CASE NOS. 18-4150 and 18-4119

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

RAPOWER-3, LLC, INTERNATIONAL AUTOMATED SYSTEMS, INC., LTB1, LLC, R. GREGORY SHEPARD, NELDON JOHNSON,

Defendants – Appellants.

On Appeal from the United States District Court
For the District of Utah, Central Division
The Honorable Judge David Nuffer
D.C. No. 2:15-cv-00828-DN

APPELLANTS' PETITION FOR HEARING

Respectfully submitted,

Denver C. Snuffer, Jr.
Steven R. Paul
Attorneys for Defendants
NELSON, SNUFFER, DAHLE & POULSEN, P.C.
10885 S. State St.
Sandy, UT 84070
(801) 576-1400
denversnuffer@gmail.com
spaul@nsdplaw.com

CORPORATE DISCLOSURE STATEMENT

RaPower-3, LLC is a Utah limited liability company. Its members consist of Randale P. Johnson, a Utah resident, LaGrand T. Johnson, a Utah resident, and Neldon P. Johnson, a Utah resident.

LTB1, LLC is a Utah limited liability company. It has never established members of the entity.

/s/ Denver C. Snuffer, Jr.
Denver C. Snuffer, Jr.
Attorney for Appellants

Dated: July 13, 2020

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INTRODUCTION

On June 22, 2020, in *Liu v. SEC*, 591 U.S. ___ (2020) the Supreme Court of the United States provided clarity on federal courts' authority to order disgorgement in SEC enforcement proceedings. In reviewing a matter arising from a scheme to defraud foreign nationals, the Court held that courts must deduct legitimate expenses before ordering disgorgement under 15 USCS § 78u(d)(5)[1], including, in that case, lease payments and cancer treatment equipment.

A petition for rehearing is appropriate where a panel has misapprehended or overlooked an important point of fact or law.[2] In this case, this Court affirmed the trial court's disgorgement award, including its refusal to consider any offset for business expenses. The trial court devoted only two sentences to this issue in its Findings of Fact without "ascertaining whether expenses are legitimate or whether they are merely wrongful gains under another name."[3] In light of the Supreme Court's ruling in *Liu*, the disgorgement award, and the decision affirming, is untenable.

[1] 26 USCS Section 7402 invokes similar "appropriate or necessary" language in its authoritative grant of remedial power as the SEC section the Court reviewed in *Liu*, replacing "for the benefit of investors" with "for the enforcements of the internal revenue laws." For the reasons stated infra, the Court's reasoning (like in so many SEC cases) has analogous import to IRS equitable remedy cases. Indeed, both sides, the lower court and this court have all relied on SEC disgorgement cases for the defining authority in deciding this matter.

[2] Fed. R. App. P. 40(a)(2).

[3] *Liu v. SEC*, 591 U.S. ____ (2020) slip op. at pg. 19.

ARGUMENT

I. *LIU V. SEC* INVALIDATES THE DISGORGEMENT OF GROSS RECEIPTS AWARD AFFIRMED IN THIS CASE.

On June 22, 2020, the Supreme Court of the United States held "[c]ourts may not enter disgorgement awards that exceed gains "made upon any business or investment, when both the receipt of payments are taken into account" and accordingly "courts must deduct legitimate expenses before ordering disgorgement under [15 USCS Section 78u(d)(5)]" citing the Restatement (Third) of Restitution and Unjust Enrichment Section 51.[4] The Supreme Court explained that a rule to the contrary that "makes no allowance for the cost and expense of conducting a business" would be "inconsistent with the ordinary principles of chancery."[5]

This decision effectively rolls back decades of case law where trial courts impermissibly expanded their authority to order disgorgement awards based on gross receipts without proper consideration of business expenses.[6] Federal courts have

[4] *Lui*, 591 U.S. ___ (2020), slip op. at 19.
[5] *Id.*
[6] *SEC v. Aerokinetic Energy Corp*., No. 8:08-CV-1409-T-27TGW, 2010 WL 5174509, at *3 (M.D. Fla. Dec. 15, 2010), aff'd, 444 F. App'x 382 (11th Cir. 2011) ("Defendants request an offset of some $538,000 for claimed business expenses. The Magistrate found Defendants failed to substantiate their alleged business expenditures. The Court agrees. The unsworn and unexplained spreadsheet (Dkt.59, Ex. G) is insufficient to satisfy Defendants' burden of demonstrating that $555,000 is not a reasonable approximation of their ill-gotten gains."); *id.* at *4 ("How a defendant chooses to spend his ill-gotten gains, whether it be for business expenses, personal use, or otherwise, is immaterial to disgorgement. Defendants should not be permitted to offset the amounts wrongfully obtained from investors, even if some of the funds were spent in attempting to develop a legitimate business, as Defendants contend." (citations omitted)); *accord SEC v. Veros Farm Holding LLC*, No. 1:15-cv-00659-JMS-MJD, 2018 WL 731955, at *4 (S.D. Ind. Feb. 6, 2018); *SEC v. Projaris Mgmt*., LLC, No. 13-CV-0849 RB/KBM, 2016 WL 7325661, at *4 (D.N.M. Aug. 23, 2016); *SEC v. Novus Techs.*, LLC, No. 2:07-CV-235-TC, 2011 WL 2516938, at *2 (D. Utah June 23, 2011) (Campbell, T); *SEC v. Commonwealth Chemical Securities, Inc*. 574 2d 90, 95 (CA2 1978); *SEC v. Blatt*, 583 F. 2d 1325, 1335 (CA5 1978); *SEC v. Washington Cty. Util. Dist*., 676 F.2d 218, 227 (CA6 1982).

long endorsed the government's expansion of the scope of disgorgement, arguing that gross receipt disgorgement is within the trial courts' authority when rendering judgments and decrees "as may be necessary and appropriate" for the benefit of investors[7] or for the enforcement of internal revenue law.[8]

Prior to trial in this case, the trial court ordered the parties to submit briefs concerning "the measurement and proof of a disgorgement amount." The trial court ordered the parties to provide:

> "legal authority for (1) measuring disgorgement by the amount of (a) taxes avoided by investors in Defendant RaPower; (b) gross profit of RaPower; (c) net profit of RaPower; (d) income of individual defendants from RaPower; or any other measure, and (2) who, in the event net profit is a proper measure, bears the burden of proof on expenses RaPower incurred in its business."[9]

On March 29, 2018, the trial court entered docket text order, holding that "[u]njust enrichment may be shown by gross receipts or increase in net assets" and "A defendant is free to introduce evidence showing that unjust enrichment is something less than the amount put in evidence by plaintiff. Defendant has the burden of proving entitlement to a credit or deduction for business expenses, which may include refunds to customers. However, defendant is not entitled to a credit for costs or expenses incurred in an attempt to defraud the claimant."

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[7] 15 USCS Section 78u(d)(5).
[8] 26 USCS Section 7402(a).
[9] ECF 338 (March 14, 2018 Memorandum Decision and Order Denying Defendants' Motion in Limine to Exclude Testimony Regarding Damages Related to Disgorgement)

At trial, the government admitted into evidence SEC filings that showed **expenses** in the amount of $43,156,400.88 related to the solar business and lens research and development, sales and business costs. During closing argument, the government argued that defendants should not be given any credit for disgorgement for purported business expenses because defendants' failed to meet their burden "because no part of their business involving solar lenses was legitimate."[10]

Despite this showing, the trial court calculated its disgorgement award solely on the gross sales of lenses, without accounting for any business expenses. Devoting two sentences to the issue in its Findings of Fact and Conclusions of Law, the trial court stated:

> "Disgorgement will be ordered, pursuant to § 7402(a), in these amounts. Defendants will not be allowed any credit of operating expenses to "carry[] on the business that is the source of the profit subject to disgorgement." When a defendant defrauds the claimant, as the United States has shown Defendants have done, such credits are not consistent with principles of equitable disgorgement."[11]

In sum, the court did not deduct operating expenses of the companies, quoting the Restatement § 51(5)(c) for the proposition that a defendant "will not be allowed any

[10] "Further, defendants should not be given any credit against disgorgement for purported business expenses. As the Court has already noted in ECF Number 359 the defendant has the burden of proving entitlement to a credit or deduction for business expenses. But the defendant is not entitled to a credit for costs or expenses incurred in an attempt to defraud the claimant. This is defendants' burden, and they did not meet it because no part of their business involving solar lenses was legitimate." Tr. Transcript at pg. 2450:11-20.
[11] ECF 467 at pg. 129.

credit of operating expenses to 'carry[ ] on the business that is the source of the profit subject to disgorgement.'"[12] This directly violates the decision in *Liu v SEC*.

On appeal, this Court affirmed. Specifically concerning whether the district court should have subtracted operating expenses from gross receipts to determine the amount that should be disgorged, this Court held that the Appellants did "not muster an adequate challenge to the sufficiency of the evidence on that score." The difficulty lies in the record of this case. Following trial, the trial court made little to no findings which Appellants could address, as the decision below devoted only two sentences to this point.[13] *Liu* requires more; at a minimum, the trial court must ascertain whether expenses are legitimate or whether they are "merely wrongful gains under another name."[14] This the trial court did not do.

Similarly, this Court further noted that Appellants' failure to include the bank records made it impossible for the panel to evaluate the bank-deposit evidence. However, the bank records were not admitted in the record because the trial court never required it from the government pursuant to Rule 1006.[15] The government never disclosed their damage theory or total disgorgement calculation until the eve of trial, and by that time all discovery was ended.

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[12] *United States v. RaPower et al*, 960 F.3d 1240, pg. 17 (10th Cir. 2020)
[13] ECF 467 at pg. 129.
[14] *Liu* at 19.
[15] This discovery failure was the subject of Defendants' Motion in Limine to Strike Plaintiff's Summary Exhibit 752, which was denied in a docket text order ECF 376 on April 4, 2018.

In light of the Court's decision in *Liu v. SEC* (issued just weeks after this Court's opinion) the decision affirming the trial court in this case is no longer tenable without review and remand on the issue of businesses expenses. This Court affirmed the trial court's decision that was wholly based solely upon a database showing gross receipts, with no consideration given to the business expenses of IAS, RaPower-3, or any of the other Defendants. Prior to *Liu v. SEC*, this Court did not yet have the necessary Supreme Court clarification concerning the lawful scope of the trial court's authority to award disgorgement. The Supreme Court unanimously[16] rejected gross receipts disgorgement as the necessary and appropriate measure of damages, and held 8-1 that "Courts may not enter disgorgement awards that exceed the gains "made upon any business or investment, when both the receipts and payments are taken into account." Like the trial court in *Liu*, the court in this case did not credit business expenses because "the defendants defrauded the claimant."[17]

[16] While the decision was 8 – 1, Justice Thomas dissented because he argued that the SEC lacked the authority to seek disgorgement in any form under the statute.
[17] ECF 467 at pg. 129.

Accordingly, Appellants request a rehearing since the decision by the panel clearly conflicts with the ruling of the Supreme Court in *Liu v. SEC*, to order remand and require the trial court appropriately apply a remedy in this case that is confined to profits (as required by the US Supreme Court).

Respectfully submitted,

/s/ Denver C. Snuffer, Jr.
Denver C. Snuffer, Jr.
Steven R. Paul
Attorneys for Defendants
NELSON, SNUFFER, DAHLE & POULSEN, P.C.
10885 S. State St.
Sandy, UT 84070
(801) 576-1400
denversnuffer@gmail.com
spaul@nsdplaw.com

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By: _/s/ Denver C. Snuffer, Jr.___________
Attorney for Appellants/Defendants (Digital)

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I hereby certify that a copy of the foregoing APPELLANTS' PETITION FOR REHEARING, as submitted in Digital Form via the court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with the Windows Defender (virus scan up to date) and, according to the program, is free of viruses. In addition, I certify all required privacy redactions have been made.

By: /s/ Denver C. Snuffer, Jr.

Attorney for Appellants/Defendants (Digital)

CERTIFICATE OF SERVICE

I, Denver C. Snuffer, Jr. hereby certify that on the 13th day of July, 2020, I served a copy of the foregoing **APPELLANTS' PETITION FOR REHEARING,** to the following in manner indicated:

Clint A. Carpenter
Erin Healy Gallagher
Erin R. Hines
Christopher R. Moran
US Dept. of Justice
P.O. Box 7238
Ben Franklin Station
Washington, DC 20044
Attorneys for USA

Sent via:
_____ Mail
_____ Hand Delivery
__X__ Email: clint.a.carpenter@usdoj.gov
erin.healygallagher@usdoj.gov
erin.r.hines@usdoj.gov
christopher.r.moran@usdoj.gov
__X__ Electronic Service via Utah Court's e-filing program

/s/ Denver C. Snuffer, Jr.
10885 South State
Sandy, Utah 84070
Attorneys for Appellants/Defendants

APPENDIX

FILED
United States Court of Appeals
Tenth Circuit

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Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

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RAPOWER-3, LLC; INTERNATIONAL AUTOMATED SYSTEMS; LTB1; R. GREGORY SHEPARD; NELDON P. JOHNSON,

Defendants - Appellants,

and

HEIDEMAN & ASSOCIATES, re 290 Motion,

Respondent.

No. 18-4150

Appeal from the United States District Court
for the District of Utah
(D.C. No. 2:15-CV-00828-DN-EJF)

Denver C. Snuffer, Jr. (Steven R. Paul, with him on the briefs), Nelson, Snuffer, Dahle & Poulsen, P.C., Sandy, Utah, for Defendants-Appellants.

