC called FBI Supervisory Special Agent Chris Gianakura to testify about the seizure of those Q system servers in Curaçao. Agent Gianakura had boots on the ground in Curaçao when he and "Dutch Police" raided a data center and seized servers hosting the Q system, including hard drives that had stickers on them labeled "Bond." [11] Agent Gianakura also described the legal process to get those Q system servers sent to the United States, which Sharp and his attorneys tried to prevent.

The third and fourth witnesses called in the authentication chain were two former users of the Q system. Roger Knox, a player deeply involved in Sharp's scheme,[12] testified that he knew Sharp used the Q system to keep track of cash *and* securities transactions. Knox also explained that *he* interacted with the Q system personally from 2011 to 2018, including his *practice* of entering information from a

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[11] At trial, the parties stipulated to the fact that the SEC's exhibits containing Q data came from data stored on servers marked "Bond" obtained in Curaçao.

[12] Knox pleaded guilty in a separate (but related) criminal action and has been ordered to pay restitution of $58,046,278.24 to over 8,000 defrauded investors.

stock trade into the Q system less than 24 hours after making the trade. Additionally, Knox conducted his own monthly double-checks of the system, comparing his trade and proceeds records with the Q system to make sure everything added up. The other former Q-system-user-turned-SEC-witness, Kenneth Ciapala,[13] also testified to interacting with the Q system and recording his transactions therein at Sharp's request. Ciapala attested that Sharp told him to enter all trading and wiring information into the Q system, or else Sharp wouldn't do business with him.

[10] With the SEC's foundational evidence laid out, we find it fatal to Gasarch and Friesen's assertion that only Nikolayev's testimony was available for the court's authentication considerations. As we've just outlined, the SEC called three more percipient witnesses with personal knowledge of the Q system -- specifically knowledge of how the SEC seized the system and how members of the scheme used and verified the data therein. Furthermore, we add that the content of disputed evidence "may itself furnish indicia of authenticity." *See Paulin*, F.3d at 24. Entries in the Q system deploy code names tied to members of the scheme and list transactions of stocks during the time frame that the Sharp Group ran its pump and dump schemes. Cf. *id.* (finding a rent receipt authentic, in part, because it bore appellant's name, listed his apartment number, and referred to a time frame matching the offense). All Q data came from servers labeled "Bond" seized in Curaçao and Knox testified that when he entered trades into the Q system, he also assigned beneficiaries to those transactions using code names like "ACCO"

[13] Ciapala also pleaded guilty to similar securities laws violations.

(Veldhuis) and "GARD" (Friesen). Cf. *United States v. Ceballos*, 789 F.3d 607, 618 (5th Cir. 2015) (joining other circuits and finding "evidence of ledgers maintained in furtherance of conspiracies to be adequately authenticated by their distinctive contents and the circumstances of their discovery -- at least when the proponent offers the testimony of a participant in the conspiracy or a witness familiar with its operations").

Putting everything together and giving the requisite deference to the district court's considerable discretionary latitude, we cannot conclude the court abused its discretion in finding that the Q system was what the SEC purported it to be. That is, the evidence produced by the SEC was sufficient to find that the Q system was the internal ledger that the Sharp Group used to keep track of its dealings and distribute the proverbial pie between members of the scheme. *See Blanchard*, 867 F.3d at 8 (finding sufficient foundational testimony while leaving further questions of fact for the jury).

2. Admissibility

As we noted earlier, authenticity and admissibility, while close cousins in the evidentiary family, are nevertheless separate inquiries. We now turn to whether the Q system, though authentic, was inadmissible hearsay as Gasarch and Friesen urge.

Briefly, and undisputed by the parties, because the Q system evidence contained out of court "statements" introduced by the SEC for the truth of the matter asserted, they are quintessential hearsay statements. *See U.S. Bank Tr., N.A. as Tr. for LSF9 Master Participation Tr. v. Jones*, 925 F.3d 534, 537 (1st Cir. 2019) (citing Fed. R. Evid. 801(c), 802). Accordingly, to be admissible, the evidence must fall

under one of the exceptions to the bar against hearsay evidence. At trial, the district court posited that the Q system fell under an exception to hearsay known as the business records exception, *see* Fed. R. Evid. 803(6), and later admitted the Q system into evidence on this ground, *see Sharp II*, 737 F. Supp. 3d at 90.[14]

The business records exception provides that "a record of an act, event, condition, opinion, or diagnosis is not excluded by the rule against hearsay" if certain criteria are met. *Jones*, 925 F.3d at 537 (citation modified). Those criteria are: (1) "the record was made at or near the time by -- or from information transmitted by -- someone with knowledge;" (2) "the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling . . . ;" (3) "making the record was a regular practice of that activity;" (4) "all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification . . . ;" and (5) "the opponent does not show that the source of information or the method or circumstance of preparation indicate a lack of trustworthiness." Fed. R. Evid. 803(6); *United States v. Doe*, 23 F.4th 146, 149 (1st Cir. 2022) (listing criteria).

Gasarch and Friesen challenge the applicability of the business records exception to the Q system evidence and attack the district court's decision from a few different angles. Gasarch argues that

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[14] The court confirmed this determination when addressing the parties' remedies arguments, *Sharp II*, 737 F.

Supp. 3d at 90, because defense counsel pointed out that it wasn't clear whether the court had applied the business records exception or an exception for co-conspirator statements.

Nikolayev's testimony did not satisfy the first three business-records-exception criteria and, alternatively, that the evidence "indicate[s] an utter lack of trustworthiness." Friesen sees the problem slightly differently. He argues that the declaration of SEC expert witness Ryan Murphy did not establish the reliability of the Q system evidence for entries regarding the allocation of stock holdings and profits to individuals. In forming this argument, Friesen concedes that the SEC verified (via Murphy's declaration) Q system evidence related to the sales of stocks by Sharp and his entities, but urges that does not necessarily prove the reliability of the rest of the Q system entries recording how Sharp dished out profits from those sales.

[11] As we walk through both appellants' qualms and the district court's reasoning, "[t]he key question is whether the records in question are 'reliable enough to be admissible.' " *Jones,* 925 F.3d at 538 (quoting *FTC* v. *Direct Mktg. Concepts, Inc.,* 624 F.3d 1, 16 n.15 (1st Cir. 2010)). And, based on the evidence presented by the SEC at trial, we cannot conclude that the district court abused its discretion in admitting the Q system evidence under the business records exception. Here's why.

The district court offered a few justifications when it finalized this evidentiary ruling. It noted that Nikolayev's testimony established that limited persons could make entries into the Q system and that the SEC's comparison of data from the Q system with independent brokerage records "confirmed the reliability of Q data with considerable accuracy." *Sharp II,* 737 F. Supp. 3d at 90. More to this point, the court rattled off the near perfect comparisons between the Q system's transactional data and the

records of independent brokerages for each of the fourteen stocks at issue. *Id.* Additionally, the court found the Q system data "highly accurate" because evidence at trial had "demonstrated that Q system entries were made very close in time to the illegal trading that occurred." *Id.* at 91.

[12] Gasarch's assault on Nikolayev's qualifications to testify likewise do not persuade us that the district court abused its discretion. Contrary to Gasarch's apparent position, a "qualified witness" under Rule 803(6) "need not be the person who actually prepared the record." *Jones,* 925 F.3d at 538 (quoting *Wallace Motor Sales, Inc.* v. *Am. Motor Sales Corp.,* 780 F.2d 1049, 1061 (1st Cir. 1985)). "Rather, a qualified witness is simply one who can explain and be cross-examined concerning the manner in which the records are made and kept." *Id.* (citation modified). Here, Nikolayev served that exact purpose. His testimony explained: (1) Sharp's reasoning for wanting the Q system created; (2) the different levels of access Sharp Group personnel had to the system; (3) how the Sharp Group used the Q system; and (4) that Sharp used the Q system as a regular function of his business. And throughout Nikolayev's deposition, defense counsel was present and afforded an opportunity for cross-examination. Therefore, Nikolayev was "qualified" to testify within the meaning of Rule 803(6).

Friesen's separate challenge to the reliability of the Q system evidence tied to the allocation ofproceeds requires a different approach.[15] To rehash this claim,

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[15] We lump in Gasarch's general challenge to the trustworthiness of the Q system evidence here because she has not specified any specific reason to question the trustworthiness of the evidence. Additionally, here we are intending to consider,

Friesen bifurcates the data within the Q system into two camps: essentially transactional data and allocation data. Transactional data shows purchases and sales of stock, including how many shares and at what price. Allocation data shows where the proceeds went post-sale and to whom. Friesen argues that the SEC only demonstrated the Q system's reliability as to the transactional data, and did not meet such a burden as to the Q system's allocation data.

To resolve Friesen's challenge, we first look to the testimony of the two former Q system users we discussed earlier. Starting with Knox, he explained at trial that he would log onto the Q system server, enter in the data from a trade (such as the company and the quantity sold), and "the system worked out the commission that Fred Sharp was going to charge." Knox also testified that any trade documented in the Q system had a "beneficiary" with a corresponding code name for the account that the trade would be booked to. And, as we mentioned before, Knox said that he cross-verified his accounting ledgers with the Q system monthly to "make sure everything was accurate." As for the other former Q system user, Ciapala, we reiterate that Ciapala testified that not using the Q system was a barrier to doing business with Sharp.

Next, the SEC's expert witness Ryan Murphy testified to his analysis of all the Q records. Murphy first explained how he reviewed the transactional data and confirmed the sales of stocks by Sharp Group nominee companies (again, not the evidence Friesen claims was inadmissible hearsay). From

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and reject, appellants Veldhuis, Sexton, and Kelln's claim that the Q data is untrustworthy.

there, Murphy bridged the gap from transactional data to allocation data and explained the process of internal transfers from a sale of stock to appellants' individual Q accounts. These internal transfers involved a debit from the transactional data and then a matching credit to the allocation data, with each transfer receiving a unique batch identification number and Sharp taking a commission.

In addition *to* this testimony, record evidence establishes the allocation data's reliability due to the financial interests of various parties in getting paid correctly. Sharp's scheme ran for nearly a decade, and his clients (including Friesen) stuck around because they were making money. Recovered text messages involving Friesen revealed that he made $173,000 in one day (to which his partner recommended he go buy a boat) and $500,000 on another occasion. Furthermore, the SEC's evidence demonstrated contemporaneous requests from appellants (including Friesen) to access their allocated funds that matched debits in the same amount recorded in the Q system. For example, an exhibit entered at trial showed Friesen ("GARD') messaging Gasarch ("WIRES") on February 24, 2014, requesting a large sum of cash. The Q system allocation data for the "GARD" account shows a debit under the code "CASH" for $10,500 on February 24, 2014. Similarly, the Q system allocations measured Sharp's cut of the action -- meaning that everyone in on the scheme had reason to maintain the accuracy of the Q system. Cf. Jones, 925 F.3d at 538-39 (inferring the reliability of integrated business records based, in part, on the financial interests at stake). [16]

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[16] Were we to add suspenders on top of this evidentiary belt, the Q system allocation data could have cleared the hearsay bar

Based on the totality of evidence presented to support the reliability of all Q system records, the district court did not abuse its discretion in admitting this evidence under the business records exception.[17] So we soldier on.

B. Jury Instructions

Gasarch alone challenges the jury instructions given at her trial regarding aiding and abetting liability. She reprises here (as she did below) that jury instructions for aiding and abetting liability under 15 U.S.C. § 78t(e) must direct the jury to determine whether she had knowledge of the specific primary violations that she aided -- here being Sharp and his client's concealment of their stock ownership and their pump and dump schemes. So, according to Gasarch, the district court went astray by (1) lowering the scienter standard from knowledge to knowledge or recklessness, and (2) informing the jury that the SEC "[has] to prove that Ms. Gasarch

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as statements of co-conspirators. See Nat'I Union Fire Ins. Co. of Pittsburgh, PA v. W. Lake Acad., 548 F.3d 8, 21 (1 st Cir. 2008) (stating that a court may decline to reverse a decision to admit evidence under the business record exception when an alternate hearsay exception applies). Witness testimony established, and the parties concede, that Sharp or Knox entered the allocation data into the Q system following a trade. Such entries were made in the Q system under cover of code names for the purposes of continuing to conceal ownership and evade securities laws.

[17] Due to our resolution, we need not address Friesen's argument that the admission of the Q system evidence was not harmless. And, for what it's worth, we agree with the SEC that Friesen's argument attempts to challenge the sufficiency of the evidence used to prove liability without having preserved this challenge below. Friesen did not address this waiver problem in his reply brief, and regardless, the point is moot.

understood that her role or conduct was part of an overall activity that was improper" as opposed to proving knowledge of the specific violations. The SEC submits that Gasarch's preferred instruction is inapplicable because it comes from out-of-circuit precedent that pre-dates important changes to the relevant securities statute and because it contains an inaccurate specific knowledge requirement contrary to our caselaw.

[13] [14] We review preserved challenges to jury instructions de novo, reversing a district court's refusal to give a certain instruction only where the requested instruction was "(1) correct as a matter of substantive law, (2) not substantially incorporated into the charge as rendered, and (3) integral to an important point of the case." Davignon v. Hodgson, 524 F.3d 91, 108 (1st Cir. 2008) (quoting White v. N.H. Dep't of Corr., 221 F.3d 254, 263 (1 st Cir. 2000)). If an error occurred, we then must determine whether that error was harmless. *Id.*

Upon our de novo review, Gasarch's challenge to the district court's jury instructions falls short for two reasons: her preferred instruction is incorrect as a matter of substantive law and her concerns were adequately incorporated into the instructions as given. Gasarch first seems to suggest that aiding and abetting liability under the Exchange Act and the Securities Act can only be established by proving knowledge of the primary violation. *See SEC v. Apuzzo*, 689 F.3d 204, 206 (2d Cir. 2012) (listing " 'knowledge' of [the primary] violation" as the second element of the offense (quoting, in part, SEC v. DiBella, 587 F.3d 553, 566 (2d Cir. 2009))). However, as the SEC points out, the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act amend-

ed the relevant provision for aiding and abetting liability to state that "any person that knowingly or recklessly provides substantial assistance to another person in violation of a provision of this chapter . . . shall be deemed to be in violation of such provision to the same extent as the person to whom such assistance is provided." 15 U.S.C. § 78t(e) (emphasis added); *see also Apuzzo*, 689 F.3d at 211 n.6 (acknowledging the addition of "recklessly" to the relevant statute in 2010 but not applying the amended language). Accordingly, as a preliminary matter, Gasarch is incorrect in claiming that the district court's jury instructions needed to include a knowledge standard as opposed to a knowingly and recklessly one.

[15] Additionally, after reading the jury instructions in full, we are persuaded that the instructions as given sufficiently incorporated Gasarch's concerns. Gasarch argues the court needed to instruct the jury that the SEC had the burden of proving she knew about the specific violations she aided and abetted. We read the court's instructions as incorporating this sentiment. The full instructions given to the jury for this offense were that the SEC needed to prove: (1) Sharp or others "were knowingly *[or]* recklessly violating [Rule 10(b)(5) and *Section 17(a)(1)], and for* 17(a)(3), *were* negligently violating the securities law"; (2) "that Ms. *Gasarch* understood that her role or conduct was part of an overall activity that was improper"; and (3) "that Gasarch knowingly or recklessly provided substantial assistance to the violation." (Emphasis added).[18] These elements large-

[18] The court also defined "substantial assistance" as meaning that "Gasarch in some way associated herself with the venture,

ly map onto those we've previously identified for this offense (minus the "recklessly" standard that hadn't been added yet). *See SEC v. Tambone*, 550 F.3d 106, 144 (1st Cir. 2008), reh'g en banc granted, opinion withdrawn, 573 F.3d 54, 55 (1st Cir. 2009), opinion reinstated in relevant part on reh'g, 597 F.3d 436,450 (1 st Cir. 20 10) (en banc).

Gasarch frames the instructions as failing to levy a requirement that she "ha[d] knowledge of the specific securities violation by the primary violator." But her claim overlooks the first and third elements of the challenged jury instructions (which probably explains why she only quoted the second element in her brief). The jury almost certainly considered Gasarch's knowledge, or reckless disregard, of the primary violations because the instructions said so explicitly and listed those primary violations. See Davignon, 524 F.3d at 109.

[16] Before departing from this issue, we recognize that Gasarch also raises an argument related to the district court's use of Apuzzo in its motion to dismiss decision. *See Sharp I*, 626 F. Supp. 3d at 398. In one clause of her opening brief, Gasarch says "[d]espite the trial judge adopting the Apuzzo standard in his opinion on the motions to dismiss, the judge charged the jury on the second element as follows . . ." and proceeds to quote the instruction we've already produced for the reader. Then, in her reply brief, Gasarch claims that the SEC "completely ignores" her argument that "the district court specifically adopted the holding in Apuzzo." But, unlike her opening brief, Gasarch's reply brief goes a half-step

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that she participated in it as something that she wished to bring about, and that she sought by her action to make it succeed."

further and cites two cases that invoke the "law of the case doctrine." *See Arizona v. California*, 460 U.S. 605, 618, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983) (explaining that "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case"); United States v. Matthews, 643 F.3d 9, 12 (1st Cir. 2011) (same).

[17] Yet from our perspective, the SEC's "complete ignoring" of Gasarch's law of the case argument should've come as no surprise to Gasarch considering she (at most) superficially hinted at an argument under this doctrine in her opening brief. Our court has made clear that we do not consider arguments raised for the first time in an appellant's reply brief as such sandbagging "deprives the appellee of an opportunity to respond in writing on the issue." Sparkle Hill, Inc. v. Interstate Mat Corp., 788 F.3d 25, 29 (1st Cir. 2015); *see Seafreeze Shoreside, Inc. v. U.S. Dep't of Interior*, 123 F.4th 1, 23 n.9 (1 st Cir. 2024). Therefore, Gasarch has waived this claim.

In sum, we conclude the district court did not err in its jury instructions related to Gasarch's aiding and abetting liability.

C. Sufficiency of the Evidence

In the final portion of our trial-related appellate contentions, Gasarch asserts that no reasonable jury could have found her liable as either a primary violator or an aider and abettor of securities laws violations based on the evidence presented by the SEC. Because Gasarch properly moved for judgement as a matter of law before the district court, we review her challenge de novo. *SEC v. Lemelson*, 57 F.4th 17, 23 (1 st Cir. 2023).

[18] [19] Throughout our de novo review, we "constru facts in the light most favorable to the jury verdict, draw any inferences in favor of the non-movant, and abstain from evaluating the credibility of the witnesses or the weight of the evidence." *Id.* (quoting Suero-Algarin v. CMT Hosp. Hima San Pablo Caguas, 957 F.3d 30, 37 (1st Cir. 2020)). And in the end, we must ask whether a rational jury could have found in the SEC's favor and set aside the verdict "only if the jury failed to reach the only result permitted by the evidence." *Id.* (quoting Quiles-Ouiles v. Henderson, 439 F.3d 1, 4 (1st Cir. 2006)).

1. Primary Violator

Gasarch claims that "there is no evidence that [she] was involved at all in trading securities or making any statements used by the investing public. She made no representations at all." And while Gasarch may have been the owner of a nominee company used to perpetuate the fraudulent scheme, it was really Sharp, not her, who controlled that nominee company. Additionally, Gasarch claims that "[t]here is not a scintilla of evidence" that she had the "requisite scienter" to violate any of the SEC provisions for which she was charged, nor was there evidence that she "should have known of the [SEC's] *five* percent rule and the ban against 'pump and dump' and ignored it." Putting aside her flirtation with waiver by presenting her claims in such conclusory fashion, we disagree with her contentions, at least as we understand them.

[20] The jury found that Gasarch violated Section 17(a)(3) of the Securities Act which, to repeat, makes it "unlawful for any person in the offer or sale of any securities . . . directly or indirectly . . . to engage in any transaction, practice, or course of business which

operates or would operate as a fraud or deceit upon the purchaser." 15 U.S.C. § 77q(a)(3). Contrary to Gasarch's comment on the "requisite scienter," the Supreme Court determined nearly half a century ago that Section 17(a)(3) does not have a scienter requirement. *See Aaron v. SEC*, 446 U.S. 680, 697, 100 S.Ct. 1945, 64 L.Ed.2d 611 (1980). Instead, the statute "quite plainly focuses upon the effect of particular conduct on members of the investing public, rather than upon the culpability of the person responsible." *Id.* We have also said as much, that "[p]roof of scienter is required to establish violations of . . . [S]ection 17(a)(1), but negligence is sufficient to establish liability under [S]ection 17(a)(2) or [S]ection 17(a)(3)." *SEC v. Johnston*, 986 F.3d 63, 74 (1st Cir. 2021). So, because Gasarch's argument is incorrect off the jump in that the SEC did not need to provide evidence that she knew about the securities violations she committed, we need not consider whether the evidence was sufficient to prove a non-existent element.[19]

Next, Gasarch claims that the SEC failed to produce any evidence that she was involved in any security trading or that she made any statements used by the investing public. The latter point is a dead letter, as Gasarch was found liable under Section 17(a)(3) for her fraudulent conduct and not for making untrue statements -- a possible violation of the separate but related Section 17(a)(2). *See* 15 U.S.C. § 77q(a)(2); *see also Lorenzo v. SEC*, 587 U.S. 71, 77, 139 S.Ct. 1094, 203 L.Ed.2d 484 (2019)

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[19] Gasarch seemingly concedes that the SEC only needed to demonstrate negligence in her reply brief, but this peace between the parties soon crumbled as Gasarch's arguments continue to push a higher, and incorrect, knowledge scienter.

(discussing the differences between Section 17(a)'s three provisions). Having separated the wheat from the chaff, we are left with Gasarch's claim that the SEC failed to prove her involvement in any securities trading, notwithstanding her ownership of a nominee company undeniably involved in the fraudulent scheme.

From the SEC's perspective, Gasarch's appellate asseveration again misses the mark because Section 17(a)(3) covers a wide swath of fraudulent behavior beyond just making transactions. To continue, the SEC also says that Gasarch's role as the owner of a nominee company that was used to trade shares of nine problematic stocks ("problematic" being our shorthand for stocks that were pumped and dumped and whose ownership was impermissibly concealed) and her "other deceptive conduct in connection with the scheme" support the jury's verdict.

[21] We first recognize that, contrary to Gasarch's sweeping statement, the SEC did not need to submit evidence that Gasarch traded securities for a jury to find her liable under Section 17(a)(3). Cf. Johnston, 986 F.3d at 76 (finding sufficient evidence of claims under Sections 17(a)(1)-(3) based on misleading statements made to investors unrelated to trading). Rather, "[a] defendant may be liable under [Section] 17(a)(3) if [s]he undertook a deceptive scheme or course of conduct that went beyond . . . misrepresentations." SEC v. Bio Def. Corp., No. 12-11669, 2019 WL 7578525, at *25 (D. Mass. Sept. 6, 2019) (cleaned up), affd sub nom. SEC v. Morrone, 997 F.3d 52, 62 (1st Cir. 2021).

