UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 96627 / January 10, 2023

ADMINISTRATIVE PROCEEDING
File No. 3-21270

In the Matter of	)	**ANSWER TO ORDER INSTITUTING PROCEEDINGS**
	)	
JUSTIN W. KEENER,	)	
	)	
Respondent.	)	
	)	

RESPONDENT JUSTIN W. KEENER'S ANSWER TO THE DIVISION OF ENFORCEMENT'S ORDER INSTITUTING PROCEEDINGS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934 AND NOTICE OF HEARING

Pursuant to Securities and Exchange Commission ("SEC") Rule of Practice 220, 17 C.F.R. § 201.220, Respondent Justin W. Keener ("Mr. Keener") hereby enters the following answer to the Division of Enforcement's Order Instituting Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Notice of Hearing ("OIP" or "Order"). Mr. Keener denies several of the allegations in the OIP and further asserts that the SEC's action is unlawful and no remedial action is in the public interest. If the Commission declines to dismiss this improper, unlawful action, Mr. Keener requests the opportunity to conduct discovery prior to an in-person hearing where Mr. Keener has the opportunity to call and examine witnesses.

I. ANSWER TO ALLEGATIONS

Mr. Keener denies the allegations set forth in Section II.A.2. of the OIP, which states that "Between January 2015 and January 2018, Respondent engaged in the regular business of buying and selling billions of newly issued shares of microcap securities and generated millions of dollars of profits from those sales, while failing to register as a dealer as required by Section 15(a)(1) of the Exchange Act." OIP at 1. Among other things, Mr. Keener is not a "dealer" under the Securities Exchange Act of 1934 (the "Exchange Act").

II. THE SEC'S ACTION IS UNLAWFUL AND NO REMEDIAL ACTION IS IN THE PUBLIC INTEREST

A. The decision to initiate proceedings is not final given Mr. Keener's pending appeal and it would be arbitrary and capricious for the Commission to find otherwise.

The litigation against Mr. Keener is not final. Given Mr. Keener's pending appeal to the U.S. Court of Appeals for the Eleventh Circuit, it would be arbitrary and capricious for the Commission to proceed with this action now.

Indeed, the Commission has taken the position elsewhere that matters pending appeal are not "final." For example, the Administrative Procedure Act ("APA") requires "[e]ach agency having more than one member [to]… make available for public inspection a record of the final votes of each member in every agency proceeding." 5 U.S.C. § 522(a)(5). But the SEC as a matter of policy declines to make publicly available, while an appeal is pending, the final votes of its Commissioners authorizing federal litigation on the ground that the matter is not final. *See* https://www.sec.gov/about/commission-votes. The SEC cannot reasonably maintain that the federal-court action against Mr. Keener is final enough to warrant the follow-on administrative proceedings, while simultaneously maintaining that the matter is not final enough to require it to comply with Section 552(a)(5). Doing otherwise would be arbitrary and capricious.

B. The SEC lacks jurisdiction to institute the administrative proceeding.

The SEC cannot proceed with administrative action against Mr. Keener because it does not have jurisdiction to institute proceedings. The SEC does not have jurisdiction over Mr.

Keener because SEC administrative law judges ("ALJs") and Commissioners have unconstitutional removal protections. As the Fifth Circuit recently found in *Jarkesy v. SEC*, 34 F.4th 446, 464 (5th Cir. 2022), SEC ALJs are inferior officers, who nevertheless wield "considerable power over administrative case records… and [whose] decisions are [often] final and binding." They are also insulated by two layers of for-cause protection from removal: ALJs can only be removed by the SEC Commissioners for good cause as determined by the Merits Systems Protection Board, whose members and the SEC Commissioners who appoint them can only be removed for cause by the President. Under the Article II of the U.S. Constitution, such protections from removal are unconstitutional. *See Jarkesy*, 34 F.4th at 465 (5th Cir. 2022) (finding that "SEC ALJs are sufficiently insulated from removal that the President cannot take care that the laws are faithfully executed.").

Moreover, SEC Commissioners themselves have unconstitutional removal protections, because they can only be removed by the President for cause. The general removal power of the President "is the rule, not the exception." *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2206 (2020). There are only narrow and limited exceptions to the President's general authority to remove executive officers: (1) inferior officers with "limited duties and no policymaking or administrative authority;" and (2) "members of multimember expert agencies that do not wield substantial executive power." *Consumers' Rsch. v. Consumer Protect Safety Comm'n*, 592 F. Supp. 3d 568, 581 (E.D. Tex. 2022) (internal citations and quotations omitted). Neither exception applies here. SEC Commissioners are principal officers and wield significant executive authority. Therefore, since SEC ALJs and Commissioners act outside their constitutional remit by being too insulated against the President's removal authority, preventing the President from fulfilling his obligations to "take care" that the laws are faithfully executed under Article II, the SEC does not have jurisdiction to initiate these proceedings.