Clint A. Carpenter (Richard E. Zuckerman, Principal Deputy Assistant Attorney General, Joan I. Oppenheimer, and John W. Huber, United States Attorney, of Counsel, with him on the briefs), Tax Division, Department of Justice, Washington, D.C., for Plaintiff-Appellee.

Before **LUCERO**, **HARTZ**, and **MATHESON**, Circuit Judges.

HARTZ, Circuit Judge.

After a bench trial the district court decided that Defendants—RaPower-3, LLC; International Automated Systems, Inc. (IAS); LTB1, LLC; Neldon Johnson (the sole decision-maker for the preceding entities); and R. Gregory Shepard (who assisted Johnson in marketing and sales for the entities)—had promoted an unlawful tax scheme. To remedy the misconduct, the court enjoined Defendants from continuing to promote their scheme and ordered disgorgement of their gross receipts from the scheme. *See United States v. RaPower-3, LLC*, 343 F. Supp. 3d 1115 (D. Utah 2018). Defendants appeal. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. THE SCHEME

Defendants' tax scheme was based on a supposed project to utilize a purportedly new, commercially viable way of converting solar radiation into electricity. Mr. Johnson's design, as he advertised it, was to install arrays of framed, triangular plastic sheets ("lenses") on towers. The lens arrays would track the sun and focus its radiation onto a "receiver," where it would heat a "heat transfer fluid." *RaPower-3*, 343 F. Supp. 3d at 1124. The transfer fluid would be pumped to a "heat exchanger" to boil water and generate steam. *Id.* at 1125. The steam would spin a turbine to produce electricity, which would be sent onto wires connected to the electricity grid.

From 2006 to 2008, nineteen towers were constructed at a site near Delta, Utah. The evidence showed that the towers had lenses installed on them, but little more. Many of the towers with receivers "ha[d] no collector or mechanism to transmit energy from a receiver to a generator," *id.* at 1124, and Mr. Johnson testified that he had not even determined what substance he would use as the "transfer fluid," *id.* at 1125. There was no connection from the towers to the electricity grid; the only thing at the site was "a brown pole with wires dangling from the top." *Id.* at 1149.

Mr. Johnson testified that he could have "easily" put electricity onto the grid "at any time since 2005," but he had "made a business decision" not to do so. *Id.* at 1147 (internal quotation marks omitted). There was no "third party verification of any of Johnson's designs." *Id.* at 1151. Nor did he have any "record that his system ha[d] produced energy," and "[t]here [were] no witnesses to his production of a useful product from solar energy," a fact that he attributed to his decision to do his testing "on the weekends when no one was around because he didn't want people to see what he was doing." *Id.* (original brackets omitted). Defendant Shepard testified that "the only application that he heard of for [heat from the lenses] was to burn wood, grass, shoes, a man, and a rabbit." *Id.* at 1150.

Needless to say, Defendants never secured a purchase agreement for the sale of electricity to an end user. The district court found that "Johnson's purported solar energy technology is not now, has never been, and never will be a commercial-grade solar energy system that converts sunlight into electrical power or other useful energy." *Id.*

Despite this, Defendants' project generated tens of millions of dollars between 2005 and 2018. At first the money came from individuals leasing lenses from IAS; but beginning in 2006, buyers would purchase lenses from one of Mr. Johnson's entities, IAS or RaPower-3 (or, because Mr. Johnson and Mr. Shepard used a multilevel-marketing structure, from a "downline" marketer who had purchased the lens from IAS or RaPower-3) for a down payment of about one-third of the purchase price. The entity would "finance" the remaining two-thirds of the purchase price with a zero- or nominal-interest, nonrecourse loan. No further payments would be due from the customer until the system had been generating revenue from electricity sales for five years. The customer would agree to lease the lens back to LTB1 for installation at a "Power Plant"; but LTB1 would not be obligated to make any rental payments until the system had begun generating revenue.

The district court found that each plastic sheet for the lenses was sold to Defendants for between $52 and $70, and the correct valuation of each lens was not more than $100, yet the purchase price of a lens was between $3,500 and $30,000. Although Defendants sold between 45,000 and 50,000 lenses, fewer than 5% of them were ever installed. Stacks of uncut plastic sheets were in a warehouse in Utah, and Defendants could not tell which customer owned which lens.

Customers were told that buying a lens would have very favorable income-tax consequences. Mr. Johnson and Mr. Shepard sold the lenses by advertising that customers could "zero out" federal income-tax liability by taking advantage of depreciation deductions and solar-energy tax credits.

II. TAX-LAW IMPLICATIONS

A. Validity of claimed deductions and credits

The Internal Revenue Code (IRC) provides favorable tax treatment for investments in solar-energy projects and other capital expenditures. But the requirements to qualify are strict, and the government, believing that purchases of lenses for Defendants' project did not satisfy them, filed this action in the United States District Court for the District of Utah seeking injunctive and other equitable relief against Defendants. After a 12-day bench trial in which Defendants did not call any witnesses, the district court agreed with the government.

The district court concluded, as discussed in more detail below, that Defendants had engaged in conduct subject to penalty under 26 U.S.C. § 6700(a)(2)(A) by telling customers that they could claim solar-energy tax credits under 26 U.S.C. § 48 and depreciation deductions under 26 U.S.C. § 167(a), including deductions and credits in excess of both passive income, *see* 26 U.S.C. § 469, and the amounts at risk, *see* 26 U.S.C. § 465. It also concluded that Defendants engaged in conduct subject to penalty under § 6700(a)(2)(B) because they made a gross-valuation overstatement "each time they told someone the price of a lens (whether $9,000, $3,000, or $3,500)." *RaPower-3*, 343 F. Supp. 3d at 1191.

The district court determined that Defendants' "customers were not allowed a depreciation deduction or the solar energy credit" for several reasons. *Id.* at 1173. To begin with, "customers were not allowed a depreciation deduction . . . because [they] were not in a 'trade or business' related to the solar lenses and did not hold the lenses for the production of income." *Id.* The court evaluated whether customers had acquired lenses in good faith with the primary purpose of earning a profit. It relied on Tenth Circuit precedent, in particular *Nickeson v. Commissioner*, 962 F.2d 973 (10th Cir. 1992), which identifies factors indicating that an activity is an abusive tax scheme as opposed to a bona fide trade or business. The factors include: "marketing on the basis of projected tax benefits, grossly inflated purchase price set without bargaining, failure of taxpayers to inquire into the potential profitability of the program, taxpayers' lack of control over activities, and use of nonrecourse indebtedness[.]" *Id.* at 977 (citations omitted).

Defendants' project fit the bill. The district court found (1) that the benefits of lens ownership were marketed by reference to "the tax benefits it would provide," *RaPower-3*, 343 F. Supp. 3d at 1181; (2) that "no customer earned or would earn income from buying solar lenses," *id.* at 1174; (3) that "customers had no control over their purported 'lens leasing' businesses," *id.* at 1179; and (4) that "any purported obligation [of the customer] to pay is substantial—and perhaps indefinitely—deferred debt," "[c]ustomers borrow for free," and "the only security for the customers' promise to pay the[] outstanding amounts is the lens itself," *id.* at 1180. The district court concluded that "the solar lenses were a smokescreen for . . . unlawful 'sales' of tax deductions and credits to customers," *id.* at 1182, and that "customers' 'lens leasing' businesses were not bona fide and ongoing businesses," *id.* at 1183.

The district court concluded that depreciation deductions were also not allowed because the lenses were not "placed in service" by the same tax year as the claimed deductions. It relied on Treasury Regulation 26 C.F.R. § 1.167(a)–10(b), which prohibits depreciation deductions unless the property for which the deduction is sought had been "placed in service" by the year that the deduction is claimed. "Property is first placed in service when first placed in a condition or state of readiness and availability for a specifically assigned function, whether in a trade or business, in the production of income, in a tax-exempt activity, or in a personal activity." 26 C.F.R. § 1.167(a)–11(e)(1)(i). The district court evaluated whether the lenses were "placed in service" under the framework articulated in *Sealy Power, Ltd. v. Commissioner*, 46 F.3d 382 (5th Cir. 1995), *action on decision*, AOD-1995-10 (Aug. 7, 1995), *nonacq.*, 1995-33 I.R.B. 4, 1995-2 C.B. 1 (Aug. 14, 1995).

In *Sealy Power* the Fifth Circuit identified five factors from Revenue Rulings for determining when the components of a power-generating system are "placed in service" within the meaning of the Treasury Regulations:

> 1) whether the necessary permits and licenses for operation have been obtained; 2) whether critical preoperational testing has been completed; 3) whether the taxpayer has control of the facility; 4) whether the unit has been synchronized with the transmission grid; and 5) whether daily or regular operation has begun.

Id. at 395. Because none of these factors was met in Defendants' system and because "the bulk of customers' 'lenses' [were] not installed on towers," the district court concluded they were not "placed in service." *RaPower-3*, 343 F. Supp. 3d at 1184.

For those reasons and one additional, the district court determined that the customers were not entitled to the solar-energy credit under 26 U.S.C. § 48. Taxpayers can claim a credit for a percentage of the "basis" (generally the cost) of qualifying "energy property." 26 U.S.C. §§ 46(2); 48(a)(1), (2)(A)(i)(II). But to qualify for the credit the property must be depreciable, *see id.* § 48(a)(3)(C), and placed in service during the taxable year, *see id.* § 48(a)(1). And, for the reasons just discussed, the lenses did not satisfy either requirement. Moreover, the lenses did not satisfy the requirement that the property be "equipment which uses solar energy to generate electricity, to heat or cool (or provide hot water for use in) a structure, or to provide solar process heat." *Id.* § 48(a)(3)(A)(i). The district court found:

> The preponderance of the credible evidence . . . show[ed] that customers' lenses have never been used in a system that generates electricity, that heats or cools a structure or provides hot water for use in a structure. Nearly all customer "lenses" [were] actually rectangular sheets of plastic sitting in a warehouse, uncut, unframed, and not yet installed on towers. Further, the preponderance of credible evidence show[ed] that even the lenses installed on towers do not "provide solar process heat."

RaPower-3, 343 F. Supp. 3d at 1185. Thus, there were at least three reasons why lens customers did not qualify for the solar-energy tax credit.

The district court then concluded that even if lens customers were entitled to depreciation deductions and solar-energy credits, they were not allowed to claim deductions or credits in excess of their income from "passive" activities. The court explained that "§ 469 generally prohibits the deduction of passive activity losses, except insofar as the losses are used to offset passive activity income," and that "[a]ctivity that involves the rental of tangible property is" a passive activity. *RaPower-3*, 343 F. Supp. 3d at 1185–86. Therefore, lens customers were not allowed to use "deductions and credits from purportedly leasing out solar lenses . . . to offset active income or tax on active income." *Id.* at 1185–86.

Finally, the district court concluded that under § 465, lens customers were not allowed to claim deductions or credits in excess of their down payments on the lenses. It explained that losses incurred in connection with certain statutorily enumerated activities, including leasing depreciable property, *see* 26 U.S.C. § 465(c)(1)(C), cannot be deducted from income in excess of the amount that the taxpayer has "at risk" in the activity, *id.* § 465(a). The amount "at risk" is in general the amount of money (and the adjusted basis of property) the taxpayer has contributed to the activity. *Id.* § 465(b). The district court concluded that lens customers had no money at risk because (1) the purchase contracts "contained an explicit statement that a customer could get a refund of all amounts paid in, without penalty, if either IAS or RaPower-3 did not perform on the contract," and (2) there was no enforceable obligation to personally repay the nonrecourse, zero-interest loan used to finance the balance of the purchase price. *RaPower-3*, 343 F. Supp. 3d at 1188. Therefore, lens customers "were not allowed to claim a depreciation deduction for the full purchase price or any related amount." *Id.* at 1188–89.

In short, the district court concluded that customers were not allowed to claim the deductions or credits that Defendants advertised in connection with owning and leasing a lens.

B. Existence of a Tax Shelter Under 26 U.S.C. § 6700

The district court construed § 6700(a)(2)(A) to permit the imposition of a penalty against any "person who 1) organizes or sells any plan or arrangement involving taxes and 2) makes or furnishes, or causes another to make or furnish, a statement connecting the allowability of a tax benefit with participating in the plan or arrangement, which statement the person knows or has reason to know is false or fraudulent as to any material matter." *Id*. at 1170. Penalties can also be recovered from one who sells a service or product at a grossly inflated price (more than twice the correct value, *see* 26 U.S.C. § 6700(b)(1)(A)), so that customers can claim excessive tax benefits. *See id.* § 6700(a)(2)(B); *United States v. Campbell*, 897 F.2d 1317, 1322 (5th Cir. 1990) (explaining that tax shelters based on gross overvaluations "eliminate the buyer's incentive to pay no more than the investment's value because the financing mechanism allows the buyer to save more in tax benefits than is paid for the investment. That economic incentive pushes the price above the value"); *see also Autrey v. United States*, 889 F.2d 973, 981 (11th Cir. 1989) ("[A] promoter is in essence strictly liable for grossly overstating the value of property or services based upon which an investor will attempt to take a deduction or credit.").

The district court determined that Defendants' "solar energy scheme [was] a 'plan' under § 6700 because the key component of the scheme was its promoted connection to the federal tax benefits of a depreciation deduction and a solar energy tax credit." *RaPower-3*, 343 F. Supp. 3d at 1170. And it found that all the Defendants "organized, or assisted in organizing the scheme, and sold the scheme to customers either directly or through other people." *Id.*

The district court further determined that Defendants made false or fraudulent statements about material matters by asserting that customers could claim deductions and credits in connection with their lens purchases. It explained that these statements were material because they "'would have a substantial impact on the decision-making process of a reasonably prudent investor and include matters relevant to the availability of a tax benefit.'" *Id.* at 1171 (quoting *Campbell*, 897 F.2d at1320).