[22] The SEC provided sufficient evidence from which a reasonable jury could conclude that Gasarch was "engaged in a transaction, practice, or course of

business which operates . . . as a fraud or deceit upon the purchaser of a security." Morrone, 997 F.3d at 62 (citation modified). On a general level, encrypted email correspondence revealed Gasarch's centrality to the scheme as she was considered "the master of finance" within the Sharp Group. And in this role, she wired money across the globe, making sure it got where it needed to go. Digging down a bit deeper into the scheme, SEC witness Knox explained that Gasarch would doctor or create invoices (sometimes incorrectly, which Knox would have to point out and correct) to cover up wire transfers and give them the appearance of legitimacy. For example, the SEC entered into evidence a fax sent to Knox from one of the Sharp Group's nominee companies and an invoice from a large law firm. The fax requested that Knox wire $129,000 to a Citibank account with the beneficiary set as the law firm requesting payment. The SEC presented these documents alongside their metadata records that showed Gasarch as the author of the law firm invoice and as the last editor of both documents just before they were sent to Knox. Moreover, Knox testified that this invoice was not a normal invoice from this law firm, that it appeared to him to be a "patchwork" with the initial recipient altered (as in, the law firm did not provide these services to this Sharp Group nominee), and that it "looked fake . . . like something from a photoshop."

Then *we* have the SEC's evidence regarding Gasarch's ownership *of* one *of* the Sharp Group's nominee companies that traded in nine of the problematic issuers: Peregrine Capital (formerly known as Peaceful Lion, the name we'll be using). The Peaceful Lion account at Knox's firm remitted funds from stock sales to various individuals and entities, including at one point appellant Kelln's doctor to pay

a bill. While Gasarch claims that "every witness . . . said that Fred Sharp controlled" this nominee company, Knox testified to the opposite. Knox said the majority of payment directions pertaining to the Peaceful Lion account came from Gasarch for the benefit of unnamed and hidden individuals. Therefore, the SEC presented evidence that Gasarch actively "engaged" in the deceptive scheme by directing the transfer of funds from the nominee account to the true beneficial owners of the stock. *See Bio Def. Corp*., 2019 WL 7578525, at *25.

Gasarch's claim that she was only an administrative assistant who had no reason to know fraudulent conduct was afoot doesn't fit the facts we have before us. More importantly, her preferred verdict was not "the only result permitted by the evidence." *Lemelson*, 57 F.4th at 23 (citation modified). Between Gasarch's role as the "master of finance" for the Sharp Group, her doctoring of documents to create an air of legitimacy, and her ownership of one of the nominee companies used to perpetuate the fraudulent scheme, there was sufficient evidence before the jury to conclude that Gasarch was engaged in a course of business to defraud and deceive investors.

2. Aiding and Abetting

In addition to finding Gasarch a primary violator of Section 17(a)(3), the jury also found Gasarch liable for aiding and abetting violations of "Sections 17(a)(1), Sections 17(a)(3) of the Securities Act of 1933, or Section 10(b) of the Securities Exchange Act of 1934 and Rule lOb-5(a) and (c)." Gasarch again challenges the sufficiency of the evidence presented by the SEC to support the jury's verdict, similarly asserting (rather than arguing through our caselaw)

that the evidence did not establish that she knew the Sharp Group engaged in securities violations or that she provided substantial assistance to those violations. Distilled, Gasarch claims she "was a functionary who sat in the reception area of an office suite" and nothing more.

Much of the evidence the SEC cites to support the jury's aiding and abetting verdict mirrors the evidence it cited to support the primary violation verdict under Section 17(a) (3). However, as we mentioned in our prior discussion of the jury instructions for aiding and abetting liability, this statute requires proof that Gasarch knowingly or recklessly provided substantial assistance to the fraudulent scheme. *See* 15 U.S.C. § 78t(e); see also Lorenzo, 587 U.S. at 82, 139 S.Ct. 1094. So, to satisfy this higher scienter standard, the SEC highlights additional evidence produced at trial in the form of encrypted messages which we will now walk the reader through. *See Aldridge v. A.T. Cross Corp.*, 284 F.3d 72, 82 (1 st Cir. 2002) ("[T]he plaintiff may combine various facts and circumstances indicating fraudulent intent to show a strong inference of scienter.").

[23] As we discussed when introducing the details of this pump and dump scheme, the Sharp Group paid promotors to pump up the value of their clandestine holdings. In one message thread discussing promotions and payments, Gasarch followed up from a wire request by asking "[i]s for promotion? [sic] . . . I need to find a safe account for wire, if this is a promotion." In another text thread presented at trial, Gasarch received a wire request and responded that, when paying for promotions, she couldn't send too much at a time and that she needed to use a specific bank for the wire. In that same conversation,

when asked if she could send promotion funding sooner, she said she needed to wait five days because "I play safe." In her reply brief, Gasarch takes issue with the SEC's reliance on this evidence without "even attempt[ing] to decipher what [Gasarch] meant in 2014 by the word 'safe.' " Taken in the light most favorable to the SEC, see, e.g., United States v. Condron, 98 F.4th 1, 18 (1st Cir. 2024), the jury could have reasonably concluded "safe" accounts and conduct implicitly acknowledged the existence of "unsafe" accounts and conduct. As in, Gasarch knew that she couldn't use certain accounts or act too quickly when paying stock promoters -- a critical step for the pump and dump schemes' success. *See id.* at 19 (holding a jury could reasonably infer the defendant's intent to defraud based on circumstantial evidence).

The SEC also presented an encrypted email chain between Gasarch and Sharp (using the code names "WIRES" and "BOND") where the two discussed Sharp's concern over apparent money laundering. In that conversation, Sharp asked Gasarch to explain how a disbursement of cash to a client was "a legitimate payment" and wanted Gasarch to prepare a response in case the police ever came snooping around. Gasarch responded with the suggestion that they call the payment a loan, and that they could have the client sign a loan agreement to bolster appearances.

This evidence, in addition to what we've already recounted regarding Gasarch's near-decade long role as the "master of finance" who handled the Sharp Group's wire transfers, is sufficient for a reasonable jury to conclude that she knowingly or recklessly

provided substantial assistance to the commission of securities law violations at the Sharp Group.

III. INTERIVIISSION

To recap, we affirm the district court's evidentiary rulings regarding the Q system, find no error in the district court's jury instructions as given, and ultimately leave Gasarch and Friesen's jury verdicts untouched. With the trial matters in the rear view, we may loop back in appellants Veldhuis, Sexton, and Kelln and proceed to the second half of this collective appeal focusing on the remedial measures ordered by the district court.

IV. ACT TWO

The SEC sought three classes of remedies before the district court: (1) disgorgement and prejudgment interest against all appellants in varying amounts tailored to the profits they received; (2) civil penalties in varying amounts likewise tailored to each appellant's participation in the scheme; and (3) injunctive relief against Sexton, Friesen, and Gasarch. *See Sharp II*, 737 F. Supp. 3d at 73. After a thorough review of the case and the evidence submitted, the district court found appellants jointly and severally liable with Sharp for disgorgement awards capped at the following amounts:

- Gasarch - $2,522,367
- Kelln - $1,582,785
- Sexton - $17,367,474
- Veldhuis - $13,289,897
- Friesen - $11,846,176

Id. at 95. The court did not impose prejudgment interest on the disgorgement awards. *Id.* In addition

to disgorgement, appellants were also ordered to pay civil penalties in the following amounts:

- Gasarch - $296,651
- Kelln - $904,078
- Sexton - $1,562,603
- Veldhuis - $1,562,603
- Friesen - $1,562,603

Id. And beyond monetary remedies, the district court also issued several injunctions against appellants. At a general level (we'll get to the nitty-gritty level later), the court issued: (1) permanent injunctions barring appellants from violating securities laws in the future; (2) specific, conduct-based injunctions preventing appellants from professionally engaging in the national securities market; and (3) injunctions barring appellants from participating in future penny stock offerings. *Id.* at 77-79.

We will discuss each of these remedies levied on appellants, as well as their arguments as to why they cannot remain in place, starting with disgorgement.

A. Disgorgement

Appellants collectively challenge the district court's disgorgement award in practically every conceivable manner. We will address each claim in turn, while scrutinizing the district court's decision and reasoning throughout that process. But first, a bit more on what we mean by disgorgement.

[24] [25] [26] Disgorgement is an equitable reme designed "to strip wrongdoers of their ill-gotten gains" and compensate their victims. *Liu* v. SEC, 591 U.S. 71, 79, 140 S.Ct. 1936, 207 L.Ed.2d 401 (2020). Congress has authorized the SEC to seek, and

district courts to grant, "disgorgement . . . of any unjust enrichment by the person who received such unjust enrichment as a result of such violation." 15 U.S.C. § 78u(d)(3)(A)(ii); *see also id.* § 78u(d) (7). "Disgorgement may only be ordered in an amount that is a reasonable approximation of profits causally connected to the underlying violation." *SEC v. Commonwealth Equity Servs., LLC,* 133 F.4th 152, 171 (1st Cir. 2025) (citation modified). And, in seeking this remedy, the SEC bears the burden of showing that its request is a reasonable approximation of the defendant's unjust enrichment. *Id.* Once the SEC has established a reasonable approximation, "the burden shifts *to* the defendant *to* demonstrate that the amount of disgorgement is *not a* reasonable approximation." SEC v. Navellier & *Assocs., Inc., 108 F.4th* 19, *42 (1st Cir.* 2024) (citation modified).

As we mentioned, between *our* five appellants, we've got a lot of ground to cover starting *with* the availability of the award, a determination we review de novo. *Id.* at 41; see also In re PHC, Inc. S'holder Litig., 894 F.3d 419, 435 (1st Cir. 2018) ("The availability of an equitable remedy presents a question of law engendering de novo review.").

1. Availability of Disgorgement

[27] Disgorgement is a "profit-based measure of unjust enrichment which reflects the foundational principle that it would be inequitable that a wrongdoer should make a profit out of their own wrong." Navellier & Assocs., Inc., 108 F.4th at 41 (citation modified). Thus, the award of disgorgement is "tethered to a wrongdoer's net unlawful profits." *Id.* (quoting *Liu*, 591 U.S. at 80,140 S.Ct. 1936).

Appellants seek an early victory in arguing that once the district court decided that it couldn't determine the amount of ill-gotten gains each appellant received, disgorgement was off the table. In other words, sans proof of profits there cannot be a court order to return any profits.

[28] We disagree with appellants' view of (1) the evidence here of ill-gotten profits and (2) the district court's role in ordering disgorgement. Starting with argument one, we note that in a declaration to the district court, the SEC's expert witness Ryan Murphy explained how he combed through the Q system and other available evidence to calculate each appellant's proceeds derived from sales of the fourteen problematic stocks at issue in this case. Furthermore, as we mentioned earlier, Murphy verified the transactional data within the Q system by comparing it to independent brokerage records, thereby confirming the existence of profits. So, with that evidence of ill-gotten gains on the table, like the district court and in our de novo review, we agree that "disgorgement was available in principle." Navellier & Assocs., Inc., 108 F.4th at 41 (quoting In re PHC, Inc., 894 F.3d at 437).

[29] That said, in raising this disgorgement-error argument, we recognize appellants' deeper concern to be the district court's decision to order appellants jointly and severally liable with ringleader Sharp for their disgorgement awards.

However, unlike the legal question of whether disgorgement is available, *see id.* at 41, we review challenges to the substance of the district court's disgorgement order, including the decision to impose joint and several liability, for abuse of discretion, *id.*

at 42. And that decision is where we shift our focus to next.

2. Joint and Several Liability

When it came time to award disgorgement, the district court faced a dilemma. Q system data, verified by external brokerage records and expert testimony, established that ill-gotten gains were, in fact, generated by the appellants' pump and dump schemes. *Sharp II*, 737 F. Supp. 3d at 93-94. However, the precise moment of receipt for those ill-gotten gains was not always as clear. *Id.* at 91 (considering "the lack of bank records showing actual receipt of funds"). The evidence showed illicit proceeds allocated to appellants' individual Q accounts and appellants spending some of those proceeds, but not all. Therefore, from the district court's point of view, it was entirely possible that "at least a portion of the ill-gotten gains may have never reached the pockets of individual [appellants]." *Id.* at 94.

[30] After considering the evidence, the district court decided that the balance of equities favored awarding disgorgement awards in the amounts sought by the SEC. *Id.* at 91. But the court added a caveat to the SEC's initial request and held each appellant jointly and severally liable with Fred Sharp (who handled all profits until distributed) for their disgorgement amounts. *Id.* at 92. The court justified its decision by explaining that joint and several liability was appropriate in this case because appellants' ill-gotten gains were the product of "concerted wrongdoing." *Id.* More specifically, the court found appellants were co-conspirators in a hub-and-spoke

model with Sharp operating at the hub.[20] *Id.* But, despite finding appellants jointly and severally liable with Sharp, the court nevertheless capped the amount that could be disgorged from each appellant at the amount initially requested by the SEC, based on the Q system data. *Id.* at 92-93. The designations, therefore, did not expand any appellant's liability beyond the SEC's request.

Appellants now band together and argue the district court abused its discretion by holding them jointly and severally liable with Sharp. To appellants, the district court's decision to impose joint and several liability inexplicably belies the "default rule" of individual liability for disgorgement awards. The SEC, for its part, concedes that it never asked the district court to *find* appellants jointly and severally liable and that it would not object to striking these designations while keeping appellants individually liable for the same amounts. Alternatively, the SEC defends the district *court's* determination by arguing appellants' "long-running conspiracy to defraud investors" amounts to concerted wrongdoing suitable of joint and several disgorgement awards.

At this juncture, we must digress briefly to explain why we cannot accept the SEC's attempted olive branch. The SEC says that the joint and several

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[20] The hub-and-spoke model of conspiracy (named after the familiar design of a wheel) involves "a central mastermind, or 'hub,' [who] controls numerous 'spokes,' or secondary co-conspirators. These co-conspirators participate in independent transactions with the individual or group of individuals at the 'hub' that collectively further a single, illegal enterprise." United States v. Newton, 326 F.3d 253, 255 n.2 (1st Cir. 2003) (citing *Kotteakos v. United States*, 328 U.S. 750, 754-55, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946)).

liability designations are unnecessary, and that we could strike them while leaving the disgorgement awards otherwise intact. Appellants disagree and argue that the disgorgement awards could not have been imposed without the court's joint and several designations. When issuing its decision, the court first described joint and several liability as the "[t]hird and most important[ ]" factor "favor[ing] the awarding of the disgorgement amounts requested by the SEC." *Sharp II*, 737 F. Supp. 3d at 92 (first quote); *id.* at 91 (second quote). It then decided that the imposition of prejudgment interest was not equitable because it had already awarded disgorgement and "actual accrual to each of the Defendants [could not] be shown." *Id.* at 94. The court repeated this sentiment, professing that there was an "absence of a precise determination as to the amount of ill-gotten gains actually obtained by the individual co-conspirators in the various conspiracies." *Id.* at 95. After careful review of the court's decision, we take the court to mean that the evidence produced by the SEC was insufficient to award disgorgement on a purely individualized basis beyond what the SEC had proven was actually distributed to each appellant and, therefore, it would not have awarded disgorgement but for the joint and several liability designations.

Regardless, we may decline the SEC's suggestion and refrain from deciding whether the designations can be struck (or, put differently, their necessity) because the district court did not abuse its discretion in fashioning these equitable remedies. *See SEC v. Sargent*, 329 F.3d 34, 41 (1st Cir. 2003) (deferring to a district court's equitable remedy). Here's why. The default rule referenced by appellants (and recognized by the district court, *Sharp II*, 737 F. Supp. 3d at 92

n.16) comes from the Supreme Court's pronouncement in *Liu* v. SEC, 591 U.S. 71, 140 S.Ct. 1936, 207 L.Ed.2d 401 (2020). There, the Court elucidated that joint and several liability is disfavored when awarding equitable remedies because it risks transforming such remedies into penalties by holding defendants liable for profits "accrued to another, and in which they have no participation." *Liu*, 591 U.S. at 90, 140 S.Ct. 1936 (citation modified). However, when making this pronouncement, the Court also unequivocally left open the possibility of joint liability for "partners engaged in concerted wrongdoing." *Id.* at 90-91, 140 S.Ct. 1936 (citing Ambler v. Whipple, 87 U.S. 546, 559, 20 Wall. 546, 22 L.Ed. 403 (1874)). Furthermore, our court has previously examined, and upheld, the application of joint and several liability for a disgorgement award where appellants engaged in concerted wrongdoing. *See Navellier & Assocs., Inc.*, 108 F.4th at 43 (citing *Liu*, 591 U.S. at 90, 140 S.Ct. 1936). And here, we cannot conclude that the district court abused its discretion in applying this limited and recognized exception.

[31] In its disgorgement order, the district court found that each appellant had conspired with Sharp to commit securities fraud and had received illicit gains as a result. *Sharp II*, 737 F. Supp. 3d at 92. For all the ink spilled over joint and several liability in appellants' briefing, no one broaches the question of how or why involvement in a conspiracy to commit securities fraud does not constitute "concerted wrongdoing" between co-conspirators. We struggle to think of a clearer example. *See SEC v. Johnson*, 43 F.4th 382, 392-93 (4th Cir. 2022) (applying *Liu*'s "concerted wrongdoing" exception to an entity and control person who shared "coordinated roles in perpetrating the scheme"); *see also United States v. Ochoa*, 58

F.4th 556, 561 (1 st Cir. 2023) (explaining the rationale behind joint and several restitution orders for co-conspirators who defrauded investors).

Accordingly, we reject appellants' position that the district court abused its discretion by deviating from the default rule for disgorgement awards in this case. As all parties recognize, instances of concerted wrongdoing can rebut the general rule disfavoring joint and several disgorgement awards, *see Liu*, 591 U.S. at 90, 140 S.Ct. 1936, and no one has suggested that the district court erred in finding the existence of a hub-and-spoke conspiracy which, in turn, supports its application of the concerted wrongdoing exception.

Appellants' remaining arguments are unavailing. Each appellant compares their circumstances to those presented in a similar matter before our court. In BioPoint, Inc. v. Dickhaut, 110 F.4th 337, 353 (1st Cir. 2024), we concluded the district court abused its discretion in holding Dickhaut, "an individual, non-owner, non-director employee," jointly and severally liable with his profiting corporate employer. There, we observed "[m]ultiple red flags identified in *Liu*" disfavoring joint and several liability. *Id.* at 352. It was undisputed that the profits attributable to the illicit scheme were not commingled and accrued solely to Catapult (Dickhaut's employer) rather than to Dickhaut. *Id.* We concluded that Dickhaut's high-ranking position and mere collaboration with the corporate entity, without a determination of how much he benefitted from the scheme, made the joint and several disgorgement award inconsistent with equitable principles because it ordered Dickhaut to repay profits reaped by another. *Id.* at 353.

Returning to the issue at hand, we are in a far better position to determine appellants' receipt of ill-gotten gains than we were in *BioPoint.* Here, the district court did the appropriate leg work to determine that each appellant enjoyed the fruits of the scheme based on the amounts allocated to their individual Q accounts. The evidence established that the funds credited to appellants' Q accounts were held by the Sharp Group until requested in cash or wired to their desired destinations. Moreover, the caps imposed by the district court ensure that each appellant only pays up to the amount allocated in their individual Q account and, thus, "not [profits] which have accrued to another, and in which they have no participation." *Liu*, 591 U.S. at 90, 140 S.Ct. 1936 (citation modified); Cf. *BioPoint,* 110 F.4th at 353 (reversing a determination that ran afoul of *Liu*). Therefore, appellants' state of affairs presents meaningful differences from those red flags identified in *BioPoint,* and the imposition of joint and several liability did not transform this "equitable profits-focused remedy into a penalty." *See Liu*, 591 U.S. at 90, 140 S.Ct. 1936.

[32] Before departing from this issue, we must address one more appellate contention raised only in Veldhuis, Sexton, and Kelln's opening brief.[21] These

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[21] Appellants Veldhuis, Sexton, and Kelln also argue that joint and several liability was improper because a default judgment and disgorgement order had already been imposed against Sharp, and the district court lacked the authority to expand that judgment (by holding him jointly and severally liable) without request from the SEC and without notice to Sharp. The problem for appellants is that this is a claim for Sharp and Sharp only, considering that only his default judgment is being amended and the joint and several liability designations do not prejudice appellants in any way (keep this

appellants assert that it was legal error for the court to impose joint and several liability sua sponte.[22] We disagree.

Appellants inform us that "[s]ua sponte remedies are generally disfavored," and that the SEC never requested this designation at any stage of litigation. The SEC does not claim to have raised the issue to the district court, but it "does not believe the designation prejudices the appellants in any way." Moreover, the SEC describes the district court's sua sponte determination as an exercise in caution, that the court was merely "dotting [its] is and crossing [its] Vs."

[33] This precise question has escaped our review thus far. We'll begin our analysis with a general observation borrowed from a different sua sponte-related question: the authority to act sua sponte "should be exercised sparingly and with great circumspection." *McCov* v. *Town of Pittsfield,* 59 F.4th 497, 504 (1st Cir. 2023) (citation modified). Sticking with generalities involving sua sponte decisions (which are

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in mind). Thus, appellants have no basis for raising this argument.

And, we hasten to add that the default judgment and disgorgement order against Sharp remained amendable by the district court because that judgment resolved "fewer than all the claims or the rights and liabilities of fewer than all the parties" involved and "d[id] not end the action." Fed. R. Civ. P. 54(b); see also Fed. R. Civ. P. 55(c), Advisory Committee Notes Amendment 2015 ("Until final judgment is entered, Rule 54(b) allows revision of the default judgment at any time.").

[22] Sua sponte "is Latin for 'of one's one accord' and legalese for actions taken by a court without prompting by a party." Calderón-Amézquita v. Rivera-Cruz, 158 F.4th 54, 65 (1st Cir. 2025).

all appellants have given us to work with), our chief concern is whether the parties were afforded adequate notice that the district court might act and whether any lack of notice was prejudicial. Cf. *Calder6n-Am6zq_uita* v. *Rivera-Cruz,* 158 F.4th 54, 67 (1st Cir. 2025) (reviewing a district court's sua sponte decision to convert a motion to dismiss into a motion for summary judgment).

[34] As things played out here, even if appellants lacked adequate notice that joint and several liability was on the table, the district court's sua sponte designations did not prejudice appellants. The SEC's motion for remedies laid out its reasoning and the amounts it sought in disgorgement. The district court then ordered disgorgement awards capped at those requested amounts. *Sharp II,* 737 F. Supp. 3d at 93. Its sua sponte decision could only benefit appellants to the extent Sharp picks up any balance left on the remedial tab. Moreover, appellants have not argued that they would have done anything differently had they been provided notice that joint and several liability was an option. Cf. *Calderón-Amézquita,* 158 F.4th at 70 (finding prejudice, in part, because appellant presented the district court with a newly-material piece of evidence one day after a sua sponte ruling). Therefore, for the limited purposes of these designations, as it pertains to these appellants, the district court did not abuse its discretion in imposing joint and several liability sua sponte.[23]

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[23] To remove any residual doubt, we expressly decline to wade through the meandering possibilities where a district court might abuse its discretion in ordering joint and several liability for a disgorgement award sua sponte, to the extent such an order could prejudice future litigants.

