No. _____

IN THE

Supreme Court of the United States

CHARLES R. KOKESH,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under 28 U.S.C. § 2462, any "action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued."

The question presented is:

Does the five-year statute of limitations in 28 U.S.C. § 2462 apply to claims for "disgorgement"?

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PETITION FOR WRIT OF CERTIORARI

Charles R. Kokesh petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The decision of the Tenth Circuit (Pet. App. 1a–19a) is not yet reported in the Federal Reporter, but is available at 2016 WL 4437585. The decision of the District Court (Pet. App. 20a–47a) is unreported.

JURISDICTION

The judgment of the Tenth Circuit was entered on August 23, 2016. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2462 provides:

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

INTRODUCTION

Under 28 U.S.C. § 2462, a five-year statute of limitations applies to "any action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture." In *Gabelli v. SEC*, 133 S. Ct. 1216 (2013), this Court held that § 2462 applies with full force to SEC claims for money penalties, unanimously rejecting the SEC's request for a "discovery rule" that "would leave defendants exposed to Government enforcement action not only for five years after their misdeeds, but for an additional uncertain period into the future." *Id.* at 1223. The Court, however, expressly reserved the question of whether § 2462 applies to claims for "disgorgement." *Id.* at 1220 n.1.

That question is now the subject of an acknowledged split among the courts of appeals. The Eleventh Circuit has held that "§ 2462's statute of limitations applies to disgorgement," finding that disgorgement is a "forfeiture" within the meaning of the statute. *SEC v. Graham*, 823 F.3d 1357, 1363 (11th Cir. 2016). By contrast, the First and D.C. Circuits—and, in the opinion below, the Tenth Circuit—have held that § 2462 does not apply to actions for disgorgement. *See SEC v. Tambone*, 550 F.3d 106, 148 (1st Cir. 2008); *Riordan v. SEC*, 627 F.3d 1230, 1234 (D.C. Cir. 2010); Pet. App. 1a–19a.

This case squarely presents the issue that has divided the circuits. The SEC did not bring its disgorgement claims against Petitioner until 2009, yet the district court entered a $34.9 million disgorgement order based on securities-law violations that occurred as far back as 1995. Pet. App. 3a, 21a. In the Eleventh Circuit, all the SEC's claims that arose before 2004 would be untimely under § 2462, and the SEC has conceded that this rule would preclude all but $5 million of the disgorgement order against Petitioner. Pet. App. 26a–27a. In the decision below, however, the

Tenth Circuit expressly disagreed with the Eleventh Circuit and followed the contrary decisions of the First and D.C. Circuits, holding that disgorgement orders are "not subject to § 2462." Pet. App. 2a.

This Court should grant certiorari to resolve the conflict. The question presented recurs frequently, and it is important. *Gabelli* set a clear limitations rule for money penalties. But today, it is uncertain whether that limit applies to disgorgement—or whether instead, the SEC can reach back to punish violations as far back as it chooses to look, so long as it captions its claims "disgorgement." The SEC has exploited that uncertainty. In 2015 alone, the SEC extracted $3 billion in disgorgement payments. That amount dwarfs the SEC's money penalties, which were just $1.2 billion, and is also growing faster: Disgorgement collections have jumped 60% since 2011, compared with just a quarter increase in penalties. The SEC's increasing post-*Gabelli* reliance on disgorgement calls out for this Court's review to determine whether disgorgement claims are exempt from the statute of limitations that applied in *Gabelli*, as the First, Tenth, and D.C. Circuits have held, or subject to that same limit, as the Eleventh Circuit has concluded.

STATEMENT OF THE CASE

A. Petitioner's Securities-Law Violations

On October 27, 2009, the SEC filed a civil enforcement action alleging that, from 1995 through 2006, Petitioner violated federal securities laws by misappropriating funds. Pet. App. 3a, 21a. The SEC's claims concerned two SEC-registered investment-adviser firms—Technology Funding Ltd. ("TFL") and Technology Funding, Inc. ("TFI")—that contracted to provide investment advice to four SEC-registered business-development companies ("the Funds"). Pet. App. 2a–3a. The SEC alleged that, via TFL and TFI, Petitioner caused improper distributions to be made from the Funds. Pet. App. 21a.

A jury found that Petitioner contravened the securities laws, based on three violations. Pet. App. 4a–5a. First, from 1995 through 2006, Petitioner directed the treasurer of TFL and TFI to withdraw $23.8 million from the Funds to pay salaries and bonuses to officers of TFL and TFI, including both Petitioner and others. Pet. App. 3a, 22a. The contracts did not provide for bonus payments, and the bonuses were not reported in SEC filings. Pet. App. 3a–4a. Until 2000, the contracts also prohibited payments for the salaries of Petitioner and other officers, and the 2000 contract amendment to permit such payments was based on a misleading proxy statement. *Id.*

Second, from 1995 through 2006, Petitioner directed the treasurer of TFL and TFI to withdraw $5 million to cover office rent, which was paid to the landlords of TFL and TFI. Pet. App. 3a, 22a. The contracts prohibited rent reimbursement. Pet. App. 4a.

Third, in 2000, Petitioner caused TFL and TFI to take $6.1 million in "tax distributions." Pet. App. 3a–4a. The contracts imposed specific conditions on payments for tax distributions, which these payments did not satisfy. Pet. App. 3a–4a, 23a. These payments went both to Petitioner and others. *Id.*

Based on these improper distributions, the jury found Petitioner had violated the Investment Company Act of 1940, 15 U.S.C. § 80a-36, and that he had aided and abetted TFL and TFI in violating the Investment Advisers Act, 15 U.S.C. §§ 80b-5, 80b-6(1)-(2), and the Exchange Act of 1934, 15 U.S.C. §§ 78m, 78n, and its implementing regulations. Pet. App. 23a–24a.

B. The District Court's Disgorgement Judgment

After the jury's verdict, the SEC moved for entry of judgment. It asked the district court to impose a civil monetary penalty of $5 million and "disgorgement" of $34.9 million. Pet. App. 27a, 33a.

As to the penalty, it was common ground that the five-year limitations period in 28 U.S.C. § 2462 applied to bar any claim that "first accrued" before October 27, 2004—five years before the SEC's complaint. Pet. App. 26a; *see Gabelli*, 133 S. Ct. at 1220–21. The district court found that some, but not all, of the SEC's claims accrued after October 27, 2004. Pet. App. 28a. It ordered Petitioner to pay a money penalty of $2.4 million, equal to "the amount of funds that [Petitioner] himself received during the limitations period." Pet. App. 31a–32a.

Petitioner argued that § 2462 also applied to the SEC's claim for disgorgement, pointing to the district court's decision in *SEC v. Graham*, 21 F. Supp. 3d 1300 (S.D. Fla. 2014). Pet. App. 33a. The *Graham* district court had held that "disgorgement … can truly be regarded as nothing other than a forfeiture …, which remedy is expressly covered by § 2462." 21 F. Supp. 3d at 1310–11; *see* Pet. App. 34a. The district court below, however, found that Tenth Circuit precedent foreclosed this argument. Pet. App. 36a.

The district court ordered Petitioner to disgorge $34.9 million, which it found "reasonably approximates the ill-gotten gains causally connected to [his] violations." Pet. App. 45a. Much of this amount concededly was based on violations "outside the five-year window" in § 2462. Pet. App. 42a; *see* Dkt. 181 at 2 (SEC's concession that $29.9 million in misappropriations occurred "[b]efore the limitations period").[1]

Much of the disgorgement amount concededly reflected "funds paid to third parties," including "landlords or other … persons to whom [Petitioner] was not related." Pet. App. 42a; *see* Dkt. 181 at 2 (SEC's calculation that at least $17.6 million did not go to Petitioner). And this amount concededly was far greater than Petitioner could possibly "disgorge"—Petitioner no longer had even the funds that he had received, and he was "insolvent," with "no prospect of recovering from insolvency" or paying the SEC's requested disgorgement judgment. Pet. App. 31a; *see* Pet. App. 12a–13a; Dkt. 180 at 3, ¶ 11. Nonetheless, the district court ordered Petitioner to disgorge $34.9 million, plus an additional $18 million in prejudgment interest. Pet. App. 45.

[1] All citations to "Dkt." are to the District Court docket at *SEC v. Kokesh*, No. 1:09-cv-01021-SMV-LAM (D.N.M.). All materials cited in this petition are available on PACER.

C. The Tenth Circuit's Opinion

Petitioner appealed, renewing his argument that § 2462 barred the SEC's disgorgement claims that "accrued more than five years before the SEC brought its action." Pet. App. 5a.

The Tenth Circuit affirmed. The court acknowledged that § 2462 "sets a five-year limitations period for claims seeking certain sanctions," including "'any civil … penalty, or forfeiture.'" Pet. App. 5a–6a (quoting 28 U.S.C. § 2462). The Tenth Circuit held, however, that a disgorgement order is not "a penalty or forfeiture within the meaning of § 2462." Pet. App. 5a–6a, 19a.

First, the Tenth Circuit held that "disgorgement is not a penalty under § 2462 because" it "does not inflict punishment" but rather "is remedial." Pet. App. 10a–11a. While the Tenth Circuit acknowledged that "disgorgement serves a deterrent purpose," the court found that disgorgement does not amount to punishment because "it does so … by depriving the wrongdoer of the benefits of wrongdoing." Pet. App. 11a.

Next, the Tenth Circuit addressed Petitioner's argument "that disgorgement is a 'forfeiture.'" Pet. App. 13a. The court acknowledged that "in common English the words *forfeit* and *disgorge* … capture similar concepts," and that the "definitions in the leading legal dictionary … also have similarities": Black's defines "disgorgement" as a "legal compulsion" to "'giv[e] up something (such as profits illegally obtained),'" and "forfeiture" as the "'loss of … property because of a crime, breach of obligation, or neglect of duty.'" Pet. App. 13a (quoting *Black's Law Dictionary* 568, 765 (10th ed. 2014)). Likewise, the court acknowledged that "the Eleventh Circuit recently held that disgorgement is a forfeiture under § 2462," affirming the district court's similar conclusion. Pet. App. 13a (citing *Graham*, 823 F.3d at 1363–64).

Nonetheless, the court noted that "[o]ther circuits have a different view" than the Eleventh, citing the D.C. Circuit's decision in *Riordan v. SEC*, 627 F.3d 1230, 1234 (D.C. Cir. 2010), and the First Circuit's decision in *SEC v. Tambone*, 550 F.3d 106, 148 (1st Cir. 2008). Pet. App. 13a. The Tenth Circuit joined this latter side of the split, stating that "[r]espectfully, we also see things a bit differently" than the Eleventh Circuit. Pet. App. 14a.

The Tenth Circuit believed that § 2462 used "forfeiture" in a "narrow" "historical sense"—as "an in rem procedure to take 'tangible property used in criminal activity.'" Pet. App. 14a. It reasoned that "[w]hen the term *forfeiture* is linked in § 2462 to the undoubtedly punitive actions for a *civil fine* or *penalty*, … Congress was contemplating the meaning of *forfeiture* in this historical sense." Pet. App. 14a–15a. And the court found that the "nonpunitive remedy of disgorgement does not fit in that company." Pet. App. 15a. The court acknowledged that many modern statutes use the term "forfeiture" more broadly, to include "disgorgement-type remedies" like orders to repay amounts reflecting the "proceeds of illegal" activity. *Id.* But the court deemed these statutes irrelevant because they occurred "after § 2462 was enacted" and "should not expand the meaning of the word forfeiture in § 2462 to encompass traditional disgorgement remedies." Pet. App. 15a–16a.

The court therefore held that "disgorgement order[s] … are … no[t] forfeitures under § 2462." Pet. App. 16a–17a.

REASONS FOR GRANTING THE WRIT

This case presents an ideal vehicle to resolve a circuit split on an important question of federal law. As the Tenth Circuit acknowledged, its decision is consistent with the decisions of two other circuits, but conflicts with *SEC v. Graham*, 823 F.3d 1357, 1363–64 (11th Cir. 2016). That disagreement is outcome-determinative: In the Eleventh Circuit, § 2462 would have precluded most of the $34.9 million forfeiture judgment that the Tenth Circuit, applying a different rule, affirmed. And the disagreement is important: The question presented recurs frequently, and billions of dollars in potential liability, stretching back decades, turn on it. Only this Court can restore national uniformity, and this case is a perfect vehicle to do so. The Court should grant certiorari.