And finally, the district court concluded that the scienter element of § 6700(a)(2)(A) was met because Defendants knew or had reason to know that their statements were false or fraudulent. It applied the following test:

> A court may conclude that a promoter had reason to know his statements are false or fraudulent based on what a reasonable person in the defendant's subjective position would have discovered. The trier of fact may impute knowledge to a promoter, so long as it is commensurate with the level of comprehension required by his role in the transaction. A person selling a plan would ordinarily be deemed to have knowledge of the facts revealed in the sales materials furnished to him by the promoter. A person who holds himself out as an authority on a tax topic has reason to know whether his statements about that topic are true or false. The test . . . is satisfied if the defendant had reason to know his statements were false or fraudulent, regardless of what he actually knew or believed.

Id. at 1173 (brackets, emphasis, citations, and internal quotation marks omitted). Under this test, Defendants knew all the facts indicating that lens customers were not entitled to claim the promoted deductions or credits. Further, their defense that they relied on the advice of counsel that their customers were entitled to all of the promoted tax benefits was unavailing because "[i]f anything, the circumstances surrounding the writings [of the attorneys on whom they purportedly relied], and the attorneys' outraged response to learning that Defendants were using their writings to promote the solar energy scheme, bolster Defendants' reason to know that their statements were false or fraudulent." *Id.* at 1190.

The district court also concluded that Defendants had violated § 6700(a)(2)(B) by making gross overstatements as to the value of the lenses. It determined that each sheet of plastic from which lenses were to be cut cost Defendants between $52 and $70, and that "[b]ased on the available and credible evidence, . . . the correct valuation of any 'lens' is close to its raw cost, and does not exceed $100." *Id.* at 1191. Defendants were selling each lens for $3,500, so the court held that they "engaged in conduct subject to penalty under § 6700(a)(2)(B) and made or furnished a gross valuation overstatement each time they told someone the price of a lens[.]" *Id.*

C. Injunctive and Equitable Relief

The district court ruled that injunctive and other equitable relief was appropriate under 26 U.S.C. § 7408 (which authorizes the government to seek injunctive relief to prevent ongoing conduct subject to penalty under § 6700 and other specified sections of the Tax Code) and § 7402(a) (which grants district courts jurisdiction to issue injunctions and other equitable relief to enforce the Tax Code), because Defendants had engaged in the scheme for many years; they knew that their statements about tax benefits were false or fraudulent; the scheme had caused great harm, including harm to the federal treasury;

and Mr. Johnson's and Mr. Shepard's lack of remorse and continuation of the scheme after the IRS began investigating their scheme indicated that they were very likely to continue promoting their abusive tax scheme unless enjoined from doing so. It issued an injunction to prohibit Defendants from continuing to engage in the conduct that was subject to penalty under § 6700. For the same reasons that an injunction was appropriate, the district court ordered Defendants to disgorge their gross receipts from lens sales.

Defendants appeal, raising a number of issues, to which we now turn.

III. DISCUSSION

A. Issues Addressed Summarily

Most of Defendants' arguments on appeal can be disposed of summarily. First, they complain that the due-process rights of Solco I and XSun Energy, entities that were "created, own[ed], and control[led]" by Mr. Johnson, *RaPower-3*, 343 F. Supp. 3d at 1127, were violated by an order of the district court to freeze their assets. But Defendants do not complain that their own rights were injured by the district court's order and have made no effort to explain how they have standing to assert the rights of those entities, even after the United States raised the issue of standing in its appellate brief. We therefore decline to address the issue.

Second, Defendants say that evidence obtained after trial necessitates a remand to the district court with instructions to dissolve the injunction. We understand this argument to be a challenge to the district court's denial of their motion to alter or amend the judgment under Federal Rule of Civil Procedure 59(e). In that motion they asked for an amendment or alteration of the judgment in light of new evidence that their system worked to produce electricity. The alleged new evidence was expert testimony that a system involving a commercially available engine had been used, in connection with the lenses at the Delta site, to produce electricity after the trial was conducted. The court denied the motion because "[t]he expert testimony that Defendants now seek to introduce was within their control to produce before and at trial." Order Denying Rule 59(e) and Rule 52(b) Mot., Dec. 4, 2018, ECF No. 529. Defendants do not challenge that statement or otherwise argue that there was anything preventing them from producing this evidence before or during trial. We therefore affirm the denial of their Rule 59(e) motion. *See Nixon v. City & Cty. of Denver*, 784 F.3d 1364, 1369 (10th Cir. 2015) ("[W]e affirm the district court's dismissal of the stigma-plus due-process claim because [Appellant]'s opening brief contains nary a word to challenge the basis of the dismissal[.]").

Third, Defendants contend that the district court improperly denied them a jury trial. They filed a jury demand two months after this lawsuit was filed. On the government's motion the magistrate judge assigned to the case struck Defendants' jury demand on May 2, 2016, on the ground that there was no Seventh Amendment right to a jury because the United States was seeking only equitable relief. The court later set the deadline for pretrial motions at November 17, 2017. On February 9, 2018, Defendants again moved for a jury trial, relying largely on the June 5, 2017, decision of the Supreme Court in *Kokesh v. S.E.C.*, 137 S. Ct. 1635. The district court denied Defendants' motion on two grounds: (1) on the merits, *Kokesh* did not support Defendants' jury demand; and (2) the renewed motion for a jury trial was untimely. On appeal Defendants challenge the first ground but not the second. Because they have not challenged the district court's alternative ground for its ruling, we affirm. *See Starkey ex rel. A.B. v. Boulder Cty. Soc. Servs.*, 569 F.3d 1244, 1252 (10th Cir. 2009) ("When an appellant does not challenge a district court's alternate ground for its ruling, we may affirm the ruling."). Defendants' argument in their reply brief comes too late. *See Stump v. Gates*, 211 F.3d 527, 533 (10th Cir. 2000) ("This court does not ordinarily review issues raised for the first time in a reply brief.").

Fourth, Defendants challenge the district court's determination that they knowingly engaged in a fraudulent tax scheme. In essence, they claim there is insufficient evidence to support the court's decision. But the challenge is wholly inadequate to preserve the issue for consideration. The case was tried over the course of 12 days. The district court's opinion, which occupies about 82 pages in the official reports, includes 427 findings of fact. The opening brief devotes a little less than 12 pages to the issue. It recites a smattering of evidence favorable to Defendants but wholly fails to deal with the voluminous contrary evidence. It does not identify a single finding of fact by the district court that is unsupported by evidence at trial. There is some discussion of the law, but that discussion does not grapple with the specific evidence presented in this case. In this circumstance, this court has no obligation to conduct what would amount to a de novo review of the trial evidence to see whether it supports the district court's rulings. *See Nixon*, 784 F.3d at 1366 ("[C]ounsel for appellant . . . tells a story of injustice and argues against positions not adopted by the district court. Counsel utterly fails, however, to explain what was wrong with the reasoning that the district court relied on in reaching its decision."); *United States v. Apperson*, 441 F.3d 1162, 1195

(10th Cir. 2006) ("[Appellant] purports to challenge the district court's ruling on all of the categories of evidence it prohibited him from using to cross-examine [a witness], but fails to offer any detailed explanation of how the district court erred. Accordingly, we conclude he has failed to sufficiently place these rulings at issue."); *Anderson v. Hardman*, 241 F.3d 544, 545 (7th Cir. 2001) ("[A] brief must contain an argument consisting of more than a generalized assertion of error, . . . Yet [appellant] offers no articulable basis for disturbing the district court's judgment.").

Moreover, the record on appeal would not permit us to conduct such a factual review. The record includes some exhibits offered at trial but only a fraction of the testimony (and that fraction appears in the appellee's appendix, not the appellant's appendix). Under Fed. R. App. P. 10(b)(2), "[i]f the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant must include in the record a transcript of all evidence relevant to that finding or conclusion." As we have explained: "Our appellate review is necessarily limited when . . . an appellant challenges the sufficiency of the evidence and rulings of the district court but fails to include in the record a transcript of all evidence relevant to such finding or conclusion." *Deines v. Vermeer Mfg. Co.*, 969 F.2d 977, 979 (10th Cir. 1992) (internal quotation marks omitted); *see United States v. Brody*, 705 F.3d 1277, 1280 (10th Cir. 2013) ("By failing to file a copy of the trial transcript as part of the record on appeal, the appellant waives any claims concerning the sufficiency of the evidence at trial." (internal quotation marks omitted)).

B. Disgorgement Order

Defendants challenge the district court's disgorgement awards. "[D]isgorgement is a form of 'restitution measured by the defendant's wrongful gain.'" *Kokesh*, 137 S. Ct. at 1640 (quoting Restatement (Third) of Restitution and Unjust Enrichment § 51, cmt. a, p. 204 (Am. Law Inst. 2010) (original brackets omitted) (hereafter, the Restatement)). It "is by nature an equitable remedy as to which a trial court is vested with broad discretionary powers." *S.E.C. v. Maxxon, Inc.*, 465 F.3d 1174, 1179 (10th Cir. 2006) (internal quotation marks omitted).

The district court held Defendants jointly and severally liable for disgorgement of $50,025,480, with the maximum for each Defendant set at the amount of gross receipts received by that Defendant from the solar-energy scheme; Johnson was liable for the full amount, RaPower's limit was set at $25,874,066, IAS's limit was $5,438,089, and Shepard's was $702,001. The court did not deduct operating expenses of the companies, quoting the Restatement § 51(5)(c) for the proposition that a defendant "will not be allowed any credit of operating expenses to 'carry[ ] on the business that is the source of the profit subject to disgorgement.'" *RaPower-3*, 343 F. Supp. 3d at 1196 & n.633.[1]

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[1] The Restatement provision states:

> A conscious wrongdoer or a defaulting fiduciary may be allowed a credit for money expended in acquiring or preserving the property or in carrying on the business that is the source of the profit subject to disgorgement. By contrast, such a defendant will ordinarily be denied any credit for contributions in the form of services, or for expenditures incurred directly in the commission of a wrong to the claimant.

We review for clear error the computation of the disgorgement amount and we review de novo the method for determining that amount. *See Klein-Becker USA, LLC v. Englert*, 711 F.3d 1153, 1162 (10th Cir. 2013) (disgorgement award under the Lanham Act). Defendants raise several arguments against the awards.

First, they contend that they did not intentionally defraud investors because they "encouraged . . . customers to seek their own tax advice." Aplt. Br. at 26. But, as with their challenge to the ruling that they had engaged in a fraudulent scheme, their argument is inadequate. They do not specifically challenge any relevant findings of the district court, address the evidence relied on by the court, or even include in the record the testimony and other evidence that would enable us to make an independent judgment of the sufficiency of the evidence.

Defendants also complain about the district court's finding that they had damaged the United States Treasury in the amount of $14,207,517 through tax benefits claimed by lens customers between 2013 and 2016. But it does not appear that the district court used that figure in computing disgorgement amounts.

Another complaint by Defendants is that the awards permit double recovery against them. But there can be no double recovery. Although Defendants are jointly liable for certain amounts, the government cannot collect the sum of the separate awards against them. To the extent that two of them are jointly and severally liable for the same amount, the government can collect from either, but not both. For example, if RaPower

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Restatement 3d, § 51(5)(c).

paid the full $25,874,066 it owes, that amount would be subtracted from Johnson's liability.

Defendants' principal complaint is the amount of the disgorgement awards. We have stated that the plaintiff has the burden of showing gross receipts, while the defendant has the burden of proving any claimed deduction. *See Klein-Becker*, 711 F.3d at 1163. The Restatement § 51 cmt. i observes that "the precise amount of the defendant's unjust enrichment may be difficult or impossible to ascertain." But "a claimant who is prepared to show a causal connection between defendant's wrongdoing and a measurable increase in the defendant's net assets will satisfy the burden of proof as ordinarily understood." *Id.* "[P]laintiffs must generally establish damages with specificity," although "some estimation is acceptable if necessitated in part by the [d]efendant's poor record keeping." *Klein-Becker*, 711 F.3d at 1163 (original brackets and internal quotation marks omitted). Any uncertainty is resolved against the "conscious wrongdoer," in keeping with the rule that "'when damages are at some unascertainable amount below an upper limit and when the uncertainty arises from the defendant's wrong, the upper limit will be taken as the proper amount.'" Restatement § 51 cmt. i (quoting *Gratz v. Claughton*, 187 F.2d 46, 51–52 (2d Cir. 1951) (L. Hand, J.)).

Defendants argue that the district court should have subtracted operating expenses from the gross receipts to determine the amount that should be disgorged. But they acknowledge that "a defendant is not allowed to deduct business expenses from the disgorgement amount if the business was created and run to 'defraud investors.'" Aplt.

Br. at 25. They simply assert that "Plaintiff did not show Defendants intentionally defrauded investors." *Id*. But they do not muster an adequate challenge to the sufficiency of the evidence on that score.

Defendants further complain that the government at various times suggested a wide range of possible damages. But they fail to explain how the government's earlier suggestions could have improperly influenced the court's award.

Finally, Defendants challenge the way the district court computed the gross receipts from their enterprises. The court relied on Defendants' customer database, which apparently included transactions almost up to the time of trial, and showed that they sold 49,415 lenses and customers paid in $50,025,480 through February 28, 2018. This was less than what would have come in if customers had made only the down payment on each lens. The down payment from customers was to be $9,000 from 2006 through 2009 and $1,050 after 2009. Multiplying the lower down payment of $1,050 by the number of lenses sold gives a figure of $51,885,750. The court said that its award was also supported by the government's bank-deposit analysis for deposits through 2016.