Last, the SEC seeks to institute administrative proceedings pursuant to Section 15(b) of the Exchange Act, enjoining Mr. Keener from pursuing activities otherwise permitted by the injunction the District Court ordered. Specifically, Section 15(b)(6) applies to those who have been "enjoined… from acting as a[]… broker, dealer." The injunction ordered by the District Court says the opposite: Mr. Keener is enjoined from directly or indirectly buying or selling securities "while engaged in and pursuant to the regular business of buying and selling securities…for his own account… ***unless*** Keener is registered as a dealer with the Securities and Exchange Commission, or unless he is associated with a broker-dealer that is so registered." *SEC v. Keener*, 2022 WL 17484383, at *6 (S.D. Fla. Dec. 7, 2022) (emphasis added). Mr. Keener has not been enjoined from acting as a broker or dealer; rather, he has been ordered to register as a broker or dealer if he intends to buy or sell securities while engaged in the regular business of buying and selling securities for his own account. The administrative proceedings the SEC seeks to initiate therefore contravene the plain language of the Exchange Act.

C. Further sanctions are not in the public interest and would be arbitrary and capricious.

Additional sanctions resulting from any administrative action against Mr. Keener would not serve the public interest, as required by the SEC Rules of Practice, and would be arbitrary and capricious in violation of the Administrative Procedures Act. In the enforcement action in the District Court, the SEC argued for an injunction against Mr. Keener to "preclude him from violating Exchange Act Section 15(a)(1) again." Att. 1 (Pl.'s Mot. for Remedies at 5 n.7, SEC v. Keener, No. 20-cv-21254 (S.D. Fla. Mar. 18, 2022), ECF No. 122). In order for Mr. Keener to not violate Section 15(a)(1), he must register as a broker or dealer if he is engaged in the regular business of buying or selling securities for his own account in the future, but administrative proceedings initiated pursuant to Section 15(b)(6) would seek to entirely enjoin Mr. Keener from registering. The SEC cannot have it both ways by arguing before the District Court that it was in the public interest to force Mr. Keener to comply with Section 15(a)(1) by registering and now argue he should not be allowed to register at all.

Additionally, sanctions resulting from this follow-on action would violate due process. "A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). Here, there was no fair notice of the Commission's novel dealer theory. Mr. Keener has not engaged in any of the activities that the Commission has *ever* recognized as being indicative of "dealer" status. *Id.* (due process barred the FCC from deviating from factors identified in non-binding guidance). The lack of notice is further demonstrated by the fact that the "SEC actively reviewed issuer disclosures about Mr. Keener's investments and has been aware of those investments for years." Att. 2 (Def.'s Opp. to Pl.'s Mot. for Remedies at 7, SEC v. Keener, No. 20-cv-21254 (S.D. Fla. Mar. 18, 2022), ECF No. 124). The SEC cannot suddenly change its mind about the interpretation of Section 15(a)(1) via an enforcement action, without providing fair notice to now-regulated parties; "[t]his requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment." *Fox*, 567 U.S. at 253.

Further sanctions against Mr. Keener would also violate equal protection under the Fifth Amendment's Due Process Clause because "there is no rational basis for the difference in treatment" between Mr. Keener and others similarly situated. *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). Since the civil enforcement action was initiated against Mr. Keener, the

SEC published a proposed rule clarifying the interpretation of Section 15(a)(1) of the Exchange Act. *See Further Definition of "As Part of a Regulator Business,"* 87 Fed. Reg. 23,054 (Apr. 18, 2022). Unlike Mr. Keener, who faced severe penalties as a result of the SEC's enforcement action, the investors impacted by the proposed rule's new interpretation have a year to voluntarily comply with the regulation without facing such consequences. There is "no rational basis for the difference in treatment," so any further sanctions inflicted against Mr. Keener would violate his right to equal protection under the law. *See Vill. of Willowbrook*, 528 U.S. at 564.

D. The SEC has very limited options to sanction Mr. Keener, and none are available to them.

The sanctions available under Section 15(b) of the Exchange Act are limited, and none of the options clearly apply to Mr. Keener. For example, the Commission can "censure, place limitations on the activities, functions, or operations of, suspend for a period not exceeding twelve months, or revoke the registration of any broker or dealer." 15 U.S.C. § 78o(b)(4). But Mr. Keener is not registered as a broker or dealer—this was of course the crux of the underlying District Court action—so the SEC cannot "suspend" or "revoke" any registration. Moreover, it is not clear what "limitations" the Commission could impose. Under the District Court's order, Mr. Keener is enjoined from buying or selling securities while in the regular business of buying and selling securities for his own account, *unless* he registers as a dealer pursuant to the Exchange Act. It is therefore not clear what remaining "remedial action is appropriate in the public interest" against Mr. Keener. OIP at 2.