Considering the district court's prudent analysis and our reasoning just offered, we conclude, based on the totality of the circumstances here, that the court did not abuse its discretion in holding appellants jointly and severally liable for their disgorgement awards. *See Navellier & Assocs., Inc.,* 108 F.4th at 43-44.

3. Disgorgement Amounts

[35] With the matter of joint and several liability put to rest, the question of whether the district court abused its discretion in calculating the amounts to *be disgorged* requires our immediate attention. To remind the reader, "disgorgement may only be *ordered in* an amount *that* is a reasonable approximation of profits causally *connected* to the underlying violation." *Commonwealth Equity Servs., LLC,* 133 F.4th at 171 (citation modified). And it is the SEC's burden to prove its request is a reasonable approximation of the defendant's ill-gotten gains. *Id.* (citing SEC v. Happ, 392 F.3d 12, 31 (1st Cir. 2004)). But, once the SEC has established its reasonable approximation, "the burden shifts to the defendant to demonstrate that the amount of disgorgement is not a reasonable approximation." Navellier & Assocs., Inc., 108 F.4th at 42 (quoting Happ, 392 F.3d at 31). Lastly -- and critical to our forthcoming discourse -- "[t]he risk of uncertainty in calculating disgorgement should fall on the wrongdoer whose illegal conduct created that uncertainty." *Id.* (quoting Happ, 392 F.3d at 31).

For the most part, appellants' arguments on this front resemble one another sufficiently to be collectively considered. But to the extent they differ, we address those individualized concerns next. Appellants call in unison the refrain that the SEC failed to

provide any evidence that they "actually received" the funds at issue. To support their position on disgorgement, they recite the district court's seemingly contradictory reasoning for denying prejudgment interest: that the Q system evidence "does not show that ill-gotten gains have been obtained and retained by the individual [appellants], much less in the amounts requested by the SEC." *Sharp II*, 737 F. Supp. 3d at 94. Likewise, each appellant disparages the district court's order because the SEC failed to produce any bank records confirming the funds were disbursed from the Q system and reached appellants.[24]

When the district court faced the issue of actual receipt, it acknowledged the missing links of evidence that would have fortified the SEC's requests. See *id.* at 91. However, the district court concluded "that the balance of equities favor[ed] the awarding of the disgorgement amounts requested by the SEC." *Id.* The court reasoned that the SEC had demonstrated the "Q data's high degree of internal accuracy as to the proceeds generated" which "counsel[ed] a similar finding of accuracy as to its figures regarding the money going into the [appellants'] personal Q accounts." *Id.* In addition, the court applied the requisite burden-shifting framework, first holding the SEC to its required showing before concluding appellants had failed to mount a satisfactory rebuttal. *Id.* From our review, the district court did not abuse its discretion in weighing the equities and applying

[24] We note here that Veldhuis, Sexton, and Kelln also challenged the district court's order from the angle that it relied on inadmissible hearsay -- the Q system evidence. For the reasons given above, we reiterate the district court did not err in admitting and relying on this evidence.

our burden-shifting framework to the SEC's disgorgement requests. We'll break down our conclusion step-by-step.

[36] The SEC first needed to produce "a reasonable approximation of profits causally connected to the underlying violation." *Commonwealth Equity Servs., 133* F.4th at 171 (citation modified). To do so, it synthesized the Sharp Group's internal ledger: the Q system. To remind the reader, the Q system data contained two important metrics: transactional data and allocation data. The transactional data (verified by external brokerage records) recorded transactions in the fourteen problematic stocks and how much money was generated. The allocation data then showed where the generated money went and, more importantly, to whom.

In its motion for remedies, the SEC reported the amounts allocated to each appellant's individual Q account (designated by code names). It also took the crucial step of recounting the evidence of actual disbursements made at different appellants' requests and denoting where those requests later appeared as charges in the Q system. We see this evidence as the district court did, verifying that the individual Q accounts functioned "just like a bank account would." *Sharp II*, 737 F. Supp. 3d at 91. Proceeds from illicit trades were credited to appellants' Q accounts from which they could request cash, wire transfers, and even monthly account statements. Accordingly, the SEC met its burden to provide a "reasonable approximation of profits causally connected to the violation." Navellier & Assocs., Inc., 108 F.4th at 43.

Once the SEC met its burden, the duty to produce evidence to the contrary thus shifted to appellants, *id.*, but they declined the opportunity to do so. *See*

Sharp II, 737 F. Supp. 3d at 91. Instead, below and on appeal, appellants stake their claim on the SEC's failure to meet its initial burden by relying on the Q system evidence. Appellants did not, for example, produce evidence that the amounts allocated to their Q accounts went to someone besides them or otherwise prove that they did not have access to the funds as the evidence suggests. The failure to do so left the disgorgement ball in their court, and allowed for the district court to permissibly order disgorgement in the amounts reasonably approximated by the SEC.

To tie a bow on this burden-shifting exercise, we remind the reader that "[t]he risk of uncertainty in calculating disgorgement should fall on the wrongdoer whose illegal conduct created that uncertainty." Navellier & Assocs., Inc., 108 F.4th at 42 (quoting Happ, 392 F.3d at 31). Sharp built his enterprise from the *shadows* of anonymity. He charged a *lucrative* price for his services and could do so because he reaped exorbitant returns and kept his clients out of jail. Knox testified that the scheme was designed to get clients cash or wire payments "without any records." Our precedent and burden-shifting framework does not reward wrongdoers for successfully evading a paper trail. *See Happ*, 392 F.3d at 31 ("[D]oubts are to be resolved against the defrauding party." (quoting *SEC v. MacDonald*, 699 F.2d 47, 55 (1st Cir. 1983))). Once the SEC presented the district court with a reasonable approximation, even though it came from a unique source in the Q system, any lingering uncertainty fell on appellants as it was their scheme that built the uncertainty.

[37] In making this determination, we also disagree with appellants' complaint that the SEC failed to produce bank records showing receipt of the ill-gotten

gains. Undeniably, a concrete stack of bank records would have made the district court's work (and ours) simpler, but the district court correctly noted that the production of bank records "has never been declared a sine qua non"[25] to finding an SEC disgorgement calculation reasonable. *Sharp II*, 737 F. Supp. 3d at 91 (citing *SEC v. Lazare Indus.*, 294 F. App'x. 711, 715 (3d Cir. 2008)). Indeed, speaking generally, the SEC has the authority to seek disgorgement of profits resulting from securities violations where individual bank records would not necessarily assist their approximation. *See Happ*, 392 F.3d at 31-32 (calculating disgorgement for insider trading based on the difference in value of a stock from when it was sold to when the public became privy to the inside information). And for the calculation here, the SEC provided (1) records of the appellants' Q accounts along with (2) testimony from Knox about how disbursements occurred and (3) expert analysis from Murphy explaining the Q system and how the Q data allowed him to reasonably approximate the amounts to be disgorged. Cf. Lazare Indus., 294 F. App'x. at 715. Sometimes you've got to work with what you got, so long as what you've got amounts to a reasonable approximation. *See Commonwealth Equity Servs., 133* F.4th at 172 (commenting that " 'a reasonable approximation' obviously need not be exact").

i. Gasarch

[38] Moving on from appellants' concerted arguments, Gasarch offers a few more particularized claims tailored to her disgorgement award. These

[25] The phase "sine qua non" is Latin for something that is absolutely essential. For example, rebutting the SEC's reasonable approximation for disgorgement is a sine qua non to avoiding repayment.

claims are a bit of a grab bag, sprinkled throughout her brief in collaboration with claims we've already discussed. But we recognize from her brief she asserts that the SEC failed to prove that any payments made to her were causally connected to the profits of the fraudulent scheme. Also problematic, from Gasarch's vantage, is that the individual Q account assigned to her by the SEC and the district court used the code name "PEAC" or "PERE" while "every witness testified that [Gasarch] was referred to as 'WIRES.' "

To begin from that last point on code names, Gasarch's report of the record does not match reality. In an email thread produced by the SEC at trial, an unknown individual (code name "LION") sent a wire request to "WIRES" at 11:49 a.m. A prompt response (sent to code name "77") arrived from "PEACE" at 11:52 a.m. recommending caution when wiring too much money for promotions. The unknown individual (now back under code name "LION") carried on the conversation with "WIRES" at 11:56 a.m. And "PEACE" responded a minute later in a message sent to "77." Additionally, the SEC's expert Murphy stated that Gasarch was the initial recipient of this wire request from "LION." Several individuals involved in the Sharp Group had more than one code name, and this exchange shows Gasarch coordinating wire transfers (her known role in the scheme) under both the code names "WIRES" and "PEACE." The conversation progressed seamlessly between four different code names (representing only two different people) in less than ten minutes.

Furthermore, in 2014, the Q account "PEAC" stopped receiving funds, but "PEKE" readily took its place. Much like with "PEAC," Gasarch argues that

the SEC failed to produce evidence of her connection to the "PEKE" Q account. Again, the evidence tells a different story. First, in response to this claim before the district court, the SEC presented a message from Sharp regarding the beneficiary of an amount of money (referenced as "9k" without clarifying the denomination as U.S. or Canadian dollars). In that February 2014 exchange (around when the "PEAC" account ceased receiving funds), an unknown party messaged Sharp "Beneficiary: yvonne gasarch, vancouver." Sharp replied, "Ok. Yvonne is account pere. I have amended nit for u." The SEC also provided a similar February 2014 exchange in which Sharp told an apparent broker "Wires to yvonne r charged to pere; have changed."

On this front, the SEC had even more ammo in its clip in the form of a message exchange between Sharp and Gasarch. Here's how that *back* and forth played out. Sharp reached *out to Gasarch* (in a "BOND" to "WIRES" communication, subject line "Q") asking "What is $55k tt to andrew kaplan from pere?" Gasarch replied, *"It* is mine." Perhaps unsatisfied by this answer, Sharp followed up, "Who is kaplan? What is wire for?" Gasarch responded, "This wire is he borrowed my money [sic], I will make $5k for 2 months." If the reader remains unconvinced, the SEC also provided a list of outgoing transfers from the "PEAC"/"PERE" Q account to businesses operated by Gasarch and/or her family members. In light of these evidentiary ties, we are not convinced that the district court "committed a meaningful error in judgment" by finding that Gasarch's disgorgement amount could be tethered to the profits allocated in the "PEAC"/"PERE" Q account. *See Navellier & Assocs., Inc.*, 108 F.4th at 42 (citation modified). With her connection to the "PEAC"/"PERE" Q account

established, we must next determine whether the SEC met its burden of proving that the funds allocated to the account were causally connected to securities fraud. *See Commonwealth Equity Servs., 133* F.4th at 171. To reiterate Gasarch's position in her words, "[o]bviously, Mrs. Gasarch was a long-term employee and would be entitled to salary and whatever bonuses determined by Mr. Sharp" and "[c]learly, given the length of time and the number of accounts and activities, Mrs. Gasarch was compensated for supporting Mr. Sharp in his legitimate business activities." The SEC, meanwhile, says it proved that Gasarch was more than "an unwitting secretary performing legitimate services," and that she worked at the hub of the fraudulent scheme where she committed her own securities violations while aiding and abetting others. Furthermore, the SEC emphasizes the fact that Gasarch did not present any evidence that the money allocated to the "PEAC"/"PERE" Q account came from legitimate services, and, therefore, she failed to rebut the SEC's reasonable approximation.

Unlike her co-appellants, Gasarch's share of the pie came from Sharp each month as a cut of the commission fees paid to Sharp's Q account. In other words, Sharp received a commission from each transaction and then paid Gasarch from his commissions. As we discussed in Act I, Gasarch committed securities violations and aided and abetted other violations, particularly Sharp's. Likewise, as the district court explained, the jury heard and rejected Gasarch's defense that she was merely an innocent secretary providing legitimate services to a fraudster. *Sharp II*, 737 F. Supp. 3d at 85. The fact that Sharp allocated profits derived from his commissions earned on fraudulent dealings to Gasarch's personal Q

account satisfies the SEC's initial burden. Cf. *Commonwealth Equity Servs., 133* F.4th at 172 (explaining why the SEC failed to meet its "reasonable approximation" burden due to an improper inference).

The glaring problem for Gasarch then becomes that she hasn't provided any evidence that the payments she received were not causally connected to her securities violations. *See Navellier & Assocs., Inc.*, 108 F.4th at 43 ("Appellants failed to demonstrate that any of the advisory fees paid to them were unconnected to [the scheme]."). And while this dissociation might appear clear or obvious to Gasarch, we cannot agree. True, an employee can reasonably be expected to be paid for their work and even receive bonuses that their employer sees fitting. But here, the SEC has shown that her role with the Sharp Group perpetuated a complex securities fraud scheme, making it reasonable to conclude the payments she received (derived from commissions of the fraudulent transactions) amounted to ill-gotten gains. Gasarch had the opportunity to present evidence to the contrary -- that at least some portion of her payments came from legitimate activity rather than wrongdoing -- but she did not. Cf. *Commonwealth Equity Servs., 133* F.4th at 172 (outlining the defendant's countervailing arguments to the SEC's causation evidence).

ii. Veldhuis, Sexton, and Kelln

Much like Gasarch, appellants Veldhuis, Sexton, and Kelln assert that the SEC never produced evidence that the stock transactions supporting the disgorgement awards "arose from any violation of the federal securities laws." And because this trio raises this argument divorced from any guiding legal

precedent, we read their claim as challenging whether the evidence has established the requisite causal connection between the disgorgement awards and the underlying securities law violations. *See Navellier & Assocs., Inc.*, 108 F.4th at 43. The SEC responds that the terms of Veldhuis and Sexton's consent judgments preclude this claim. And for Kelln, her consent judgment and the evidence produced at her co-appellants' trials readily supports the disgorgement award.

[39] [40] "It is uncontested that a party to a consent judgment is thereby deemed to waive any objections it has to matters within the scope of the judgment." *Coughlin v. Regan*, 768 F.2d 468, 469-70 (1st Cir. 1985); see also SEC v. *Hallam*, 42 F.4th 316,325 (5th Cir. 2022) ("Ordinarily, a party may not appeal an issue decided by a consent judgment."). After reviewing the scope of appellants' consent judgments entered by the district court, we find the arguments raised here waived via the terms of those judgments. *Cf. Hallam*, 42 F.4th at 326 (finding an argument against the SEC's ability to seek disgorgement foreclosed by the terms of a consent judgment). In the consent judgments entered against Veldhuis, Sexton, and Kelln, each appellant agreed they would not contest liability under the claims filed by the SEC. The claims filed by the SEC explicitly set forth grounds for appellants' liability under Sections 17(a)(1) and (3) of the Securities Act, Sections 5(a) and 5(c) of the Securities Act, and Section 10(b) of the Exchange Act.[26] For Veldhuis and Sexton, those grounds were that they used the Sharp Group's services to obfuscate their ownership of shares in the

[26] The amended complaint also claimed Veldhuis and Sexton were liable for violating Section 13(d) of the Exchange Act.

fourteen problematic stocks later used to calculate their disgorgement awards. For Kelln, they were that she fraudulently concealed the identity of Sharp Group clients (who were selling large quantities of stock) by routinely splitting up shareholdings into less than five percent blocks to be held by various nominee entities. Accordingly, we see appellants' challenge that the SEC failed to prove that the disgorgement awards were causally connected to any violation of federal securities laws as an impermissible attempt to contravene the agreements of their consent judgments. *See Hallam*, 42 F.4th at 326.

Appellants' counters do not persuade us differently. They assert that they "simply agreed to not contest liability" and that they did not "agree to accept the SEC's allegations or otherwise bind themselves to the SEC's position." But we cannot read the consent judgments so narrowly as to effectively entertain a backdoor trial on the merits. *See Swift & Co. v. United States*, 276 U.S. 311, 324, 48 S.Ct. 311, 72 L.Ed. 587 (1928) (explaining that a decree "rendered by consent is always affirmed, without considering the merits of the cause" (citation modified)). Once appellants agreed not to contest liability for the purposes of determining disgorgement, the district court acted within its discretion in accepting the grounds offered by the SEC in its complaint for establishing that liability, notwithstanding appellants' objection that the judgments lack certain language. *See SEC v. Engler*, No. 1:20-cv-1625, 2022 WL 4596745, at *6 (E.D.N.Y. Sept. 30, 2022) ("When a defendant agrees to entry of a consent judgment with the SEC and agrees not to challenge the details of the SEC's complaint, courts accept the allegations in the complaint to be true when deciding the SEC's subsequent motion for monetary relief." (citation modi-

fied)); *SEC v. Rooney*, No. 11 C 8264, 2014 WL 3500301, at *2 (N.D. Ill. July 14, 2014) ("Pursuant to the consent judgment, the [c]ourt will accept the allegations in the complaint as true for the purpose of determining appropriate relief."); *see also Coughlin*, 768 F.2d at 470 (holding that the right to appeal a consent judgment must be unequivocally reserved and "will not be presumed").

Likewise, we do not read the consent judgments' unequivocal preservation of the right to challenge any requested remedies as taking appellants' appellate claims beyond the scope of the consent judgments. The consent judgments' terms preserved appellants' ability to challenge the SEC's calculation of how much money arose from the sales in the fourteen stocks, or even better, permitted appellants to provide evidence rebutting the SEC's approximations. Appellants may not (despite their best efforts) argue that they were not "involved in the underlying transaction[s]" or that the transactions were legal. They've already agreed to those determinations and cannot fit that square liability peg into the round remedies hole. *See Hallam*, 42 F.4th at 325-26.

Thus, for all appellants, we conclude the district court did not err in calculating the disgorgement awards. The court aptly applied our burden-shifting framework and placed the risk of uncertainty on those responsible for any uncertainties that may remain. *See Navellier & Assocs., Inc.*, 108 F.4th at 42.

4. Statute of Limitations

Next, all appellants argue that the applicable statute of limitations forecloses the SEC's disgorge-

ment requests.[27] This argument comes down to whether five or ten years is the right window for calculating ill-gotten gains, which will be determined by the retroactive effect given to the National Defense Authorization Act ("NDAA") of 2021. See William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 6501, 134 Stat. 3388, 4626 (codified in part at 15 U.S.C. § 78u(d)(8)(A)). The district court discussed this matter at length, recognizing that it was one our court had yet to weigh in on. *Sharp I*, 626 F. Supp. 3d at 372. We review the district court's interpretation de novo. *Lattab v. Ashcroft*, 384 F.3d 8, 14 (1st Cir. 2004). Like our previous discussion, Gasarch offers a personal twist on this argument based on the unique results of her jury trial -- a claim we will address after explaining why we view the NDAA as applying retroactively to appellants' disgorgement awards.

To address appellants' arguments, we need to lay a bit more foundation. Appellants claim that "[a]t the time of all the conduct alleged in this case," the SEC had five years from the time its claim accrued to file actions seeking disgorgement. Appellants pull their preferred statute of limitations from 28 U.S.C. § 2462 and the Supreme Court's holding in *Kokesh v. SEC*, 581 U.S. 455, 467,137 S.Ct. 1635, 198 L.Ed.2d 86 (2017). But, in the interim between the Court's holding in *Kokesh* and when the SEC brought this enforcement action on August 5, 2021, Congress

[27] Friesen states in a footnote of his brief that he joins his fellow appellants in this argument. Due to important distinctions between the circumstances of his appeal compared to Gasarch's, we assume he has joined Veldhuis, Sexton, and Kelln's position on the relevant statute of limitations.

renewed the NDAA on January 1, 2021. *Sharp I*, 626 F. Supp. 3d at 371.

The amended statutory language states that the SEC may bring a claim for disgorgement "not later than 10 years after the latest date of the violation that gives rise to the action or proceeding in which the [SEC] seeks the claim if the violation involves conduct that violates" certain scienter-based offenses. 15 U.S.C. § 78u(d)(8)(A)(ii)(IV). And the NDAA amendments provide that this provision "shall apply with respect to any action or proceeding that is pending on, or commenced on or after," January 1, 2021. National Defense Authorization Act § 6501(b), 134 Stat. at 4626.

All parties agree that the NDAA established a new statute of limitations for the specific remedy of disgorgement for scienter-based securities violations; however, appellants resist a retroactive application of this statute for ill-gotten gains procured between five and ten years before the SEC initiated its claim. In support of this position, appellants emphasize the two distinct ways Congress may alter a statute of limitations window retroactively. One method is for Congress to extend an existing statute of limitations pertaining to conduct still ripe for an enforcement action. But, appellants continue, the enforcement action here pertains to conduct that had gone stale by the time the SEC brought its case -- that is, conduct occurring more than five years before August 5, 2021, which they say would have been forgiven and forgotten if not for the retroactive extension of the statute of limitations. And appellants believe this latter category of retroactivity cannot be applied to the facts of this case given the relevant statutory language and our binding caselaw. The SEC reads

the NDAA differently and informs us that every court to have considered this question has rejected appellants' position.

[41] [42] We need not conduct this inquiry in the dark, as our caselaw, our sister circuits, and the district court installed floodlights on our path forward. We first note that "[t]here is no doubt that Congress has the raw power to enact statutes that operate retroactively." *Lattab*, 384 F.3d at 14. However, we employ a presumption against giving retroactive effect to "statutes burdening private rights unless Congress ha[s] made clear its intent." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994). To rebut this presumption, "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.' " *SEC v. Ahmed*, 72 F.4th 379, 400 (2d Cir. 2023) (quoting *Landgraf*, 511 U.S. at 269-70, 272, 114 S.Ct. 1483). If Congress has made its retroactivity intentions clear, our inquiry ends, and we enforce the statute as written. *Lattab*, 384 F.3d at 14. But if the statute lacks a clear directive, we then ask "whether the application in question would have an impermissibly retroactive effect." *Id.* If it does, the presumption against retroactivity holds. *Id.* at 14-15.

[43] The NDAA's disgorgement amendment contains an explicit retroactivity mandate that the ten-year statute of limitations "shall apply . . . to any action or proceeding that is pending on, or commenced on or after, the date of enactment of this Act." National Defense Authorization Act § 6501(b), 134 Stat. at 4626. As the SEC points out, and appellants do not dispute, courts have uniformly

applied the ten-year window retroactively to actions that were pending on January 1, 2021. *See Ahmed*, 72 F.4th at 400; *Hallam*, 42 F.4th at 335. While appellants say the "pending on" language is irrelevant to our analysis, because the SEC undeniably commenced this action "after" January 1, 2021, this contention jumbles the question posed. Our task is to decide whether Congress clearly indicated its intent to give the NDAA a retroactive effect. *Lattab*, 384 F.3d at 14. And here, Congress did just that by extending the ten-year statute of limitations to all actions and proceedings "pending on, or commenced on or after," January 1, 2021. National Defense Authorization Act § 6501(b), 134 Stat. at 4626; *see Landgraf*, 511 U.S. at 259-60, 114 S.Ct. 1483 (using "shall apply to all proceedings pending on or commenced after the date of enactment" as an example of text carrying a retroactive effect); *Ahmed*, 72 F.4th at 400 (presuming Congress ascribed a particular meaning to this specific language as previously defined by the Supreme Court).