Defendants argue that the customer database was misinterpreted, leading to an excessively high figure. But it was their database and they would know better than anyone how to interpret the data; yet they offered no testimony regarding the database. Nor have they pointed to any errors by the court that appear on the face of the database. For example, their reply brief states that the database "contains entries listing a small down payment, some entries show a partial down payment, some of those payments bounced (but could not be deleted from the database), some orders were canceled (but could not be deleted), and some amounts are refunded (but cannot be deleted) and all contracts offered a full refund." Aplt. Rep. Br. at 7. The brief, however, does not identify any specific entries supporting their assertion, nor do they identify any evidence in the record supporting the claim that certain entries could not be deleted from the database. This failure to support their arguments with evidence is not just a lapse on appeal; they failed at trial as well. As the district court said, "Defendants—who are the ones in possession of the best evidence of a reasonable approximation of their gross receipts—failed to rebut the United States' evidence of this reasonable approximation, and introduced no credible evidence of their own on the point." *RaPower-3*, 343 F. Supp. 3d at 1195. Similarly, although it is not clear to us from the limited appellate record whether the district court's gross-receipts estimate is well-supported by the bank-deposit evidence (the record contains document summaries but no testimony explaining them), the failure of Defendants to include the bank-deposit testimony in the appellate record makes it impossible for us to evaluate the bank-deposit evidence; and, in any event, Defendants, as with so many other issues, do not adequately argue the matter in their briefs.

In our view, the district court's computation was not clearly erroneous because it was a reasonable approximation. It used Defendants' own business records to determine how many lenses were sold, and multiplied that by a conservative estimate of the amount paid for each lens. Defendants argue about ambiguities in their own records that led the court to calculate an excessively high gross-receipts figure; but they bore the risk of uncertainty, particularly when caused by their own record keeping, obstruction of discovery (further discussed below), and decision not to put on any evidence or call any witnesses who could have helped the court reach a more precise estimate of their receipts or any legitimate expenses.

We affirm the disgorgement awards against Defendants.

C. Alleged Discovery Violations

1. Computation of Damages

Defendants challenge the district court's admission of evidence that supported the amount of disgorgement, contending that the evidence had not been adequately disclosed before trial. Federal Rule of Civil Procedure 26(a)(1)(A)(iii) requires each party to "provide to the other parties . . . a computation of each category of damages claimed by the disclosing party." Moreover, the claimant has an ongoing duty throughout the litigation to supplement the damages computation "in a timely manner [(1)] if the party learns that in some material respect the [initial] disclosure or response is incomplete or incorrect, and [(2)] if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing[.]" Fed. R. Civ. P. 26(e)(1)(A). If a party fails to disclose or, where appropriate, supplement computations, Federal Rule of Civil Procedure Rule 37(c)(1) prohibits the use of that "information or witness to supply evidence . . . unless the failure was substantially justified or is harmless."

The district court denied Defendants' motion in limine to exclude evidence and testimony relating to disgorgement, ruling that "'[d]isgorgement is not a damages remedy, and therefore 'the disclosure required by Rule 26(a)(1)(A)(iii) is inapplicable.'"

Aplt. App., Vol. I at 115 (quoting *United States v. Stinson*, 2016 WL 8488241, at *7 (M.D. Fla. 2016)). We are not so sure that disgorgement does not come within the meaning of *damages* in the rule. The advisory committee note to the 1993 amendments to Rule 26 (addressing 26(a)(1)(C), which became 26(a)(1)(A)(iii) in the 2007 amendment restyling the Rule) says: "A party claiming damages *or other monetary relief* must, in addition to disclosing the calculation of such damages, make available the supporting documents for inspection and copying . . . ." Fed. R. Civ. P. 26 advisory committee's note to 1993 amendment (emphasis added). It therefore appears to require disclosure of calculations for equitable remedies providing monetary relief. On the other hand, the last sentence of that paragraph in the 1993 note states: "Likewise, a party would not be expected to provide a calculation of damages which, as in many patent infringement actions, depends on information in the possession of another party or person." *Id*. As with disgorgement here, the recovery sought in a patent-infringement action may be based on the defendant's income (rather than the injury to the plaintiff); so the sentence certainly supports the district court's decision, although on a slightly different ground—the fact that the information necessary to calculate the monetary relief is in the hands of the defendant.

In any event, even if the rule applied to the government here, it was satisfied. The evidence necessary to determine Defendants' gross receipts for the purpose of assessing disgorgement was in the hands of Defendants. The government was reasonably forthcoming once it obtained that evidence. The government's initial disclosure in April 2016 said that it would seek "disgorgement of the . . . gross receipts . . . [Defendants] received from any source as a result of their conduct in furtherance of the abusive solar energy scheme[.]" United States' Initial Disclosures to All Defs., Ex. 1 to Defs.' Reply Mem. in Supp. of Mot. in Lim. to Exclude Test. Regarding Damages Relating to Disgorgement of Funds at 7, Mar. 13, 2018, ECF No. 337-1. It further stated that the information then in its possession showed that Defendant Shepard earned $170,000 from the scheme over the course of four years and that Defendant Johnson had earned nearly $500,000 over the course of two years. And it added that the government "expect[ed] the disgorgement calculation to increase as additional information is produced with respect to the gross receipts each defendant received relating to the abusive tax scheme." *Id.* at 8.

To make a more complete assessment of what disgorgement damages it would seek, the government needed to review Defendants' records that would show how many lenses had been purchased and how much money they had taken in. But despite discovery requests for those records in April 2016 and a motion to compel filed in August 2017, Defendants were not forthcoming. Finally, on October 16, 2017, Defendants provided 190 pages of customer information. With that information, the government disclosed about five months before trial a disgorgement figure in the same ballpark as the ultimate award. On November 17, 2017, it moved for an order to freeze Defendants' assets and appoint a receiver "to ensure that Defendants will have the funds to pay any disgorgement this Court may award." United States' Mot. to Freeze the Assets of Defs. Neldon Johnson, RaPower-3, LLC, and International Automated Systems, Inc. and Appoint a Receiver at 5, Nov. 17, 2017, ECF No. 252. Its supporting memorandum argued that the amount frozen should equal the number of lenses sold by Defendants multiplied by the $1,050 down payment for each lens. It reported that, "[a]ccording to Defendants' own records (which are likely incomplete), Defendants have sold *at least* 45,201 lenses," so that $47,461,050 should be frozen. *Id.* at 13.

The October disclosure by Defendants, however, was still incomplete. In January, the district court, no longer willing to rely on voluntary compliance by Defendants, ordered Defendants to allow the government's computer forensic expert to make a copy of the customer database from their computer equipment. The government finally obtained the raw data on February 28. It therefore took some chutzpah for Defendants to file on March 5 a motion in limine to exclude testimony regarding disgorgement damages on the ground that the government had not disclosed its calculations in a timely manner.

Once the context is understood, any complaint that the government violated Rule 26 by failing to timely produce its disgorgement calculations is plainly without merit. Because the government was required only to supplement its initial Rule 26(a)(1)(A)(iii) disgorgement computation "if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing," because the information was largely "made known" to Defendants in the government's motion to freeze their assets, and because the complete evidence of Defendants' gross receipts was not obtained by the government until shortly before the motion in limine was filed, it was not an abuse of discretion for the district court to admit the government's evidence of Defendants' gross receipts.

2. Expert Witnesses

Federal Rule of Civil Procedure 26(a)(2) requires a party to disclose witnesses who may give expert testimony and, in certain circumstances, provide a report by the expert. Defendants argue that various testimony by government witnesses should not have been admitted because the government had failed to disclose the witnesses as experts before they testified. The challenged testimony related to the amount of deposits into Defendants' bank accounts, the amount of gross receipts based on lens sales multiplied by down payments, and the estimated harm to the Treasury based on tax benefits claimed multiplied by an assumed tax rate. The district court determined that the government's witnesses were not offering expert testimony, so the government was not required to identify them as experts or produce expert-witness reports. The district court was correct.

It is not an abuse of discretion to allow a nonexpert witness to testify regarding "elementary mathematical operations." *James River Ins. Co. v. Rapid Funding, LLC*, 658 F.3d 1207, 1214 (10th Cir. 2011); *see Bryant v. Farmers Ins. Exch.*, 432 F.3d 1114, 1124 (10th Cir. 2005) ("Taking a simple average of 103 numbers, though technically a statistical determination, is not so complex a task that litigants need to hire experts in order to deem the evidence trustworthy"). Defendants have waived their challenge by not including in the record on appeal the testimony they ask us to review. *See Deines*, 969 F.2d at 979. But in any event, the testimony that we do have for review did not require expert credentials. For example, the government witness who testified regarding the harm to the United States Treasury simply multiplied the IRS's publicly available average tax rate by the sum of the deduction and credit amounts claimed by a sample of RaPower customers. Because these "mathematical calculation[s] [were] well within the ability of anyone with a grade-school education," *Bryant*, 432 F.3d at 1124, it was not an abuse of discretion to admit their testimony.

IV. CONCLUSION

We **AFFIRM** the judgment below.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
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Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257
(303) 844-3157

Christopher M. Wolpert
Clerk of Court

Jane K. Castro
Chief Deputy Clerk

June 02, 2020

Mr. Denver C. Snuffer Jr.
Mr. Steven Richard Paul
Nelson, Snuffer, Dahle & Poulsen
10885 South State Street
Sandy, UT 84070-0000

RE: 18-4119, 18-4150, United States v. RaPower-3, et al
Dist/Ag docket: 2:15-CV-00828-DN-EJF

Dear Counsel:

Enclosed is a copy of the opinion of the court issued today in this matter. The court has entered judgment on the docket pursuant to Fed. R. App. P. Rule 36.

Pursuant to Fed. R. App. P. 40(a)(1), any petition for rehearing must be filed within 14 days after entry of judgment. Please note, however, that if the appeal is a civil case in which the United States or its officer or agency is a party, any petition for rehearing must be filed within 45 days after entry of judgment. Parties should consult both the Federal Rules and local rules of this court with regard to applicable standards and requirements. In particular, petitions for rehearing may not exceed 3900 words or 15 pages in length, and no answer is permitted unless the court enters an order requiring a response. If requesting rehearing en banc, the requesting party must file 6 paper copies with the clerk, in addition to satisfying all Electronic Case Filing requirements. *See* Fed. R. App. P. Rules 35 and 40, and 10th Cir. R. 35 and 40 for further information governing petitions for rehearing.

Please contact this office if you have questions.

Sincerely,

Christopher M. Wolpert
Clerk of the Court

cc: Clint Carpenter
Joan I. Oppenheimer

CMW/mlb

Syllabus

SUPREME COURT OF THE UNITED STATES

Syllabus

LIU ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 18–1501. Argued March 3, 2020—Decided June 22, 2020

To punish securities fraud, the Securities and Exchange Commission is authorized to seek "equitable relief" in civil proceedings, 15 U. S. C. §78u(d)(5). In *Kokesh* v. *SEC*, 581 U. S. ___, this Court held that a disgorgement order in a Securities and Exchange Commission (SEC) enforcement action constitutes a "penalty" for purposes of the applicable statute of limitations. The Court did not, however, address whether disgorgement can qualify as "equitable relief" under §78u(d)(5), given that equity historically excludes punitive sanctions.

Petitioners Charles Liu and Xin Wang solicited foreign nationals to invest in the construction of a cancer-treatment center, but, an SEC investigation revealed, misappropriated much of the funds in violation of the terms of a private offering memorandum. The SEC brought a civil action against petitioners, seeking, as relevant here, disgorgement equal to the full amount petitioners had raised from investors. Petitioners argued that the disgorgement remedy failed to account for their legitimate business expenses, but the District Court disagreed and ordered petitioners jointly and severally liable for the full amount. The Ninth Circuit affirmed.

Held: A disgorgement award that does not exceed a wrongdoer's net profits and is awarded for victims is equitable relief permissible under §78u(d)(5). Pp. 5–20.

(a) In interpreting statutes that provide for "equitable relief," this Court analyzes whether a particular remedy falls into "those categories of relief that were *typically* available in equity." *Mertens* v. *Hewitt Associates*, 508 U. S. 248, 256. Relevant here are two principles of equity jurisprudence. Equity practice has long authorized courts to strip wrongdoers of their ill-gotten gains. And to avoid transforming that remedy into a punitive sanction, courts restricted it to an individual wrongdoer's net profits to be awarded for victims. Pp. 5–14.

(1) Whether it is called restitution, an accounting, or disgorgement, the equitable remedy that deprives wrongdoers of their net profits from unlawful activity reflects both the foundational principle that "it would be inequitable that [a wrongdoer] should make a profit out of his own wrong," *Root* v. *Railway Co.,* 105 U. S. 189, 207, and the countervailing equitable principle that the wrongdoer should not be punished by "pay[ing] more than a fair compensation to the person wronged," *Tilghman* v. *Proctor,* 125 U. S. 136, 145–146. The remedy has been a mainstay of equity courts, and is not limited to cases involving a breach of trust or fiduciary duty, see *Root,* 105 U. S., at 214. Pp. 6–9.