The Commission can also bar a person from associating with a broker or dealer, but that sanction only applies to someone "who was associated or was seeking to become associated with a broker or dealer," or was participating in the offering of a penny stock. 15 U.S.C. § 78o(b)(6)(A). Mr. Keener does not fit into either category. He has not been and has not sought to be associated with a broker or dealer, and Mr. Keener has not been involved in the offering of a penny stock. *See* 17 C.F.R. § 230.144.

III. RESERVATION

Mr. Keener reserves the right to amend this Answer pursuant to SEC Rule of Practice 220(e).

Dated: February 2, 2023

By: */s/Christopher F. Regan*

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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of February, 2023, pursuant to 17 C.F.R. § 201.150 and Section IV of the Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Notice of Hearing ("Order"), the foregoing Answer to the Order has been filed electronically via the SEC's eFAP system, and was served by email to the following:

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/s/ Christopher F. Regan

Christopher F. Regan

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
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RESPONDENT JUSTIN W. KEENER'S INDEX OF ATTACHMENTS TO ANSWER

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1	Pl.'s Mot. for Remedies, SEC v. Keener, No. 20-cv-21254 (S.D. Fla. Mar. 18, 2022)
2	Def.'s Opp. to Mot. for Remedies, SEC v. Keener, No. 20-cv-21254 (S.D. Fla. Apr. 15, 2022)

KEENER Attachment 1

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

SECURITIES AND EXCHANGE COMMISSION,	)	
Plaintiff,	)	
v.	)	
JUSTIN W. KEENER D/B/A JMJ FINANCIAL,	)	**No. 20-cv-21254**
Defendant.	)	**Hon. Beth Bloom**

PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S MOTION FOR REMEDIES AGAINST DEFENDANT JUSTIN W. KEENER D/B/A JMJ FINANCIAL AND SUPPORTING MEMORANDUM OF LAW

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On January 21, 2022, the Court granted the SEC's motion for summary judgment and held that Defendant Justin W. Keener d/b/a JMJ Financial violated the dealer registration requirements of Section 15(a)(1) of the Securities Exchange Act of 1934 ("Exchange Act"). The SEC now moves the Court to impose remedies for this violation, including an injunction, a penny stock bar, disgorgement of net profits of $17,557,840, prejudgment interest of $5,141,461, and a civil penalty of $1,750,000. The Court should also order Defendant to surrender for cancellation shares of stock from, and conversion rights under, convertible notes that issuers[1] sold to him.

BACKGROUND

As the Court held in its order granting the SEC's motion for summary judgment, Defendant operated as an unregistered dealer from at least January 2015 through January 2018. *SEC v. Keener*, No. 20-cv-21254-BLOOM, 2022 WL 196283, at *3-4 (S.D. Fla. Jan. 21, 2022). He did this primarily by buying convertible notes, converting them to stock of the issuers at a discount to the prevailing market price, and selling the stock into the public market. *Id.* The Court found that Defendant admitted that he converted more than 100 notes from more than 100 different microcap issuers and subsequently liquidated billions of shares of stock. *Id.* at *4.

Although the statute of limitations for civil penalties and disgorgement for non-scienter based charges is five years, 15 U.S.C. § 78u(d)(8)(A)(ii); 28 U.S.C. § 2462, the parties signed a one-year tolling agreement.[2] *See* DE 67 at ¶ 8 n.1 (tolling agreement). Thus, the relevant period for purposes of disgorgement and civil penalties began on March 24, 2014, six years before the

[1] The issuers are listed in Exhibit 1 (attached). *See* DE 122-1.

[2] Defendant challenged the tolling agreement in response to the SEC's motion for summary judgment on his statute of limitations affirmative defense. *Keener*, 2022 WL 196283, at *15 ("Defendant further argues that the parties' tolling agreement cannot suspend the statute of limitations because Section 2462 is jurisdictional."). Although it did not expressly address the validity of the tolling agreement, the Court rejected Defendant's statute of limitations defense in granting the SEC's motion. *See id.*

SEC filed its complaint. *See* DE 68 at 28 (SEC's explanation of the relevant period); DE 1 (complaint filed on March 24, 2020).