Furthermore, we agree with the district court's commonsense approach to this question. If we were to agree with appellants that the ten-year statute of limitations window only applied retroactively to actions pending on January 1, 2021, but not actions commenced on or after that date, we'd sign off on some less than logical outcomes. For instance, an SEC action under the same statutory scheme filed *on* December 31, 2020, could seek *disgorgement for* conduct occurring before January 1, 2016, but an identical action filed on January 2, 2021, targeting the same conduct would be *untimely*. Thus, if we were to adopt appellants' approach, the SEC could have sought disgorgement for pre-January 2016 conduct only if it filed the present action before the

NDAA gave it authority to do so. We decline to read the statute as producing this absurd result. *See Bostock v. Clayton Cnt_v., Ga.*, 590 U.S. 644, 789 n.4, 140 S.Ct. 1731, 207 L.Ed.2d 218 (2020) (Kavanaugh, J., dissenting) (explaining that the absurdity canon "tells courts to avoid construing a statute in a way that would lead to absurd consequences").

Appellants' remaining sub-arguments to the contrary do not sway us, either. Appellants compare the Sarbanes-Oxley Act with the NDAA to suggest that because other courts have found the former does not apply retroactively, neither should the latter. While appellants refer to the statutory text as "virtually identical," they overlook two crucial differences that operate against their claim. As we've already mentioned, the NDAA's retroactivity command references actions "pending on, or commenced on or after" the enactment date. National Defense Authorization Act § 6501(b), 134 Stat. at 4626. Meanwhile, the Sarbanes-Oxley Act provides that it "shall apply to all proceedings addressed by this section that are commenced on or after the date of enactment." Public Company Accounting Reform and Investor Protection Act of 2002, Pub. L. No. 107-204 § 804(b), 116 Stat. 745, 801 (codified in part at 28 U.S.C. § 1658(b)).[28] To perhaps state the obvious, the Sarbanes-Oxley Act provision does not explicitly cover actions pending on the date of enactment.

We do not point out this difference with our noses in the air. The use of "pending on, or commenced on or after" is the type of "unambiguous language that

[28] For the purposes of today's argument, we assume without deciding that appellants are correct, and this Sarbanes-Oxley Act provision does not apply retroactively -- a question not before our court.

the Supreme Court has asserted would amount to an express retroactivity command." In re Enter. Mortg. Acceptance Co., Sec. Litig., 391 F.3d 401, 406-07 (2d Cir. 2004) (citing *Landgraf*, 511 U.S. at 255-56 & n.8, 114 S.Ct. 1483, and *Martin v. Hadix*, 527 U.S. 343, 354, 119 S.Ct. 1998, 144 L.Ed.2d 347 (1999)). In one case cited by appellants, the Second Circuit determined the Sarbanes-Oxley Act did not apply retroactively partially because it did not contain the "pending on" language that the NDAA has. *See id. Fu*rthermore, the Sarbanes-Oxley Act includes a provision which states: "Nothing in this section shall create a new, private right of action." Public Company Accounting Reform and Investor Protection Act of 2002, Pub. L. No. 107-204 § 804(c), 116 Stat. at 801. The Second Circuit in Enterprise Mortgage found this language clouded an interpretation that the Sarbanes-Oxley Act applied retroactively. 391 F.3d at 407. The NDAA lacks a similar muddying counterpart which could prevent us from fmding that Congress clearly intended to give the NDAA a retroactive effect. *See Landgraf*, 511 U.S. at 268, 114 S.Ct. 1483 (requiring that Congress "make its intention clear").

Because we disagree with appellants that the NDAA lacks a clear retroactivity command, our inquiry ends, and we need not reach their contention that the statute would have an impermissibly retroactive effect. *See Lattab*, 384 F.3d at 14 ("If this perscrutation leads to a firm conviction that Congress intended the statute to have a specific temporal reach, the retroactivity analysis ends and we will apply the statute in accordance with Congress's prescription."); *Ahmed*, 72 F.4th at 400 (fmding an explicit retroactivity command for pending actions and ending the inquiry); *see also Lieberman v.*

Cambridge Partners, L.L.C., 432 F.3d 482,491-92 (3d Cir. 2005) (proceeding to review whether the Sarbanes-Oxley Act had an impermissible retroactive effect after concluding it lacked a clear directive from Congress).[29]

i. Gasarch

[44] Before departing from our statute of limitations conversation, we must turn to Gasarch's stand-alone claim. Unlike her fellow appellants, Gasarch does not claim that the NDAA lacks retroactive effect. Rather, Gasarch seeks to benefit from the NDAA's implementation of a five-year statute of limitations for non-scienter-based securities violations.

The SEC has a shorter, five-year window to bring a disgorgement claim for securities violations that do not require scienter to be established. 15 U.S.C. § 78u(d)(8)(A) (i). That much is not up for debate. Gasarch's claim comes from the disjunctive use of the word "or" on her jury verdict form -- which to her means "there can be no confidence that the jury found Mrs. Gasarch as an aider and abettor to anther's scienter-based violation." Therefore, she says the SEC cannot order disgorgement from any securities violations committed before August 5, 2016. Here's a bit more about this controversial verdict form.

The jury found that Gasarch violated Section 17(a)(3) of the Securities Act and that she aided and

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[29] Given our holding, we need not address appellants' claim that tolling is unavailable, nor the SEC's contention that due to appellants' fraudulent scheme taking place within a five-year window, the NDAA could have applied non-retroactively.

abetted the *violation* of securities laws. The fine print under the aiding and abetting finding reads:

> Did Zhiying Yvonne Gasarch aid and abet violations of Sections 17(a)(1), Sections 17(a)(3) of the Securities Act of 1933, or Section 10(b) of the Securities Exchange Act of 1934 and Rule lOb-5(a) and (c) thereunder by others?[30]

While the jury's answer to this question is unambiguous ("YES"), Gasarch laments that it is possible she was only found liable for aiding and abetting violations of Section 17(a) (3) -- a non-scienter-based security violation. *See SEC v. Ficken*, 546 RM 45, 47 (1 st Cir. 2008) (staring that negligence is sufficient to establish liability under Section 17(a)(3)). And because an individual who aids and abets a securities violation "shall be deemed to be in violation of such provision to the same extent as the person to whom such assistance is provided," Gasarch believes her disgorgement statute of limitations must be limited to five years. 15 U.S.C. § 78t(e). The district court dealt with this quandary by supplementing the jury's verdict with its own factual findings. *Sharp II*, 737 F. Supp. 3d at 80. First, when imposing injunctive relief, the district court found that Gasarch acted intentionally, and

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[30] The critical word here, "or," was written in ink after the verdict form was printed.

The SEC also makes a one-off comment that Gasarch should have requested a special verdict form if she wanted to reap the benefits of a particular reading of the jury verdict. Gasarch adamantly refutes this attempt to place the blame on her. Neither party has made any attempt at developed argument on this point, and because it will be immaterial to our conclusion, we decline to weigh in on this issue.

thus with scienter. *Id.* On a related note, the court determined that Gasarch's argument lacked merit because scienter is required to prove aiding and abetting liability, regardless of the underlying primary violation. *Id.* And later, when imposing civil penalties, the court found that Gasarch worked as Sharp's assistant at the hub of the fraudulent enterprise, which meant that "she aided and abetted the Sharp scheme clients in their violation of both the Securities Act and the Exchange Act." *Id.* at 85. These findings arose during the court's analyses of different remedies; however, when discussing disgorgement, the court made clear it was applying the ten-year statute of limitations to all appellants because all "acted with varying degrees of scienter." *Id.* at 93.

Gasarch declined to address the district court's analysis or additional fact findings on which it relied when entering the judgment that she now appeals. The result of this decision is that her claim is waived, and we will not venture off into complex, greenfield legal questions without the benefit of developed argumentation from either party. Sparkle Hill, 788 F.3d at 30 (finding waiver where "the opening brief presents no argument at all challenging express grounds upon which the district court prominently relied in entering judgment"). There's nothing more to say on this matter, other than the ten-year statute of limitations period as applied to Gasarch's disgorgement calculation remains in place.

5. Identifying Victims

Still operating within the realm of the district court's disgorgement awards, appellants next present arguments related to the disbursement of disgorged funds to victims. On this front, appellants' claims

rhyme, but raise slightly different issues for us to address. Veldhuis, Sexton, and Kelln (thinking big picture) say the district court erred because the SEC failed to identify any victims who suffered pecuniary harm, something they consider an essential prerequisite for ordering disgorgement. On the other hand, Friesen (thinking about his case) says the district court should have made the SEC produce the identities of the victims who would receive any disgorged funds before it ordered him to pay up. We'll start with the big picture and work our way into the specifics.

[45] Resolving this dispute requires us to return briefly to the Supreme Court's guidance in *Liu* along with our binding precedent established in Navellier. The disgorgement remedy lies atop two bedrock principles: it "strip[s] wrongdoers of their ill-gotten gains"; and it is "restricted . . . to an individual wrongdoer's net profits to be awarded *for victims*." *Liu*, 591 U.S. at 79, 140 S.Ct. 1936 (emphasis added). A simple conclusion follows: disgorgement requires a victim.

Appellants supplement this simple conclusion by defining a victim as one "who suffered pecuniary harm" and claim that "none of the evidence marshalled demonstrates investors suffered pecuniary harm." While we have previously decided that there is no requirement for "investors to suffer pecuniary harm as a precondition to a disgorgement award," Navellier & Assocs., Inc., 108 F.4th at 41 n.14, we need not rely on that principle because, as the district court noted, appellants' scheme certainly harmed investors. *See Sharp II*, 737 F. Supp. 3d at 93 (referencing "plans to return the disgorged funds to the harmed investors").

[46] For a fraudster to profit from a pump and *dump* scheme, *they* must *sell* their inflated shares to someone else, *who* ultimately gets stuck with an empty bag of goods. *See United States v. Weed*, 873 F.3d 68, 70 n.I (1 st Cir. 2017) (explaining the components of a pump and dump scheme); *see also Hemi Grp., LLC v. City of New York*, 559 U.S. 1, 28-29,130 S.Ct. 983, 175 L.Ed.2d 943 (2010) (Breyer, J., dissenting) (listing the last step of a pump and dump scheme as "[w]hen the fraud is revealed, the price crashes, to the investors' detriment"). The evidence shows appellants paying for various stock promotions, dumping their shares into the market, and reaping substantial profits -- all of which gives rise to the inescapable inference that some cohort of unwitting investors suffered pecuniary harm as a result.

[47] Friesen's take on this issue (as we mentioned) is slightly different, but nevertheless leads to a similar result. Friesen argues that the district court erred in awarding disgorgement before it considered the SEC's plan for allocating the disgorged funds to victims. According to Friesen, the court could have reviewed the SEC's plan and realized that the disgorgement figures requested based on the Q system were too high. The district court called this argument "premature" and accepted the SEC's assurances that "a plan can and will be submitted to the [c]ourt, to its satisfaction, detailing plans to return the disgorged funds to the harmed investors." *Sharp II*, 737 F. Supp. 3d at 93.

Following the entry of judgment against appellants, the SEC filed a motion to establish a fund and framework to distribute disgorged funds to harmed investors. We have previously affirmed a disgorge-

ment award where "the SEC intend[ed] to distribute to the [victims] any disgorgement awarded" without requiring the SEC to have already identified those victims. Navellier & Assocs., Inc., 108 F.4th at 41 n.14. With the presence of a plan to disburse disgorged funds in place, awaiting those funds, we cannot conclude the district court abused its discretion in finding the request to provide a list of victims premature.

6. Double Counting

[48] To continue, appellants Veldhuis, Sexton, and Kelln also claim that the district court abused its discretion in failing to protect against impermissible double counting. That is, appellants claim the SEC's disgorgement requests in this case overlap with funds that Knox (the same Knox who testified for the SEC at trial) agreed to return from his own enforcement action. The SEC calls their bluff, and recharacterizes the one snippet of trial testimony cited by appellants as discussing a different matter entirely.

The district court acknowledged appellants' concerns over double counting, *Sharp II*, 737 F. Supp. 3d at 89 (considering this as appellants' seventh argument before the district court), but it did not specifically address this argument beyond a catch-all conclusion that it found "the remaining objections raised by the [appellants] unavailing," *id.* at 93. After reviewing appellants' scant evidentiary support for this claim, we lack a firm conviction that the district court made a meaningful error in its judgment; that means the disgorgement award must stay put. Allow us to explain why we lack that necessary conviction.

Appellants say that Knox testified to returning millions of dollars in funds that "he believed belonged to 'Sharp Group' clients." At trial, Knox testified that he agreed to return $7 million that "belong[ed] to clients of Silverton" which was his firm. He also stated that those millions of dollars had something to do with Sharp's clients, an individual named Luis Carrillo, and Fred Sharp himself, but could not say exactly how much belonged to who. That is the extent of evidentiary support appellants cite and meager fare for claiming the district court abused its discretion. Cf. *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1232 (D.C. Cir. 1989) (rejecting appellants' efforts to rebut the SEC's reasonable disgorgement approximation with "impossibly speculative" claims).

So, while appellants allege double counting occurred, they have not shown how (if at all) the funds that Knox returned overlap with any of the proceeds allocated to their individual Q accounts which they've been ordered to repay. As such, appellants failed to rebut the SEC's reasonable approximation. *See Navellier & Assocs., Inc.*, 108 F.4th at 42.

7. Knox Restitution Fund

[49] In our final conversation on disgorgement (before addressing two other remedies), Kelln claims the district court's indicative approval of the SEC's proposed distribution plan for her disgorged funds was "reversible error."[31] The SEC's plan proposed

[31] On September 18, 2024, while this appeal was pending, the district court issued an "indicative ruling" that it "intends to allow the Fair Plan motion in its entirely [sic], save only that, if the funds presently ordered disgorged exceed the sum of the identified claimants claims, such funds shall be retained by the SEC subject to further order of the [c]ourt."

contributing money collected from Kelln (and Gasarch) to the "Knox Restitution Fund."[32] That fund arose from the SEC's plan to pay back victim-investors with profits disgorged from Knox after he pleaded guilty in a separate proceeding. *The* SEC calls *this* claim premature because (1) Kelln's money hasn't been collected yet; and (2) *Kelln's* contribution to *the* Knox Restitution *Fund* is only a possibility at this stage.

[50] [51] [52] This argument pulls on a few different threads. It is undisputed that a disgorgement award is an unlawfully retained sum, "rather than a requirement to replevy a specific asset." Navellier & Assocs., Inc., 108 F.4th at 43 (quoting SEC v. Banner Fund Int'l, 211 F.3d 602, 617 (D.C. Cir. 2000)). And, as we addressed earlier, the district court acted within its discretion by ordering disgorgement prior to reviewing and approving the SEC's plan to distribute the funds to victims. *See SEC v. Blackburn*, 15 F.4th 676,682 (5th Cir. 2021). But also, disgorgement must be limited to a wrongdoer's "'net profits' and must 'be awarded to victims.'" *Id.* (quoting *Liu*, 591 U.S. at 75,140 S.Ct. 1936). The question then becomes whether disgorged funds wrongly procured must be awarded to victims of the same wrongful conduct. As Kelln succinctly notes, her victims are not necessarily Knox's victims. And while the SEC claimed in its proposal that Kelln's misconduct (via her role with the Sharp Group)

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[32] On September 18, 2024, while this appeal was pending, the district court issued an "indicative ruling" that it "intends to allow the Fair Plan motion in its entirely [sic], save only that, if the funds presently ordered disgorged exceed the sum of the identified claimants claims, such funds shall be retained by the SEC subject to further order of the [c]ourt."

related to sixteen out of seventeen securities manipulated and selected in the case against Knox, only one (Vitality Biopharma Inc.) is mentioned in the complaint against Kelln.

This kind of cross-pollination seems at odds with the "equitable nature of the profits remedy [that] generally requires the SEC to return a defendant's gains to wronged investors for their benefit." Navellier & Assocs., Inc., 108 F.4th at 42 (quoting *Liu*, 591 U.S. at 88, 140 S.Ct. 1936). That said, we still think, given the posture of this challenge, our input is premature and Kelln is wrong to call the district court's indicative ruling reversible error. In accordance with Federal Rule of Civil Procedure 62.1(a)(3), the district court acknowledged the pendency of this appeal in its order and provisionally stated that it intended to grant the SEC's motion. *See United States v. Maldonado-Rios*, 790 F.3d 62, 64-65 (1 st Cir. 2015) (citing Fed. R. App. P. 12.1). The district court remains duty bound to review and approve the SEC's plan for distribution in the normal course, and the SEC retains its discretion in allocating Kelln's disgorged assets, which may ultimately end up catering to the concerns she raises here. *See In re Drexel Burnham Lambert Grp. Inc.*, 995 F.2d 1138, 1146 (2d Cir. 1993) (declining to consider the issue of mixed distribution funds prior to a court order approving the SEC's distribution plan).

To conclude, after considering all appellants' disgorgement related claims, the disgorgement awards as imposed by the district court remain in place.

B. Civil Penalties

[53] To briefly reorient the reader, the SEC requested two additional remedies from the district court on top of disgorgement. Those additional requested remedies (which the district court granted) were the imposition of civil penalties and injunctions barring conduct related to securities trading. Appellants Gasarch and Sexton appeal the district court's decision to impose civil penalties, and that is where we turn our attention to next.[33] We will first set out the relevant legal landscape controlling the contours of our discussion before addressing the individualized concerns of Gasarch and Sexton -- specifically the evidence brought against them that gave rise to their respective civil penalties.

[54] [55] [56] Our federal securities laws authorize the SEC to seek, and district courts to impose, civil penalties from any person who has violated securities laws. 15 U.S.C. § 77t(d)(1). District courts pull the amount in civil penalties from a hierarchical three-tiered schedule in light of the facts and circumstances surrounding the violation. *Id.* § 77t(d) (2). First-tier penalties apply generally, *id.* § 77t(d)(2)(A), second-tier penalties apply to violations that "involved fraud, deceit, manipulation, or deliberate or reckless disreg-

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[33] Friesen has not appealed the district court's injunctions or civil penalty of $1,562,603 against him. *Sharp II*, 737 F. Supp. 3d at 77-84. Accordingly, his appeal has concluded, and any reference to "appellants" from here on will not include Friesen.

Likewise, all argument pertaining to civil penalties in Veldhuis, Sexton, and Kelln's collective brief solely references Sexton and the SEC's evidence against him. Per our Circuit's rule, we respond only to Sexton's claims and deem any similar arguments from Veldhuis or Kelln waived. *See Maldonado-Pena*, 4 F.4th at 41 n.29.

ard of a regulatory requirement," *id.* § 77t(d)(2)(B), and third-tier penalties apply to violations involving the second-tier requirements plus "substantial losses or . . . a significant risk of substantial losses to other persons," *id.* § 77t(d)(2)(C). The applicable tier sets the maximum penalty, but the actual penal amount falls under the discretion of the district court. SEC v. Kern, 425 F.3d 143, 153 (2d Cir. 2005) (citing 15 U.S.C. § 77t(d)). We have previously identified several factors a district court may take into account when evaluating whether to assess civil penalties: "(1) the egregiousness of the violations; (2) the isolated or repeated nature of the violations; (3) the defendant's financial worth; (4) whether the defendant concealed his trading; (5) what other penalties arise as the result of the defendant's conduct; and (6) whether the defendant is employed in the securities industry." SEC v. Sargent, 329 F.3d 34, 42 (1st Cir. 2003). We review the penalties assessed for abuse of discretion. *id.*

The SEC's requests for civil penalties are subject to a five-year statute of limitations. Gabelli v. SEC, 568 U.S. 442, 445, 133 S.Ct. 1216, 185 L.Ed.2d 297 *(2013) (citing* 28 U.S.C. § 2462). According to this undisputed five-year window, the district court established August 5, 2016, to August 5, 2021, as the relevant period for reviewing securities law violations that could give rise to civil penalties. *Sharp II*, 737 F. Supp. 3d at 81. Gasarch and Sexton both claim the SEC failed to produce sufficient evidence of violations occurring within that timefiame to support the district court's determination.

1. Gasarch

[57] After considering the SEC's request and weighing the relevant factors, the district court

imposed a civil penalty of $296,651 against Gasarch. *Id.* at 86. In reaching that figure, the court agreed with the SEC that Gasarch's aiding and abetting violations of the Securities Act and the Exchange Act warranted two third-tier penalties, and her primary violation of Section 17(a)(3) of the Securities Act warranted an additional second-tier penalty. *Id.* at 86 nn. I1-12. However, the court granted a downward variance from the amount initially requested by the SEC, in part due to Gasarch's aider and abettor status. *Id.* at 86. Now, Gasarch summarily claims that "[w]ithout proof of a violation post-dating August 5, 2016, the SEC's request for penalties should have been denied."

Turning to the record once again, Gasarch's claim fails to hold water. The SEC's evidence showed Gasarch altering information on wire requests in May 2017 and setting up a fictious loan agreement for a Sharp Group nominee company in May 2018. Furthermore, the district court found that Gasarch operated alongside Sharp at the hub of the Sharp Group's fraudulent scheme, *Sharp II*, 737 F. Supp. 3d at 85, and Q system data revealed that the scheme continued to operate after August 5, 2016, a fact that Gasarch has not meaningfully contested.

Based on the evidence of Gasarch's conduct that occurred within the statute of limitations, the court did not abuse its discretion in assessing its downwardly varying penalty against her.

2. Sexton

[58] As for Sexton, the district court calculated a $1,562,603 civil penalty against him for seven separate third-tier violations that occurred during the appropriate five-year window. *Id.* at 84. The

seven violations correspond to Sexton's trading in seven out of the fourteen problematic stocks relevant to the Sharp Group's scheme between August 2016 and August 2021 -- the idea being that Sexton could not have traded those securities without having disguised his ownership through the Sharp Group's services and that substantial losses to other persons occurred because of the pump and dump schemes. *Id.* at 82 (finding seven to be "the number of entities [Sexton] utilized to defraud unwitting investors during the five years preceding August 2021 "). On appeal, Sexton claims the court erred because any trades were not connected to violations of securities laws and the SEC's limited evidence shows that he profited from only three of the problematic stocks during the relevant time frame, rather than seven.

As before with Sexton's disgorgement award, the terms of Sexton's consent judgment foreclose his claim that he did not violate the securities laws as alleged by the SEC. Cf. *Hallam*, 42 F.4th at 326 (fmding the terms of a consent judgment foreclosed appellant's challenge to the SEC's ability to seek a disgorgement award). Furthermore, to the extent Sexton's consent judgment authorized the court to "resolve any material factual disputes" at the remedies phase, the court did not abuse its discretion in relying on the declaration submitted by the SEC's expert witness Ryan Murphy. *Sharp II*, 737 F. Supp. 3d at 83 (discussing Murphy's declaration). Murphy provided competent testimony at Gasarch and Friesen's trial and spent "several hundred hours" preparing the Q system summaries referenced in his declaration. And Murphy's declaration (based on the Q system and other available evidence) concludes that "Veldhuis, Sexton, and Friesen, working together . . . traded the securities of seven of the

Fourteen Issuers" between August 2016 and August 2021. As was the district court's prerogative, it settled the relevant facts based on the evidence presented and it did not err in assessing seven third-tier penalties on Sexton. [34]

Based on the above, we affirm the civil penalties imposed against Sexton and Gasarch and continue on.