I. THERE IS AN ACKNOWLEDGED CIRCUIT SPLIT ON THE QUESTION PRESENTED.

A. The Eleventh Circuit Has Held That Section 2462 Applies to Claims for Disgorgement.

In *SEC v. Graham*, 823 F.3d 1357 (11th Cir. 2016), the Eleventh Circuit considered the same question as the Tenth Circuit below. The SEC filed disgorgement claims in 2013 based on alleged securities-law violations in 2004 through 2008, and the issue was whether § 2462 applied to bar disgorgement claims outside that statute's five-year limitations period. *Id.* at 1359.

The Eleventh Circuit held that "§ 2462's statute of limitations applies to disgorgement," affirming the district court's similar holding and rendering the SEC's claims untimely. *Id.* at 1363. Section 2462, the Eleventh Circuit noted, applies to any action seeking a "forfeiture." *Id.* And "for the purposes of § 2462," the Eleventh Circuit concluded, "forfeiture and disgorgement are effectively synonyms." *Id.*

The Eleventh Circuit looked to these terms' "ordinary meaning." *Id.* Webster's, the court observed, "defines forfeiture as 'the divesting of the ownership of particular property of a person on account of the breach of a legal duty.'" *Id.* (quoting Forfeiture, *Webster's Third New Int'l Dictionary* (2002)). Similarly, the Oxford English Dictionary defines forfeiture as "[t]he fact of losing or becoming liable to deprivation of (an estate, goods, life, an office, right, etc.) in consequence of a crime, offence, or breach of engagement." *Id.* (quoting Forfeiture, *Oxford English Dictionary* (2d ed. 1989)). These definitions, the court found, "illustrate that forfeiture occurs when a person is forced to turn over money or property because of a crime or wrongdoing." *Id.*

The Eleventh Circuit found "no meaningful difference in the definitions of disgorgement and forfeiture." *Id.* "Black's Law Dictionary," the court explained, "defines disgorgement as '[t]he act of giving up something (such as profits illegally obtained) on demand or by legal compulsion,'" and provides "a very similar definition for forfeiture," which Black's defines as "'[t]he loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty.'" *Id.* (quoting Disgorgement, Forfeiture, *Black's Law Dictionary* (10th ed. 2014)). Indeed, the Eleventh Circuit noted, "[t]he Supreme Court, too, has used the terms interchangeably." *Id.* In *United States v. Ursery*, 518 U.S. 267 (1996), this Court explained that forfeitures "are designed primarily to confiscate property used in violation of the law, and to require disgorgement of the fruits of illegal conduct." *Id.* at 284.

The Eleventh Circuit therefore "conclude[d] that for the purposes of § 2462 the remedy of disgorgement is a 'forfeiture,' and § 2462's statute of limitations applies." *Graham*, 823 F.3d at 1363.

The Eleventh Circuit considered and rejected the SEC's argument that "disgorgement cannot be forfeiture because the two terms refer to … different things" in their "technical definitions." *Id.* at 1363–64; *see id.* (SEC's argument that "disgorgement only includes direct proceeds from wrongdoing, whereas forfeiture can include both ill-gotten gains and any additional profit earned on those ill-gotten gains"). To begin, the Eleventh Circuit observed that even "under the definitions the SEC puts forth, disgorgement is imposed as redress for wrongdoing and can be considered a subset of forfeiture." *Id.* at 1364. More fundamentally, the Eleventh Circuit found "no indication that in enacting § 2462's widely applicable statute of limitations, Congress meant to adopt the technical definitions … the SEC urges over the words' ordinary meanings." *Id.* Indeed, the presumption is the opposite—that "words in statutes should be given their ordinary, popular meaning unless Congress clearly meant the words in some more technical sense.'" *Id.* (quoting *United States v. Nat'l Broiler Mktg. Ass'n*, 550 F.2d 1380, 1386 (5th Cir. 1977), *aff'd*, 436 U.S. 816 (1978)).

Accordingly, the Eleventh Circuit held that "§ 2462 applies to … disgorgement." *Id.*

B. The First Circuit, D.C. Circuit, and Tenth Circuit Have Held That Section 2462 Does Not Apply to Claims for Disgorgement.

The Circuits are now in express disagreement over whether § 2462's limitations period applies to disgorgement. While the Eleventh Circuit has answered that question in the affirmative, the First Circuit, D.C. Circuit, and Tenth Circuit have held the opposite.

First Circuit. The First Circuit considered whether § 2462 applies to an SEC claim for disgorgement in *SEC v. Tambone*, 550 F.3d 106 (1st Cir. 2008). There, the SEC filed suit in 2005, but sought disgorgement based on alleged violations dating back to 1998, which would be untimely under § 2462's five-year limitation period. *Id.* at 115–16. The First Circuit, however, held that § 2462 "applies only to penalties sought by the SEC, not its request for … disgorgement." *Id.* at 148. Accordingly, the First Circuit found that the claims for "disgorgement … are not barred" by "the applicable five-year statute of limitations" under § 2462. *Id.*[2]

D.C. Circuit. In *Riordan v. SEC*, 627 F.3d 1230 (D.C. Cir. 2010), the SEC filed its action in 2007 but sought divestiture based on "wrongdoing that took place before … 2002." *Id.* at 1234. The "key question" for the D.C. Circuit, as for the Tenth Circuit below, was whether the "five-year statute of limitations in 28 U.S.C. § 2462 applies to an action for … disgorgement." *Id.* That court "said no." *Id.* The D.C. Circuit had previously held that disgorgement orders are not "penalties" under § 2462. *Id.* (citing *Zacharias v. SEC*, 569 F.3d 458, 471–72 (D.C. Cir. 2009)). The court acknowledged the argument that "disgorgement is a kind of forfeiture covered by § 2462." *Id.* at 1234 n.1. But the court found that its precedent "at least implicitly rejects that argument and [wa]s binding on … a three-judge panel." *Id.*

Tenth Circuit. As just explained, the Tenth Circuit below held that disgorgement claims are "not subject to § 2462." Pet. App. 2a. It expressly disagreed with the Eleventh Circuit's contrary holding and instead

[2] The First Circuit granted en banc review in *Tambone* and withdrew the panel opinion, but the en banc court limited its review to a different issue. *See SEC v. Tambone*, 573 F.3d 54 (1st Cir. 2009). The en banc court's subsequent opinion confined itself to that issue and expressly reinstated the panel's opinion on issues that the en banc court did not reach. *SEC v. Tambone*, 597 F.3d 436, 450 (1st Cir. 2010). The en banc court held that certain of the SEC's claims could proceed, including claims seeking disgorgement, and the panel's rejection of the defendants' limitations argument was necessary to that judgment. *Id.*; *see Tambone*, 550 F.3d at 117, 148.

followed the decisions of the First and D.C. Circuits. Pet. App. 12a–13a.[3]

II. THIS CASE IS WORTHY OF THIS COURT'S REVIEW.

This case meets all of the Court's criteria for granting certiorari. First, the question presented is important. Second, the question presented concerns an intractable and developed circuit split on a recurring question that only this Court can resolve. Third, this case is a flawless vehicle.

A. The Question Presented Is Important.

The question presented is critical to the fair and uniform enforcement of the Nation's securities laws.

As the Court observed in *Gabelli*, § 2462 is not "specific … to securities law; it governs many penalty provisions throughout the U.S. Code." 133 S. Ct. at 1219; *see also, e.g.*, *United States v. EME Homer City Generation, L.P.*, 727 F.3d 274, 282 n.9, 296 (3d Cir. 2013) (noting that § 2462 applies to enforcement actions under Clean Air Act). All of the reported cases on the question presented, however, have arisen in the context of SEC enforcement actions, and it is in that context that the question is of greatest practical significance.

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[3] District courts are also in conflict over the question presented. *Compare Graham*, 21 F. Supp. 3d at 1308–11 (§ 2462 applies to disgorgement), *with, e.g.*, *SEC v. Saltsman*, No. 07-CV-4370 (NGG) (RML), 2016 WL 4136829, at *24–29 (E.D.N.Y. Aug. 2, 2016); *SEC v. Collyard*, 154 F. Supp. 3d 781, 792 (D. Minn. 2015) (opposite), *appeal docketed*, No. 16-1405 (8th Cir. Feb. 17, 2016); *SEC v. Jones*, 476 F. Supp. 2d 374, 385 (S.D.N.Y. 2007).

Disgorgement has become a ubiquitous remedy in SEC enforcement actions. Every year, the SEC brings hundreds of enforcement actions—807 in 2015 alone. *See* SEC, Select SEC and Market Data, Fiscal 2015, at 3, https://www.sec.gov/reportspubs/select-sec-and-market-data/secstats2015.pdf ("SEC 2015 Data").

In virtually all of them, the SEC includes a claim for disgorgement. *See, e.g.*, *SEC v. Pardue*, 367 F. Supp. 2d 773, 778 (E.D. Pa. 2005) ("Disgorgement has become the routine remedy for a securities enforcement action."); *SEC v. Drexel Burnham Lambert Inc.*, 837 F. Supp. 587, 611 (S.D.N.Y. 1993) ("Disgorgement is one of the most common forms of ancillary relief granted in SEC enforcement actions ….").

In addition to being common, disgorgement is also a potent remedy. For example, courts have held that the SEC is not required to "trace[]" "specific assets . . . back to a violation." *SEC v. Quan*, 817 F.3d 583, 594 (8th Cir. 2016); *see SEC v. Rosenthal*, 426 F. App'x 1, 3 (2d Cir. 2011). Indeed, defendants can be required to "disgorge" funds that they "never possessed," but that instead went to employers, co-workers, or unrelated "third parties" like landlords. *SEC v. Contorinis*, 743 F.3d 296, 300, 307 (2d. Cir. 2014) (affirming disgorgement of $7.2 million despite "personal profit" of only $427,875); Pet. App. 11a–12a, 42a–43a; *see also SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1475 (2d Cir. 1996). Even if the defendant himself "ultimately … lost" money, still disgorgement may be ordered. *SEC v. First Pac. Bancorp*, 142 F.3d 1186, 1192 & n.6 (9th Cir. 1998). Courts have even required disgorgement when the actual "cause of all the[] profits" was not any securities-law violation, but rather an "intervening cause" that was linked to the violation only by "dumb luck"—so long as the courts determine that the "deterrent impact" of this sanction will "further[] future compliance." *See SEC v. Teo*, 746 F.3d 90, 108–09 (3d Cir. 2014) (defendants failed to fully report stock holdings, but all profit was due to an unrelated tender offer that increased the stock price). Even on evidentiary matters, the SEC receives the benefit of every doubt: The amount of disgorgement need not be proven, but rather can be only a "reasonable approximation of profits causally connected to the violation." *SEC v. Whittemore*, 659 F.3d 1, 7 (D.C. Cir. 2011) (quoting *SEC v. First City Fin. Corp., Ltd.*, 101 F.3d 1215, 1231 (D.C. Cir. 1989)).

In the years since *Gabelli*, the SEC has increasingly relied on disgorgement in order to maximize its recoveries: Disgorgement payments have jumped 60% since 2011, as against only a 25% rise in penalties.[4] And the SEC's frequent and aggressive use of the disgorgement remedy has allowed it to collect enormous sums. In 2015 alone, for example, the SEC collected $3 billion in disgorgement payments. SEC 2015 Data at 2. Single cases routinely yield tens or even hundreds of millions of dollars: Under the Foreign Corrupt Practices Act alone, there have been six disgorgement awards over $100 million since 2008,

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[4] *Compare* SEC 2015 Data at 2 (disgorgement of $3.019 billion and penalties of $1.175 billion), *with* SEC, Select SEC and Market Data, Fiscal 2011, at 2, https://www.sec.gov/reportspubs/select-sec-and-market-data/secstats2011.pdf (disgorgement of $1.878 billion and penalties of $928 million).

including a $350 million disgorgement award against Siemens.[5] The SEC's disgorgement collections have grown to dwarf its monetary penalties, which came to only $1.2 billion in 2015. SEC 2015 Data at 2.

The SEC routinely seeks disgorgement for violations dating well before the five-year limitations period in § 2462. Here, for example, the SEC sought to impose liability for violations that occurred 15 years before its complaint. Pet. App. 21a. And this case is no outlier. *See, e.g.*, *SEC v. Wyly*, 56 F. Supp. 3d 394, 411 (S.D.N.Y. 2014) (2010 complaint seeking disgorgement for violations dating to 1992); *SEC v. Geswein*, 2 F. Supp. 3d 1074, 1083 (N.D. Ohio 2014) (2010 complaint for violations dating to 1999); *SEC v. Mercury Interactive, LLC*, No. C 07-2822 JF (RS), 2009 WL 2984769, at *1 (N.D. Cal. Sept. 15, 2009) (2007 complaint for violations dating to 1997).