(2) To avoid transforming a profits award into a penalty, equity courts restricted the remedy in various ways. A constructive trust was often imposed on wrongful gains for wronged victims. See, *e.g.*, *Burdell* v. *Denig,* 92 U. S. 716, 720. Courts also generally awarded profits-based remedies against individuals or partners engaged in concerted wrongdoing, not against multiple wrongdoers under a joint-and-several liability theory. See, *e.g.*, *Ambler* v. *Whipple*, 20 Wall. 546, 559. Finally, courts limited awards to the net profits from wrongdoing after deducting legitimate expenses. See, *e.g.*, *Rubber Co.* v. *Goodyear*, 9 Wall. 788, 804. Pp. 9–12.

(3) Congress incorporated these longstanding equitable principles into §78u(d)(5), but courts have occasionally awarded disgorgement in ways that test the bounds of equity practice. Petitioners claim that disgorgement is necessarily a penalty under *Kokesh*, and thus not available at equity. But *Kokesh* expressly declined to reach that question. The Government contends that the SEC's interpretation has Congress' tacit support. But Congress does not enlarge the breadth of an equitable, profit-based remedy simply by using the term "disgorgement" in various statutes. Pp. 12–14.

(b) Petitioners briefly claim that their disgorgement award crosses the bounds of traditional equity practice by failing to return funds to victims, imposing joint-and-several liability, and declining to deduct business expenses from the award. Because the parties did not fully brief these narrower questions, the Court does not decide them here. But certain principles may guide the lower courts' assessment of these arguments on remand. Pp. 14–20.

(1) Section 78u(d)(5) provides limited guidance as to whether the practice of depositing a defendant's gains with the Treasury satisfies its command that any remedy be "appropriate or necessary for the benefit of investors," and the equitable nature of the profits remedy gen-

erally requires the SEC to return a defendant's gains to wronged investors. The parties, however, do not identify a specific order in this case directing any proceeds to the Treasury. If one is entered on remand, the lower courts may evaluate in the first instance whether that order would be for the benefit of investors and consistent with equitable principles. Pp. 14–17.

(2) Imposing disgorgement liability on a wrongdoer for benefits that accrue to his affiliates through joint-and-several liability runs against the rule in favor of holding defendants individually liable. See *Belknap* v. *Schild*, 161 U. S. 10, 25–26. The common law did, however, permit liability for partners engaged in concerted wrongdoing. See, *e.g.*, *Ambler*, 20 Wall., at 559. On remand, the Ninth Circuit may determine whether the facts are such that petitioners can, consistent with equitable principles, be found liable for profits as partners in wrongdoing or whether individual liability is required. Pp. 17–18.

(3) Courts may not enter disgorgement awards that exceed the gains "made upon any business or investment, when both the receipts and payments are taken into the account." *Goodyear*, 9 Wall., at 804. When the "entire profit of a business or undertaking" results from the wrongdoing, a defendant may be denied "inequitable deductions." *Root*, 105 U. S., at 203. Accordingly, courts must deduct legitimate expenses before awarding disgorgement under §78u(d)(5). The District Court below did not ascertain whether any of petitioners' expenses were legitimate. On remand, the lower courts should examine whether including such expenses in a profits-based remedy is consistent with the equitable principles underlying §78u(d)(5). Pp. 18–20.

754 Fed. Appx. 505, vacated and remanded.

SOTOMAYOR, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, BREYER, ALITO, KAGAN, GORSUCH, and KAVANAUGH, JJ., joined. THOMAS, J., filed a dissenting opinion.

SUPREME COURT OF THE UNITED STATES

No. 18–1501

CHARLES C. LIU, ET AL., PETITIONERS *v.* SECURITIES AND EXCHANGE COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 22, 2020]

JUSTICE SOTOMAYOR delivered the opinion of the Court.

In *Kokesh* v. *SEC*, 581 U. S. ___ (2017), this Court held that a disgorgement order in a Securities and Exchange Commission (SEC) enforcement action imposes a "penalty" for the purposes of 28 U. S. C. §2462, the applicable statute of limitations. In so deciding, the Court reserved an antecedent question: whether, and to what extent, the SEC may seek "disgorgement" in the first instance through its power to award "equitable relief" under 15 U. S. C. §78u(d)(5), a power that historically excludes punitive sanctions. The Court holds today that a disgorgement award that does not exceed a wrongdoer's net profits and is awarded for victims is equitable relief permissible under §78u(d)(5). The judgment is vacated, and the case is remanded for the courts below to ensure the award was so limited.

I

A

Congress authorized the SEC to enforce the Securities Act of 1933, 48 Stat. 74, as amended, 15 U. S. C. §77a *et seq.*, and the Securities Exchange Act of 1934, 48 Stat. 881, as amended, 15 U. S. C. §78a *et seq*., and to punish securities fraud through administrative and civil proceedings. In administrative proceedings, the SEC can seek limited civil penalties and "disgorgement." See §77h–1(e) ("In any cease-and-desist proceeding under subsection (a), the Commission may enter an order requiring accounting and disgorgement"); see also §77h–1(g) ("Authority to impose money penalties"). In civil actions, the SEC can seek civil penalties and "equitable relief." See, *e.g.*, §78u(d)(5) ("In any action or proceeding brought or instituted by the Commission under any provision of the securities laws, . . . any Federal court may grant . . . any equitable relief that may be appropriate or necessary for the benefit of investors"); see also §78u(d)(3) ("Money penalties in civil actions" (quotation modified)).

Congress did not define what falls under the umbrella of "equitable relief." Thus, courts have had to consider which remedies the SEC may impose as part of its §78u(d)(5) powers.

Starting with *SEC* v. *Texas Gulf Sulphur Co.*, 446 F. 2d 1301 (CA2 1971), courts determined that the SEC had authority to obtain what it called "restitution," and what in substance amounted to "profits" that "merely depriv[e]" a defendant of "the gains of . . . wrongful conduct." *Id.*, at 1307–1308. Over the years, the SEC has continued to request this remedy, later referred to as "disgorgement,"[1] and

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[1] Courts have noted the relatively recent vintage of the term "disgorgement." See, *e.g.*, *SEC* v. *Cavanaugh*, 445 F. 3d 105, 116, n. 24 (CA2 2006). The dissent contends that this recency in terminology alone removes disgorgement from the class of traditional equitable remedies, *post*, at 4 (opinion of THOMAS, J.), despite seeming to recognize disgorgement's parallels to restitution-based awards well within that class, *post*, at 4–5. It is no surprise that the dissent notes such parallels, given this Court's acknowledgment that "disgorgement of improper profits" is "a remedy only for restitution" that is "traditionally considered . . . equitable." *Tull* v. *United States*, 481 U. S. 412, 424 (1987); see also *infra*, at 7.

courts have continued to award it. See *SEC* v. *Commonwealth Chemical Securities, Inc.*, 574 F. 2d 90, 95 (CA2 1978) (explaining that, when a court awards "[d]isgorgement of profits in an action brought by the SEC," it is "exercising the chancellor's discretion to prevent unjust enrichment"); see also *SEC* v. *Blatt*, 583 F. 2d 1325, 1335 (CA5 1978); *SEC* v. *Washington Cty. Util. Dist.*, 676 F. 2d 218, 227 (CA6 1982).

In *Kokesh*, this Court determined that disgorgement constituted a "penalty" for the purposes of 28 U. S. C. §2462, which establishes a 5-year statute of limitations for "an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture." The Court reached this conclusion based on several considerations, namely, that disgorgement is imposed as a consequence of violating public laws, it is assessed in part for punitive purposes, and in many cases, the award is not compensatory. 581 U. S., at ___–___ (slip op., at 7–9). But the Court did not address whether a §2462 penalty can nevertheless qualify as "equitable relief" under §78u(d)(5), given that equity never "lends its aid to enforce a forfeiture or penalty." *Marshall* v. *Vicksburg*, 15 Wall. 146, 149 (1873). The Court cautioned, moreover, that its decision should not be interpreted "as an opinion on whether courts possess authority to order disgorgement in SEC enforcement proceedings." *Kokesh*, 581 U. S., at ___, n. 3 (slip op., at 5, n. 3). This question is now squarely before the Court.

The dissent also observes the solid equitable roots of an accounting for profits, *post*, at 3; accord, *infra*, at 6 (discussing the equitable origins of the accounting remedy), a remedy closely resembling disgorgement, see *infra*, at 8–9. In any event, casting aside a form of relief solely "based on the particular label affixed to [it] would 'elevate form over substance,'" *Aetna Health Inc.* v. *Davila*, 542 U. S. 200, 214 (2004), leaving unresolved the question before us: whether the underlying profits-based award conforms to equity practice.

B

The SEC action and disgorgement award at issue here arise from a scheme to defraud foreign nationals. Petitioners Charles Liu and his wife, Xin (Lisa) Wang, solicited nearly $27 million from foreign investors under the EB–5 Immigrant Investor Program (EB–5 Program). 754 Fed. Appx. 505, 506 (CA9 2018) (case below). The EB–5 Program, administered by the U. S. Citizenship and Immigration Services, permits noncitizens to apply for permanent residence in the United States by investing in approved commercial enterprises that are based on "proposals for promoting economic growth." See USCIS, EB–5 Immigrant Investor Program, https://www.uscis.gov/eb-5. Investments in EB–5 projects are subject to the federal securities laws.

Liu sent a private offering memorandum to prospective investors, pledging that the bulk of any contributions would go toward the construction costs of a cancer-treatment center. The memorandum specified that only amounts collected from a small administrative fee would fund "'legal, accounting and administration expenses.'" 754 Fed. Appx., at 507. An SEC investigation revealed, however, that Liu spent nearly $20 million of investor money on ostensible marketing expenses and salaries, an amount far more than what the offering memorandum permitted and far in excess of the administrative fees collected. 262 F. Supp. 3d 957, 960–964 (CD Cal. 2017). The investigation also revealed that Liu diverted a sizable portion of those funds to personal accounts and to a company under Wang's control. *Id.*, at 961, 964. Only a fraction of the funds were put toward a lease, property improvements, and a proton-therapy machine for cancer treatment. *Id.*, at 964–965.

The SEC brought a civil action against petitioners, alleging that they violated the terms of the offering documents by misappropriating millions of dollars. The District Court found for the SEC, granting an injunction barring petitioners from participating in the EB–5 Program and imposing a civil penalty at the highest tier authorized. *Id.*, at 975, 976. It also ordered disgorgement equal to the full amount petitioners had raised from investors, less the $234,899 that remained in the corporate accounts for the project. *Id.*, at 975–976.

Petitioners objected that the disgorgement award failed to account for their business expenses. The District Court disagreed, concluding that the sum was a "reasonable approximation of the profits causally connected to [their] violation." *Ibid.* The court ordered petitioners jointly and severally liable for the full amount that the SEC sought. App. to Pet. for Cert. 62a.

The Ninth Circuit affirmed. It acknowledged that *Kokesh* "expressly refused to reach" the issue whether the District Court had the authority to order disgorgement. 754 Fed. Appx., at 509. The court relied on Circuit precedent to conclude that the "proper amount of disgorgement in a scheme such as this one is the entire amount raised less the money paid back to the investors." *Ibid.*; see also *SEC* v. *JT Wallenbrock & Assocs.*, 440 F. 3d 1109, 1113, 1114 (CA9 2006) (reasoning that it would be "unjust to permit the defendants to offset . . . the expenses of running the very business they created to defraud . . . investors").

We granted certiorari to determine whether §78u(d)(5) authorizes the SEC to seek disgorgement beyond a defendant's net profits from wrongdoing. 589 U. S. ___ (2019).

II

Our task is a familiar one. In interpreting statutes like §78u(d)(5) that provide for "equitable relief," this Court analyzes whether a particular remedy falls into "those categories of relief that were *typically* available in equity." *Mertens* v. *Hewitt Associates*, 508 U. S. 248, 256 (1993); see also *CIGNA Corp.* v. *Amara*, 563 U. S. 421, 439 (2011);

Montanile v. *Board of Trustees of Nat. Elevator Industry Health Benefit Plan*, 577 U. S. 136, 142 (2016). The "basic contours of the term are well known" and can be discerned by consulting works on equity jurisprudence. *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U. S. 204, 217 (2002).

These works on equity jurisprudence reveal two principles. First, equity practice long authorized courts to strip wrongdoers of their ill-gotten gains, with scholars and courts using various labels for the remedy. Second, to avoid transforming an equitable remedy into a punitive sanction, courts restricted the remedy to an individual wrongdoer's net profits to be awarded for victims.

A

Equity courts have routinely deprived wrongdoers of their net profits from unlawful activity, even though that remedy may have gone by different names. Compare, *e.g.*, 1 D. Dobbs, Law of Remedies §4.3(5), p. 611 (1993) ("Accounting holds the defendant liable for his profits"), with *id.*, §4.1(1), at 555 (referring to "restitution" as the relief that "measures the remedy by the defendant's gain and seeks to force disgorgement of that gain"); see also Restatement (Third) of Restitution and Unjust Enrichment §51, Comment *a*, p. 204 (2010) (Restatement (Third)) ("Restitution measured by the defendant's wrongful gain is frequently called 'disgorgement.' Other cases refer to an 'accounting' or an 'accounting for profits'"); 1 J. Pomeroy, Equity Jurisprudence §101, p. 112 (4th ed. 1918) (describing an accounting as an equitable remedy for the violation of strictly legal primary rights).

No matter the label, this "profit-based measure of unjust enrichment," Restatement (Third) §51, Comment *a*, at 204, reflected a foundational principle: "[I]t would be inequitable that [a wrongdoer] should make a profit out of his own wrong," *Root* v. *Railway Co.,* 105 U. S. 189, 207 (1882). At the same time courts recognized that the wrongdoer should not profit "by his own wrong," they also recognized the countervailing equitable principle that the wrongdoer should not be punished by "pay[ing] more than a fair compensation to the person wronged." *Tilghman* v. *Proctor*, 125 U. S. 136, 145–146 (1888).