C. Injunctive Relief

[59] The final scene of this collective appeal involves only Sexton and his challenge to four permanent injunctions imposed against him by *the district* court. "In an SEC enforcement action, we review the district *court's* decision to enter an injunction for abuse of discretion." *SEC v. Lemelson*, 57 F.4th 17, 30 (1st Cir. 2023).

[60] [61] Pursuant to federal law, the SEC may seek injunctive relief to prevent the violation of securities laws. 15 U.S.C. § 78u(d)(1); *see also Lemelson*, 57 F.4th at 30. A district court may grant injunctive relief "where there is, at a minimum, proof that a person is engaged in or is about to engage in a substantive violation of either the Securities Act of 1933 or the Securities Exchange Act of 1934 or of the regulations promulgated thereunder." *Lemelson*, 57 F.4th at 30 (citation modified). Typically, when considering whether a district court abused its discretion

[34] We acknowledge Sexton's claim that the Q data shows he received profits from trades in only three of the seven problematic stocks during the relevant period -- and profits can be evidence of trading. The district court, too, recognized as much when entering its judgment and appropriately levied penalties based on Sexton's misconduct as opposed to his receipt of profits. *Sharp II*, 737 F. Supp. 3d at 83.

in entering an injunction, we view the decision in light of several non-determinative factors such as the nature of the violation, the individual's capacity to commit future violations, and whether the individual has recognized the wrongfulness of their conduct. *id.*

Sexton's appeal, however, does not challenge the district court's consideration of those factors. Instead, Sexton claims the district court issued impermissible "obey-the-law" injunctions that enhance the penalties he could face for potential violations down the road and deprive him of adequate notice of the barred conduct as required by Federal Rule of Civil Procedure 65(d).[35] The SEC states that injunctions like the ones entered by the district court are run of the mill in enforcement actions with sufficient guardrails in place to alleviate Sexton's concerns.

[62] [63] [64] "[T]he district court has 'broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may fairly be anticipated from the defendant's conduct in the past.' " Brown v. Trs. of Bos. Univ., 891 F.2d 337, 361 n.23 (1st Cir. 1989) (quoting NLRB v. Express Publ'g Co., 312 U.S. 426, 435, 61 S.Ct. 693, 85 L.Ed. 930 (1941)). Yet every order granting an injunction must "state its terms specifically" and "describe in reasonable detail -- and not by referring to the complaint or other document -- the act or acts restrained or required." Fed. R. Civ. P.

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[35] Courts in our circuit have adopted the term "obey-the-law" injunctions in similar contexts. *See SEC v. McLellan*, 737 F. Supp. 3d 95, 106 (D. Mass. 2024); *SEC v. Sargent*, 790 F. Supp. 3d 37, 40 (D. Mass. 2025); *see also League of Women Voters of N.H., et al. v. Kramer, et al.*, No. 24-cv-73-SM-TSM, 2025 WL 3260024, at *5 (D.N.H. Oct. 17, 2025).

65(d)(1); *see SEC v. Keener*, 102 F.4th 1328, 1336 (11th Cir. 2024). In exercising its discretion, a district court may enter a broad injunction, largely adopting language from a statute or regulation, so long as the enjoined individual knows exactly what she's been ordered to do or not to do. *See Keener*, 102 F.4th at 1336; Cf. Brown, 891 F.2d at 361 n.23 (affirming an injunction as not overbroad for prohibiting various forms of sex discrimination). Lastly, obey-the-law injunctions may be "necessary to prevent further violations where a proclivity for unlawful conduct has been shown." *McComb* v. Jack. Paper Co., 336 U.S. 187,192,69 S.Ct. 497,93 L.Ed. 599 (1949); *see also SEC v. Sargent*, 790 F. Supp. 3d 37,40 (D. Mass. 2025). In its judgment against Sexton, the district court "permanently restrained and enjoined" him from violating: (1) Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder; (2) Section 17(a) of the Securities Act; (3) Section 5 of the Securities Act; and (4) Section 13(d) of the Exchange Act and Rule 13d-1 promulgated thereunder.[36] We have previously affirmed broad obey-the-law injunctions related to securities laws, *see Lemelson*, 57 F.4th at 30, 32 (affirming an injunction prohibiting violations of Section 10(b) and Rule 10b-5 for five years), without expressing our view on whether such an injunction properly places an individual on notice of what they are barred from doing.

[65] [66] [67] As a general matter, we disagree with Sexton's premise that obey-the-law injunctions are

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[36] The court also enjoined Sexton from participating in any offering of a penny stock and from participating in any securities transactions beyond purchasing and selling securities for his own personal accounts. He has not appealed for relief from those injunctions.

per se impermissible. *See McComb*, 336 U.S. at 191-92, 69 S.Ct. 497; Brown, 891 F.2d at 361 n.23. Nor do we believe the district court abused its discretion in issuing these permanent injunctions against Sexton (save one which we will address at the end). As with any injunction sought by the SEC in an enforcement action, "the legal standard for issuance . . . is a reasonable likelihood of recidivism." SEC v. Sargent, 129 F.4th 1, 15 (1st Cir. 2025) (citation modified). Thus where (as here) the district court finds a particularly high proclivity to for unlawful conduct of a sophisticated nature, a sweeping obey-the-law injunction can be appropriate recourse due to the broad scope of potential future violations. *See McComb*, 336 U.S. at 191-92, 69 S.Ct. 497; *see also Keener*, 102 F.4th at 1336. Sexton engaged in a decade-long, international securities fraud scheme involving at least fourteen separate stock issuers, dozens of players, and clandestine operations fitting of a James Bond spin-off. *Sharp II*, 737 F. Supp. 3d at 75-76. The district court did not abuse its discretion in issuing injunctions that map onto the language of federal securities laws because Sexton has demonstrated a willingness and capacity to engage in conduct stretching the contours of those laws. *See SEC v. McLellan*, 737 F. Supp. 3d 95, 110 (D. Mass. 2024).

Furthermore, while the language of the injunctions issued against Sexton may be broad, "they are not complicated." *Id.*

The injunctions state that Sexton may not engage in fraud in the offering or sale of securities and cannot engage in the sale of securities without adhering to the relevant registration requirements. Directions to comply with these foundational con-

cepts provide reasonable detail to Sexton and therefore do not contravene the requirements of Federal Rule of Civil Procedure 65(d).

[68] One injunction, however, does impermissibly run afoul of Rule 65(d)(1)(C)'s requirement that an injunction may not incorporate a separate document by reference. The fourth permanent injunction -- which permanently restrains and enjoins Sexton from violating Section 13(d) of the Exchange Act and Rule 13d-1 promulgated thereunder -- references "information required by Schedule 13D" and "any equity security of a class which is specified in Exchange Act Rule 13d-1(I)." The other three permanent injunctions first cite the relevant securities law before listing specific conduct thereby prohibited (such as engaging in fraud). By contrast, the fourth permanent injunction only cross-references the Code of Federal Regulations without any guidance for Sexton as to what his court-ordered obligations are. *See SEC v. Goble,* 682 F.3d 934, 952 (11th Cir. 2012) ("Plainly, Goble would need to look beyond the four corners of the district court's injunction in order to comply with its strictures."). This is a bridge too far, and, accordingly, we vacate this portion of the injunction and remand for the district court to describe the requirements and proscribed conduct within its injunction. *See id.*

V. CURTAIN CALL

For the foregoing reasons, the verdicts entered against Gasarch and Friesen, the district court's disgorgement awards against all appellants, and the civil penalties imposed against all appellants are *affirmed.* Likewise, we *affirm* the permanent injunctions issued against Sexton barring violations of (1) Section 10(b) of the Exchange Act and Rule 10b-5

promulgated thereunder; (2) Section 17(a) of the Securities Act; and (3) Section 5 of the Securities Act, but *vacate* the permanent injunction barring violations of Section 13(d) of the Exchange Act and Rule 13d-1 promulgated thereunder, and *remand* for proceedings consistent with this opinion.

No costs are awarded.

APPENDIX B

737 F.Supp.3d 66
United States District Court, D. Massachusetts.

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

FREDERICK L. SHARP, ZHIYING YVONNE GASARCH, COURTNEY KELLN, MIKE K. VELDHUIS, PAUL SEXTON, JACKSON T. FRIESEN, WILLIAM T. KAITZ, AVTAR S. DHILLON, AND GRAHAM R. TAYLOR,

Defendants.

CIVIL ACTION NO. 21-11276-WGY

Signed June 17, 2024

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MEMORANDUM & ORDER

YOUNG, JUDGE of the UNITED STATES [1]

I. INTRODUCTION

Following a ten day civil securities fraud jury trial resulting in a verdict for the plaintiff Securities and Exchange Commission ("SEC"), the SEC now moves for remedies against the defendants Zhiying Yvonne Gasarch ("Gasarch"), Courtney Kelln ("Kelln"), Mike K. Veldhuis ("Veldhuis"), Paul Sexton ("Sexton"), and Jackson T. Friesen ("Friesen") (collectively, the "Defendants"). *See generally* Pl.'s Mot. for Remedies against Defs. ("Mot. Remedies"), ECF No. 425. The Defendants oppose the SEC's proposed remedies. *See* Def. Sexton's Opp'n Mot. Remedies ("Sexton's Opp'n"), ECF No. 454; Defs. Kelln & Veldhuis' Opp'n

[1] This is how my predecessor, Peleg Sprague (D. Mass. 1841-1865), would sign official documents. Now that

I'm a Senior District Judge I adopt this format in honor of all the judicial colleagues, state and federal, with whom I have had the privilege to serve over the past 46 years.

Mot. Remedies ("Kelln & Veldhuis' Opp'n"), ECF No. 455; Def. Gasarch's Opp'n Mot. Remedies ("Gasarch's Opp'n"), ECF No. 464; Def. Friesen's Opp'n Mot. Remedies ("Friesen's Opp'n"), ECF No. 471.

The SEC filed replies to all of the above-mentioned opposition memoranda. *See* Pl.'s Reply Mem. Supp. Mot. Remedies against Defs. Sexton, Veldhuis, and Kelln ("Pl.'s Reply to Sexton, Veldhuis & Kelln"), ECF No. 470; Pl.'s Reply Mem. Supp. Mot. Remedies against Def. Gasarch ("Pl.'s Reply to Gasarch"), ECF No. 474; Pl.'s Reply Mem. Supp. Mot. Remedies against Def. Friesen ("Pl.'s Reply to Friesen"), ECF No. 480. Sexton and Gasarch filed sur-replies to the SEC's replies. *See* Sexton's Sur-Reply Mot. Remedies ("Sexton's Sur-Reply"), ECF No. 473; Gasarch's Sur-Reply Mot. Remedies ("Gasarch's Sur-Reply"), ECF No. 481.

On September 27, 2023, a unanimous jury found Friesen and Gasarch to have committed various securities violations alleged by the SEC. *See* Jury Verdict, ECF No. 402.[2] As to the other defendants presently before the Court, Kelln, Veldhuis, and Sexton, the Court entered partial judgments against them before the trial. *See* J. as to Kelln ("Kelln J."), ECF No. 317; J. as to Veldhuis ("Veldhuis J."), ECF No. 325; J. as to Sexton ("Sexton J."), ECF No. 378. Pursuant to those judgments, the Court ordered Kelln, Veldhuis, and Sexton, and they each agreed, not to "contest liability under the claims filed by the [SEC]" at the remedies stage. Kelln J. 5; Veldhuis J. 5; Sexton J. 1-2. In the same partial judgments,

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[2] These were various violations of both the Securities Act of 1933 ("Securities Act") and the Securities

Exchange Act of 1934 ("Exchange Act").

however, the Court ordered that these three defendants, while accepting liability, would "be permitted to challenge the remedies and sanctions sought by the [SEC]," Kelln J. 5; Veldhuis J. 5, and that they would "be permitted to oppose the [SEC's] requested relief, including any calculations thereof." Sexton J. 2.

The remedies now sought by the SEC are threefold. *See generally* Pl.'s Mem. Supp. Mot. Remedies ("Mem. Supp."), ECF No. 426. *First,* the SEC requests injunctive relief against Sexton, Friesen, and Gasarch, asking this Court to (1) permanently restrain and enjoin them from violating securities laws; (2) issue specific conduct-based injunctions permanently barring them from professionally -- but not personally -- participating in a national securities exchange; and (3) issue penny stock bars permanently barring them from trading in penny stocks. [3] *See id.* at 2-11.

Second, the SEC requests this Court impose civil penalties against the Defendants in the following amounts: (1) $1,562,603 against Sexton; (2) $1,562,603 against Friesen; (3) $1,562,603 against Veldhuis; (4) $904,078 against Kelln; and (5) $558,072 against Gasarch. *Id.* at 1.

Third, the SEC seeks disgorgement awards and prejudgment interest as to the Defendants in the following amounts: (1) $17,367,474 in disgorgement and $5,872,145 in prejudgment interest against

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[3] Penny stock "generally refers to a security issued by a very small company that trades at less than $5 per share." Am. Compl. ¶ 40, ECF No. 230; *see also Securities and Exchange Commission* v. *Sharp,* 626 F. Supp. 3d 345, 366 n.3 (D. Mass. 2022).

Sexton; (2) $11,846,176 in disgorgement and $4,057,737 in prejudgment interest against Friesen; (3) $13,289,897 in disgorgement and $4,314,031 in prejudgment interest against Veldhuis; (4) $1,582,785 in disgorgement and $460,687 in prejudgment interest against Kelln; and (5) $2,522,367 in disgorgement and $646,366 in prejudgment interest against Gasarch. *Id.*

Having reviewed the parties' briefs and having held a hearing on the question of remedies, *see* ECF No. 484, this Court (1) granted the SEC's request for injunctive relief against Sexton, Friesen, and Gasarch in its entirety; (2) imposed civil penalties against Sexton, Friesen, Veldhuis, and Kelln in the amounts requested by the SEC, and as to Gasarch, having considered a downward variance from the SEC's requested amount of $558,072 equitable and appropriate, imposed a civil penalty of $269,651; and (3) took the issue of disgorgement and prejudgment interest as to all of the Defendants under advisement. *See id.*

With this memorandum and order, the Court now provides its written disposition of the SEC's motion for remedies. In addition to providing its explanation for imposing the above-mentioned injunctions and civil penalties against the Defendants, for the reasons elucidated below, the Court now **GRANTS** the SEC's motion for disgorgement in its entirety, but modifying it to hold the Defendants jointly and severally liable in the following manner, and **DENIES** the SEC's motion for prejudgment interest.

II. FACTUAL BACKGROUND

At its core, the present enforcement action centers around an elaborate securities fraud scheme involv-

ing a sequence of separate pump and dump endeavors. Each proceeded in three steps. Certain defendants (1) accumulated penny stocks in national markets in micro-cap companies; (2) promoted the penny stocks in these companies by using paid promotions to garner the attention and interest of unwitting investors; and (3) sold their stocks to investors, not in their own names but through so-called shell or nominee companies they formed in order to skirt securities laws that otherwise prohibit the unregulated sale of restricted and control securities. *See Sharp,* 626 F. Supp. 3d at 366 (detailing the scheme based on allegations in SEC's complaint). In essence, the Defendants "engaged in a decade-long scheme to profit at the expense of unwitting investors by concealing their, or their clients', ownership and control of many microcap companies." Mem. Supp. 1.

Each of the Defendants played a different role in the interconnected pump-and-dump schemes. Sexton, Veldhuis, and Friesen acted as a group that teamed with Sharp to "sell stock surreptitiously in the public market." Am. Compl. ¶ 7. They acquired, held, and then disposed of shares. *Id.* ¶ 153. Kelln, Sharp's employee, helped conceal common control of shares by distributing them accordingly to Sharp's directions. *Id.* ¶¶ 52-53. "Much of Kelln's work was grouping stocks for transmission to transfer agents such that the totals appeared five percent to avoid disclosure and registration requirements." *Sharp,* 626 F. Supp. 3d at 366 (footnote omitted). Gasarch, another Sharp employee, "organized wire transfers of the proceeds from the illegal stock sales while concealing the beneficiaries, maintained records in the encrypted accounting system, and routinely

created false invoices to support the payments." *Id.* at 366-67; *see also* Am. Compl. ¶¶ 57-59.

Importantly, Kelln, Veldhuis, and Sexton have admitted their liability, and this Court has entered partial judgments against them in which they were instructed not to contest liability but were given the opportunity to challenge any and all remedies the SEC now seeks against them. *See* Kelln J. 5; Veldhuis J. 5; Sexton J. 1-2. As for the remaining defendants, Friesen and Gasarch, a ten-day trial ensued in which a unanimous jury found both liable for the various securities laws violations alleged in the SEC's complaint. *See* Jury Verdict; *see also generally* Tr. Jury Trial Day Ten 7-9, ECF No. 445.

III. ANALYSIS

The SEC seeks three remedies: (1) injunctive relief against Sexton, Friesen, and Gasarch; (2) civil penalties against the Defendants, in varying amounts; and (3) disgorgement and prejudgment interest against the Defendants, in varying amounts. *See generally* Mem. Supp. 1.

A. Injunctive Relief Against Sexton, Friesen, and Gasarch

[1] [2] [3] [4] Section 21(d) of the Exchange Act permits the SEC to seek temporary or permanent injunctions against persons "engaged or [ ] about to engage" in Exchange Act violations. 15 U.S.C. § 78(u)(d)(1); *see also Securities and Exchange Commission* v. *Sargent,* 329 F.3d 34, 39 (1st Cir. 2003). "Such an injunction is appropriate where there is, 'at a minimum, proof that a person is engaged in or is about to engage in a substantive violation of either one of the Acts or of the regulations promulgated thereunder.' " *Sargent,* 329 F.3d at 39

(quoting *Aaron* v. *SEC,* 446 U.S. 680, 700-01, 100 S.Ct. 1945, 64 L.Ed.2d 611 (1980)). "The legal standard for issuing an injunction is 'reasonable likelihood of recidivism, not an imminent threat of it.' " *Securities and Exchange Commission* v. *Lemelson,* 596 F. Supp. 3d 227, 231 (D. Mass. 2022) (Saris, J.) (quoting *Sargent,* 329 F.3d at 39). In assessing the likelihood of recidivism, courts look at several, non-dispositive factors, including "the nature of the violation, including its egregiousness and its isolated or repeated nature"; "whether the defendants will, owing to their occupation, be in a position to violate again"; and "whether the defendants have recognized the wrongfulness of their conduct." *Id.* In analyzing whether injunctive relief is appropriate, courts consider the relevant factors to be established based on "a preponderance of the evidence." *Steadman* v. *SEC,* 450 U.S. 91, 95, 101 S.Ct. 999, 67 L.Ed.2d 69 (1981) (affirming a lower court "holding that in a disciplinary proceeding before the [SEC] violations of the antifraud provisions of the securities laws may be established by a preponderance of the evidence").

Here, the SEC seeks three types of injunctive relief: (1) permanent injunctions; (2) specific, conduct-based injunctions; and (3) penny stock bars. *See* Mem. Supp. 2-11.

1. Permanent Injunctions

[5] The SEC seeks permanent injunctions against Sexton, Friesen, and Gasarch that would prevent them from violating securities laws. *Id.* at 2.

Specifically, the SEC makes three arguments. First, it argues that the three Defendants' conduct was "egregious, recurrent, and sustained." *Id.* at 3. The SEC notes in support of this contention that the

scheme in which these three Defendants were involved "resulted[ed] in the fraudulent sale of more than $144 million worth of penny stocks," *id.;* that Gasarch enabled the scheme by, among other things, concealing beneficial ownership and fabricating invoices and other documents, *id.* at 3-4; and that Sexton and Friesen exercised control over the stock of 14 issuers but concealed their control in their pump-and-dump schemes, *id.* at 4. Second, the SEC argues that these three Defendants "have the opportunity to violate again." *Id.* at 5. The SEC notes that they engaged in illegal conduct spanning a decade; that they are located in "metropolitan Vancouver where they apparently have not found gainful employment"; and that they have refused to testify before the SEC to answer questions about their activity. *Id.* at 5-6. Third, the SEC argues that these three Defendants "have not yet recognized the wrongful nature of their conduct." *Id.* at 6. The SEC also notes that this Court has issued similar injunctions against certain other defendants in this case. *Id.* at 3; *see, e.g.,* Final J. as to Sharp 2 ("Sharp J."), ECF No. 211 (ordering that Sharp "is permanently restrained and enjoined" from violating securities laws); Kelln J. 2-4 (same language); Veldhuis J. 2-4 (same language).

The three Defendants oppose. Sexton argues that the SEC "has not established a reasonable likelihood of recurrence," Sexton's Opp'n 16, emphasizing that the last purported profit attributed to him is dated 2018, and that "nearly 93 percent of the alleged profits are from in or before 2015," *id.* Friesen contends that the SEC has failed to provide the Court with *"evidence of any conduct in the last six years"* to establish a likelihood of recurrence. Friesen's Opp'n 11 (emphasis in original). Gasarch also opposes a permanent injunction, arguing that she was never

involved in the actual issuance, purchase, offer or sale of security, which the permanent injunction seeks to enjoin. Gasarch's Opp'n 15. She also notes that the SEC has failed to establish the likelihood of recurrence. *Id.* at 16.

[6] While "an injunction is a drastic remedy," *Aaron,* 446 U.S. at 703, 100 S.Ct. 1945 (Burger, C.J., concurring), for the following reasons, this Court concludes that a permanent injunction against Sexton, Friesen, and Gasarch is an appropriate remedy.

[7] *First,* the Court finds that these three Defendants' securities laws violations were egregious and of a repeated nature. As the First Circuit has observed, a securities law "violation [may be considered] not an egregious one, particularly where [the defendant] neither traded on the information himself nor derived any direct personal profit." *Sargent,* 329 F.3d at 39. Conversely, here, each of the three Defendants directly and personally profited from the scheme. Pursuant to the partial judgment as to Sexton, he "is liable under Counts I-IV of the Amended Complaint[.]" Sexton J. 1. Those counts attribute liability to Sexton for engaging in fraud in connection with the offer and sale of unregistered securities, Am. Compl. ¶¶ 250-63, which has resulted in "the fraudulent sale of more than $144 million worth of penny stocks," Mem. Supp. 3, from which Sexton personally profited. *See, e.g.,* Decl. of Ryan Murphy ("Decl. of Ryan Murphy I") ¶¶ 48-49, ECF No. 273; Mem. Supp. 4. Friesen and Gasarch have similarly profited from the schemes. *See* Decl. of Ryan Murphy I ¶¶ 48-49 (Friesen); Mem. Supp. 3-4 (Gasarch).