The question presented in this case is whether the SEC is entitled to pursue such stale disgorgement claims. Given how frequently the SEC pursues disgorgement and how powerful the disgorgement remedy has become, that question is of great practical importance. If § 2462 does not provide a statute of

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[5] U.S. Dep't of Justice, Press Release, *Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fines* (Dec. 15, 2008), https://www.justice.gov/archive/opa/pr/2008/December/08-crm-1105.html; *see* Richard L. Cassin, *VimpelCom FCPA disgorgement is third biggest ever*, FCPA Blog (Feb. 23, 2016, 7:28 a.m.), http://www.fcpablog.com/blog/2016/2/23/vimpelcom-fcpa-disgorgement-is-third-biggest-ever.html.

limitations for disgorgement actions, then this sweeping liability will also be limitless in time. Statutes of limitations aim to provide "security and stability to human affairs," reflecting the settled wisdom that it would be "'utterly repugnant to the genius of our laws'" if actions "could 'be brought at any distance of time.'" *Gabelli*, 133 S. Ct. at 1221, 1223 (quoting *Adams v. Woods*, 6U.S. (2 Cranch) 336, 342 (1805)). But if § 2462 does not apply to claims that the SEC denominates "disgorgement," this promise will be hollow. Every participant in the securities industry will be eternally at risk of being confronted with "stale claims" brought by the SEC decades after the alleged misconduct. *Id.* at 1221.

Such indefinite liability not only deprives participants of repose, but also risks inflicting grave unfairness on individuals whose ability to defend themselves may deteriorate with each passing year. Statutes of limitations "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Gabelli*, 133 S. Ct. at 1221 (quoting *R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348–49 (1944)). After a decade or more, the targets of the SEC's disgorgement claims may struggle to develop the evidence necessary to defend against the sweeping, but stale, liability the SEC seeks to impose. The potential for unfairness is particularly great given the SEC's penchant for condemning, after the fact, market practices that were widespread and even *known* to the SEC at the time.[6]

The SEC's increasing post-*Gabelli* reliance on disgorgement calls out for this Court's review to determine whether disgorgement claims are exempt from the statute of limitations that applied in *Gabelli*, as the First, Tenth, and D.C. Circuits have held, or subject to that same limit, as the Eleventh Circuit has concluded.

B. This Court Should Resolve the Circuit Split.

This case merits the Court's review. The question presented is not just substantively important, but arises frequently: Since the start of 2015 alone, ten cases have addressed the question of whether § 2462 applies to disgorgement.[7]

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[6] *See, e.g.*, Mary Jo White, Chair, SEC, Speech at Sandler O'Neill Partners, L.P. Global Exchange and Brokerage Conference: Enhancing Our Equity Market Structure (June 5, 2014), http://www.sec.gov/News/Speech/Detail/Speech/1370542004312 (promising stricter scrutiny of use of technology, high-speed trading, and alternative trading systems); *cf. Upton v. SEC*, 75 F.3d 92, 98 (2d Cir. 1996) (vacating censure because SEC knew about the practice in question before it occurred and did not condemn it).

[7] Pet. App. 16a–17a; *Saltsman*, 2016 WL 4136829, at *24; *Graham*, 823 F.3d at 1364; *SEC v. Amerindo Inv. Advisors*, 639 F. App'x 752, 754 (2d Cir. 2016); *SEC v. Battoo*, 158 F. Supp. 3d 676, 691 (N.D. Ill. 2016); *SEC v. Jones*, 155 F. Supp. 3d 1180, 1187 (D. Utah 2015); *Collyard*, 154 F. Supp. 3d at 791; *SEC v. Stoecklien*, No. 15CV0532 JAH WVG, 2015 WL 6455602, at *3 (S.D. Cal. Oct. 26, 2015); *SEC v. Strebinger*, 114 F. Supp. 3d 1321, 1328 n.6 (N.D. Ga. 2015); *SEC v. Wealth Strategy Partners, LC*, No. 8:14-CV-02427-T, 2015 WL 3603621, at *9 (M.D. Fla. June 5, 2015).

Only this Court can resolve the conflict of authority between the Eleventh Circuit and its sister circuits. There is no realistic possibility of the Eleventh Circuit reconsidering *Graham*: The unanimous panel decision in *Graham* came after the SEC appealed from a district court decision that also applied § 2462 to disgorgement, and after the SEC expressly urged the Eleventh Circuit to follow the D.C. Circuit's decision in *Riordan*. *See* Br. of SEC at 36–37, *Graham*, 2014 WL 6844558 (No. 14-13562-E). The SEC then declined to file a petition for rehearing en banc or a petition for certiorari. *See generally*, Docket, *SEC v. Graham*, No. 14-13562-E (11th Cir.). Thus, the circuit split will persist until this Court grants certiorari to resolve it.

There is no need for additional percolation. Four circuits, as well as numerous district courts, have considered whether § 2462 applies to claims for disgorgement, and the arguments on both sides of the split have been fully aired. Although the majority of circuits have sided with the government, the Eleventh Circuit's opinion rejecting the government's position is careful and correct. Indeed, this case is an even stronger certiorari candidate than *Gabelli* itself, in which only one circuit had adopted the position that this Court ultimately endorsed, and in an unpublished decision after the filing of the petition for certiorari. *See* Br. for SEC at 23–24, *Gabelli*, 2012 WL 613633 (No. 11-1274) (citing *SEC v. Bartek*, No. 11-10594, 2012 WL 3205446, at *3–6 (5th Cir. Aug. 7, 2012)). The Court routinely grants review in cases presenting 1-1 or 2-1 splits;[8] the Court should resolve the 3-1 split presented

[8] *See, e.g.*, *Ocasio v. United States*, 136 S. Ct. 1423 (2016) (1-1 split);

here as well, especially in light of the substantive importance of the question presented.

Finally, this Court's review is especially warranted because the circuit split creates the prospect of venue manipulation by the government. In securities cases, the SEC routinely has a choice of venue, which can be proper anywhere that the defendant resides or transacts business, or where the act or transaction constituting the violation occurred, or—in some cases—where any offer or sale linked to the violation took place. *SEC v. Johnson*, 650 F.3d 710, 714 (D.C. Cir. 2011); *see, e.g.*, 15 U.S.C. § 77v(a) (Securities Act); *id.* § 78aa (Securities Exchange Act); *id.* § 80b-14(a) (Investment Adviser Act). So, for example, if an alleged securities-law violator resides in Georgia, does business in the District of Columbia, and makes a sale constituting a violation of the securities laws in Denver, the SEC can avoid any statute of limitations by choosing to bring an action that would be governed by the more pro-government law of the D.C. or Tenth Circuits. The time for bringing a disgorgement claim, with the vast liability it can entail, should not turn on different interpretations of federal law in different jurisdictions. The Court should grant certiorari and resolve the issue nationwide.

C. This Case Is a Perfect Vehicle.

This case is an ideal vehicle. The Tenth Circuit

Nichols v. United States, 136 S. Ct. 1113 (2016) (1-1 split); *Luis v. United States*, 136 S. Ct. 1083 (2016) (1-1 split); *Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016) (2-1 split); *Taylor v. United States*, 136 S. Ct. 2074 (2016) (2-1 split).

expressly considered and rejected the Eleventh Circuit's holding that § 2462 applies to claims for disgorgement. Pet. App. 13a. And it is undisputed that, if § 2462 applied, the $34.9 million disgorgement judgment against Petitioner could not stand: In the SEC's request for a money penalty concededly governed by § 2462's five-year limitations period, the SEC admitted that at most $5 million reflected securities-law violations arising "during the limitations period, i.e., on or after October 27, 2004." Pet. App. 26a–27a; Dkt. 181 at 2 (SEC's concession that the remaining $29.9 million reflected violations "[b]efore the limitations period"). Thus, the Tenth Circuit's holding regarding § 2462 was plainly outcome-determinative.

Moreover, this case is a strong vehicle because it is characteristic of the aggressive disgorgement claims that the SEC regularly pursues. For instance, courts have held that the SEC is not required to "trace[]" "specific assets … back to a violation." *SEC v. Quan*, 817 F.3d 583, 594 (8th Cir. 2016); *see SEC v. Rosenthal*, 426 F. App'x 1, 3 (2d Cir. 2011). That principle applies in this case: the SEC cannot "trace" these funds to any funds still in Petitioner's possession, because those funds have been spent. Pet. App. 12a–13a; Dkt. 180 at 3, ¶ 11. Likewise, courts have held that a defendant may be liable to disgorge assets he never personally received. *See, e.g.*, *Contorinis*, 743 F.3d at 300, 307 (affirming disgorgement of $7.2 million despite "personal profit" of only $427,875). Again, this case illustrates that principle: the amount that Petitioner has been ordered to disgorge far exceeds any amount that Petitioner ever received, and instead reflects payments to separate corporations, unrelated officers of those corporations, and even landlords. Pet. App. 3a–4a, 11a–12a, 22a–23a, 42a–43a; Dkt. 180 at 2, ¶ 7; Dkt. 181 at 2. The straightforward facts of this case well illustrate the potency of the disgorgement remedy and provide a strong vehicle for this Court's review.

III. THE TENTH CIRCUIT'S OPINION IS WRONG.

The Tenth Circuit erred in holding that § 2462 does not apply to disgorgement claims.

Disgorgement qualifies as "forfeiture" under § 2462. As the Eleventh Circuit persuasively explained in *Graham*, "forfeiture and disgorgement are effectively synonyms." 823 F.3d at 1363. The court pointed out that "Black's Law Dictionary defines disgorgement as '[t]he act of giving up something (such as profits illegally obtained) on demand or by legal compulsion,'" and provides "a very similar definition for forfeiture," which Black's defines as "'[t]he loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty.'" *Id.* (quoting Disgorgement, Forfeiture, *Black's Law Dictionary* (10th ed. 2014)). And even this Court has equated the two terms: In *United States v. Ursery*, 518 U.S. 267 (1996), this Court explained that forfeitures "are designed primarily to confiscate property used in violation of the law, and to require disgorgement of the fruits of illegal conduct." *Id.* at 284.

In rejecting *Graham*'s reasoning, the Tenth Circuit concluded that the term "forfeiture" referred only to *in* *rem* forfeiture actions, and excluded remedies imposed as part of *in personam* government enforcement actions. Pet. App. 14a–15a. But nothing in the statutory text supports this artificial narrowing construction, especially given that the other two statutory terms in § 2462—"fine" and "penalty"—are remedies that are typically imposed in the context of *in personam* government enforcement actions.

Further, as the Tenth Circuit recognized, there are multiple federal statutes requiring illicit assets to be turned over to the government—and in those statutes, the turnover orders are referred to as orders of "forfeiture." Pet. App. 15–16a. The Tenth Circuit held that those statutes were irrelevant because they were enacted many years after the enactment of § 2462, Pet. App. 16a, but that reasoning is not persuasive. Congress referred to the turnover of illicit assets as "forfeiture" because it recognized that such turnovers were a species of "forfeiture" under the well-settled meaning of that term. For the same reason, the disgorgement order imposed by the District Court falls comfortably within the statutory definition of forfeiture.

The Tenth Circuit also held that § 2462 does not apply to disgorgement because it applies only to "punitive" remedies. According to the Tenth Circuit, disgorgement is not a "penalty" under § 2462 because "penalties" are punitive remedies, whereas disgorgement is not. Pet. App. 10a–13a. The Tenth Circuit then inferred that the term "forfeiture," too, applies only to punitive remedies, and that "[t]he nonpunitive remedy of disgorgement" therefore does not qualify as a forfeiture. Pet. App. 14a–15a.

Even assuming § 2462 applies only to punitive remedies, disgorgement is a punitive remedy. As such, it amply qualifies as a "penalty," as well as a "forfeiture" even under the Tenth Circuit's restrictive definition of that term.

Disgorgement judgments are monetary judgments, payable to the government, imposed as a result of a judicial finding of wrongdoing. Disgorgement is not a compensatory remedy. The SEC is not "required to make any particular effort to compensate … victims," *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 373 (2d Cir. 2011); *see Official Comm. of Unsecured Creditors of WorldCom, Inc. v. SEC*, 467 F.3d 73, 81 (2d Cir. 2006) (compensation is at best a "secondary goal"). Rather, the "primary purpose of disgorgement orders is to deter violations of the securities laws"—a classic characteristic of a punitive remedy. *SEC v. Fischbach Corp.*, 133 F.3d 170, 175 (2d Cir. 1997).