Decisions from this Court confirm that a remedy tethered to a wrongdoer's net unlawful profits, whatever the name, has been a mainstay of equity courts. In *Porter* v. *Warner Holding Co.*, 328 U. S. 395 (1946), the Court interpreted a section of the Emergency Price Control Act of 1942 that encompassed a "comprehensiv[e]" grant of "equitable jurisdiction." *Id.*, at 398. "[O]nce [a District Court's] equity jurisdiction has been invoked" under that provision, the Court concluded, "a decree compelling one to disgorge profits . . . may properly be entered." *Id.*, at 398–399.

Subsequent cases confirm the "'protean character' of the profits-recovery remedy." *Petrella* v. *Metro-Goldwyn-Mayer, Inc.*, 572 U. S. 663, 668, n. 1 (2014). In *Tull* v. *United States*, 481 U. S. 412 (1987), the Court described "disgorgement of improper profits" as "traditionally considered an equitable remedy." *Id.*, at 424. While the Court acknowledged that disgorgement was a "limited form of penalty" insofar as it takes money out of the wrongdoer's hands, it nevertheless compared disgorgement to restitution that simply "'restor[es] the status quo,'" thus situating the remedy squarely within the heartland of equity. *Ibid.*[2]

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[2] The dissent acknowledges that this Court has "referred to disgorgement as an equitable remedy in some of its prior decisions." *Post*, at 6 (citing *Feltner* v. *Columbia Pictures Television, Inc.*, 523 U. S. 340, 352 (1998)). While the dissent attempts to discount those cases for having "merely referred to the term" only "in passing," *post*, at 6, those cases expressly "characterized as equitable . . . actions for disgorgement of improper profits" in analyzing whether certain remedies were traditionally available in equity, *Feltner*, 523 U. S., at 352 (citing *Teamsters* v. *Terry*, 494 U. S. 558, 570 (1990) ("characteriz[ing] damages as equitable where they are restitutionary, such as in 'action[s] for disgorgement of improper

In *Great-West*, the Court noted that an "accounting for profits" was historically a "form of equitable restitution." 534 U. S., at 214, n. 2. And in *Kansas* v. *Nebraska*, 574 U. S. 445 (2015), a "'basically equitable'" original jurisdiction proceeding, the Court ordered disgorgement of Nebraska's gains from exceeding its allocation under an interstate water compact. *Id.*, at 453, 475.

Most recently, in *SCA Hygiene Products Aktiebolag* v. *First Quality Baby Products, LLC*, 580 U. S. ___ (2017), the Court canvassed pre-1938 patent cases invoking equity jurisdiction. It noted that many cases sought an "accounting," which it described as an equitable remedy requiring disgorgement of ill-gotten profits. *Id.*, at ___ (slip op., at 11). This Court's "transsubstantive guidance on broad and fundamental" equitable principles, *Romag Fasteners, Inc.* v. *Fossil Group, Inc.*, 590 U. S. ___, ___ (2020) (slip op., at 5), thus reflects the teachings of equity treatises that identify a defendant's net profits as a remedy for wrongdoing.

Contrary to petitioners' argument, equity courts did not limit this remedy to cases involving a breach of trust or of fiduciary duty. Brief for Petitioners 28–29. As petitioners acknowledge, courts authorized profits-based relief in patent-infringement actions where no such trust or special relationship existed. *Id.*, at 29; see also *Root*, 105 U. S., at 214 ("[I]t is nowhere said that the patentee's right to an account is based upon the idea that there is a fiduciary relation created between him and the wrong-doer by the fact of infringement").

Petitioners attempt to distinguish these patent cases by suggesting that an "accounting" was appropriate only because Congress explicitly conferred that remedy by statute in 1870. Brief for Petitioners 29 (citing the Act of July 8, 1870, §55, 16 Stat. 206). But patent law had not previously deviated from the general principles outlined above: This

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profits' "); *Tull*, 481 U. S., at 424).

Court had developed the rule that a plaintiff may "recover the amount of . . . profits that the defendants have made by the use of his invention" through "a series of decisions under the patent act of 1836, which simply conferred upon the courts of the United States general equity jurisdiction . . . in cases arising under the patent laws." *Tilghman*, 125 U. S., at 144. The 1836 statute, in turn, incorporated the substance of an earlier statute from 1819 which granted courts the ability to "proceed according to the course and principles of courts of equity" to "prevent the violation of patent-rights." *Root*, 105 U. S., at 193. Thus, as these cases demonstrate, equity courts habitually awarded profits-based remedies in patent cases well before Congress explicitly authorized that form of relief.

B

While equity courts did not limit profits remedies to particular types of cases, they did circumscribe the award in multiple ways to avoid transforming it into a penalty outside their equitable powers. See *Marshall*, 15 Wall., at 149.

For one, the profits remedy often imposed a constructive trust on wrongful gains for wronged victims. The remedy itself thus converted the wrongdoer, who in many cases was an infringer, "into a trustee, as to those profits, for the owner of the patent which he infringes." *Burdell* v. *Denig,* 92 U. S. 716, 720 (1876). In "converting the infringer into a trustee for the patentee as regards the profits thus made," the chancellor "estimat[es] the compensation due from the infringer to the patentee." *Packet Co.* v. *Sickles*, 19 Wall. 611, 617–618 (1874); see also *Clews* v. *Jamieson*, 182 U. S. 461, 480 (1901) (describing an accounting as involving a "'distribution of the trust moneys among all the beneficiaries who are entitled to share therein'" in an action against the governing committee of a stock exchange).

Equity courts also generally awarded profits-based remedies against individuals or partners engaged in concerted wrongdoing, not against multiple wrongdoers under a joint-and-several liability theory. See *Ambler* v. *Whipple*, 20 Wall. 546, 559 (1874) (ordering an accounting against a partner who had "knowingly connected himself with and aided in . . . fraud"). In *Elizabeth* v. *Pavement Co.*, 97 U. S. 126 (1878), for example, a city engaged contractors to install pavement in a manner that infringed a third party's patent. The patent holder brought a suit in equity to recover profits from both the city and its contractors. The Court held that only the contractors (the only parties to make a profit) were responsible, even though the parties answered jointly. *Id.*, at 140; see also *ibid.* (rejecting liability for an individual officer who merely acted as an agent of the defendant and received a salary for his work). The rule against joint-and-several liability for profits that have accrued to another appears throughout equity cases awarding profits. See, *e.g.*, *Belknap* v. *Schild*, 161 U. S. 10, 25–26 (1896) ("The defendants, in any such suit, are therefore liable to account for such profits only as have accrued to themselves from the use of the invention, and not for those which have accrued to another, and in which they have no participation"); *Keystone Mfg. Co.* v. *Adams*, 151 U. S. 139, 148 (1894) (reversing profits award that was based not on what defendant had made from infringement but on what third persons had made from the use of the invention); *Jennings* v. *Carson*, 4 Cranch 2, 21 (1807) (holding that an order requiring restitution could not apply to "those who were not in possession of the thing to be restored" and "had no power over it") (citing *Penhallow* v. *Doane's Administrators*, 3 Dall. 54 (1795) (reversing a restitution award in admiralty that ordered joint damages in excess of what each defendant received)).

Finally, courts limited awards to the net profits from wrongdoing, that is, "the gain made upon any business or investment, when both the receipts and payments are taken into the account." *Rubber Co.* v. *Goodyear*, 9 Wall.

788, 804 (1870); see also *Livingston* v. *Woodworth*, 15 How. 546, 559–560 (1854) (restricting an accounting remedy "to the actual gains and profits . . . during the time" the infringing machine "was in operation and during no other period" to avoid "convert[ing] a court of equity into an instrument for the punishment of simple torts"); *Seymour* v. *McCormick*, 16 How. 480, 490 (1854) (rejecting a blanket rule that infringing one component of a machine warranted a remedy measured by the full amounts of the profits earned from the machine); *Mowry* v. *Whitney*, 14 Wall. 620, 649 (1872) (vacating an accounting that exceeded the profits from infringement alone); *Wooden-Ware Co.* v. *United States,* 106 U. S. 432, 434–435 (1882) (explaining that an innocent trespasser is entitled to deduct labor costs from the gains obtained by wrongfully harvesting lumber).

The Court has carved out an exception when the "entire profit of a business or undertaking" results from the wrongful activity. *Root*, 105 U. S., at 203. In such cases, the Court has explained, the defendant "will not be allowed to diminish the show of profits by putting in unconscionable claims for personal services or other inequitable deductions." *Ibid.* In *Goodyear*, for example, the Court affirmed an accounting order that refused to deduct expenses under this rule. The Court there found that materials for which expenses were claimed were bought for the purposes of the infringement and "extraordinary salaries" appeared merely to be "dividends of profit under another name." 9 Wall., at 803; see also *Callaghan* v. *Myers*, 128 U. S. 617, 663–664 (1888) (declining to deduct a defendant's personal and living expenses from his profits from copyright violations, but distinguishing the expenses from salaries of officers in a corporation).

Setting aside that circumstance, however, courts consistently restricted awards to net profits from wrongdoing after deducting legitimate expenses. Such remedies, when assessed against only culpable actors and for victims, fall comfortably within "those categories of relief that were *typically* available in equity." *Mertens*, 508 U. S., at 256.

C

By incorporating these longstanding equitable principles into §78u(d)(5), Congress prohibited the SEC from seeking an equitable remedy in excess of a defendant's net profits from wrongdoing. To be sure, the SEC originally endeavored to conform its disgorgement remedy to the common-law limitations in §78u(d)(5). Over the years, however, courts have occasionally awarded disgorgement in three main ways that test the bounds of equity practice: by ordering the proceeds of fraud to be deposited in Treasury funds instead of disbursing them to victims, imposing joint-and-several disgorgement liability, and declining to deduct even legitimate expenses from the receipts of fraud.[3] The SEC's disgorgement remedy in such incarnations is in considerable tension with equity practices.

Petitioners go further. They claim that this Court effectively decided in *Kokesh* that disgorgement is necessarily a penalty, and thus not the kind of relief available at equity. Brief for Petitioners 19–20, 22–26. Not so. *Kokesh* expressly declined to pass on the question. 581 U. S., at ___, n. 3 (slip op., at 5, n. 3). To be sure, the *Kokesh* Court evaluated a version of the SEC's disgorgement remedy that seemed to exceed the bounds of traditional equitable principles. But that decision has no bearing on the SEC's ability

[3] See, *e.g.*, *SEC* v. *Clark*, 915 F. 2d 439, 441, 454 (CA9 1990) (requiring defendant to disgorge the profits that his stockbroker made from unlawful trades); *SEC* v. *Brown*, 658 F. 3d 858, 860–861 (CA8 2011) (*per curiam*) (ordering joint-and-several disgorgement of funds collected from investors and concluding that "'the overwhelming weight of authority hold[s] that securities law violators may not offset their disgorgement liability with business expenses'"); *SEC* v. *Contorinis*, 743 F. 3d 296, 304–306 (CA2 2014) (requiring defendant to disgorge benefits conferred on close associates).

to conform future requests for a defendant's profits to the limits outlined in common-law cases awarding a wrongdoer's net gains.

The Government, for its part, contends that the SEC's interpretation of the equitable disgorgement remedy has Congress' tacit support, even if it exceeds the bounds of equity practice. Brief for Respondent 13–21. It points to the fact that Congress has enacted a number of other statutes referring to "disgorgement."

That argument attaches undue significance to Congress' use of the term. It is true that Congress has authorized the SEC to seek "disgorgement" in administrative actions. 15 U. S. C. §77h–1(e) ("In any cease-and-desist proceeding under subsection (a), the Commission may enter an order requiring accounting and disgorgement"). But it makes sense that Congress would expressly name the equitable powers it grants to an agency for use in administrative proceedings. After all, agencies are unlike federal courts where, "[u]nless otherwise provided by statute, all . . . inherent equitable powers . . . are available for the proper and complete exercise of that jurisdiction." *Porter*, 328 U. S., at 398.

Congress does not enlarge the breadth of an equitable, profit-based remedy simply by using the term "disgorgement" in various statutes. The Government argues that under the prior-construction principle, Congress should be presumed to have been aware of the scope of "disgorgement" as interpreted by lower courts and as having incorporated the (purportedly) prevailing meaning of the term into its subsequent enactments. Brief for Respondent 24. But "that canon has no application" where, among other things, the scope of disgorgement was "far from 'settled.'" *Armstrong* v. *Exceptional Child Center, Inc.*, 575 U. S. 320, 330 (2015).

At bottom, even if Congress employed "disgorgement" as a shorthand to cross-reference the relief permitted by §78u(d)(5), it did not silently rewrite the scope of what the

SEC could recover in a way that would contravene limitations embedded in the statute. After all, such "statutory reference[s]" to a remedy grounded in equity "must, absent other indication, be deemed to contain the limitations upon its availability that equity typically imposes." *Great-West*, 534 U. S., at 211, n. 1. Accordingly, Congress' own use of the term "disgorgement" in assorted statutes did not expand the contours of that term beyond a defendant's net profits—a limit established by longstanding principles of equity.

III

Applying the principles discussed above to the facts of this case, petitioners briefly argue that their disgorgement award is unlawful because it crosses the bounds of traditional equity practice in three ways: It fails to return funds to victims, it imposes joint-and-several liability, and it declines to deduct business expenses from the award. Because the parties focused on the broad question whether any form of disgorgement may be ordered and did not fully brief these narrower questions, we do not decide them here. We nevertheless discuss principles that may guide the lower courts' assessment of these arguments on remand.