In addition to the egregiousness of the deceit undergirding it, the pump-and-dump schemes, far from being isolated or short in duration, lasted for a decade. *See* Mem. Supp. 1. Courts in this district and others have not hesitated to impose permanent injunctive relief against securities law violations much shorter in duration. *See, e.g., Securities and Exchange Commission* v. *Chan,* 465 F. Supp. 3d 18, 38 (D. Mass. 2020) (Burroughs, J.) (finding an "egregious" violation where "an [ ] insider trading scheme [ ] lasted for nearly two years and involved multiple trades"); *Securities and Exchange Commission* v. *Wall,* 2020 WL 1539919, at *8, 2020 U.S. Dist. LEXIS 56152, at *25 (D. Me. Mar. 31, 2020) (ordering permanent injunction where "the defendants' violations were part of a pattern lasting more than four years").

Additionally, in view of the fact that the pump-and-dump scheme involved fourteen separate issuers, thus rendering these Defendants' securities violations repetitive and schematic in nature, the Court does not hesitate to conclude that said violations were egregious. *Cf. Securities and Exchange Commission* v. *Cody,* 2019 WL 6619195, at *4, 2019 U.S. Dist. LEXIS 210452, at *11 (D. Mass. Dec. 5, 2019) (Saylor, J.) (finding egregious conduct in view of "the fact that [defendant] made multiple representations over a prolonged period of time and created falsified documents to hide his deceptions"); *Securities and Exchange Commission* v. *Weed,* 315 F. Supp. 3d 667, 676 (D. Mass. 2018) (Gorton, J.) (finding egregiousness where "[t]he violations [ ] were repeated in nature"); *Securities and Exchange Commission* v. *Spencer Pharm. Inc.,* 2015 WL 5749436, at *6, 2015 U.S. Dist. LEXIS 132909, at *17 (D. Mass. Sept. 30, 2015) (Talwani, J.) (finding that

"the scope and complexity of the scheme supports the need for a permanent injunction").

[8] *Second,* the Court finds that these three Defendants have the opportunity to violate securities laws again. As the First Circuit has clarified, under this prong of the analysis, courts must find a reasonable likelihood -- not mere possibility -- of recidivism. *See Securities and Exchange Commission* v. *Lemelson,* 57 F.4th 17, 31 (1st Cir. 2023). Here, the Court so finds. Although Sexton points out that his "proceeds have been frozen," Sexton's Opp'n 17, the SEC notes that "all three defendants recently sought a release of frozen funds," and none presented the Court with evidence that there are now gainfully employed outside of the microcap industry in which their fraudulent scheme operated. *See* Mem. Supp. 5. Remaining in the same sector or industry in which one's offensive conduct took place is a factor that courts have weighed in favor of finding a likelihood of recidivism. *Cf. Lemelson,* 57 F.4th at 31 ("Lemelson's continued position as a hedge fund manager and investment adviser would readily allow him to benefit from future material misstatements concerning investments."). Further, Sexton's argument that the "so-called Sharp network is no more," Sexton's Opp'n 16-17, is unavailing. The "Sharp network" is no more not because the Defendants ceased to operate it on their own accord, which could have been an indication to the Court that the Defendants do not intend to engage in future violations. That counterfactual is of no moment: the Sharp network is no more simply because of law enforcement and the present action brought by the SEC, not because the Defendants do not intend to engage in future violations.

Moreover, that considerable time has elapsed since these three Defendants last violated securities laws, *see, e.g.,* Sexton's Opp'n 16; Friesen's Opp'n 11, does not persuade the Court that they will not offend in the future. Courts have found a likelihood of recurrence where Defendants were seemingly similarly, if not more, unlikely to offend again. *See, e.g., Cody,* 2019 WL 6619195, at *4, 2019 U.S. Dist. LEXIS 210452, at *10-11 (finding likelihood of recurrence "[a]lthough it is true that he is currently imprisoned, and thus not immediately in a position to commit further violations"); *Securities and Exchange Commission* v. *Present,* 2018 WL 1701972, at *1 n.1, 2018 U.S. Dist. LEXIS 45056, at *5 n.1 (D. Mass. Mar. 20, 2018) (Sorokin, J.) (finding likelihood of recidivism in 2018 even though defendant "has not worked in the securities industry since 2014"). [4]

Third, the Court finds that these three Defendants have not acknowledged their wrongdoing. Sexton still contends that the SEC, at most, can establish discrete securities laws violations but not that there was a fraudulent scheme where "all transactions involving 14 issuers were fraudulent," Sexton's Opp'n 8, thereby attempting to minimize his offensive

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[4] The Court also observes that the duration of the schemes, spanning nearly a decade, in addition to weighing in favor of issuing a permanent injunction in and of itself, persuades the Court, *in combination with* the reasons provided under this paragraph, that the three defendants have significant experience in the securities industry, rendering a future violation more likely than not. *Cf. Securities and Exchange Commission* v. *Baccam,* 2017 WL 5988007, at *9, 2017 U.S. Dist. LEXIS 88450, at *26 (C.D. Cal. June 8, 2017) (granting SEC's request for a permanent injunction in view of the fact, among others, that "[defendant] has more than a decade of experience in the securities industry").

conduct. Sexton also contends that "[t]here is nothing unlawful about stock promotion," *id.* at 9, denying the impropriety and illegality of his conduct. Sexton further avers that the SEC has not been able to show that there "are any victims" of the scheme, *id.* at 10, a contention reiterated by Friesen, *see* Friesen's Opp'n 8, that, once again, endeavors to deny or at least minimize the large-scale harm perpetrated by their schemes. In similar fashion, Gasarch, despite a unanimous jury verdict finding her liable of independent and aiding-and-abetting violations of securities laws, *see* Jury Verdict, continues to argue that her involvement in the scheme was legitimate. *See, e.g.,* Gasarch's Opp'n 10 ("Clearly, given the length of time and the number of accounts and activities, Mrs. Gasarch was compensated for supporting Mr. Sharp in his legitimate business activities."); *see also id.* at 16 (contending that her conduct was not "grave" and her involvement in the scheme not "prominent"). The Court accordingly finds that these three Defendants have failed to show proper remorse and acknowledge the wrongful nature of their conduct.

[9] Finally, Gasarch unpersuasively argues that a permanent injunction restraining and enjoining her from the issuance, purchase, offer or sale of securities is inappropriate because she did not independently and directly engage in any violations involving such actions but, at most, aided and abetted others who directly engaged in those actions. *See* Gasarch's Opp'n 15. Other sessions of this Court have not hesitated to permanently restrain and enjoin defendants from engaging in violations whose perpetration they aided and abetted. *See, e.g., Spencer Pharm. Inc.,* 2015 WL 5749436, at *5–6, *6, 2015 U.S. Dist. LEXIS 132909, at *15, *18 (issuing permanent in-

junction against aider and abettor of securities law violation). [5]

Accordingly, this Court finds that Sexton, Friesen, and Gasarch engaged in egregious and repeated violations of securities laws for many years; are in a position to violate again; and have failed to recognize the wrongfulness of their conduct. In view of these

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[5] Accepting Gasarch's contention that the Court ought not issue a permanent injunction against her because she merely aided and abetted others in their fraudulent participation in the securities market is unmeritorious for two additional reasons. First, the jury, in addition to finding her to have aided and abetted others, found Gasarch independently liable of violating Section 17(a)(3). *See* Jury Verdict 2. While that independent violation does not directly pertain to the issuance of securities, it supports this Court's finding -- made during the trial -- that Gasarch was "at the hub" of the scheme. Tr. Jury Trial Day Eight 41, 164, ECF No. 442. Her role at the hub of the scheme supports this Court's finding that she was an important part of the scheme even though she may not have been as culpable as the other defendants. Second and more generally, permanent injunctions are equitable remedies over which courts enjoy a great degree of latitude. *See, e.g., Securities and Exchange Commission* v. *Tropikgadget FZE,* 2017 WL 722573, at *4, 2017 U.S. Dist. LEXIS 25495, at *12 (D. Mass. Feb. 23, 2017) (Burroughs, J.) ("The Court has broad authority to grant such an injunction."). Gasarch's contention that she ought not be enjoined from activity she herself did not commit but only aided and abetted would run afoul of that latitude and also of the relevant statutory text that grants this Court broad equitable powers: "In any action or proceeding brought or instituted by the [SEC] under any provision of the securities laws, the [SEC] may seek, and any Federal court may grant, *any equitable relief that may be appropriate or necessary* for the benefit of investors." 15 U.S.C. § 78(u)(d)(5) (emphasis added).

findings, a permanent injunction against each of the three is appropriate. [6]

2. Specific, Conduct-Based Injunctions

The SEC requests this Court specifically enjoin Sexton, Friesen, and Gasarch from "participating in the issuance, purchase, offer, or sale of any security; provided, however, that such an injunction shall not prevent [defendants] from purchasing or selling securities listed on a national securities exchange for [their] own personal account." *See, e.g.,* Mot. Remedies, Text of Proposed Order Proposed Final J. as to Gasarch, ECF No. 425-2. In essence, the requested conduct-based injunction would prevent the three Defendants from professionally -- but not personally -- engaging in the national securities market.

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[6] At least one of the three defendants has averred that permanent injunctions enjoining future securities laws violations, so-called "obey-the-law injunctions," do not make sense because everyone, regardless of an injunction, is bound to not violate laws, including the securities laws in question. *See, e.g.,* Sexton's Opp'n 17; *see also Securities and Exchange Commission* v. *Goble,* 682 F.3d 934, 949 (11th Cir. 2012) ("As the name implies, an obey-the-law injunction does little more than order the defendant to obey the law. We have repeatedly questioned the enforceability of obey-the-law injunctions not only in the context of securities cases but other cases as well.").

While the First Circuit has struck general and vaguely worded "obey-the-law" injunctions in other contexts, *see Equal Employment Opportunity Commission* v. *Aviation Port Servs., LLC,* 2020 WL 1550564, at *11– 12, 2020 U.S. Dist. LEXIS 57073, at *34-35 (D. Mass. Apr. 1, 2020) (Saylor, C.J.) (collecting and analyzing cases), courts in this Circuit as well as other sessions of this Court have issued injunctions in the securities context that are similar to the injunctions requested in the present case. *See, e.g., Chan,* 465 F. Supp. 3d at 38; *Present,* 2018 WL 1701972, at *1, 2018 U.S. Dist. LEXIS 45056, at *2-3.

[10] This Court is authorized to issue the requested conduct-based injunction. *See* 15 U.S.C. § 78(u)(d)(1); 15 U.S.C. § 78(u)(d)(5). "The Court has wide discretion to impose a conduct-based injunction in SEC actions." *Securities and Exchange Commission* v. *CKB168 Holdings, Ltd.,* 2022 WL 3347253, at *4, 2022 U.S. Dist. LEXIS 144893, at *9 (E.D.N.Y. Aug. 12, 2022). The analysis for the SEC's request for permanent injunctions, *see supra* Section III.A.1 ("Permanent Injunctions"), is equally applicable here. *See CKB168 Holdings, Ltd.,* 2022 WL 3347253, at *4, 2022 U.S. Dist. LEXIS 144893, at *9 (applying its permanent injunction analysis in its entirety -- "[f]or the same reasons laid out [above]" -- to its conduct-based injunction analysis).

[11] For the same reasons elucidated above, the Court issues the specific, conduct-based injunctions requested by the SEC. The Court additionally notes three points in support of its conclusion. First, as the SEC correctly brings to this Court's attention, "[t]his Court has issued this same requested injunction against Sharp, Kelln, and Veldhuis already." Mem. Supp. 7. Sexton, Friesen, and Gasarch have not raised any convincing argument as to why their cases ought be treated any differently. Second, other courts, including those in this Circuit, have issued similar specific, conduct-based injunctions. *See, e.g., Wall,* 2020 WL 1539919, at *8–9, 2020 U.S. Dist. LEXIS 56152, at *26-27. Third, the injunction still allows the three Defendants to "purchas[e] or sell[ ] securities listed on a national securities exchange for [their] own personal account." *See, e.g.,* Mot. Remedies, Text of Proposed Order Proposed Final J. as to Sexton 5, ECF No. 425-3. As such, this conduct-based injunction "does not deprive [the three defendants] of [their] living or the opportunity to

purchase and sell securities for [their] own personal account." *Wall,* 2020 WL 1539919, at *9, 2020 U.S. Dist. LEXIS 56152, at *27.

3. Penny Stock Bars

The SEC requests that Sexton, Friesen, and Gasarch be barred from participating in future offerings of penny stocks. *See* Mem. Supp. 8-11; *see also* Mot. Remedies, Text of Proposed Order Proposed Final J. as to Sexton 5 (requesting the Court decree the three Defendants "permanently barred from participating in an offering of penny stock, including engaging in activities with a broker, dealer, or issuer for purposes of issuing, trading, or inducing or attempting to induce the purchase or sale of any penny stock").

[12] "The standard for imposing a penny stock bar essentially 'mirrors that for imposing an officer-or-director bar.' " *Weed,* 315 F. Supp. 3d at 677 (quoting *Securities and Exchange Commission* v. *Universal Exp., Inc.,* 475 F. Supp. 2d 412, 429 (S.D.N.Y. 2007)). The criteria to determine whether an officer-or-director bar is appropriate, in turn, are: "(1) the egregiousness of the underlying securities law violation, (2) whether defendant was a repeat offender, (3) defendant['s[ ] role in the fraud[,] (4) defendant's degree of scienter, (5) defendant's economic stake in the fraud and (6) the likelihood that misconduct will recur." *Id.* (citing *Securities and Exchange Commission* v. *Patel,* 61 F.3d 137, 142 (2d Cir. 1995)). These criteria, also known as the *Patel* factors, are "neither mandatory nor exclusive." *Securities and Exchange Commission* v. *Bankosky,* 716 F.3d 45, 46 (2d Cir. 2013); *see also Securities and Exchange Commission* v. *Johnston,* 368 F. Supp. 3d 247, 251 (D. Mass. 2019) (Gorton, J.) ("While the

Patel factors are instructive . . . they are not exhaustive and it is not necessary to apply all of the factors in every case.”).

[13] Here, the analysis in the foregoing sections has already established that Sexton, Friesen, and Gasarch meet many of the *Patel* factors,[7] which obviates the need for repetition. Accordingly, the Court grants the SEC’s request for penny stock bars against each of the three Defendants.

The Court finds it appropriate to dispose of Gasarch’s argument concerning her scienter -- or rather, in her formulation, the lack thereof -- here, as a “defendant’s degree of scienter” is among the relevant *Patel* factors quoted above. *Weed,* 315 F. Supp. 3d at 677.

In her opposition, Gasarch correctly points to a misquotation by the SEC. *See* Gasarch’s Opp’n 1. Indeed, in its motion for remedies, the SEC submitted that the jury found “Gasarch liable for violating Section 17(a)(3) of the Securities Act and aiding and abetting violations of Sections 17(a)(1) *and* (3) of the Securities Act *and* Section 10(b) and Rule 10b-5(a) and (c) of the Exchange Act . . . .” Mot. Remedies (emphasis added). Yet, as Gasarch points out and as the jury verdict form clearly indicates, the jury found Gasarch liable for independently violating Section 17(a)(3) of the Securities Act and aiding and

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[7] For example, Sexton, Friesen, and Gasarch's conduct was egregious, *see supra* p. 75; repeated over the

course of many years, *see supra* pp. 75-76; and resulted in economic benefit to the three defendants, *see supra* p. 75. Further, there is a likelihood that their misconduct, in the absence of an appropriate injunction, will recur. *See supra* pp. 75-76.

abetting violations of Section 17(a)(1) or Section 17(a)(3) of the Securities Act or Section 10(b) and Rule 10b-5(a) and (c) of the Exchange Act. *See* Jury Verdict 2; *see also* Gasarch's Opp'n 1. While the jury may have found multiple aiding and abetting violations, the use of the disjunctive "or" indeed makes it also entirely possible, as Gasarch contends, that the jury may have found her liable for her independent violation of Section 17(a)(3) of the Securities Act and for aiding and abetting violations of, again, Section 17(a)(3). *See* Gasarch's Opp'n 1.

Since a Section 17(a)(3) violation does not require scienter, as this Court previously held, *see Sharp,* 626 F. Supp. 3d at 382, Gasarch argues that it is possible that she is liable for her independent non-scienter-based conduct violating Section 17(a)(3) and for aiding and abetting others' non-scienter-based conduct violating the same. *See* Gasarch's Opp'n 2. Gasarch goes on to argue that, assuming those are her only two securities law violations, "an aider and abettor may be liable only to the same extent as the person to whom such assistance is provided." Gasarch's Sur-Reply 5 (quotation omitted). Her contention seems to be that her aiding and abetting violation may be without scienter since the conduct she aided and abetted itself is non-scienter-based if it is just the aiding and abetting of others' non-scienter-based Section 17(a)(3) violations.

[14] This Court rejects this contention for two reasons and instead finds that Gasarch acted with a degree of scienter in aiding and abetting securities violations by other defendants. First, even assuming, *arguendo,* that they jury found Gasarch liable only for her independent and non-scienter-based violation of Section 17(a)(3) and for aiding and abetting other

defendants' violation of the same, this Court is still permitted to make findings of fact as to the appropriate remedy that do not conflict with the jury's findings as to liability. Such findings as to remedy may -- and here they do -- include the finding that Gasarch acted with scienter. Based on ample evidence presented at trial, and as the Court made clear during the hearing on remedies, the Court finds that there is sufficient evidence to establish that Gasarch acted intentionally. Second, and relatedly, the Court rejects Gasarch's contention as erroneous that an aiding and abetting violation ought have, at most, the same degree of scienter as the underlying violation. That is because here, the very act of aiding and abetting a securities violation, regardless of whether the aided conduct itself requires scienter for its commission, requires its own culpable mental state. *See, e.g., Malouf* v. *SEC,* 933 F.3d 1248, 1268 (10th Cir. 2019) (holding that "scienter is an essential element of aiding and abetting a violation of the securities law"); *Securities and Exchange Commission* v. *Blackburn,* 2015 WL 5307424, at *8, 2015 U.S. Dist. LEXIS 120747, at *21 (E.D. La. Sept. 10, 2015) ("[A] prima facie claim for aiding and abetting a violation of securities laws involves an underlying requirement of scienter."). In the case at bar, this Court instructed the jury during Gasarch's trial that an aiding and abetting violation requires knowing or reckless conduct. *See* Tr. Jury Trial Day Nine 34:24-25, 35:1, ECF No. 444 (instructing the jury on the aiding and abetting allegation against Gasarch, explaining that it must find, among other things, that "Gasarch knowingly or recklessly provided substantial assistance to the violation"). Thus, regardless of the conduct Gasarch aided and abetted, that she aided and abetted others' conduct in

violation of the securities laws suffices for this Court to find that she acted with scienter. [8]

Accordingly, a permanent penny stock bar will issue against Sexton, Friesen, and Gasarch.

B. Civil Penalties Against All of the Defendants

1. Legal Standard

Section 20(d)(2) of the Securities Act and Section 21(d)(3) of the Exchange Act authorize the SEC to seek, and this Court to impose, civil penalties to be determined "in light of the facts and circumstances." *See Lemelson,* 596 F. Supp. 3d at 233. In assessing civil penalties, courts may choose from three tiers, Tier I, Tier II, and Tier III, in increasing order of severity. Tier II requires "fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement." 15 U.S.C. § 77(t)(d)(2)(B). Tier III requires all of the elements of Tier II and the additional requirement that "such violation directly or indirectly result[ ] in substantial losses or create[ ] a significant risk of substantial losses to other persons." 15 U.S.C. § 77(t)(d)(2)(C). Tier I is available for all other violations. *See also* Mem. Supp. 12 (outlining the tier system). "The tier determines the maximum penalty, with the actual amount of the penalty left up to the discretion of the district court." *Securities and Exchange Commission* v. *Kern,* 425 F.3d 143, 153 (2d Cir. 2005) (citing 15 U.S.C. § 77(t)(d)).

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[8] In any event, in view of the fact that scienter is but one of the many *Patel* factors discussed above, the egregiousness of Gasarch's conduct, her economic stake in the fraud, and the likelihood that her misconduct will recur, still weigh in favor of issuing a penny stock bar against her.

[15] In fashioning an appropriate civil penalty, courts look to a variety of factors, including: "the egregiousness of the violation, the defendant's willingness or failure to admit wrongdoing, the isolated or repeated nature of the violations, the degree of scienter involved, the defendant's cooperation with authorities or lack thereof, and the defendant's current financial condition." *Securities and Exchange Commission* v. *Esposito,* No. 16-cv-10960-ADB, 2018 WL 2012688 at *9, 2018 U.S. Dist. LEXIS 72728 at *9 (D. Mass. Apr. 30, 2018) (Burroughs, J.).

Importantly, civil penalty claims may be time-barred. As this Court previously held in disposing of a prior motion to dismiss in this case, *see Sharp,* 626 F. Supp. 3d at 385-86, the applicable statute subjects civil penalty claims like those requested here to a five-year statute of limitations. Thus, this Court may impose civil penalties only in relation to securities law violations that may have occurred between August 5, 2016, and August 5, 2021, *id.* at 382. By contrast, as this Court previously stated, it *cannot* impose a monetary penalty in relation to violations prior to August 2016. *See* Tr. Motion and Charge Conference 55:15-18, ECF No. 443 ("So let me be clear. If we get to remedies, and I'm coming to think about remedies, and I think that violation was pre-August 2016, then I cannot impose a monetary penalty."); *see also* Sexton's Opp'n 14 (same); Gasarch's Opp'n 13 (same).

2. Parties' Arguments

With the foregoing legal standard in mind, the SEC requests this Court condemn the Defendants' conduct as repeated and egregious violations "evinc[ing] a high degree of scienter." Mem. Supp. 13. The SEC also argues that none of the Defendants have

acknowledged the wrongfulness of their conduct and that they are in possession of "substantial assets to satisfy a judgment." *Id.* at 14; *see also id.* at 3-5 (describing how the Defendants' conduct caused substantial loss to investors).

As for each of Sexton, Veldhuis, and Friesen, the SEC requests the Court impose "individual civil penalties in the amount of $1,562,603." *Id.* at 14. The SEC's proposed methodology is as follows: multiply a one-time Tier III penalty amount of $223,229 by seven since each of these three Defendants traded in seven issuers' stock -- out of the 14 -- during the five-year statute of limitations period between August 2016 and August 2021, that is, $223,229 × 7 = $1,562,603. *See id.*

Sexton opposes, arguing that the SEC's position that he was involved in issuing stock from seven companies between August 2016 and August 2021 is based on "a summary witness[ˈ] alleg[ations.]" Sexton's Opp'n 14. Sexton also argues that the evidence, at most, demonstrates that he profited from three issuers, not seven, and even then, that the passive receipt of pay checks is not, in and of itself, sufficient to restart the five-year clock for what were payments relating to conduct predating August 2016. *See id.* at 15. Finally, Sexton argues that in alleging that he has sufficient funds to pay a civil penalty -- $13,808,338 in frozen assets according to the SEC, *see* Mem. Supp. 14 -- the SEC has failed to take into account the fact that it is also asking this Court to impose disgorgement and prejudgment interest against him in the amount of $17,367,474. Sexton's Opp'n 15. Veldhuis concurs with Sexton's objections. *See* Kelln & Veldhuis' Opp'n 2. Friesen similarly argues that the evidence proffered by the SEC shows

that he "ceased his involvement with the other defendants in or about 2015," thus before the applicable five-year window beginning in August 2016. Friesen's Opp'n 10.