The Tenth Circuit characterized disgorgement as a nonpunitive remedy that "leaves the wrongdoer in the position he would have occupied had there been no misconduct." Pet. App. 11a (quotation marks omitted). But disgorgement is not merely a matter of the defendant returning a tainted asset that does not belong to him. As noted above, the SEC can obtain disgorgement of assets that are not traceable to a violation. *Supra* at 15; *see Quan*, 817 F.3d at 594. Thus, disgorgement constitutes the punitive "imposition of personal liability." *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 221 (2002). It is a money judgment, payable to the government, that is premised on a judicial finding that *the law was violated*: a quintessentially punitive remedy. Moreover, the SEC can obtain disgorgement of assets that the defendant never personally received. *Supra* at 15; *see Contorinis*, 743 F.3d at 300, 307. Thus, disgorgement may leave a defendant worse off than the position he would have occupied without any misconduct—further underscoring that it is a punitive remedy.

Finally, the government's position is inconsistent with the longstanding American legal tradition of applying statutes of limitations to government enforcement actions seeking money judgments. In *Gabelli*, this Court, quoting Chief Justice Marshall, observed that it "'would be utterly repugnant to the genius of our laws' if actions for penalties could 'be brought at any distance of time.'" 133 S. Ct. at 1223 (quoting *Adams*, 6 U.S. (2 Cranch) 336, 342 (1805)). Thus, the Court rejected an interpretation of § 2462 that would leave defendants "exposed to Government enforcement action" for an indefinite "period into the future," and that eliminates the "security and stability to human affairs" that statutes of limitation aim to provide. *Id.* at 1221, 1223 (internal quotation marks omitted). Yet, under the government's interpretation of § 2462, that is precisely what will occur: enforcement actions seeking disgorgement may reach back forever. The Court should not contort the definition of "forfeiture" to reach this extraordinary outcome.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SECURITIES AND EXCHANGE COMMISSION Plaintiff-Appellee, v. CHARLES R. KOKESH, Defendant-Appellant.	No. 15-2087

FILED August 23, 2016
Elisabeth A. Shumaker
Clerk of Court

Appeal from the United States District Court for the District of New Mexico (D.C. No. 1:09-CV-01021-SMV-LAM)

Before HARTZ, PHILLIPS, and McHUGH, Circuit Judges.

The Securities and Exchange Commission (SEC) brought an enforcement action against Defendant Charles Kokesh for misappropriating funds from four

SEC-registered business development companies (BDCs) in violation of federal securities laws. After a jury returned a verdict in favor of the SEC, the United States District Court for the District of New Mexico entered a final judgment permanently enjoining Defendant from violating certain provisions of federal securities laws, ordering disgorgement of $34.9 million plus prejudgment interest of $18.1 million, and imposing a civil penalty of $2.4 million. Defendant appeals, asserting that the court's imposition of the disgorgement and permanent injunction was barred by 28 U.S.C. § 2462, which sets a five-year limitations period for suits "for the enforcement of any civil fine, penalty, or forfeiture." He also argues that the district court erred by precluding him from presenting evidence of attorney and accountant participation to show his lack of knowledge of the misconduct. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm. We hold that both the permanent injunction and the disgorgement order are remedial and not subject to § 2462. And we reject the evidentiary claim.

I. BACKGROUND

The BDCs from which Defendant misappropriated funds were Technology Funding Medical Partners I, L.P.; Technology Funding Partners III, L.P.; Technology Funding Venture Partners IV, An Aggressive Growth Fund, L.P.; and Technology Funding Venture Partners V, An Aggressive Growth Fund, L.P. (collectively, the Funds). The Funds raised money from investors through public securities offerings and invested in private start-up companies that focused on technology, biotechnology, and medical diagnostics.

As a limited partnership, each Fund was governed by a written agreement. Each agreement provided for the election of three individual general partners and two managing general partners. The managing general partners conducted day-to-day operations and made investment recommendations, subject to supervision by the governance committee of each Fund, which was composed of the individual general partners or the individual general partners and two representatives of the managing general partners.

Technology Funding Ltd. and Technology Funding, Inc. (collectively, the Advisers), which were SEC-registered investment advisers, were the managing general partners for each Fund. The Advisers were owned and controlled by Defendant. They had contracts with the Funds—which were signed by Defendant—that described how they would be compensated. The contracts prohibited any payments to the Advisers that were not expressly specified.

From 1995 through 2006, Defendant directed the Advisers' treasurer to take $23.8 million from the Funds to pay salaries and bonuses to officers of the Advisers (which included Defendant himself) and to take $5 million to cover the Advisers' office rent. In 2000 he also caused the Advisers to take $6.1 million in payments described as "tax distributions" in SEC reports that he signed. Defendant received over 90% of these "tax distributions," despite paying only $10,304 in federal taxes that year.

These payments violated the contracts between the Advisers and the Funds. First, until 2000 the contracts prohibited payments for salaries of the Advisers' controlling persons, including Defendant and other officers. Although the contracts were amended in 2000 to permit reimbursement for controlling-person salaries, the amendment was based on a misleading proxy statement (signed by Defendant) which falsely identified him as the only controlling person and grossly underreported his annual salary. Second, the contracts did not provide for bonus payments and Defendant did not disclose the bonuses to the Funds' directors or in SEC filings that he signed on the Funds' behalf. Third, the contracts specifically prohibited rent reimbursement, yet he failed to disclose the rent payments to the Funds' directors. Fourth, although the contracts allowed for payment of tax obligations if certain conditions were met, the 2000 payment did not satisfy these conditions.

Before trial the SEC filed a motion in limine to preclude Defendant from offering evidence that he reasonably relied on the advice of his counsel and his accountants. The district court granted this motion under Fed. R. Evid. 403, finding that any probative value of such evidence was outweighed by the danger of confusing the issues and misleading the jury. The court acknowledged, however, that such evidence could be presented if Defendant met the test for an advice-of-counsel defense under *United States v. Wenger*, 427 F.3d 840 (10th Cir. 2005).

The case was tried to a jury, which found (1) that Defendant knowingly and willfully converted the

Funds' assets to his own use or to the use of another and (2) that he knowingly and substantially assisted the Advisers in defrauding the Funds, in filing false and misleading reports with the SEC, and in soliciting proxies using false and misleading proxy statements. The court found that disgorgement of $34.9 million "reasonably approximates the ill-gotten gains causally connected to Defendant's violations," Aplt. App., Vol. 2 at 1880 (order granting SEC's motion for entry of final judgment), and that an order enjoining him from violating certain provisions of federal securities laws was warranted because "there is a reasonable and substantial likelihood that Defendant will again violate the securities laws," *id.* at 1876.

II. DISCUSSION

Defendant appeals on two grounds: (1) that the injunction and disgorgement order, obtained under 15 U.S.C. § 78u(d)(1), (5), must be set aside because the claims accrued more than five years before the SEC brought its action and are therefore barred under the five-year statute of limitations in 28 U.S.C. § 2462 for government suits seeking penalties or forfeitures; and (2) that the district court erred in disallowing evidence of attorney and accountant participation to show his lack of knowledge of the misconduct. We address each in turn.

A. Section 2462

Unless another statute specifies otherwise, § 2462 sets a five-year limitations period for claims seeking certain sanctions. It states:

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

Id. (emphasis added). "The construction and applicability of a federal statute of limitation is a question of law we review *de novo*." *United States v. Telluride Co.*, 146 F.3d 1241, 1244 (10th Cir. 1998). Statutes of limitation are interpreted narrowly in the government's favor "to protect the public from the negligence of public officers in failing to timely file claims in favor of the public's interests." *Id.* at 1246 n.7; *see also Guar. Trust Co. of New York v. United States*, 304 U.S. 126, 132–33, 58 S.Ct. 785, 82 L.Ed. 1224 (1938) (public policy generally supports not imposing laches or statutes of limitations on the government). And we have also recognized that equitable claims are usually not subject to statutes of limitations. *See Telluride*, 146 F.3d at 1245.

Defendant argues that the injunction (an order to refrain from future violations of certain provisions of federal securities laws) is a penalty and the disgorgement order is a penalty or forfeiture within the meaning of § 2462. We first discuss the injunction.

1. Injunction

The district court's final judgment ordered "that Defendant is permanently enjoined from directly or indirectly violating Section 206(1) and (2) of the Investment Advisers Act; Section 13(a) of the Exchange Act and Exchange Act Rules 12b-20, 13a-1, and 13a-13; Section 14(a) of the Exchange Act and Exchange Act Rule 14a-9; Section 37 of the Investment Company Act, and Section 205(a) of the Investment Advisers Act." Aplt. App., Vol. 2 at 1883 (final judgment). We fail to see how an order to obey the law is a penalty. Its purpose is not to penalize Defendant; after all, everyone has a duty to obey the law. It is to protect the public by giving Defendant an added incentive to conduct himself in accordance with the securities laws: violating the injunction would subject him to the court's contempt power, *see* 18 U.S.C. § 401(3) (authorizing courts to punish disobedience of a lawful order). It has been recognized for some time that such an order is "purely remedial and preventative," and not a penalty or forfeiture. *Drath v. F.T.C.*, 239 F.2d 452, 454 (D.C. Cir. 1956) (internal quotation marks omitted); *see id.* ("One is not prosecuted by being told to desist from illegal conduct, nor does he thereby suffer the imposition of a penalty or the forfeiture of any legally-protected right or property."); *Welch Sci. Co. v. N.L.R.B.*, 340 F.2d 199, 202–03 (2d Cir. 1965) (NLRB's order that "the company should cease and desist from interrogating the New York employees concerning their [union] membership" (a violation of the National Labor Relations Act) was "purely remedial"); *cf. Hecht Co. v. Bowles*, 321 U.S. 321, 329, 64

S.Ct. 587, 88 L.Ed. 754 (1944) ("The historic injunctive process was designed to deter, not to punish."). More recently, the D.C. Circuit applied that proposition to hold that § 2462 does not apply to an SEC cease-and-desist order to refrain from violating securities laws. *See Riordan v. S.E.C.*, 627 F.3d 1230, 1234–35 (D.C. Cir. 2010); *In the Matter of Guy P. Riordan*, Release No. 9085, 2009 WL 4731397 (Dec. 11, 2009) (ordering "that Guy P. Riordan cease and desist from committing or causing any violations or future violations of Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934, and Exchange Act Rule 10b-5"). We fully agree with the D.C. Circuit.

Defendant relies on another decision by that circuit, *Johnson v. S.E.C.*, 87 F.3d 484, 491–92 (D.C. Cir. 1996), holding that the SEC injunction in that case did impose a penalty. But in *Johnson* the injunction censured the violator and imposed a six-month disciplinary suspension "from acting in a supervisory capacity with any broker or dealer." *Id.* at 486. The court held that on the facts of record "it is evident that the sanctions here were not based on any ... showing of the risk she posed to the public, but rather were based on [her] alleged failure reasonably to supervise [a subordinate]." *Id.* at 489. The court rejected the SEC's contention that "the sanctions were imposed not as punishment for past dereliction, but primarily because of [her] present danger to the public." *Id.* at 490. We need not assess whether we agree with that opinion. We need only point out that there is a qualitative difference between a disciplinary suspension and being ordered to comply with the law. There is no inconsistency between the circuit's decision in *Johnson* and its later decision in *Riordan* holding that § 2462 does not apply to an order requiring compliance with the securities laws.

Finally, Defendant argues that in light of his age, insolvency (and meager prospects of recovering from it), and the passage of time since his unlawful conduct, he is unlikely to engage in the conduct for which he is liable here, so the injunction must be intended solely to punish him. He further argues that the SEC did not allege any wrongdoing by him after the Funds and the Advisers were dissolved, so he is being punished for past conduct, as in *Johnson*. We are not persuaded. If Defendant is not going to engage in securities-related activity, the order does not punish him. And the absence of SEC allegations of recent misconduct did not preclude the district court from finding that he still poses a risk to the public. The court found that Defendant's occupation would "present opportunities for future violations" because of his extensive experience with owning and controlling investment-adviser firms and operating investment companies. Also, noting Defendant's work history, his extravagant lifestyle, and his demeanor, the court expressly rejected his statement that he would not engage in business activity that could present opportunities for future securities-laws violations. These are factual matters and the court did not clearly err in its findings. *See Att'y. Gen. of Oklahoma v. Tyson Foods, Inc.*, 565 F.3d 769, 775–76 (10th Cir. 2009) (factual findings underlying injunction are reviewed for clear error).

2. Disgorgement

Disgorgement "consists of factfinding by a district court to determine the amount of money acquired through wrongdoing—a process sometimes called 'accounting'—and an order compelling the wrongdoer to pay that amount plus interest to the court." *United States v. Badger*, 818 F.3d 563, 566 (10th Cir. 2016) (internal quotation marks omitted). The amount of the disgorgement is essentially the same whether the relief is sought in a private cause of action or, as in this case, by the government. *See* 15 U.S.C. § 78u(d)(5) (authorizing court to grant equitable relief sought by SEC); *F.T.C. v. Bronson Partners, LLC*, 654 F.3d 359, 369–70 (2d Cir. 2011) (affirming district court's award because it "satisfies the requirements of equitable disgorgement").