A

Section 78u(d)(5) restricts equitable relief to that which "may be appropriate or necessary for the benefit of investors." The SEC, however, does not always return the entirety of disgorgement proceeds to investors, instead depositing a portion of its collections in a fund in the Treasury. See SEC, Division of Enforcement, 2019 Ann. Rep. 16–17, https://www.sec.gov/files/enforcement-annual-report-2019.pdf. Congress established that fund in the Dodd-Frank Wall Street Reform and Consumer Protection Act for disgorgement awards that are not deposited in "disgorgement fund[s]" or otherwise "distributed to victims." 124

Stat. 1844. The statute provides that these sums may be used to pay whistleblowers reporting securities fraud and to fund the activities of the Inspector General. *Ibid.* Here, the SEC has not returned the bulk of funds to victims, largely, it contends, because the Government has been unable to collect them.[4]

The statute provides limited guidance as to whether the practice of depositing a defendant's gains with the Treasury satisfies the statute's command that any remedy be "appropriate or necessary for the benefit of investors." The equitable nature of the profits remedy generally requires the SEC to return a defendant's gains to wronged investors for their benefit. After all, the Government has pointed to no analogous common-law remedy permitting a wrongdoer's profits to be withheld from a victim indefinitely without being disbursed to known victims. Cf. *Root*, 105 U. S., at 214–215 (comparing the accounting remedy to a breach-of-trust action, where a court would require the defendant to "refund the amount of profit which they have actually realized").

The Government maintains, however, that the primary function of depriving wrongdoers of profits is to deny them the fruits of their ill-gotten gains, not to return the funds to victims as a kind of restitution. See, *e.g.*, SEC, Report Pursuant to Section 308(C) of the Sarbanes Oxley Act of 2002, p. 3, n. 2 (2003) (taking the position that disgorgement is not intended to make investors whole, but rather to deprive wrongdoers of ill-gotten gains); see also 6 T. Hazen, Law of Securities Regulation §16.18, p. 8 (rev. 7th ed. 2016) (concluding that the remedial nature of the disgorgement remedy does not mean that it is essentially compensatory and

[4] According to the Government, petitioners "transferred the bulk of their misappropriated funds to China, defied the district court's order to repatriate those funds, and fled the United States." Brief for Respondent 36.

concluding that the "primary function of the remedy is to deny the wrongdoer the fruits of ill-gotten gains"). Under the Government's theory, the very fact that it conducted an enforcement action satisfies the requirement that it is "appropriate or necessary for the benefit of investors."

But the SEC's equitable, profits-based remedy must do more than simply benefit the public at large by virtue of depriving a wrongdoer of ill-gotten gains. To hold otherwise would render meaningless the latter part of §78u(d)(5). Indeed, this Court concluded similarly in *Mertens* when analyzing statutory language accompanying the term "equitable remedy." 508 U. S., at 253 (interpreting the term "appropriate equitable relief"). There, the Court found that the additional statutory language must be given effect since the section "does not, after all, authorize . . . 'equitable relief' *at large*." *Ibid.* As in *Mertens*, the phrase "appropriate or necessary for the benefit of investors" must mean something more than depriving a wrongdoer of his net profits alone, else the Court would violate the "cardinal principle of interpretation that courts must give effect, if possible, to every clause and word of a statute." *Parker Drilling Management Services, Ltd.* v. *Newton*, 587 U. S. ___, ___ (2019) (slip op., at 9) (internal quotation marks omitted).

The Government additionally suggests that the SEC's practice of depositing disgorgement funds with the Treasury may be justified where it is infeasible to distribute the collected funds to investors.[5] Brief for Respondent 37. It is an open question whether, and to what extent, that practice nevertheless satisfies the SEC's obligation to award relief

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[5] We express no view as to whether the SEC has offered adequate proof of failed attempts to return funds to investors here. To the extent that feasibility is relevant at all to equitable principles, we observe that lower courts are well equipped to evaluate the feasibility of returning funds to victims of fraud. See, *e.g.*, *SEC* v. *Lund*, 570 F. Supp. 1397, 1404–1405 (CD Cal. 1983) (appointing a magistrate judge to determine whether it was feasible to locate victims of financial wrongdoing).

"for the benefit of investors" and is consistent with the limitations of §78u(d)(5). The parties have not identified authorities revealing what traditional equitable principles govern when, for instance, the wrongdoer's profits cannot practically be disbursed to the victims. But we need not address the issue here. The parties do not identify a specific order in this case directing any proceeds to the Treasury. If one is entered on remand, the lower courts may evaluate in the first instance whether that order would indeed be for the benefit of investors as required by §78u(d)(5) and consistent with equitable principles.

B

The SEC additionally has sought to impose disgorgement liability on a wrongdoer for benefits that accrue to his affiliates, sometimes through joint-and-several liability, in a manner sometimes seemingly at odds with the common-law rule requiring individual liability for wrongful profits. See, *e.g.*, *SEC* v. *Contorinis*, 743 F. 3d 296, 302 (CA2 2014) (holding that a defendant could be forced to disgorge not only what he "personally enjoyed from his exploitation of inside information, but also the profits of such exploitation that he channeled to friends, family, or clients"); *SEC* v. *Clark*, 915 F. 2d 439, 454 (CA9 1990) ("It is well settled that a tipper can be required to disgorge his tippee's profits"); *SEC* v. *Whittemore*, 659 F. 3d 1, 10 (CADC 2011) (approving joint-and-several disgorgement liability where there is a close relationship between the defendants and collaboration in executing the wrongdoing).

That practice could transform any equitable profits-focused remedy into a penalty. Cf. *Marshall*, 15 Wall., at 149. And it runs against the rule to not impose joint liability in favor of holding defendants "liable to account for such profits only as have accrued to themselves . . . and not for those which have accrued to another, and in which they have no participation." *Belknap*, 161 U. S., at 25–26; see also *Elizabeth* v. *Pavement Co.*, 97 U. S. 126 (1878).

The common law did, however, permit liability for partners engaged in concerted wrongdoing. See, *e.g.*, *Ambler*, 20 Wall., at 559. The historic profits remedy thus allows some flexibility to impose collective liability. Given the wide spectrum of relationships between participants and beneficiaries of unlawful schemes—from equally culpable codefendants to more remote, unrelated tipper-tippee arrangements—the Court need not wade into all the circumstances where an equitable profits remedy might be punitive when applied to multiple individuals.

Here, petitioners were married. 754 Fed. Appx. 505; 262 F. Supp. 3d, at 960–961. The Government introduced evidence that Liu formed business entities and solicited investments, which he misappropriated. *Id.*, at 961. It also presented evidence that Wang held herself out as the president, and a member of the management team, of an entity to which Liu directed misappropriated funds. *Id.*, at 964. Petitioners did not introduce evidence to suggest that one spouse was a mere passive recipient of profits. Nor did they suggest that their finances were not commingled, or that one spouse did not enjoy the fruits of the scheme, or that other circumstances would render a joint-and-several disgorgement order unjust. Cf. *SEC* v. *Hughes Capital Corp.*, 124 F. 3d 449, 456 (CA3 1997) (finding that codefendant spouse was liable for unlawful proceeds where they funded her "lavish lifestyle"). We leave it to the Ninth Circuit on remand to determine whether the facts are such that petitioners can, consistent with equitable principles, be found liable for profits as partners in wrongdoing or whether individual liability is required.

C

Courts may not enter disgorgement awards that exceed the gains "made upon any business or investment, when both the receipts and payments are taken into the account." *Goodyear*, 9 Wall., at 804; see also Restatement (Third) §51, Comment *h*, at 216 (reciting the general rule that a defendant is entitled to a deduction for all marginal costs incurred in producing the revenues that are subject to disgorgement). Accordingly, courts must deduct legitimate expenses before ordering disgorgement under §78u(d)(5). A rule to the contrary that "make[s] no allowance for the cost and expense of conducting [a] business" would be "inconsistent with the ordinary principles and practice of courts of chancery." *Tilghman*, 125 U. S., at 145–146; cf. *SEC* v. *Brown*, 658 F. 3d 858, 861 (CA8 2011) (declining to deduct even legitimate expenses like payments to innocent third-party employees and vendors).

The District Court below declined to deduct expenses on the theory that they were incurred for the purposes of furthering an entirely fraudulent scheme. It is true that when the "entire profit of a business or undertaking" results from the wrongdoing, a defendant may be denied "inequitable deductions" such as for personal services. *Root*, 105 U. S., at 203. But that exception requires ascertaining whether expenses are legitimate or whether they are merely wrongful gains "under another name." *Goodyear*, 9 Wall., at 803. Doing so will ensure that any disgorgement award falls within the limits of equity practice while preventing defendants from profiting from their own wrong. *Root*, 105 U. S., at 207.

Although it is not necessary to set forth more guidance addressing the various circumstances where a defendant's expenses might be considered wholly fraudulent, it suffices to note that some expenses from petitioners' scheme went toward lease payments and cancer-treatment equipment. Such items arguably have value independent of fueling a fraudulent scheme. We leave it to the lower court to examine whether including those expenses in a profits-based remedy is consistent with the equitable principles underlying §78u(d)(5).

* * *

For the foregoing reasons, we vacate the judgment below and remand the case to the Ninth Circuit for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 18–1501

CHARLES C. LIU, ET AL., PETITIONERS *v.* SECURITIES AND EXCHANGE COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 22, 2020]

JUSTICE THOMAS, dissenting.

The Court correctly declines to affirm the Ninth Circuit's decision upholding the District Court's disgorgement order, but I disagree with the Court's decision to vacate and remand for the lower courts to "limi[t]" the disgorgement award. *Ante,* at 1. Disgorgement can never be awarded under 15 U. S. C. §78u(d)(5). That statute authorizes the Securities and Exchange Commission (SEC) to seek only "equitable relief that may be appropriate or necessary for the benefit of investors," and disgorgement is not a traditional equitable remedy. Thus, I would reverse the judgment of the Court of Appeals.

I

The Securities Exchange Act of 1934, as amended in 2005, allows the SEC to request "equitable relief" in federal district court against those who violate federal securities laws. §78u(d)(5). According to our usual interpretive convention, "equitable relief" refers to forms of equitable relief available in the English Court of Chancery at the time of the founding. Because disgorgement is a creation of the 20th century, it is not properly characterized as "equitable relief," and, hence, the District Court was not authorized to award it under §78u(d)(5).

A

"This Court has never treated general statutory grants of equitable authority as giving federal courts a freewheeling power to fashion new forms of equitable remedies." *Trump* v. *Hawaii*, 585 U. S. ___, ___ (2018) (THOMAS, J., concurring) (slip op., at 3). "Rather, it has read such statutes as constrained by 'the body of law which had been transplanted to this country from the English Court of Chancery' in 1789." *Ibid.* (quoting *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 105 (1945)). As Justice Story put it, "the settled doctrine of this court is, that the remedies in equity are to be administered . . . according to the practice of courts of equity in [England], as contradistinguished from that of courts of law; subject, of course to the provisions of the acts of congress." *Boyle* v. *Zacharie & Turner*, 6 Pet. 648, 654 (1832).

We have interpreted other statutes according to this "settled doctrine." For example, we have read the term "equitable relief" in the Employee Retirement Income Security Act of 1974 to refer to "those categories of relief that were typically available in equity." *Mertens* v. *Hewitt Associates*, 508 U. S. 248, 256 (1993) (emphasis deleted). We have done the same for the Judiciary Act of 1789, see, *e.g.*, *Grupo Mexicano de Desarrollo, S. A.* v. *Alliance Bond Fund, Inc.*, 527 U. S. 308, 318–319 (1999), and for provisions in the Bankruptcy Code, see *Taggart* v. *Lorenzen*, 587 U. S. ___, ___ (2019) (slip op., at 5). There is nothing about §78u(d)(5) that counsels departing from this approach.

B

Disgorgement is not a traditional form of equitable relief. Rather, cases, legal dictionaries, and treatises establish that it is a 20th-century invention.

As an initial matter, it is not even clear what "disgorgement" means. The majority frankly acknowledges its "‘“protean character.”’" *Ante*, at 7 (quoting *Petrella* v.

Metro-Goldwyn-Mayer, Inc., 572 U. S. 663, 688, n. 1 (2014)). The difficulty of defining this supposedly traditional remedy is the first sign that it is not a historically recognized equitable remedy. In contrast, an accounting for profits, or accounting—a distinct form of relief that the majority groups with disgorgement—has a well-accepted definition: It compels a defendant to account for, and repay to a plaintiff, those profits that belong to the plaintiff in equity. Bray, Fiduciary Remedies, in The Oxford Handbook of Fiduciary Law 449 (E. Criddle, P. Miller, & R. Sitkoff eds. 2019). The definition of disgorgement, after today's decision, is a remedy that compels each defendant to pay his profits (and sometimes, though it is not clear when, all of his codefendants' profits) to a third-party Government agency (which sometimes, though it is not clear when, passes the money on to victims). This remedy has no basis in historical practice.