As for Kelln and Gasarch, the SEC requests this Court impose civil penalties in the amount of $904,078 and $558,072, respectively. Mem. Supp. 15. For Kelln, the SEC's proposed methodology is as follows: the sum of (1) one Tier III penalty for violating Section 17(a); (2) one Tier III penalty for violating Section 10(b); (3) one Tier III penalty for aiding and abetting violations of the Securities Act by the Sharp network clients; (4) one Tier III penalty for aiding and abetting violations of the Exchange Act by the Sharp network clients; and (5) one Tier I penalty for her primary violation of Section 5 of the Securities Act. *See id.* In general, Kelln concurs with Sexton's objections to the civil penalties sought by the SEC. *See* Kelln & Veldhuis' Opp'n 2.

For Gasarch, the SEC's proposed methodology is as follows: the sum of (1) one Tier III penalty for aiding and abetting violations of the Securities Act by the Sharp network clients; (2) one Tier III penalty for aiding and abetting violations of the Exchange Act by the Sharp network clients; and (3) one Tier II penalty for her primary violation of Section 17(a)(3) of the Securities Act. Mem. Supp. 15. Gasarch opposes, arguing that the SEC has failed to proffer evidence that convincingly imputes any post-August 2016 liability to Gasarch. *See* Gasarch's Opp'n 13. She further objects to the amount as excessive, contending that the jury finding regarding her aiding and abetting "could have been based on one underlying violation," not two or three, *id.* at 14; that her distribution of proceeds happened after the

purported fraud, *id.;* and that she does not have the requisite financial condition to pay the requested sum, *id.* at 15.

3. Analysis

[16] The Court agrees with the SEC's proposed methodology for calculating civil penalties against Sexton, Veldhuis, and Friesen, determining that they each ought be liable for seven Tier III violations, as their fraudulent schemes concerned seven out of the 14 issuers during the applicable five-year period. Another session of this Court recently adopted a similar methodology where a civil penalty was imposed against each of the so-called entity defendants, that is, corporations who engaged in penny stock fraud. *See Securities and Exchange Commission* v. *Knox,* 2022 WL 1912877, *3, 2022 U.S. Dist. LEXIS 99321, *9-10 (D. Mass. June 3, 2022) (Stearns, J.). Similarly, this Court finds it appropriate to impose a civil penalty against each of Sexton, Veldhuis, and Friesen per the number of entities they utilized to defraud unwitting investors during the five years preceding August 2021. The SEC asserts, and this Court agrees, that that number is seven.

Further, that the SEC is not seeking civil penalties in relation to stock sold through all 14 of the issuers is congruent with this Court's statement during trial that if it is persuaded that a violation "was pre-August 2016, then [it] cannot impose a monetary penalty." Tr. Motion and Charge Conference 55:17-18.

Indeed, evidence offered by the SEC supports its contention that seven out of the 14 issuers were involved in the fraudulent scheme between August 2016 and August 2021. An affidavit by Ryan Murphy,

an enforcement accountant at the SEC, submits to this Court "[his] determin[ation] that during that time period, Veldhuis, Sexton and Friesen traded the securities of seven of the Fourteen Issuers: Stevia First/Vitality, Arch Therapeutics, Liberty One Lithium, NewGen Biopharma, StartMonday Technology Corp., Lexington Biosciences, and BreathTec Biomedical." Decl. of Ryan Murphy ("Decl. of Ryan Murphy II") ¶ 30, ECF No. 427. While Sexton attempts to have the Court dismiss this as an unsupported allegation of "a summary witness," Sexton's Opp'n 14, the SEC responds by drawing the Court's attention to numerous pieces of evidence from trial exhibits as well as other witness statements that show that Sexton sold stock of the seven aforementioned issuers between August 5, 2016, and August 5, 2021. *See* Pl.'s Reply to Sexton 11 (collecting evidence). In his sur-reply, Sexton argues that certain pieces of evidence put forward by the SEC do not meaningfully identify that it was Sexton who traded the stock of these seven issuers. Sexton's Sur-Reply 5-6. Even assuming, *arguendo,* that Sexton's objections have any merit, he fails to respond to witness testimony as well as other evidence relating to his involvement in these issuers. *See, e.g.,* Tr. Jury Trial Day Two 108:19-20, ECF No. 436 (Dhillon's testimony that Seton participated in the sale of Vitality stock "in 2017 and maybe even '18"); Tr. Jury Trial Day Five 91:9-18, ECF No. 439 (Knox's testimony regarding Sexton's involvement in Vitality and Arch throughout 2018); Tr. Jury Trial Day Six 34:24-25, 35:1-2, ECF No. 440 (Knox's testimony regarding NewGen trading in 2017).

[17] Sexton's remaining objections that he, at most, profited from three out of the seven issuers during the five-year period and that the penalty amount is

excessive, *see* Sexton's Opp'n 14-15, are unavailing. As for profits, Sexton misconstrues the law: the relevant inquiry for purposes of determining the applicable period in relation to which civil penalties are to be imposed is *not* whether he profited from his misconduct during the relevant period but rather whether his misconduct, that is, the illegal stock trading, occurred during that same period. *See, e.g., Securities and Exchange Commission* v. *Cohen,* 332 F. Supp. 3d 575, 591 (E.D.N.Y. 2018) ("[T]he statute of limitations runs from when Defendants allegedly engaged in misconduct, not when they received compensation in connection with that misconduct."). Regarding the alleged excessiveness of the penalty, the SEC convincingly raises two points: (1) that the Sexton, Veldhuis, and Friesen control group generated a total amount of $31,000,000 in profits during the five-year window; and (2) that Sexton "entirely ignores the value of his significant real estate holdings and other assets not held in frozen financial institutional accounts." Pl.'s Reply to Sexton 12. Sexton's frozen assets already total $13,808,338 as of December 2022, according to the SEC. Mem. Supp. 14. Accordingly, this Court overrules Sexton's objection based on his purported financial inability to pay the requested civil penalty.

Much of the above analysis applies with equal force to Veldhuis and Friesen against whom the SEC requests identical civil penalties. Veldhuis and Friesen, too, illegally traded in the stock of seven out of the 14 issuers during the relevant five-year period.[9] Friesen, like Sexton, argues that the SEC

[9] Since Veldhuis concurs with Sexton's objections to the civil penalty sought by the SEC, *see* Kelln & Veldhuis' Opp'n 2, and

has failed to establish that he engaged in illegal conduct during the five-year window, averring instead that he simply profited from some deals that transpired prior to those five years. *See* Friesen's Opp'n 10-11. The voluminous evidence provided during trial contradicts that contention. *See* Pl.'s Reply to Friesen 3 (referring to numerous trial exhibits). Indeed, evidence was put before the jury during trial that indicated Friesen's -- and Veldhuis' -- involvement in the scheme post-dating August 5, 2016. *See* Pl.'s Reply to Sexton 11; *see also* Decl. of Ryan Murphy II ¶ 30 (documenting Friesen and Veldhuis' engagement in the trade of stocks of seven out of the 14 issuers during the applicable window). In view of the foregoing as well as voluminous evidence from trial demonstrating that Sexton, Veldhuis, and Friesen acted in concert, the Court is persuaded that these three Defendants illegally traded in the stock of seven issuers between August 2016 and August 2021. *See, e.g.,* Tr. Jury Trial Day Five 78, 87-88, 90; Tr. Jury Trial Day Three 13-16, 24, 41, 96-97, ECF No. 437.

The Court also agrees with the SEC that the maximum Tier III penalty is warranted for each of the seven violations. The scheme in which Sexton, Veldhuis, and Friesen were involved, this Court finds, operated through fraud and deceit, thereby fulfilling the statutory requirement that this Court impose Tier III penalties against violations involving "fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement." 15 U.S.C. § 77(t)(d)(2)(B). It is also clear that their violations "directly or indirectly resulted in substantial losses or

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since those objections have been overruled above, the remainder of this paragraph deals with Friesen's objections.

created a significant risk of substantial losses to other persons," 15 U.S.C. § 77(t)(d)(2)(C), as it is inconceivable for the scheme these three Defendants participated in during the five-year period to not have caused actual loss, let alone a significant risk thereof. [10]

Accordingly, the SEC's request of one Tier III penalty multiplied by seven against each of the three Defendants Sexton, Veldhuis, and Friesen is appropriate and hereby granted. The Court imposes a civil penalty of $223,229 × 7 = $1,562,603 against each of them.

[18] The Court also grants the SEC's proposed civil penalty against Kelln. Pursuant to the partial judgment as to her, Kelln was ordered to "not contest liability under the claims filed by the [SEC]." J. as to Kelln 5. Those claims allege five different violations: (1) an independent violation of Section 17(a) of the Securities Act; (2) an independent violation of Section 10(b) of the Exchange Act; (3) aiding and abetting others in their violation of the Securities Act; (4) aiding and abetting in their violation of the Exchange Act; and (5) an independent violation of Section 5 of the Securities Act. *See* Mem. Supp 15; *see also* Am. Compl. ¶¶ 259-58, 277-85. "Liability under Section 17(a)(1) [and] Section 10(b) . . . requires materiality and scienter." *Flannery* v. *SEC,* 810 F.3d 1, 9 (1st Cir. 2015). Aiding and abetting securities violations, as the above discussion regarding Gasarch's aiding and

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[10] While courts have split over the issue of whether a demonstration of actual loss is required to impose a Tier

III penalty, *see Lemelson,* 596 F. Supp. 3d at 235 (collecting cases), this Court need not adopt a position as to that split since here it is clear that investors were defrauded through the pump-and-dump schemes.

abetting violation reveals, *see supra* pp. 79-80, requires, at a minimum, knowledge or recklessness. As such, the first four of the five violations by Kelln, this Court finds, qualify as Tier III violations.

As for Kelln's independent violation of Section 5 of the Securities Act, because liability under thereof need not require a showing of scienter, a less severe civil penalty is appropriate. *See Securities and Exchange Commission* v. *Esposito,* 2017 WL 5615571, at *2–3, 2017 U.S. Dist. LEXIS 192120, at *5-6 (D. Mass. Nov. 21, 2017) (Burroughs, J.) (collecting cases that have held that a Section 5 violation does not require scienter); *Securities and Exchange Commission* v. *Smith,* 2015 WL 4067095, at *9, 2015 U.S. Dist. LEXIS 86625, at *25 (D.N.H. July 2, 2015) ("Section 5 imposes no scienter requirement."); *see also* Mem. Supp. 15 (contending that "liability under [Section 5] does not require a showing of scienter"). Accordingly, a Tier I civil penalty for Kelln's independent and non-scienter-based violation of Section 5 is appropriate. In sum, a Tier III civil penalty of $223,229 for each of her first four violations and a Tier I civil penalty of $11,162 for her Section 5 violation is appropriate. This Court therefore imposes a civil penalty against Kelln in the amount of ($223,229 × 4) + $11,162 = $904,078.

[19] As for Gasarch, the Court agrees with the SEC's proposed methodology for calculating a monetary penalty but is persuaded that a downward variance from the SEC's requested amount is appropriate. At the outset, the Court dismisses Gasarch's contention that she merely rendered legitimate secretarial services to Sharp and, at most, just arranged the distribution of proceeds after the fraud by other occurred. *See* Gasarch's Opp'n 14. That is

precisely the unwitting secretary contention and defense mounted by Gasarch during trial that the jury necessarily rejected in finding her liable for various securities law violations. Relying on the disjunctive "or" appearing on the jury verdict, *see* Jury Verdict 2, that found her liable for alternative aiding and abetting violations, Gasarch contends that she is liable for, at most, two violations: (1) an independent violation of Section 17(a)(3) of the Securities Act and (2) one aiding and abetting violation of securities laws. *See* Gasarch's Opp'n 14.

Gasarch is not wrong, *per se,* to argue that the jury, in addition to finding her independently liable for a violation of Section 17(a)(3) of the Securities Act, may have found that she aided and abetted just one of the two violations separated by the disjunctive "or" on the jury slip. Conversely, the jury may have found Gasarch liable for aiding and abetting both Securities Act and Exchange Act violations in addition to her independent violation of the Securities Act.

Moreover, and more importantly, for purposes of fashioning appropriate remedies in the context of a securities enforcement adjudication, "[a]t the remedies stage, trial judges may make factual findings and rely on such findings in assessing the amount of civil penalties so long as the court's findings do not conflict with the jury's findings as to liability." *Securities and Exchange Commission* v. *Life Partners Holdings, Inc.,* 854 F.3d 765, 781-82 (5th Cir. 2017). At trial, this Court found that Gasarch worked "at the hub" of the fraudulent Sharp enterprise. *See* Tr. Jury Trial Day Eight 41:10, 164:21, ECF No. 442. In her role as Sharp's aide working "at the hub," *id.,* she aided and abetted the Sharp scheme clients in their violation of both the Securities Act and the Exchange

Act. This finding does not conflict but rather comports with and honors the jury verdict against Gasarch.

Accordingly, this Court agrees with the SEC that she is liable for three violations: (1) her independent violation of Section 17(a)(3) of the Securities Act; (2) aiding and abetting others in their violation of the Securities Act; and (3) aiding and abetting others in their violation of the Exchange Act. *See* Mem. Supp. 15. Further, in view of the earlier discussion that Gasarch's aiding and abetting required scienter, *see supra* pp. 79-80, a Tier III monetary penalty for her two aiding and abetting violations is appropriate. As for her independent violation of Section 17(a)(3) of the Securities Act, a Tier II penalty is appropriate, as an independent violation of Section 17(a)(3) does not require a showing of scienter. *See Sharp,* 626 F. Supp. 3d at 382; *see also supra* pp. 79-80.

While the Court agrees with the SEC's proposed methodology for imposing a monetary penalty against Gasarch, the Court will not impose the exact amount proposed by the SEC of ($223,229 × 2)[11] + $111,614[12] = $558,072. At least three reasons persuade this Court that a downward variance is appropriate. First, while this Court indeed found Gasarch to be an operative of the Sharp scheme and one at its hub, *see* Tr. Jury Trial Day Eight 41:10, 164:21, her role at the hub was necessarily under the command of Sharp and also meant that she did not operate at the spoke

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[11] A total of two Tier III penalties for Gasarch's two aiding and abetting violations: one for aiding and abetting Securities Act violations and the other for aiding and abetting Exchange Act violations.

[12] One Tier II penalty for Gasarch's independent and non scienter-based violation of Section 17(a)(3) of the Securities Act.

end of the hub-andspoke scheme, where investors were directly harmed. Second, evidence presented at trial points to the fact that Gasarch was involved in the fraudulent enterprise not at the outset but later in time.[13] As such, the Court finds that, at least as an initial matter, prior to joining the scheme as co-conspirator, Gasarch performed legitimate secretarial services to Sharp. Third, the two Tier III civil penalties against her are in relation to Gasarch's aiding and abetting, not independent and primary, violations. While her aiding and abetting required its own mental culpability and scienter, equitable considerations demand that a lesser civil penalty be imposed against her than other Defendants whom she aided and abetted in their primary and scienter-based violations of the various securities laws. *Cf. Securities and Exchange Commission* v. *Zwick,* 2007 WL 831812, at *26–27, 2007 U.S. Dist. LEXIS 19045, at *83-84 (S.D.N.Y. Mar. 16, 2007) (imposing a Tier III penalty against an aider and abettor but with a downward variance because of aider and abettor status, as opposed to being the primary violator, among other reasons).

In view of the fact that the SEC submits to this Court that as of December 2022 Gasarch has $296,651 in frozen assets, the Court imposes a civil penalty of $296,651 against her. [14]

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[13] At trial, the Court stated as much: "[Gasarch] joined the conspiracy later in time than her initial employment, which candidly I think is the fact, I'm not persuaded she was a co-conspirator at that time, whenever it was, that she became employed by Sharp. I'm not clear when she joined the conspiracy." Tr. Jury Trial Day Eight 165:8-13.

[14] The Court observes that the civil penalty amounts requested by the SEC are all based on inflation-adjusted figures

C. Disgorgement and Prejudgment Interest Against All of the Defendants

1. Legal Standard

[20] Disgorgement is an equitable remedy that is intended to deprive a wrongdoer of his ill-gotten gains at the expense of victims. *See Liu* v. *SEC,* 591 U.S. 71, 75, 140 S.Ct. 1936, 207 L.Ed.2d 401 (2020) (clarifying "that a disgorgement award that does not exceed a wrongdoer's net profits and is awarded for victims is equitable relief permissible under § 78(u)(d) (5)"). *Liu* provided three clarifications to disgorgement law.

[21] *First,* it clarified that disgorgement is non-punitive and intended to make victims whole. *See id.* at 74, 140 S.Ct. 1936 (defining courts' power to award equitable relief as "a power that historically excludes punitive sanctions"); *id.* at 75, 140 S.Ct. 1936 (holding that a disgorgement award "is awarded for vict-

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from 2023. *See* Mem. Supp. 12. Since the SEC moved for remedies in December 2023, the SEC has updated its civil penalty amounts, announcing in January 2024 its inflation adjustment figures for 2024. *See Inflation Adjustments to the Civil Monetary Penalties Administered by the Securities and Exchange Commission (as of January 15, 2024), SEC.gov* (Jan. 16, 2024), *-inflation-adjustments*. The question arises whether the Court ought consider the most recent inflation-adjusted figures for 2024 or instead ought consider the inflation-adjusted figures for 2023 used by the SEC in its calculation.

The parties have not raised the issue of inflation adjustment in their briefs nor during oral argument. In the interest of fairness, the Court will not adjust figures to reflect inflation for 2024, although it is highly likely that the Court has the equitable power to do so *sua sponte. Cf. Weed,* 315 F. Supp. 3d at 677 (taking notice of the SEC's "increasing the maximum Tier-III penalty from the statutory limit of $100,000 to account for inflation adjustments").

ims"); *see also Sharp,* 626 F. Supp. 3d at 380 ("The Supreme Court has entrenched disgorgement's non-punitive character in the context of securities violations, by requiring that it be used to make victims whole.").

[22] *Second* and relatedly, a disgorgement award ought be limited to a wrongdoer's "net profits," *Liu,* 591 U.S. at 75, 140 S.Ct. 1936, calculated by "deducting legitimate expenses" from a wrongdoer's gross ill-gotten gains, *id.* at 84, 140 S.Ct. 1936. The Court noted one historical exception to the rule that legitimate expenses ought be diminished from the show of profits, defining that exception as "when the entire profit of a business or undertaking results from [a] wrongful activity." *Id.* at 84, 140 S.Ct. 1936 (quotation omitted).

[23] *Third, Liu* clarified that the general rule in awarding disgorgement is to hold wrongdoers individually liable for their personal ill-gotten gains. *See id.* at 82-83, 140 S.Ct. 1936 ("Equity courts also generally awarded profits-based remedies against individuals or partners engaged in concerted wrongdoing, not against multiple wrongdoers under a joint-and-several liability theory."). Reviewing a corpus of precedents, the Supreme Court observed that a "rule against joint-and-several liability for profits that have accrued to another appears throughout equity cases awarding profits." *Id.* Still, the Supreme Court also observed that "[t]he common law did . . . permit liability for partners engaged in concerted wrongdoing." *Id.* at 90, 140 S.Ct. 1936.

In sum, then, "[t]he [C]ourt's power to order disgorgement extends only to the amount with interest by which the defendant profited from his wrongdoing." *Securities and Exchange Commission* v.

MacDonald, 699 F.2d 47, 54 (1st Cir. 1983) (en banc) (quoting *Securities and Exchange Commission* v. *Blatt,* 583 F.2d 1325, 1335 (5th Cir. 1978)). "[C]ourts consistently restrict[ ] awards to net profits from wrongdoing after deducting legitimate expenses[,]" *Liu,* 591 U.S. at 84, 140 S.Ct. 1936, though it is also possible -- under exceptional circumstances -- to dispense with that requirement, especially if the entire business, undertaking, or enterprise involves wrongful activity, *id.* at 83, 140 S.Ct. 1936.

[24] [25] In any case, "[t]he amount of disgorgement 'need only be a reasonable approximation of profits causally connected to the violation.' " *Securities and Exchange Commission* v. *Happ,* 392 F.3d 12, 31 (1st Cir. 2004) (quoting *Securities and Exchange Commission* v. *First City Fin. Corp.,* 890 F.2d 1215, 1231 (D.C. Cir. 1989)). "The risk of uncertainty in calculating disgorgement should fall on the wrongdoer whose illegal conduct created that uncertainty." *Id.* "Once the SEC shows that the disgorgement is a reasonable approximation, the burden shifts to the defendant to demonstrate that the amount of disgorgement is not a reasonable approximation." *Id.*

Finally, the Court takes notice of its previous holding regarding the applicable statute of limitations in issuing disgorgement awards: scienter-based claims for disgorgement require a ten-year statute of limitations whereas non-scienter-based claims for disgorgement "continue to require a five-year statute of limitations." *Sharp,* 626 F. Supp. 3d at 381.

2. Parties' Arguments

The SEC requests this Court issue disgorgement awards in the following amounts: (1) $17,367,474

against Sexton; (2) $13,289,897 against Veldhuis; (3) $11,846,176 against Friesen; (4) $1,582,785 against Kelln; and (5) $2,522,367 against Gasarch. Mem. Supp. 1.

The SEC bases its calculation "on the sums that each of them received into their personal Q accounts of the Fourteen Issuers whose illegal trading was at issue." [15] *Id.* at 17-18. The SEC further asserts that the applicable statute of limitations is ten, not five, years, rendering the Defendants' profits from 2011 - not from 2016 -- onward susceptible to disgorgement. *Id.* at 17 ("[I]t is appropriate to award disgorgement for a ten-year time period, given that each of the Defendants was found liable, or is being held liable, for violating a statute requiring the proof of scienter as an element."). As such, the SEC requests the Court award disgorgement based on the time period from August 5, 2011, that is, ten years before the SEC filed this present action. *Id.*

The Defendants object to the SEC's position as well as the specific award amounts proposed by the SEC on numerous grounds. After having carefully rev-

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[15] As the following discussion on the Q data will make clear, in proposing respective amounts for its proposed disgorgement awards, the SEC focuses on a specific piece of evidence presented at trial: the so-called "Q records" or "Q data" that is a compilation of internal records kept by Sharp that the SEC contends shows stock proceeds allocated to each of the Defendants that they gained throughout the course of the pump-anddump scheme, as well as commissions received by some of them. *See, e.g.,* Mem. Supp. 17-18, 19, 21.

Separately, because some of the transfers reflected on the Q system were made in Canadian Dollars, the SEC informs the Court that its estimate "converts all of those transfers into US Dollars, using the applicable exchange rate on the date of the transfer in the Q system." *Id.* at 18.

iewed their briefs and the arguments made during the hearing held on the question of remedies, the Court distills these various objections to seven separate contentions.