Defendant, who owned and controlled the Advisers, misappropriated $34.9 million from the Funds between 1995 and 2006 to pay salaries and bonuses to officers of the Advisers (including himself), to pay the Advisers' office rent, and to pay phony "tax distributions." The district court ordered him to disgorge this money that went to him and his subordinate cohorts, finding that the sum "reasonably approximates the ill-gotten gains causally connected to [his] violations." Aplt. App., Vol. 2 at 1880. Defendant claims that the disgorgement order is a penalty or forfeiture. We disagree. We first address the claim that it is a penalty.

We have previously said that disgorgement is not a penalty under § 2462 because it is remedial. *See Telluride*, 146 F.3d at 1247 ("[O]ther equitable remedies, *such as disgorgement*, which sanction past conduct, are remedial [rather than punitive]." (emphasis added)). Other circuits have similarly held that it is not. *See Riordan*, 627 F.3d at 1234 ("[D]isgorgement orders are not penalties, at least so long as the disgorged amount is causally related to the wrongdoing."); *S.E.C. v. Tambone*, 550 F.3d 106, 148 (1st Cir. 2008) ("[T]he applicable five-year statute of limitations period [the defendant] invokes applies only to penalties sought by the SEC, not its request for injunctive relief or the disgorgement of ill-gotten gains."), *withdrawn*, 573 F.3d 54 (1st Cir. 2009), *reinstated in relevant part*, 597 F.3d 436, 450 (1st Cir. 2010).

The reasons for this view are clear. Properly applied, the disgorgement remedy does not inflict punishment. "The object of restitution [in the disgorgement context] ... is to eliminate profit from wrongdoing while avoiding, so far as possible, the imposition of a penalty." Restatement (Third) of Restitution and Unjust Enrichment § 51(4) (Am. Law Inst. 2010). Disgorgement just leaves the wrongdoer "in the position he would have occupied had there been no misconduct." *Id.* § 51 cmt. k; *see id.* ("Disgorgement of wrongful gain is not a punitive remedy."). To be sure, disgorgement serves a deterrent purpose, but it does so only by depriving the wrongdoer of the benefits of wrongdoing. *See S.E.C. v. Contorinis*, 743 F.3d 296, 301 (2d Cir. 2014) ("[D]isgorgement does not serve a punitive function.... [Its] underlying purpose is to make lawbreaking unprofitable for the law-breaker...."); *S.E.C. v. First City Fin. Corp.*, 890 F.2d 1215, 1231 (D.C. Cir. 1989) ("[D]isgorgement primarily serves to prevent unjust enrichment....”). Indeed, if punishment is required, disgorgement can be supplemented with exemplary damages. *See* Restatement (Third) § 51 cmt. k.

Defendant complains that the disgorgement order is punitive because he is being required to disgorge more than he actually gained himself (some of the misappropriated money went to others). But there is nothing punitive about requiring a wrongdoer to pay for all the funds he caused to be improperly diverted to others as well as to himself. *See Contorinis*, 743 F.3d at 307 (“[W]hen third parties have benefitted from illegal activity, it is possible to seek disgorgement from the violator, even if that violator never controlled the funds. The logic of this ... is that to fail to impose disgorgement on such violators would allow them to unjustly enrich their affiliates.”); *S.E.C. v. Platforms Wireless Int’l Corp.*, 617 F.3d 1072, 1098 (9th Cir. 2010) (“A person who controls the distribution of illegally obtained funds is liable for the funds he or she dissipated as well as the funds he or she retained.”); *S.E.C. v. JT Wallenbrock & Assocs.*, 440 F.3d 1109, 1114–15 (9th Cir. 2006) (defendant was not entitled to deduct business and operating expenses from the amount of his disgorgement because “it would be unjust to permit the defendants to offset against the investor dollars they received the expenses of running the very business they created to defraud those investors into giving the defendants the money in the first place”); *S.E.C. v. Banner Fund Int’l*, 211 F.3d 602, 617 (D.C. Cir. 2000) (“[A]n order to disgorge establishes a personal liability, which the defendant must satisfy regardless whether he retains the selfsame proceeds of his wrongdoing."). After all, we do not consider it punitive to require a personal-injury tortfeasor to pay for all damages caused by his tort (say, a motor-vehicle accident) even if he gained nothing thereby.

Defendant also argues that the disgorgement order is punitive because in light of his age (late sixties) and insolvency, there is no prospect of his restoring the gains he received. But the likelihood of the government's recovery is irrelevant to determining whether his disgorgement order is punitive or remedial because it does not change the nature of the sanction. The disgorgement order does not require Defendant to do more than he is capable of.

Defendant next contends that disgorgement is a "forfeiture." To be sure, in common English the words *forfeit* and *disgorge* (as well as *relinquish*) capture similar concepts; one subject to formal forfeiture could be said to "disgorge" what is forfeited. The definitions in the leading legal dictionary, although different, also have similarities. *See Black's Law Dictionary* 568, 765 (10th ed. 2014) (defining *disgorgement* as "[t]he act of giving up something (such as profits illegally obtained) on demand or by legal compulsion," and *forfeiture* as "[t]he loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty"). Because of these similarities the Eleventh Circuit recently held that disgorgement is a forfeiture under § 2462. *See S.E.C. v. Graham*, 823 F.3d 1357, 1363–64 (11th Cir. 2016).

Other circuits have a different view. *See Riordan*, 627 F.3d at 1234; *Tambone*, 550 F.3d at 148 (§ 2462 does not apply to disgorgement); *see also S.E.C. v. Saltsman*, No. 07–CV–4370 (NGG) (RML), 2016 WL 4136829, at *25–29 (E.D.N.Y. Aug. 2, 2016) (rejecting *Graham* and citing three other district courts sharing that view). Respectfully, we also see things a bit differently. The word *forfeiture* in § 2462 must be read in the context of government causes of action—"an action, suit or proceeding," 28 U.S.C. § 2462. Government forfeiture actions date back to the early days of the Republic, and for most of the time since then have had a narrow focus. Forfeiture was an in rem procedure to take "tangible property used in criminal activity." *United States v. 92 Buena Vista Ave.*, 507 U.S. 111, 118, 113 S.Ct. 1126, 122 L.Ed.2d 469 (1993). Indeed, *Black's Law Dictionary* defines *civil forfeiture*—which, in our view, is the relevant definition here—as "[a]n in rem proceeding brought by the government against property that either facilitated a crime or was acquired as a result of criminal activity." As the Supreme Court has summarized: "The First Congress enacted legislation authorizing the seizure and forfeiture of ships and cargos involved in customs offenses. Other statutes authorized the seizure of ships engaged in piracy.... Later statutes involved the seizure and forfeiture of distilleries and other property used to defraud the United States of tax revenues from the sale of alcoholic beverages." *Id.* at 119–20, 113 S.Ct. 1126. The owner of the seized property could be completely innocent of any wrongdoing, and the value of the property taken have no necessary relation to any loss to others or gain to the owner. A modern-day example makes the point. In *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 94 S.Ct. 2080, 40 L.Ed.2d 452

(1974), the Supreme Court affirmed a forfeiture proceeding in which a yacht was seized from an innocent owner after government officers apparently found only one marijuana cigarette on the yacht while it was under the control of the lessee, *see id.* at 693, 94 S.Ct. 2080 (Douglas, J., dissenting).

When the term *forfeiture* is linked in § 2462 to the undoubtedly punitive actions for a *civil fine* or *penalty*, it seems apparent that Congress was contemplating the meaning of *forfeiture* in this historical sense. The nonpunitive remedy of disgorgement does not fit in that company. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* ch. 31, 195–98 (2012) ("Associated words bear on one another's meaning (*noscitur a sociis*)."). In fact, construing a predecessor to § 2462, which imposed a five-year limitations period for a "suit or prosecution for any penalty or forfeiture," the Supreme Court said that "[t]he words 'penalty or forfeiture' in this section refer to something imposed in a punitive way for an infraction of a public law." *Meeker v. Lehigh Valley R.R. Co.*, 236 U.S. 412, 423, 35 S.Ct. 328, 59 L.Ed. 644 (1915).

We recognize that in recent years some federal forfeiture statutes have been expanded to include disgorgement-type remedies, *see* 18 U.S.C. § 1963(a)(3) (authorizing forfeiture of *proceeds* from racketeering activity); 21 U.S.C. § 881(a)(6) (authorizing forfeiture of the *proceeds* of illegal drug transactions). But this is a recent development, occurring decades after § 2462 was enacted in 1948. The Supreme Court recently discussed the development in *United States v. 92 Buena Vista*

Ave., 507 U.S. 111, 113 S.Ct. 1126, 122 L.Ed.2d 469 (1993) (addressing scope of innocent-owner exception to federal forfeiture statute). The introduction of "disgorgement" features in the forfeiture laws began with the 1978 amendment to the Comprehensive Drug Abuse Prevention and Control Act of 1970, which "authorize[d] the seizure and forfeiture of proceeds of illegal drug transactions" and continued with the 1984 amendment to the Racketeer Influenced and Corrupt Organizations Act, which likewise authorized "forfeiture of 'proceeds'" from racketeering activity. *Id.* at 121 & n.16, 113 S.Ct. 1126. These changes in the forfeiture statutes "marked an important *expansion* of governmental power." *Id.* at 121, 113 S.Ct. 1126 (emphasis added). But this expansion should not expand the meaning of the word *forfeiture* in § 2462 to encompass traditional disgorgement remedies outside those forfeiture statutes. We have said that when interpreting statutory language, "words will be interpreted as taking their ordinary, contemporary, common meaning at the time Congress enacted the statute." *Hackwell v. United States*, 491 F.3d 1229, 1236 (10th Cir. 2007) (internal quotation marks omitted).

Further, we must not forget that we are to construe § 2462 in the government's favor to avoid a limitations bar. *See Telluride*, 146 F.3d at 1246 & n.7. We should not strain to expand the meaning of the statute's language to restrict the government. We conclude that the disgorgement order in this case is not a forfeiture within the meaning of § 2462.

Because we hold that the disgorgement order and injunction in this case are neither penalties nor forfeitures under § 2462, we need not decide whether (as requested by the government) the statute is inapplicable to all equitable remedies; nor need we decide whether disgorgement remedies in forfeiture statutes come under § 2462. And for the same reason, we need not address Defendant's arguments that the government's causes of action accrued more than five years before it filed suit and that the statute is jurisdictional.

B. Evidence of the Participation of Lawyers and Accountants

Defendant argues that the district court erred in disallowing his proffered evidence of attorney and accountant participation. He asserts that the evidence was proper to "show[ ] that, because of his dealings with the Funds' lawyers and accountants, he had no contemporaneous awareness that he was 'part of an overall activity that was improper' and did not knowingly assist primary violation, of which he was unaware." Aplt. Br. at 61.

Evidence of reliance on professionals such as attorneys and accountants is, however, significantly restricted in this circuit. Under the standard set forth in *Wenger*, ordinarily "the defendant must show (1) a request for advice of [independent] counsel on the legality of a proposed action, (2) full disclosure of the relevant facts to counsel, (3) receipt of advice from counsel that the action to be taken will be legal, and (4) reliance in good faith on counsel's advice," 427 F.3d at 853 (internal quotation marks omitted); *see C.E. Carlson, Inc. v. S.E.C.*, 859 F.2d 1429, 1436 (10th Cir. 1988). Defendant does not contend that he satisfied the

Wenger requirements in seeking to put on evidence regarding his attorneys and accountants. Rather, he argues that *Wenger* is inapplicable. As we understand his position, it is that restrictions on evidence of reliance on professionals concerns only evidence offered to negate specific intent such as willfulness or intent to defraud. Here, in contrast, he claims to be offering the evidence to negate his knowledge of relevant facts. That may be a valid distinction. If a defendant contends that a professional adviser failed to convey historical facts, *Wenger* may not apply. But if Defendant is merely saying that a professional adviser failed to convey the "fact" that a transaction contravened a contract or a statute (that is, failed to convey professional advice), *Wenger* controls. Unfortunately for Defendant, his briefs on appeal do not preserve the issue. Although he cites to the record, we decline to review his challenge to the exclusion of evidence because his briefs fail to identify specific items of testimony that would have been offered and to state why each would have been relevant. *See Reinhart v. Lincoln County*, 482 F.3d 1225, 1228 n.1 (10th Cir. 2007) (citation to record did not preserve issue). Moreover, even if Defendant's evidence was somewhat probative, it could be excluded under Fed. R. Evid. 403 if "its probative value is substantially outweighed by a danger of ... confusing the issues." And, as Defendant acknowledges in his opening brief, the district court relied on that rule to exclude evidence about his attorneys and accountants. Yet Defendant's opening brief never addresses this basis for excluding his evidence. This failure waives the issue on appeal. *See SCO Grp., Inc. v. Novell, Inc.*, 578 F.3d 1201, 1226 (10th

Cir. 2009) (issue is waived when appellant fails to challenge an "alternative, independently sufficient basis for the district court's ruling" in its opening brief); *Bronson v. Swensen*, 500 F.3d 1099, 1104 (10th Cir. 2007) ("[W]e routinely have declined to consider arguments that are not raised, or are inadequately presented, in an appellant's opening brief."). We therefore affirm exclusion of the evidence.