No published case appears to have used the term "disgorgement" to refer to equitable relief until the 20th century. Even then, the earliest cases use the word in a "nontechnical" sense, Brief for Law Professors as *Amici Curiae* 22, to describe the action a defendant must take when a party is awarded a traditional equitable remedy such as an accounting for profits or an equitable lien.[1] For example, in *Byrd* v. *Mullinix*, 159 Ark. 310, 251 S. W. 871 (1923), the Supreme Court of Arkansas affirmed the imposition of an equitable lien to prevent a debtor from "put[ting] the money in property which was itself beyond the reach of creditors, and to compel its disgorgement," *id.,* at 316–317, 251 S. W., at 872. Likewise, in *Armstrong* v. *Richards*, 128 Fla. 561, 175 So. 340 (1937), the Supreme Court of Florida referred to "the right of the taxpayer to require an accounting from

[1] An equitable lien is imposed on a defendant's property "as security for a claim on the ground that otherwise the former would be unjustly enriched." Restatement of Restitution §161, p. 650 (1936).

and disgorgement by public officers and those in collusion with them," *id.*, at 564, 175 So., at 341. In these cases, the term "disgorgement" colloquially described what a defendant was ordered to do, not the remedy itself.

By the 1960s, published opinions began to use "disgorgement" to refer to a remedy in the administrative context. In *NLRB* v. *Local 176*, 276 F. 2d 583 (CA1 1960), the agency had "applied its . . . remedy of disgorgement of dues, requiring the union to refund to every member who had obtained employment on the Company project the dues which he had paid," *id.*, at 586 (footnote omitted). The court declined to enforce this part of the agency's order, but not because disgorgement was an impermissible form of relief. Instead, it found that, in the circumstances of the case, disgorgement "seem[ed] . . . to be an *ex post facto* penalty." *Ibid.*; see also *NLRB* v. *Local 111*, 278 F. 2d 823, 825 (CA1 1960) (enforcing a disgorgement order from the agency).

By the 1970s, courts started using the term "disgorgement" to describe a judicial remedy in its own right. When the SEC initially sought this kind of relief under the Securities Exchange Act in *SEC* v. *Texas Gulf Sulphur Co.*, 312 F. Supp. 77 (SDNY 1970), the District Court called it "restitution," *id.,* at 93, and the Court of Appeals called it "[r]estitution of [p]rofits," *SEC* v. *Texas Gulf Sulphur Co.*, 446 F. 2d 1301, 1307 (CA2 1971) (emphasis deleted). Courts soon substituted the label "disgorgement." *SEC* v. *Manor Nursing Centers*, *Inc.*, 458 F. 2d 1082, 1105 (CA2 1972); *SEC* v. *Shapiro*, 349 F. Supp. 46, 55 (SDNY 1972).

The late date of these cases is sufficient reason to reject the argument that disgorgement is a traditional equitable remedy. But it is also telling that, when the SEC began seeking this relief, it did so without any statutory authority. Prior to 2005, the SEC lacked the power even to seek "equitable relief" in cases like this one. See §305(b), 116 Stat. 779 (amending the Securities Exchange Act). The District Court in *Texas Gulf Sulphur* purported to "imply [a] new remed[y]," based on its "inherent equity power" and a belief that "the congressional purpose is effectuated by so doing." 312 F. Supp., at 91. But the sources it cited are dubious. The court relied on *J. I. Case Co.* v. *Borak*, 377 U. S. 426 (1964), a case about implied causes of action that we have since abrogated. See *Alexander* v. *Sandoval*, 532 U. S. 275, 287 (2001). It also relied on a securities law treatise that advocated for what it called "restitution" but admitted that district courts had no express authority to grant the remedy and that the SEC had never sought this remedy in the past. 3 L. Loss, Securities Regulation 1827–1828 (1961). It is functionally this same unauthorized remedy that the SEC and courts now call "disgorgement." The details have varied over time, but the lineage is clear: Disgorgement is "a relic of the heady days" of courts inserting judicially created relief into statutes. *Correctional Services Corp.* v. *Malesko*, 534 U. S. 61, 75 (2001) (Scalia, J., concurring).

Disgorgement as a remedy in its own right is also absent from legal publications until the 20th century. Leading legal dictionaries did not define the term until the turn of the 20th century. See, *e.g.*, Merriam-Webster's Dictionary of Law 143 (1996); Black's Law Dictionary 480 (7th ed. 1999). Nor was disgorgement included in the first Restatement of Restitution, adopted in 1936. The remedy does not appear until the Third Restatement, adopted in 2010, which states that "[r]estitution remedies" that seek "to eliminate profit from wrongdoing . . . are often called 'disgorgement' or 'accounting.'" 2 Restatement (Third) of Restitution and Unjust Enrichment §51(4), p. 203. But "Restatement" is an inapt title for this edition of the treatise. Like many of the modern Restatements, its "authors have abandoned the mission of describing the law, and have chosen instead to set forth their aspirations for what the law ought to be." *Kansas* v. *Nebraska*, 574 U. S. 445, 475 (2015) (Scalia, J., concurring in part and dissenting in part). The inclusion of "disgorgement" in the Third Restatement, which the majority cites in support of its holding, *ante*, at 6, represents a "'novel extension'" of equity. *Kansas*, *supra*, at 483 (THOMAS, J., concurring in part and dissenting in part) (quoting Roberts, Restitutionary Disgorgement for Opportunistic Breach of Contract and Mitigation of Damages, 42 Loyola (LA) L. Rev. 131, 134 (2008)).

I acknowledge that this Court has referred to disgorgement as an equitable remedy in some of its prior decisions. See, *e.g.*, *Feltner* v. *Columbia Pictures Television*, *Inc.*, 523 U. S. 340, 352 (1998). But these opinions merely referred to the term in passing without considering the question in depth. The history is clear: Disgorgement is not a form of relief that was available in the English Court of Chancery at the time of the founding.

C

The majority's treatment of disgorgement as an equitable remedy threatens great mischief. The term disgorgement itself invites abuse because it is a word with no fixed meaning. The majority sees "parallels" between accounting and disgorgement, *ante,* at 2, n. 1, but parallels are by definition not the same. Even if they were, the traditional remedy of an accounting—which compels a party to repay profits that belong to a plaintiff—has important conceptual limitations that disgorgement does not. An accounting connotes the relationship between a plaintiff and a defendant. In the words of one scholar, "it is an accounting by A to B." Bray, Fiduciary Remedies*,* at 454. But disgorgement connotes no relationship and so is not naturally limited to net profits and compensation of victims. It simply "is A disgorging." *Ibid.* Further, the traditional remedy of a constructive trust[2] or an equitable lien requires that the "money or prop-

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[2] A constructive trust compels a defendant "holding title to property . . . to convey it to another on the ground that he would be unjustly enriched

erty identified as belonging in good conscience to the plaintiff . . . clearly be traced to particular funds or property in the defendant's possession." *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U. S. 204, 213 (2002). Disgorgement reaches further because it has no tracing requirement. By using a word with no history in equity jurisprudence, the SEC and courts have made it possible to circumvent the careful limitations imposed on other equitable remedies.

One need look no further than the SEC's use of disgorgement to see the pitfalls of the majority's acquiescence in its continued use as a remedy. The order in *Texas Gulf Sulphur* did not depart too far from equitable principles. The award was limited to the defendants' net profits and the funds were held in escrow and were at least partly available to compensate victims, 446 F. 2d, at 1307. It did not take long, however, for a district court to order a defendant to turn over both his profits and the investment "income earned on the proceeds." *Manor Nursing Centers*, 458 F. 2d, at 1105. And in the case before us today, just a half century later, disgorgement has expanded even further. The award is not limited to net profits or even money possessed by an individual defendant when it is imposed jointly and severally. See *ante*, at 5. And not only is it not guaranteed to be used to compensate victims, but the imposition of over $26 million in disgorgement and approximately $8 million in civil monetary penalties in this case seems to ensure that victims will be unable to recover anything in their own actions. As long as courts continue to award "disgorgement," both courts and the SEC will continue to have license to expand their own power.

The majority's decision to tame, rather than reject, disgorgement will also cause confusion in administrative prac-

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if he were permitted to retain it." Restatement of Restitution §160, at 640–641.

tice. As the majority explains, the SEC is expressly authorized to impose "'disgorgement'" in its in-house tribunals. *Ante*, at 13 (quoting 15 U. S. C. §77h–1(e)). It is unclear whether the majority's new restrictions on disgorgement will apply to these proceedings as well. If they do not, the result will be that disgorgement has one meaning when the SEC goes to district court and another when it proceeds in-house.

More fundamentally, by failing to recognize that the problem is disgorgement itself, the majority undermines our entire system of equity. The majority believes that insistence on the traditional rules of equity is unnecessarily formalistic, *ante,* at 3, n. 1, but the Founders accepted federal equitable powers only because those powers depended on traditional forms. The Constitution was ratified on the understanding that equity was "a precise legal system" with "specific equitable remed[ies]." *Missouri* v. *Jenkins*, 515 U. S. 70, 127 (1995) (THOMAS, J., concurring). "Although courts of equity exercised remedial 'discretion,' that discretion allowed them to deny or tailor a remedy despite a demonstrated violation of a right, not to expand a remedy beyond its traditional scope." *Trump*, 585 U. S., at ___ (THOMAS, J., concurring) (slip op., at 5). The majority, while imposing some limits, ultimately permits courts to continue expanding equitable remedies. I would simply hold that the phrase "equitable relief" in §78u(d)(5) does not authorize disgorgement.

II

After holding that disgorgement is equitable relief, the majority remands for the lower courts to reconsider the disgorgement order in this case. If the majority is going to accept "disgorgement" as an available remedy, it should at least limit the order to be consistent with the traditional rules of equity. First, the order should be limited to each petitioner's profits. Second, the order should not be imposed jointly and severally. Third, the money paid by petitioners should be used to compensate petitioners' victims.

A

First, the disgorgement order should be limited to "the profits actually made" by each petitioner. *Mowry* v. *Whitney*, 14 Wall. 620, 649 (1872); see also *ante*, at 11, 18–20. Defendants in equity traditionally may deduct "allowances . . . for the cost and expense of the business" from the amount of the award. *Root* v. *Railway Co.*, 105 U. S. 189, 215 (1882); see also *Callaghan* v. *Myers*, 128 U. S. 617, 665 (1888); *Elizabeth* v. *Pavement Co.*, 97 U. S. 126, 139 (1878); *Rubber Co.* v. *Goodyear*, 9 Wall. 788, 804 (1870). The rationale behind this rule is that "it is not the function of courts of equity to administer punishment." *Bangor Punta Operations*, *Inc.* v. *Bangor & Aroostook R. Co.*, 417 U. S. 703, 717–718, n. 14 (1974) (internal quotation marks omitted); see also 2 J. Story, Commentaries on Equity Jurisprudence §1494, p. 819 (13th ed. 1886). Here, however, the District Court reasoned that "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.'" 754 Fed. Appx. 505, 509 (CA9 2018) (quoting *SEC* v. *J. T. Wallenbrock & Assocs.*, 440 F. 3d 1109, 1114 (CA9 2006)). On remand, the lower courts should limit the award to each petitioner's profits.

B

Second, and relatedly, the disgorgement order should not be imposed jointly and severally. The majority analogizes disgorgement to accounting, *ante*, at 6, but this Court has rejected joint and several liability in actions for an accounting. *Elizabeth*, *supra,* at 139–140; *Keystone Mfg. Co.* v. *Adams*, 151 U. S. 139, 148 (1894); *Belknap* v. *Schild*, 161 U. S.

10, 25–26 (1896). The majority instructs the lower courts to determine whether petitioners were "partners in wrongdoing," apparently based on a case about the liability of partners. *Ante,* at 10, 18 (citing *Ambler* v. *Whipple*, 20 Wall. 546 (1874)). But the liability in that case was premised on the law of partnership, and nothing indicates that petitioners here were legal partners. The joint and several order in this case is thus at odds with traditional equitable rules.[3]

C

Finally, the award should be used to compensate victims, not to enrich the Government. Plaintiffs in equity may claim "that which, *ex aequo et bono* [according to what is equitable and good], is theirs, and nothing beyond this." *Livingston* v. *Woodworth*, 15 How. 546, 560 (1854). The money ordered to be paid as disgorgement in no sense belongs to the Government, and the majority cites no authority allowing a Government agency to keep equitable relief for a wrong done to a third party. Requiring the SEC to only "generally" compensate victims, *ante,* at 15, is inconsistent with traditional equitable principles.

Worse still from a practical standpoint, the majority provides almost no guidance to the lower courts about how to resolve this question on remand. Even assuming that disgorgement is "equitable relief" for purposes of §78u(d)(5) and that the Government may sometimes keep the money,

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[3] For its part, respondent cites the joint and several liability in *Jackson* v. *Smith,* 254 U. S. 586, 589 (1921), but the remedy in that case was a constructive trust, see *Smith* v. *Jackson*, 48 App. D. C. 565, 576 (1919). As explained above, there is no tracing requirement in the District Court's order as would be required in a case of constructive trust. *Supra*, at 6–7. The Court also allowed joint and several liability in *Belford* v. *Scribner*, 144 U. S. 488 (1892), a copyright case. But it based its holding on the fact that, under the relevant copyright statute, "both the printer and the publisher are equally liable to the owner of the copyright for an infringement." *Id.*, at 507; see also *Washingtonian Publishing Co.* v. *Pearson*, 140 F. 2d 465, 467 (CADC 1944).

the Court should at least do more to identify the circumstances in which the Government may keep the money. Instead, the Court asks lower courts to improvise a solution. If past is prologue, this uncertainty is sure to create opportunities for the SEC to continue exercising unlawful power.

* * *

I would reverse for the straightforward reason that disgorgement is not "equitable relief" within the meaning of §78u(d)(5). Because the majority acquiesces in the continued use of disgorgement under that statute, I respectfully dissent.