First, the Defendants impeach the credibility of the Q data evidence by variously characterizing it as hearsay or as a document susceptible to manipulation. *See, e.g.,* Sexton's Opp'n 6 (arguing that "the Court has already ruled, the database is not a business record, because, among other issues, there are not sufficient indications that the records were entered contemporaneously"); Kelln & Veldhuis' Opp'n 2 (concurring with Sexton's objections); Friesen's Opp'n 5 (characterizing Q records as inadmissible hearsay); Gasarch's Opp'n 2, 7-8 (arguing that the Q data is unreliable and unverified). As a corollary to the objection regarding its reliability, Gasarch also contends that there is no evidence that the designations "PEAC" or "PERE" in the Q data indicate her Q account. Gasarch's Opp'n 4.

Second, even assuming that the Q data is reliable, the Defendants argue, it shows, at most, the proceeds generated over the course of a decade but, crucially, not the actual disbursements made from the generated proceeds to the individual Defendants. Sexton argues that the Q system may be considered indicative of the stock transactions that transpired, but that there is no evidence that this data is reflective of "the division of proceeds stemming from those transactions." Sexton's Opp'n 7. In furtherance of his objection, Sexton also points out that the SEC has not presented this Court with any "documentary evidence to corroborate the purported gains" shown on the Q system, specifically, bank records that would verify that the Q system transfers actually

happened and were received by the Defendants. *See id.* at 4-5; *see also* Kelln & Veldhuis' Opp'n 2 (concurring with Sexton's objections). Friesen, too, argues that the Q records, at most, indicate stock entries but not actual transfers to each of the Defendants. *See* Friesen's Opp'n 7.

Third, the Defendants argue that the SEC has not shown that any transfers that they may have received from trading in all 14 of the issuers are ill-gotten, and not legitimate, gains. *See* Sexton's Opp'n 8 (arguing that the SEC "has not tied funds to violations of the securities laws"); Kelln & Veldhuis' Opp'n 2 (same); Friesen's Opp'n 3 (same); Gasarch's Opp'n 12 (rejecting the SEC's position that she received ill-gotten funds).

Fourth, the Defendants argue that the SEC has failed to show that disgorgement would make victims whole, as the SEC has failed to specifically point to any victims who have suffered pecuniary harm as a result of the Defendants' alleged misconduct. Sexton avers, for example, that the SEC "has not established that there are any victims to whom disgorgement should be allocated." Sexton's Opp'n 10; *see also* Friesen's Opp'n 8-9 (same); Gasarch's Opp'n 10-11 (same).

Fifth, the Defendants argue that the SEC, in relying on the sums reflected in the Q system to calculate proposed disgorgement award amounts, failed to factor out legitimate expenses and payments received by the Defendants. Friesen agues, for example, that the Q records also show repayments, debt payments, and offsets, which the SEC has not but should have considered in its calculation. Friesen's Opp'n 6. Gasarch similarly contends that the SEC does not attempt to factor out "legitimate"

payments to her for her secretarial services. Gasarch's Opp'n 4-5, 10.

Sixth, the Defendants contend that disgorgement is time-barred as the SEC has failed to establish that disgorgement is tied to scienter-based conduct. Sexton's Opp'n 11; Gasarch's Opp'n 12 (similar).

Seventh, the Defendants argue that the SEC should have but has not avoided double counting in its calculations, failing to offset funds frozen or funds collected from others -- such as Sharp, Knox, or Dhillon -- involved in the Sharp enterprise. *See* ECF No. 484.

3. Analysis

After reading the briefs and hearing the above-mentioned objections from Defendants during a hearing held on the question of remedies, the Court took the issue of disgorgement and prejudgment interest under advisement. *See id.* The Court is now prepared to rule on the issue and for the following reasons **GRANTS** the SEC's motion for disgorgement in its entirety, subject to certain caps as described below, *see infra* pp. 92-93, and **DENIES** its motion for prejudgment interest in its entirety.

[26] *First,* the Court has previously rejected, and once again rejects, characterizations of the Q data that seek to describe it as hearsay. While the Court did not make a final finding during the course of the trial, it intimated that it was prepared to admit the Q system into evidence under the business records exception to the rule against hearsay. *See generally* Tr. Jury Trial Day Four 69-72, ECF No. 438 (the Court, upon hearing from witness testimony, holding that the Q data "would seem to satisfy the business records exception"; noting that not "anyone could

write in the book"; holding that the Q data "satisfies the requirements of a business record"); *see also* Tr. Hr'g Disgorgement 24:8-11, ECF No. 491 (the Court holding during the hearing on remedies that "[t]his Court is satisfied that the Q system records qualify as business records under the federal rules of evidence"). Thus, the Q system is admissible evidence and not hearsay.

Further, the Defendants' efforts to describe the Q data as easily manipulable are unavailing. *See, e.g.,* Tr. Jury Trial Day Two 10:15-16 (Gasarch contending that Sharp "had the power as the administrator to change all the Q data"); *id.* at 21:11-12 (Friesen describing the Q system data as Sharp "sort of inputting data apparently in any way that he sees fit"); *see also id.* at 21:18-19 (Friesen arguing that the Q system data "is not a believable, authentic, reliable recitation of anything"); Tr. Jury Trial Day Nine 61:2 (Gasarch calling the Q data "garbage"). That Sharp may have been the main administrator of the Q system, *see, e.g.,* Tr. Jury Trial Day Seven 129:3, ECF No. 441 (witness testimony characterizing the Q system as "[Sharp]'s own accounting system"), does not by itself demonstrate that the data has been unreliably manipulated.

The SEC has compared the Q data to independent brokerage records, Decl. of Ryan Murphy I ¶ 15, and the comparison has returned a very high rate of accuracy. As the affidavit of Ryan Murphy indicates, the comparison between Q data for each of the 14 issuers and independent brokerage records has confirmed the reliability of Q data with considerable accuracy: (1) 95% for Stevia First/Vitality, *id.* ¶ 17; (2) 94% for Echo Automotive, *id.* ¶ 20; (3) 97% for Arch Therapeutics, *id.* ¶ 23; (4) 100% for Stevia

Corp., *id.* ¶ 26; (5) 95% for Liberty One Lithium Corp., *id.* ¶ 29; (6) 96% for Oryon Technologies, *id.* ¶ 31; (7) 100% for Makism 3D Corp., *id.* ¶ 33; (8) 98% for Graphite Corp., *id.* ¶ 35; (9) 97% OncoSec Medical Inc., *id.* ¶ 37; (10) 97% for NewGen Biopharma Corp., *id.* ¶ 39; (11) 91% for StartMonday Technology Corp., *id.* ¶ 41; (12) 100% for Lexington Biosciences Holdings Corp., *id.* ¶ 43; (13) 100% for BreathTec Biomedical Inc., *id.* ¶ 45; and (14) 75% for RightsCorp., *id.* ¶ 47. While the Defendants are correct to argue that only a sample, and not all, of the brokerage records and Q transactions were compared, they do not meaningfully challenge, much less demonstrate, how the sample is not representative. *Securities and Exchange Commission* v. *Commonwealth Equity Servs., LLC,* 2024 WL 1375970, at *9, 2024 U.S. Dist. LEXIS 59361, at *28 (D. Mass. Mar. 29, 2024) (Talwani, J.) (rejecting the argument that the SEC's sample was "cherry-picked"). Accordingly, the Q record, as a comparison with independent brokerage records confirms, is a detailed and highly accurate representation of the funds generated by the Sharp pump-and-dump schemes.

The Court is further persuaded that the Q data is highly accurate since evidence presented at trial demonstrated that Q system entries were made very close in time to the illegal trading that occurred. *See, e.g.,* Tr. Jury Trial Day Six 49:9 (witness testimony that Q entries were made within "less than 24 hours" following trade). The Court therefore finds the Q data reliable and credible evidence of the proceeds generated through the illegal trading that occurred with respect to the 14 issuers.

[27] *Second,* the Court rejects the Defendants' contention that there is no evidence that the proceeds recorded in the Q system were actually disbursed and distributed to and received by the Defendants. To be sure, the Defendants are correct to point out that the SEC compared the Q data to independent brokerage records but did not "look at any bank records." Tr. Jury Trial Day Eight 150:22 (SEC analyst testifying that he did not look at bank records to confirm receipt of the proceeds by the Defendants). The Defendants repeatedly emphasized this point during the hearing on remedies. *See* Tr. Hr'g Disgorgement 16:12, 17:1, 20:21-22, (mentioning the lack of evidence that the Defendants "actually received money"; that there are no "funds received were by us"; and asking the Court to focus on "what the individual actually received"). Moreover, witness testimony at trial seemed to indicate that not all of the proceeds generated by the pump-and-dump scheme actually went to the Defendants. *See, e.g.,* Tr. Jury Trial Day Seven 89.

The SEC notes that the Q system shows the transfers of illegal stock sale proceeds from the issuer accounts into each of the Defendants' personal accounts, and that the system shows, just like a bank account would, the Defendants paying their mortgages, paying the expenses of their family members, and making other transfers. *See* Tr. Hr'g Disgorgement 26:9-17. This, while true, does not change the fact that the SEC has not submitted any bank records to this Court that show actual receipt of funds by the Defendants.

Having carefully reviewed the record and considered the question of the lack of bank records showing actual receipt of funds by the Defendants, this Court

is persuaded, for the following reasons, that the balance of equities favors the awarding of the disgorgement amounts requested by the SEC. First, the Q data's high degree of internal accuracy as to the proceeds generated counsels a similar finding of accuracy as to its figures regarding the money going into the Defendants' personal Q accounts, especially because the Defendants failed to argue, much less show, that there is money in their accounts in the Q system that still remains there. *See Happ,* 392 F.3d at 31 (burden of proof shifting to defendants once SEC makes a reasonable approximation).

Second, the production of bank records confirming actual receipt of funds, to this Court's knowledge, has never been declared a *sine qua non* before finding the SEC's disgorgement calculation reasonable. Rather, courts in this district and in others have looked at bank records in combination with other evidence and sometimes have not looked at bank records at all. *See, e.g., Securities and Exchange Commission* v. *Lazare Indus.,* 294 Fed. Appx. 711, 715 (3d Cir. 2008) (holding that the defendants' argument that the district court "abused its discretion in fixing the amount of disgorgement because the SEC did not offer bank records showing that defendants actually received the amounts memorialized on the subscription agreements" "lacks merit"); *Securities and Exchange Commission* v. *Eiten,* 2014 WL 4965102, at *1, 2014 U.S. Dist. LEXIS 139428, at *3 (D. Mass. Sept. 30, 2014) (O'Toole, J.) (finding the SEC's disgorgement calculation based on "bank records, other financial information, and documents" reasonable).

[28] Third and most importantly, in cases involving concerted wrongdoing, joint and several liability may

be appropriate, in which case the ill-gotten gains subject to disgorgement need not accrue to each defendant individually.[16] *Cf. Securities and Exchange Commission* v. *San Francisco Reg'l Ctr. LLC,* 2019 WL 13215716, at *3, 2019 U.S. Dist. LEXIS 4983, at *9-10 (N.D. Cal. Jan. 10, 2019) (rejecting the SEC's contention that the court can disgorge profits accruing to a defendant that "it never had" because SEC failed to articulate a conspiracy claim and that the defendant was "a participant in the wrongdoing"). Here, the Defendants were co-conspirators within a hub-and-spoke model: Gasarch conspired with Sharp; Kelln conspired with Sharp; and Sexton, Veldhuis,

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[16] Here, the Court notes that the antecedent question may arise as to whether joint and several liability is permissible in the context of disgorgement. As noted above, *Liu,* while articulating the default rule of individual liability in the disgorgement context, still carved out an exception applicable to instances of "concerted wrongdoing." *Liu,* 591 U.S. at 90, 140 S.Ct. 1936. Further, the *Liu* Court eschewed "wad[ing] into all the circumstances where an equitable profits remedy might be punitive when applied to multiple individuals[,]" *id.* at 91, 140 S.Ct. 1936, remanding the case to the lower court instead so that it could determine whether joint and several liability would be appropriate, "[g]iven the wide spectrum of relationships between participants and beneficiaries of unlawful schemes—from equally culpable codefendants to more remote, unrelated tipper- tippee arrangements." *Id.* As such, the *Liu* Court recognized the permissibility of assigning joint and several liability to defendants engaged in concerted wrongdoing.

Post-Liu, at least two sessions of this Court have held securities law offenders jointly and severally liable for disgorgement. *See Knox,* 2022 WL 1912877, at *4, 2022 U.S. Dist. LEXIS 99321, at *11 ("The interchangeable role the Entity Defendants played within the scheme makes joint and several liability appropriate."); *see also Securities and Exchange Commission* v. *Gomes,* 2022 WL 11804022, 2022 U.S. Dist. LEXIS 191457, at *19-20 (D. Mass. Oct. 20, 2022) (Saylor, C.J.).

and Friesen conspired with each other and with Sharp as part of specific pump-and-dump schemes. As such, joint and several liability is appropriate: Gasarch is jointly and severally liable with Sharp; Kelln is jointly and severally liable with Sharp; and Sexton, Veldhuis, and Friesen are jointly and severally liable with Sharp. Given that Sharp was a co-conspirator in each of the conspiracies, the ill-gotten gains need not have accrued personally to each of the Defendants -- that they may have partially or entirely accrued to Sharp suffices to award disgorgement. *See Securities and Exchange Commission* v. *Platforms Wireless Int'l Corp.,* 617 F.3d 1072, 1098 (9th Cir. 2010) ("We hold that the district court did not abuse its discretion in holding Martin jointly and severally liable with Platforms. We have never held that a personal financial benefit is a prerequisite for joint and several liability."); *see also Securities and Exchange Commission* v. *Monterosso,* 756 F.3d 1326, 1337-38 (11th Cir. 2014) ("[Defendant] argues it would be inequitable to hold him liable for disgorgement when he did not receive proceeds. The Ninth Circuit, however, has stated, and we agree, a personal financial benefit is not a prerequisite for joint and several liability." (quotations omitted)).

The Court, in exercising its "broad discretion not only in determining whether or not to order disgorgement but also in calculating the amount to be disgorged[,]" *Securities and Exchange Commission* v. *Druffner,* 802 F. Supp 2d 293, 297 (D. Mass. 2011) (Gorton, J.) (quotation omitted), will, however, cap the individual amount that may be disgorged from each of the Defendants, notwithstanding their joint and several liability, at the following amounts requested by the SEC based on the Q system data: (1) $17,367,474 against Sexton; (2) $11,846,176 against

Friesen; (3) $13,289,897 against Veldhuis; (4) $1,582,785 against Kelln; and (5) $2,522,367 against Gasarch.

Third, the Court finds the remaining objections raised by the Defendants unavailing. As evidence submitted to this Court as well as presented during trial indicates, the proceeds reflected in the Q system are, absent any showing to the contrary proffered by the Defendants, generated by illegal pump-and-dump schemes that involved 14 different issuers.

Additionally, the argument the SEC has failed to show any victims is premature: the SEC has agreed in writing, *see, e.g.,* Mem. Supp. 22-24, and verbally represented to this Court during the hearing on remedies, *see* ECF No. 482, that a plan can and will be submitted to the Court, to its satisfaction, detailing plans to return the disgorged funds to the harmed investors.

The objection that disgorgement is time-barred is also without merit, as all of the Defendants acted with varying degrees of scienter, rendering the applicable statute of limitations ten, not five, years. Finally, as to offsetting legitimate expenses, the Defendants' objections are, again, unpersuasive for two reasons. First, the Defendants do not meaningfully counter the SEC's calculation by any showing how certain payments were indeed legitimate, bearing in mind the SEC's obligation is to formulate a "reasonable approximation." *Happ,* 392 F.3d at 31. Second, even though there may have been incidental expenses that could be offset, the exception articulated in *Liu* that offsetting or diminishing legitimate business expenses is not necessary where the enterprise itself is fraudulent, *see Liu,* 591 U.S. at 83-84, 140 S.Ct. 1936, is applicable here.

For the foregoing reasons, the Court holds the Defendants jointly and severally liable as follows:

- Gasarch is jointly and severally liable with Sharp for disgorgement in the amount of $2,522,367;

- Kelln is jointly and severally liable with Sharp for disgorgement in the amount of $1,582,785; and

- Sexton, Veldhuis, and Friesen are jointly and severally liable with Sharp for disgorgement in the amount of $42,503,547; provided, however, that the amount to be disgorged from Sexton, Veldhuis, and Friesen will be capped at, and shall not exceed, $17,367,474, $13,289,897, and $11,846,176, respectively.

The disgorgement awards are, of course, subject to the SEC's submission, and this Court's approval, of a plan detailing how the disgorged funds will be returned to the harmed investors.

4. Prejudgment Interest

[29] [30] [31] "Prejudgment interest, like disgorgement prevents a defendant from profiting from his securities violations." *Sargent,* 329 F.3d at 40 (internal quotations omitted). "An award of prejudgment interest is based on consideration of a variety of factors, including the remedial purpose of the statute [involved], the goal of depriving culpable defendants of their unlawful gains, and . . . unfairness to defendants." *Id.* (citing *Securities and Exchange Commission* v. *First Jersey Securities,* 101 F.3d 1450, 1477 (2d Cir. 1996)). The award of prejudgment interest in securities violations prevents a defendant from "receiving the benefit of what would otherwise be an interest-free loan." *Druffner,* 802 F. Supp. 2d at 298.

[32] Here, the SEC seeks prejudgment interest against all five Defendants. *See* Mem. Supp. 24. The SEC "computed prejudgment interest using the IRS underpayment rate, compounded quarterly on defendants' net proceeds for each calendar year separately, assuming (favorably to the defendants) that each year's net profit was received on the last day of the year in which it was received into each defendant's personal Q account." *Id.* at 25. The end date for the SEC's calculation is August 5, 2021, when the SEC obtained the asset freeze against the Defendants. *See id.* The IRS methodology for calculating prejudgment interest is one which other sessions of this Court have previously determined to be appropriate. *See, e.g., Commonwealth Equity Servs., LLC,* 2024 WL 1375970, at *11–12, 2024 U.S. Dist. LEXIS 59361, at *34; *Securities and Exchange Commission* v. *Esposito,* 260 F. Supp. 3d 79, 83 (D.Mass. 2017) (Burroughs, J.).

Accordingly, the SEC asks that the Defendants pay the following amounts in prejudgment interest: (1) $5,872,145 against Sexton; (2) $4,314,031 against Veldhuis; (3) $4,057,737 against Friesen; (4) $460,687 against Kelln; and (5) $646,366 against Gasarch. Mem. Supp. 25.

The Defendants do not meaningfully oppose, having instead focused their objections on the SEC's request for disgorgement. Sexton argues, however, that the SEC "has not presented any evidence that [he] invested any funds or even placed them in an interest-bearing account." Sexton's Opp'n 13. Sexton misconstrues the law here: a showing of the defendant gaining interest on the ill-gotten funds is not necessary for the Court to award prejudgment interest. The very act of obtaining and retaining ill-

gotten funds is enough for defendants to benefit from what resembles an interest-free loan: a showing that the Defendants used ill-gotten funds to , make more money out of it is not necessary. *Cf. Druffner,* 802 F. Supp. 2d at 298 ("The defendants derived direct monetary benefit from their misrepresentations and retained those profits unjustly.").

Because this Court holds the Defendants jointly and severally liable as described above, *see supra* pp. 92, 93, however, the imposition of prejudgment interest is not equitable. In holding the Defendants jointly and severally liable, the Court noted above that the ill-gotten gains need not have accrued to each of the individual offenders, *see supra* p. 92, and noted further that it suffices in the context of disgorgement for ill-gotten gains to have accrued to one or more of the co-conspirators.

The institution of prejudgment interest is premised, on the other hand, on the notion that a wrongdoer derives *direct monetary benefit* by unjustly "retain[ing]" profits. *Druffner,* 802 F. Supp. 2d at 298. While the Q data evidence, verified by external brokerage records, persuades this Court that ill-gotten gains have been generated by the pump-and-dump scheme perpetrated by the Defendants -- irrespective of to whom among the co-conspirators the proceeds accrued -- thereby necessitating disgorgement, the same data does not show that ill-gotten gains have been obtained and retained by the individual Defendants, much less in the amounts requested by the SEC. Where actual accrual to each of the Defendants cannot be shown and where it is entirely possible that at least a portion of the ill-gotten gains may never have reached the pockets of individual Defendants, it is not possible to speak

with any reasonable degree of certainty that the Defendants benefited from what resembled an "interest-free loan." *Sargent,* 329 F.3d at 41.

Additionally, and equally importantly, as "[t]he decision whether to grant prejudgment interest [is] confided to the district court's broad discretion," *Sargent,* 329 F.3d at 40 (quotation omitted), this Court, in view of having issued injunctive relief, imposed monetary penalties, and awarded disgorgement, is satisfied that the foregoing relief will serve a significant remedial purpose. Going any further and awarding prejudgment interest, in the absence of a precise determination as to the amount of ill-gotten gains actually obtained by the individual co-conspirators in the various conspiracies, may occasion unfairness to defendants. Having weighed these factors, the Court will not award prejudgment interest. *Cf. id.* at 40-41 (upholding a district court's finding of joint and several liability in the context of disgorgement, its disgorgement award, and its refusal to award prejudgment interest).

For the foregoing reasons, this Court **DENIES** the SEC's motion for prejudgment interest.

IV. CONCLUSION

Pursuant to the proposed judgments by the SEC, *see* ECF No. 485, which this Court hereby incorporates into this memorandum and order, injunctive relief will issue forthwith.

Civil penalties imposed against the Defendants in these amounts:

- Sexton: $1,562,603
- Friesen: $1,562,603
- Veldhuis: $1,562,603

- Kelln: $904,078

- Gasarch: $296,651

Such sums will be payable to the SEC within 30 days after entry of this memorandum and order, and together with it, entry of the incorporated judgments as to the Defendants.

Disgorgement, is ordered as follows:

- Gasarch is jointly and severally liable with Frederick L. Sharp ("Sharp") for disgorgement in the amount of $2,522,367;

- Kelln is jointly and severally liable with Sharp for disgorgement in the amount of $1,582,785; and

- Sexton, Veldhuis, and Friesen are jointly and severally liable with Sharp for disgorgement in the amount of $42,503,547; provided, however, that the amount to be disgorged from Sexton, Veldhuis, and Friesen will be capped at, and shall not exceed, $17,367,474, $13,289,897, and $11,846,176, respectively.

The disgorgement awards shall be subject to the SEC's submission, and this Court's approval, of a plan detailing how the funds disgorged will be used to make victims whole. The SEC shall submit said plan in due course and without any unreasonable delay.

No prejudgment interest will be awarded.

For the reasons elucidated above, the Court **GRANTS** the SEC's motion for remedies in part, ECF No. 425.

SO ORDERED.

APPENDIX C

Title 15. Commerce and Trade
Chapter 2B. Securities Exchanges
15 U.S.C.A. § 78u
§ 78u. Investigations and actions

Effective: January 1, 2021

Currentness

15 U.S.C. § 78u(d)(3) provides:

(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.

***

15 U.S.C. § 78u(d)(7) provides:

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.