III. CONCLUSION

We AFFIRM the district court's final judgment.

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

No. 09-cv-1021 SMV/LAM

CHARLES R. KOKESH,

Defendant.

March 30, 2015

MEMORANDUM OPINION AND ORDER GRANTING PLAINTIFF'S MOTION FOR ENTRY OF FINAL JUDGMENT

THIS MATTER is before the Court on Plaintiff's Motion for Entry of Final Judgment against Defendant Charles R. Kokesh [Doc. 176] ("Motion"), filed on December 2, 2014. Defendant filed his Response and Declaration on January 7, 2015. [Docs. 179, 180]. Plaintiff replied on January 21, 2015. [Doc. 181]. The Court heard oral argument on March 9, 2015. Having considered the motion, briefing, oral argument, record, and relevant law and being otherwise fully advised in the premises, the Court finds that the Motion is well-taken and will be GRANTED.

I. BACKGROUND

Defendant owned and controlled two SEC-registered investment-adviser firms, Technology Funding Ltd. ("TFL") and Technology Funding, Inc. ("TFI") (collectively, "the Advisers"). TFL and TFI were contracted to provide investment advice to four SEC-registered business development companies ("BDCs" or "Funds"). Plaintiff filed its Complaint [Doc. 1] on October 27, 2009, alleging that, *inter alia*, from 1995 through July 2007, Defendant misappropriated more than $34.9 million from the Funds; caused the filing of false and misleading SEC reports and proxy statements to conceal the truth about his misappropriation scheme; and caused the execution, renewal, and performance of contracts with illegal performance-fee provisions. [Doc. 166] at 11–16. The Court presided over a five-day jury trial that began on November 3, 2014, [Doc. 168], and concluded with a jury verdict against Defendant on all claims, [Doc. 174].

A. Direct Violations

The jury rendered a verdict against Defendant, finding that he "knowingly and willfully" converted investment-company assets to his own use or to the use of another, in direct violation of § 37 of the Investment Company Act of 1940 ("Investment Company Act"), 15 U.S.C. § 80a-36. [Doc. 174] at 2; [Doc. 166] at 30. Specifically, the evidence established that, through two investment advisers he owned and controlled, TFL and TFI, Defendant converted $34,927,329 from the Funds as follows:

First, from 1995 through 2006, Defendant directed the Advisers' treasurer, Charlie Freeman, to take $23,807,091 from the Funds to pay salaries and bonuses to Defendant and other officers of the Advisers. The contracts between the Advisers and the Funds contained no bonus provision and prohibited payments to the Advisers that were not expressly specified in the contracts. Defendant signed the contracts. Defendant did not disclose the bonus payments to the Funds' directors or in SEC filings he signed on the Funds' behalf.

Moreover, until a 2000 amendment, the contracts specifically prohibited reimbursements to cover salaries of the Advisers' "controlling persons," including Defendant and the other officers. The 2000 amendment permitted reimbursement for controlling-person salaries. But it was based on misleading proxy statements signed by Defendant that falsely identified him as the only controlling person. The proxy statements also falsely stated that Defendant's average annual salary from 1998 through 2000 was $221,000 when, in fact, it was $771,000. Following the amendment, Defendant caused TFL and TFI to take average annual payments more than 15 times greater than the anticipated average annual payments disclosed in the proxy statements.

Second, from 1995 through 2006, Defendant directed Freeman to take $5,007,441 from the Funds to cover the Advisers' office rent. Defendant knew the contracts specifically prohibited such rent reimbursement. Defendant did not disclose the rent payments to the Funds' directors.

Third, in 2000, Defendant caused the Advisers to take $6,112,797 in payments falsely described in SEC reports he signed as “tax distributions.” The contracts required several conditions to be met before the Advisers could be paid a distribution to cover their tax obligations. But the payments in 2000 did not satisfy the contracts’ stated conditions for tax distributions and had nothing to do with any tax obligation. Defendant personally received more than 90% of the money. Defendant knew the money he received was not related to a tax liability, but he did not return the money to the Funds. Defendant paid only $10,304 in federal taxes in 2000.

B. Aiding-and-Abetting Violations

From the same misconduct described above, the jury found that Defendant “knowingly and substantially assisted” the Advisers to employ a device, scheme, or artifice to defraud a client and to engage in a transaction, practice, or course of business that operated or would operate as a fraud or deceit upon a client and that, in so doing, Defendant aided and abetted violations of Sections 206(1) and 206(2) of the Advisers Act, 15 U.S.C. §§ 80b-6(1) and (2). [Doc. 174] at 1; [Doc. 166] at 18, 21. The jury further found that he aided and abetted violations of § 205 of the Advisers Act, 15 U.S.C. § 80b-5, by knowingly assisting an investment adviser to perform on a contract that provided for illegal profit sharing in an investment company.

The jury also found that Defendant knowingly and substantially assisted the Funds in filing false and misleading quarterly and annual reports with the SEC and in soliciting proxies using false and misleading proxy statements, thereby aiding and abetting violations of § 13(a) and 14(a) of the Exchange Act, 15 U.S.C. §§ 78m and 78n, and Exchange Act Rules 12b-20, 13a-1, 13a-13, and 14a-9, 17 C.F.R. §§ 240.12b-20, 13a-1, 13a-13, and 14a-9.

Under § 209(f) of the Investment Advisers Act of 1940 ("Advisers Act") and § 20(e) of the Securities Exchange Act of 1934 ("Exchange Act"), any person who aids and abets another person's violation shall be deemed to be in violation to the same extent as the person who committed the violation. 15 U.S.C. §§ 80b-9(f) and 78t(e). Accordingly, having been found liable of aiding and abetting certain violations of the securities laws, Defendant is deemed to be in violation to same extent as the primary violators.

C. Plaintiff's Motion for Entry of Judgment

Based on the jury's verdict, Plaintiff filed the instant Motion seeking entry of final judgment ordering Defendant: (1) to pay a civil money penalty, (2) to be permanently enjoined from violating specified provisions of federal securities laws, and (3) to disgorge the amounts that Defendant misappropriated in violation of securities laws. [Doc. 176] at 1. Defendant urges the Court to deny all of the requested relief.

II. ANALYSIS

The statute of limitations at 15 U.S.C. § 2462 applies to the civil money penalty and, thus, limits the total amount of penalty that the Court may impose. However, because some of the claims first accrued within the limitations period, § 2462 does not bar a civil money penalty in its entirety. In light of the facts and circumstances, the Court finds that a third-tier, civil money penalty should be imposed against Defendant in the amount of $2,354,593.

The Court further finds that neither injunction nor disgorgement constitutes a "penalty" in this case because neither is unrelated to, or in excess of, the damages caused by Defendant. In fact, they are tailored to the injury caused by Defendant. Therefore, neither injunction nor disgorgement is subject to the statute of limitations at § 2462.

The Court further finds that there is a reasonable and substantial likelihood that Defendant, if not enjoined, will violate securities laws in the future. Accordingly, he will be permanently enjoined from violating the securities laws.

Finally, the Court determines that $34,927,329 reasonably approximates the ill-gotten gains causally connected to Defendant's violations and will order him to disgorge that amount, plus prejudgment interest of $18,077,103.37.

A. The Court will impose a civil penalty against Defendant in the amount of $2,354,593.

There is no dispute that a civil money penalty generally would be available for the violations at issue in this case. [Doc. 176] at 9 (citing 78u(d); 80b-9(e); and 80a-41(e)); [Doc. 179] at 5. Similarly, there is no dispute that § 2462 applies to such a penalty and, thus, limits the time period during which Plaintiff may seek to enforce it. The statute reads:

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

§ 2462. The parties further agree that because Plaintiff filed its Complaint on October 27, 2009, the relevant limitations period begins on October 27, 2004. Accordingly, there is no dispute that the claim for a civil money penalty must have "first accrued" on or later than October 27, 2004. If it "first accrued" on or prior to October 26, 2004, it would be barred.[1]

The parties dispute when the claim for the civil money penalty "first accrued." Plaintiff maintains that the claim accrued for purposes of § 2462 when the monies at issue were taken by Defendant. [Doc. 181] at 1–3. Plaintiff concedes that monies taken by Defendant on or before October 26, 2004, are barred by § 2462. *Id.* However, according to Plaintiff, Defendant took $5,004,773 and also signed and filed misleading reports with Plaintiff during the limitations period, i.e., on or

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[1] The five-year limitations period may be subject to tolling under certain circumstances. *SEC v. Jones*, 476 F. Supp. 2d 374, 381 (S.D.N.Y. 2007). However, here, Plaintiff does not argue that it is entitled to tolling. *See* [Doc. 181].

after October 27, 2004.[2] *Id.* Therefore, Plaintiff urges the Court to impose a civil monetary penalty against him for $5,004,773. *Id.*

Defendant argues that no monetary penalty should be imposed because the claim first accrued prior to the limitations period. Defendant's position is that accrual occurred, not when he took funds, but rather when he submitted the first of certain filings with Plaintiff. Specifically, he argues that the claim related to his improper receipt of incentive payments accrued when "the registration statements originally containing the unauthorized incentive compensation plans were filed with the SEC." [Doc. 179] at 3 (citing Exs. 2, 54, 165, 274), at 7 (such statements were filed between 1986 and 1992). He argues further that the claim related to the wrongful tax distributions accrued when the quarterly 10Qs and annual 10Ks were filed with SEC in May of 2000. [Doc. 179] at 7; at 4 (citing Exs. 83, 195, 295, (10Qs) 91, 203, 299 (10Ks)). Finally, the claim related to the improper payments to "controlling persons" accrued when the related definitive proxy solicitations were filed with Plaintiff on Nov. 8, 2000. [Doc. 179] at 3 (citing Exs. 29, 90, 202, 298), at 7. Defendant makes no argument regarding the accrual of the claim related to the improper rent payments. *See* [Doc. 179].

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[2] The monies included improper payments to "controlling persons," office-rent payments, and bonuses. [Doc. 181] at 1–3. The misleading reports are contained in Exhibits 117, 119, 122, 127, 131, 134, 139, 156, 232, 233, 239, 243, 245, 247, 252, 268, 323, 325, 330, 334, 338, 340, and 346. [Doc. 181] at 3, n.4.

A claim "accrues" under § 2462 when the fraud occurs (as opposed to when it is discovered). *Gabelli v. SEC*, 133 S. Ct. 1216, 1220 (2013). In this case, Defendant's fraud spanned 12 years and continued into the limitations period. Therefore, his fraud accrued both before and after October 27, 2004, the limitations cut-off for the purposes of § 2462. Under *Gabelli*, the fraud that accrued before the cut-off would be barred by § 2462, while the fraud accruing after would not. Accordingly, some of the illegally obtained funds—those distributed after on or after October 27, 2004—are not barred by the statute of limitations.

Having found that some of the illegally obtained funds would not be barred by § 2462, the Court must still evaluate whether to impose a civil money penalty, and if so, how much. The relevant statutes set forth a three-tier penalty structure in which each tier provides for a penalty that shall not exceed the greater of either a specific enumerated statutory amount or "the gross amount of pecuniary gain to such defendant as a result of the violation." 15 U.S.C. §§ 78u(d)(3)(B), 80b-9(e)(2), 80a-41(e)(2). A first-tier penalty cannot exceed the greater of $5,000 or the gross amount of pecuniary gain; a second-tier penalty cannot exceed the greater of $50,000 or the gross amount of pecuniary gain; and a third-tier penalty cannot exceed the greater of $100,000 or the gross amount of pecuniary gain. *Id.*[3] The

[3] Although the statute itself provides for enumerated penalties not to exceed $5,000, $50,000, and $100,000, respectively, this statutory amount has been adjusted for inflation pursuant to the Debt Collections Improvement Act of 1996, Pub. L. No. 104-134, § 31001 (April 26, 1996). *See* 17 C.F.R. § 201.1003. Accordingly, the

first-tier penalty appears to be the default penalty amount. A second-tier penalty is appropriate if the violation "involved fraud, deceit, manipulation, or deliberate or reckless disregard for a regulatory requirement." §§ 78u(d)(3)(B)(ii), 80b-9(e)(2)(B), 80a-41(e)(2)(B). A third-tier penalty is appropriate if the requirements for a second-tier penalty are met and the violation "directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons." §§ 78u(d)(3)(B)(iii), 80b-9(e)(2)(C), 80a-41(e)(2)(C).

Courts determine the amount of the civil penalty, if any, "in light of the facts and circumstances" of the particular case. §§ 78u(d)(3)(B), 80b-9(e)(2), 80a-41(e)(2). In determining the amount of a civil penalty, courts have looked to various factors, including: (1) the egregiousness of the violations at issue; (2) the degree of the defendant's scienter; (3) whether the violations were isolated or recurrent; (4) a defendant's failure to admit wrongdoing; (5) whether the defendant's conduct created substantial losses or the risk of substantial losses to investors; (6) defendant's lack of cooperation and honesty with authorities; and (7) whether an otherwise appropriate penalty should be reduced due to the defendant's demonstrated current and future financial condition. *SEC v. United Amer. Ventures, LLC*, 2012 U.S. Dist. LEXIS 51978, *24 (D.N.M. Mar. 2, 2012) (citing *S.E.C.*

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actual statutory amounts have increased. However, the specific amounts are not ultimately consequential here because the Court does not rely on them in awarding the civil money penalty. *See infra*.

v. Universal Express, Inc., 646 F. Supp. 2d 552, 568 (S.D.N.Y. 2009) (listing factors)). The purpose of a civil penalty is to punish the wrongdoer and discourage future violations of the securities laws. *See, e.g., id.* at *27 (considering punishment and deterrence in imposing civil money penalties).

In this case, Defendant was found liable for numerous "knowing" violations of securities laws, and the circumstances were egregious. He misappropriated nearly $35 million over an 11-year period, abusing his roles in several adviser and investment firms for his own personal benefit and to the detriment of investors. He specifically targeted smaller investors (those investing $5,000 or less) because they would be less likely to sue if they discovered his schemes. *See* Trial Transcript dated Nov. 4, 2014 [Doc. 163] at 43–44. Based on these circumstances, the Court finds that Defendant's violations were egregious.

Defendant was aware of his wrongdoing, which supports a higher civil penalty. Scienter, according to the Supreme Court, is knowing or intentional misconduct designed to deceive or defraud investors. *Rolf v. Blyth, Eastman Dillon & Co., Inc.*, 570 F.2d 38, 45 (2nd Cir. 1978) (citing *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 (1976)); *see also SEC v. Wall Street Pub. Institute, Inc.*, 591 F. Supp. 1070, 1084 (D.D.C. 1984) (scienter established by showing intentional, knowing, or reckless conduct resulting in the alleged fraud or deceit). Tenth Circuit authority has reasoned that illegal conduct that is knowing and willful satisfies the scienter requirement. *Edward J. Mawod & Co. v. SEC*, 591 F.2d 588 (10th Cir. 1979). Defendant is highly educated and by all accounts highly intelligent and knowledgeable about advising and investing. These circumstances, coupled with the vast extent of the fraud, tend to show that Defendant acted with a high degree of scienter.

The fourth and fifth factors support a higher civil penalty, but the sixth and seventh do not. Defendant has never admitted any wrongdoing. Even in the face of a unanimous jury verdict, Defendant has not recognized his wrongful conduct. In his Declaration, [Doc. 180], filed concurrently with the Response, [Doc. 179], Defendant blames the dissolution of the Funds on market conditions and certain market collapses. *Id.* Defendant also blames the "profound changes in the capital markets" since 2000 rather than take any responsibility for his own conduct. [Doc. 179] at 9. He even blames those in control of the very funds he pilfered. *See* Final Jury Instructions [Doc. 166] at 15–17. His conduct created substantial losses to investors. However, Defendant has cooperated with Plaintiff's investigations. Defendant strenuously emphasizes the seventh factor. He insists that he is insolvent and has no prospect of recovering from insolvency, which if true, may support a lower civil penalty.

Balancing these factors, and pursuant to 78u(d)(3)(B)(iii), 80b-9(e)(2)(C), and 80a-41(e)(2)(C), the Court finds that Defendant meets the statutory requirements for third-tier penalties. In furtherance of the dual purposes of punishment and deterrence, and on careful consideration of all the circumstances, the Court finds that a civil money penalty equal to the amount of funds that Defendant himself received during the limitations period, or $2,354,593, is warranted.[4] *See* [Doc. 179] at 4 (Defendant's calculated total).

B. The Court will permanently enjoin Defendant from violating the securities laws and order him to disgorge $34,927,329 plus prejudgment interest of $18,077,103.37.

The parties agree that the violations at issue in this case could result in an injunction barring further violations, as well as a disgorgement order. [Doc. 176] at 4–5 (citing 15 U.S.C. §§ 78u(d), 80b-9(d), 80a-41(d)); *see* [Doc. 179] at 8–11. Additionally, the parties agree that an injunction or disgorgement order, being an equitable remedy, would not be subject to the five-year statute-of-limitations found in § 2462. [Doc. 179] at 8–11; [Doc. 181] at 3–7. They also agree that if an injunction or disgorgement order did amount to a "penalty," those remedies would then become subject to the § 2462 limitations period. [Doc. 179] at 8–11; [Doc. 181] at 3–7.

The dispute here is whether the injunction or disgorgement order requested by Plaintiff constitutes a "penalty" such that § 2462 would apply. Plaintiff argues

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[4] This finding should not be interpreted as a legal determination on whether civil money penalties may be imposed for monies paid to third-parties. Although Defendant has raised such argument, [Doc. 179] at 4–6, the Court need not reach the issue because, here, a penalty exceeding the amount that Defendant himself received is not warranted anyway.

that neither remedy amounts to a "penalty," and therefore, § 2462 does not apply. Plaintiff urges the Court to permanently enjoin Defendant from violating the securities law and to order him to disgorge all of his ill-gotten gains, in the amount of $34,927,329. [Docs. 176, 181].

Defendant argues that neither an injunction nor a disgorgement order—apparently in any amount—is permissible. He makes the same § 2462 statute-of-limitations argument here that he makes against a civil penalty. *See* n.4, *supra.* With respect to these (traditionally) equitable remedies, however, he makes a necessary additional argument. He insists that an injunction or disgorgement order would constitute a civil penalty under § 2462. If he is correct, and if either constitutes a civil penalty, then § 2462's statute-of-limitations period applies. As he did with the civil-money-penalty argument, Defendant posits that all of Plaintiff's claims "first accrued" prior to October 27, 2004. Therefore, any injunction or disgorgement order would be barred by § 2462. To support his theory, he points to *SEC v. Graham*, 21 F. Supp. 3d 1300 (S.D. Fla. 2014), and *Gabelli*, 133 S. Ct. at 1220–21.

In *Graham*, the Honorable Lawrence King, United States District Judge for the Southern District of Florida, held that an injunction barring future violations of securities laws and a disgorgement order would be "penalties" subject to § 2462's statute of limitations. 21 F. Supp 3d at 1310–11. In *Graham*, all of the alleged wrongdoings had occurred outside of § 2462's five-year limitations period, which was the heart of Judge King's ruling. *Id.* at 1305. Relying heavily on the Supreme Court's decision in *Gabelli*, which reaffirmed the fundamental importance and necessity of statutes of limitations, Judge King rejected the notion that equitable remedies for violations of securities laws might *not* be subject to § 2462 and thus might have no statute of limitations. *Id.* at 1310–11. He reasoned that under *Gabelli*, there simply must be *some* method of repose. After all, finding that § 2462 did not apply to equitable remedies "would make the Government's reach to enforce such claims akin to its unlimited ability to prosecute murderers and rapists." *Id.* at 1310. Accordingly, he found that enjoining the defendants from any future violations of securities laws "can be regarded as nothing short of a penalty 'intended to punish,' especially where [there was] no evidence (or allegations) of any continuing harm or wrongdoing [within the limitations period]." *Id.* at 1310. With respect to the proposed disgorgement order, Judge King found that it would be essentially the same as a civil penalty (which is clearly subject to § 2462) because ordering the disgorgement of all ill-gotten gains would be tantamount to a forfeiture. *Id.* at 1310–11.

Although the *Graham* opinion does not expressly mention the term, Judge King's reasoning is referred to as the concurrent remedy rule. "The concurrent remedy rule provides: when legal and equitable relief are available concurrently (*i.e.*, when an action at law or equity could be brought on the same facts), equity will withhold its relief in such a case where the applicable statute of limitations would bar the concurrent legal remedy." *United States v. Telluride Co.*, 146 F.3d 1241, 1249 n.12 (10th Cir. 1998) (internal quotation marks omitted) (citing *Cope v. Anderson*, 331 U.S. 461, 464 (1947)). As Plaintiff points out, the Tenth Circuit has spoken on this issue and has reached a different result than *Graham*. *Id.*

In *Telluride*, the Tenth Circuit held that equitable remedies *are* available to the government even where legal relief on the same facts is barred by the statute of limitations. *Id.* at 1248–49. The court explained that "a suit by the United States in its governmental capacity is not subject to a time limitation unless Congress explicitly imposes one and any statute of limitations sought to be applied against the United States must receive a strict construction in favor of the Government." *Id.*

In addition to rejecting the concurrent remedy rule, the court also determined whether the equitable relief sought—enjoining the defendant from continuing to illegally fill wetlands and requiring the defendant to restore damaged wetlands or create new wetlands to replace those that could not be restored—amounted to a penalty and, thus, whether § 2462 applied. *Id.* at 1243, 1245–46. The court held that the injunction did not constitute a penalty under § 2462 because it sought only to restore the damaged wetlands. *Id.* at 1246. It "did not seek compensation unrelated to or in excess of the damage caused by the defendant's acts." *Id.*

On careful analysis of the case law, this Court is not persuaded that the reasoning in *Graham* should apply here. First, *Graham* is factually distinct. In *Graham*, none of the alleged wrongdoing had occurred within the limitations period. Here, however, the Court has found that some of Defendant's wrongs did occur within the limitations period. Therefore, even if the concurrent remedy rule were to apply in this case, it would not preclude all equitable relief. Second, the Court finds *Graham* to be an outlier. Plaintiff cites numerous cases in which other courts have addressed, and rejected, *Graham's* reasoning. *See* [Doc. 181] at 10 (collecting cases). Finally, and most importantly, this Court is bound by *Telluride* and, accordingly, shall not apply the concurrent remedy rule.

Graham and the concurrent remedy rule notwithstanding, Defendant still argues that the injunction and disgorgement sought in this case are actually "penalties" subject to § 2462. A permanent injunction or a disgorgement order would be a punitive measure, and thus subject to § 2462, if it is imposed as "a form of punishment" that "goes beyond remedying" the damage allegedly caused by the defendant. *Johnson v. SEC*, 87 F.3d 484, 488 (D.C. Cir. 1996). A § 2462 penalty is a "sanction or punishment imposed for violating a public law which goes beyond compensation for the injury caused by the defendant." *Telluride*, 146 F.3d at 1246. In other words, there may be a penalty where the "sanction seeks compensation unrelated to, or in excess, of the damages caused by the defendant." *Id.*

i. Injunction

Defendant urges the Court to ignore *Telluride* in determining whether the proposed injunction would amount to a penalty. Defendant argues that the injunction would constitute a penalty because there is minimal likelihood that the injunction would restore the *status quo ante* Defendant's wrongs, and because there is "no reasonable prospect of future harm." [Doc. 179] at 9–10; *see SEC v. Jones*, 476 F. Supp. 2d 374, 384 (S.D.N.Y. 2007) (holding that where the SEC adduced no positive proof, aside from the defendants' past wrongdoing, to suggest some cognizable danger of recurrent violation, an injunction barring future violations of securities laws would constitute a "penalty" under § 2462).

The Court is not persuaded. The Court finds that the requested injunction—barring Defendant from any future violations of the securities laws—is not a penalty under § 2462 because it does not seek compensation unrelated to or in excess of the damage caused by Defendant. *See Telluride*, 146 F.3d at 1246. In fact, enjoining Defendant from future securities-laws violations is precisely tailored to Defendant's wrongs.

Additionally, even assuming *arguendo* that the injunction were a penalty, § 2462 would not bar it. Because the Court finds that some of Defendant's violations occurred within the five-year window, injunctive relief—even if tantamount to a "penalty"—would not be barred by the statute of limitations.

Even though the Court has found that the injunction requested in this case is not a penalty and is not barred by the statute of limitations, those findings do not mean, *ipso facto*, that an injunction is warranted. "An injunction based on the violation of securities laws is appropriate if the SEC demonstrates a reasonable and substantial likelihood that the defendant, if not enjoined, will violate securities laws in the future."

SEC v. Pros Int'l, Inc., 994 F.2d 767, 769 (10th Cir. 1993). The relevant factors for determining the likelihood of future violations are the seriousness of the violation, the degree of scienter, whether the defendant's occupation will present opportunities for future violations, and whether the defendant has recognized his wrongful conduct and gives sincere assurances against future violations. *Id.* While no single factor is determinative, "the degree of scienter bears heavily on the decision." *Id.*

The first factor, the seriousness of Defendant's violations, was established at trial. Defendant was found liable for numerous "knowing" violations of securities laws, and the circumstances were egregious. He misappropriated nearly $35 million over an 11-year period, abusing his roles in several adviser and investment firms for his own personal benefit and to the detriment of investors. He specifically targeted smaller investors (those investing $5,000 or less) because they would be less likely to sue if they discovered his schemes. *See* Trial Transcript dated Nov. 4, 2014 [Doc. 163] at 43–44. Based on these circumstances, the Court finds that Defendant's violations were quite serious. Consequently, this factor weighs in favor of an injunction.

The second factor, Defendant's degree of scienter, also weighs in favor of an injunction. Scienter, according to the Supreme Court, is knowing or intentional misconduct designed to deceive or defraud investors. *Rolf*, 570 F.2d at 45 (citing *Ernst & Ernst*, 425 U.S. at 199); *see also Wall Street Pub.*, 591 F. Supp. at 1084 (scienter established by showing intentional, knowing, or reckless conduct resulting in the alleged fraud or deceit). Tenth Circuit authority has reasoned that illegal conduct that is knowing and willful satisfies the scienter requirement. *Edward J. Mawod & Co.*, 591 F.2d 588.

Defendant is highly educated and by all accounts highly intelligent and knowledgeable about advising and investing. The jury found that his violations were committed "knowingly." [Doc. 174]. These circumstances, coupled with the vast extent of the fraud, tend to show that Defendant acted with a high degree of scienter.

The third factor is whether Defendant's occupation will present opportunities for future violations. Defendant testified at trial that he owned and controlled investment-adviser firms and operated investment companies for decades. [Doc. 165] at 48–58; [Doc. 166] at 38–69. He holds a law degree and a master's degree in business administration. At trial, he expounded on his vast business experience, knowledge, and training in business formation and securities markets. *Id.* Defendant attests that he does not intend to engage in business activity that would present opportunities for future violations, citing his age (67 years old), his alleged insolvency, loss of his residence in foreclosure proceedings, and "fundamental market changes" precluding investment opportunities in high tech initial public offerings. [Doc. 180]. However, his occupation has historically been in business formation and securities markets. *Id.* Moreover, the evidence at trial establishes that Defendant has been accustomed to an extravagant lifestyle, and in light of his demeanor, the Court is not persuaded that Defendant would refrain from pursuing a business opportunity that could lead to violating the securities laws. Although Defendant attests that he is not currently employed, [Doc. 180] at 3, the Court finds this third factor favors issuance of an injunction.

The final factor the Court considers is whether Defendant has recognized his wrongful conduct or given assurances against future violations. Even in the face of a unanimous jury verdict, Defendant has not recognized his wrongful conduct. Defendant's Declaration, [Doc. 180], filed concurrently with his Response, [Doc. 179], blames the dissolution of the Funds on market conditions and certain market collapses. *Id.* Defendant also blames the "profound changes in the capital markets" since 2000 for his financial circumstances rather than take any responsibility for his own conduct. [Doc. 179] at 9. His claims that he does not intend to engage in his prior business activities are self-serving. Defendant has not recognized his wrongful conduct, nor has he given any credible assurances against future violations. Therefore, the final factor also weighs in favor of an injunction.

All of the factors set forth by the Tenth Circuit weigh in favor of issuing a permanent injunction. Therefore, the Court finds that there is a reasonable and substantial likelihood that Defendant will again violate the securities laws. Accordingly, an injunction is warranted and shall issue.

ii. Disgorgement

The question of disgorgement is slightly different from the question of an injunction. Although the Court finds that some of the violations occurred within the five-year period, not all did. Nevertheless, Plaintiff requests disgorgement of all funds that were misappropriated, even those outside the five-year window. Therefore, the Court first analyzes whether disgorgement in this case would constitute a penalty such that § 2462 would apply. Finding that it does not apply, the Court next evaluates whether and to what extent disgorgement is warranted.

a. Disgorgement in this case is not a penalty.

In *Telluride*, the Tenth Circuit explained that an equitable remedy, like disgorgement, would not amount to a "penalty" under § 2462 where it "did not seek compensation unrelated to or in excess of the damage caused by the defendant's acts." 146 F.3d at 1246. The court specifically described disgorgement as "remedial" even though it "sanction[s] past conduct. *Id.* at 1247. Under *Telluride*, equitable disgorgement should apply to "ill-gotten gains earned by the defendant while in violation of securities laws." *Id.* (internal quotation marks omitted).

Nevertheless, relying upon other, out-of-circuit cases, namely *Johnson*, *Bartek*, and *Commonwealth Chemical*, Defendant urges the Court to find that disgorgement would constitute a penalty because of the "crushing financial consequences" to Defendant, and because there is no evidence of the likelihood of recurrence of violations. [Doc. 179] at 10. Therefore, Defendant argues that no equitable purpose could be served by ordering disgorgement of all of the misappropriated funds, including those taken outside the five-year window. *Id.*

However, neither *Johnson* nor *Bartek* nor *Commonwealth Chemical* supports his position. Disgorgement was not at issue in any of these cases. *See Johnson* 87 F.3d at 491; *Bartek*, 484 F.App'x at 950–57; *SEC v. Commonwealth Chem. Sec., Inc.*, 574 F.2d 90, 95–96, 102 (2d Cir. 1978). In fact, the *Johnson* court refers to "disgorgement of ill-gotten gains" to illustrate a "strictly remedial" measure without respect for the consequences of disgorgement on the defendant. *Johnson* 87 F.3d at 491. Disgorgement is not mentioned at all in *Bartek*. And the court in *Commonwealth Chemical* seems to suggest that the effect of a disgorgement order on a defendant is irrelevant to its equitable nature. 574 F.2d at 96. The authorities cited by Defendant actually seem consistent with the rule in *Telluride*. Applying the *Telluride* rule, the Court finds that the disgorgement sought by Plaintiff is remedial, equitable, and thus, not subject to § 2462.

Defendant makes one final argument as to why disgorgement amounts to a penalty. He states in his Response (with no citation to authority) that an order for disgorgement of funds paid to third parties, instead of paid directly to Defendant, would constitute a penalty. [Doc. 179] at 2. The implication is that Defendant should not be ordered to disgorge funds that were paid to landlords or other controlling persons to whom Defendant was not related. *See id.* Plaintiff replies that the question is not what amount of illegally obtained funds was *received* by Defendant but, rather, what amount of illegally obtained funds was *distributed* under Defendant's control. [Doc. 181] at 11 (citing *United Amer. Ventures*, 2012 U.S. Dist. LEXIS 51978, at *16).

A "person who controls the distribution of illegally obtained funds is liable for the funds he or she dissipated as well as the funds he or she retained." *United Amer. Ventures*, 2012 U.S. Dist. LEXIS 51978, *16 (quoting *S.E.C. v. Platforms Wireless Int'l Corp.*, 617 F.3d 1072, 1098 (9th Cir. 2010)). Moreover, defendants "should not be allowed to deduct referral fees, payroll, or other expenses from the net proceeds to reduce their liability for ill-gotten gains, because it would be 'unjust to permit the defendants to offset against investor dollars the expenses of running the very business created to defraud those investors.'" *Id.* at *17 (quoting *SEC v. JT Wallenbrock & Assocs.*, 440 F.3d 1109, 1114 (9th Cir. 2006) (ellipsis omitted). These rules make sense considering that disgorgement is designed both to prevent the wrongdoer's unjust enrichment and to deter others' violations of the securities laws, especially in cases of securities fraud. *See United States v. Nacchio*, 573 F.3d 1062, 1080 (10th Cir. 2009).

Defendant's argument—that any disgorgement of monies that he distributed to third parties would not be equitable—holds water only on the most superficial review. The Court is persuaded that *all* of the funds misappropriated by Defendant should be disgorged. Requiring Defendant to give up his ill-gotten gains—even those he received many years ago and those he caused to be paid to third parties—is quintessentially equitable. The requested disgorgement is for the precise damage caused by Defendant's acts and, thus, does not amount to a penalty. Therefore, the limitations period in § 2462 does not apply to the request for disgorgement.

b. Disgorgement in the amount of $34,927,329 is appropriate.

Although disgorgement does not amount to a penalty in this case and is not barred by the statute of limitations, the Court must still evaluate whether and what amount of disgorgement is appropriate. Plaintiff argues that Defendant should be ordered to disgorge all of the profits causally connected to his violations. [Doc. 176] at 8 (citing *First Pacific Bancorp*, 142 F.3d at 1192 n.6.). Plaintiff contends that such order would total $34,927,329. *Id.*

Disgorgement is "an equitable remedy as to which a trial court is vested with broad discretionary powers." *SEC v. Maxxon, Inc.*, 465 F.3d 1174, 1179 (10th Cir. 2006). When the Court is calculating the proper amount of disgorgement for violation of securities laws, it need not make "an exact calculation of the defendant's profits, but only a reasonable approximation of profits causally connected to the violation. Because such calculations are not capable of exactitude, any risk of uncertainty in calculating disgorgement should fall on the wrongdoer whose illegal conduct created that uncertainty." *S.E.C. v. Haligiannis*, 470 F. Supp. 2d 373, 384 (S.D.N.Y. 2007) (internal quotations and modifications omitted); *see SEC v. Fisher*, 2008 US

Dist. LEXIS 37838, at *25 (N.D. Ill. May 13, 2008) (unpublished) (holding that disgorgement of all ill-gotten gains would be available if the SEC "prove[d] that its disgorgement figure reasonably approximate[d] the amount of unjust enrichment")).

In this case, the Court is satisfied that $34,927,329 reasonably approximates the ill-gotten gains causally connected to Defendant's violations. Indeed, Defendant does not argue otherwise. He argues that portions of the amount should not be ordered disgorged for other reasons, which have already been addressed above. However, he does not dispute the calculation. The Court will order Defendant to disgorge $34,927,329, plus prejudgment interest of $18,077,103.37.

III. CONCLUSION

The statute of limitations at 15 U.S.C. § 2462 applies to the civil money penalty and, thus, limits the total amount of penalty the Court may impose. However, because some of the claims first accrued within the limitations period, § 2462 does not bar a civil money penalty in its entirety. In light of the facts and circumstances, the Court finds that a third-tier, civil money penalty should be imposed against Defendant in the amount of $2,354,593.

The Court further finds that neither injunction nor disgorgement, as Plaintiff requests, amounts to a "penalty" in this case because neither is unrelated to, or in excess, of the damages caused by Defendant. In fact, they are tailored to the injury caused by Defendant. Therefore, neither injunction nor disgorgement is subject to the statute of limitations at § 2462.

There is a reasonable and substantial likelihood that Defendant, if not enjoined, will violate securities laws in the future. Accordingly, he will be permanently enjoined from violating the securities laws. Finally, the Court determines that $34,927,329 reasonably approximates the ill-gotten gains causally connected to Defendant's violations and will order him to disgorge that amount plus prejudgment interest of $18,077,103.37.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Plaintiff's Motion for Entry of Final Judgment against Defendant Charles R. Kokesh [Doc. 176] is **GRANTED.**

IT IS FURTHER ORDERED that Defendant shall pay a civil penalty in the amount of $2,354,593 pursuant to Section 21(d) of the Exchange Act, Section 209(e) of the Advisers Act, and Section 42(e) of the Investment Company Act, 15 U.S.C. §§ 78u(d); 80b-9(e), and 80a-41(e), **within 30 days** of entry of this Order.

IT IS FURTHER ORDERED that a permanent injunction will issue enjoining Defendant from violating Section 206(1) and (2) of the Investment Advisers Act; Section 13(a) of the Exchange Act and Exchange Act Rules 12b-20, 13a-1, and 13a-13; Section 14(a) of the Exchange Act and Exchange Act Rule 14a-9; Section 37 of the Investment Company Act, and Section 205(a) of the Investment Advisers Act, directly or indirectly.

IT IS FURTHER ORDERED that Defendant shall disgorge $34,927,329, together with prejudgment interest thereon in the amount of $18,077,103.37, **within 30 days** of entry of this Order.

IT IS SO ORDERED.

/s/
STEPHAN M. VIDMAR
United States Magistrate Judge
Presiding by Consent