The SEC's motion for summary judgment explained that the stock Defendant received and sold resulted from his convertible notes business. Defendant received most of the stock he sold during the relevant period from converting notes he bought from penny stock companies. Defendant also received substantial proceeds when he sold: (1) $5.76 million in stock that he received from exercising his rights under warrant agreements he had bundled[3] with the convertible notes at issue in this case, DE 68 at 4, 8, and (2) $4.78 million in lump-sum blocks of stock he received from issuers to pay off convertible notes (so-called "settlements"), rather than converting the notes to shares of stock piecemeal. *Id.* at 8.

In a summary declaration (attached as Exhibit 3), Dr. Carmen Taveras summarized Defendant's relevant trading data. *See* DE 122-3 (hereinafter "Summary Remedies Declaration"). Using Defendant's own records, the declaration demonstrates that, for the period March 24, 2014 through January 31, 2018, Defendant had net income (as Defendant's accountants defined it) from his convertible notes business of $32,971,128. *Id.* at ¶ 13 & n. 1. The declaration then subtracts from this amount Defendant's business expenses. *Id.* at ¶ 19. The SEC accepted the business expenses for 2015, 2016, 2017 and January 2018 that Defendant claimed through his expert accounting witness, Jason Flemmons. *See id.* at ¶¶ 14-16; DE 73-21 at Ex. 5 (admitting that Defendant's business expenses for January 2015 through January 2018 were $12,377,974). For 2014, Dr. Taveras's declaration uses the business expenses that

[3] Defendant sold stock from 12 warrant agreements during the relevant period, and 11 of them "had a convertible note around the same time, or sometimes on the very same day that the warrant agreement was signed." *See* Exhibit 2 (attached), DE 122-2 at 32:24 – 33:2 (March 4, 2022 deposition of Dr. Taveras in her role as a summary witness). For eight of the 12 warrant agreements, "JMJ paid zero cost for those warrants, as they came with a convertible note," but they produced $4.6 million in proceeds. *Id.* at 33:7-10.

Defendant deducted on his 2014 federal tax return, prorated for the partial year (resulting in a figure of $3,053,314). Summary Remedies Declaration at ¶ 17 & n. 10. Accordingly, Defendant's total business expenses under *Liu v. SEC* are $15,413,288.[4] *Id.* at ¶ 18. Defendant therefore had net profits under *Liu* of $17,557,840 (net income from notes of $32,971,128 minus total business expenses of $15,413,288). *Id.* at ¶ 19.

LEGAL STANDARD

"Once [a] district court has found federal securities law violations, it has broad . . . power to fashion appropriate remedies." *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1474 (2d Cir. 1996); *SEC v. First Pacific Bancorp*, 142 F.3d 1186, 1193 (9th Cir. 1998) (noting a "district court has broad . . . powers to fashion appropriate relief for violations of the federal securities laws").

ARGUMENT

A. Injunction

The Court should enjoin Defendant from committing further violations of Exchange Act Section 15(a)(1). *See* 15 U.S.C. § 78(u)(1) (authority for a federal district court to enter an injunction in SEC enforcement proceedings under the Exchange Act). The SEC is entitled to injunctive relief when it establishes: (1) a prima facie case of previous violations of the federal securities laws, and (2) a reasonable likelihood that the wrong will be repeated. *SEC v. Calvo*, 378 F.3d 1211, 1216 (11th Cir. 2004). Indicia that a wrong will be repeated include: (1) the egregiousness of the defendant's violations, (2) the isolated or recurrent nature of the infraction, (3) the degree of scienter involved, (4) the sincerity of the defendant's assurances against future violations, (5) the defendant's recognition of the wrongful nature of his conduct, and (6) the

[4] Specifically, the Supreme Court held that this Court may order disgorgement that does not exceed Defendant's net profits after "deducting legitimate expenses." *See Liu v. SEC*, 140 S. Ct. 1936, 1946-1948 (2020).

likelihood that the defendant's occupation will present opportunities for future violations. *Id*. at 1216. The SEC need not prove every factor in order to obtain permanent injunctive relief. *Id.*

Here, the Court has already found that Defendant violated the dealer registration requirements under Section 15(a) of the Exchange Act for several years.[5] *Keener*, 2022 WL 196283, at *11-13. The dealer registration requirement is "of the utmost importance in effecting the purposes of the Act" because it enables the Commission "to exercise discipline over those who may engage in the securities business and it establishes necessary standards with respect to training, experience, and records." *SEC v. Benger*, 697 F. Supp. 2d 932, 944 (N.D. Ill. 2010) (quoting *Celsion Corp. v. Stearns Mgmt. Corp*., 157 F. Supp. 2d 942, 947 (N.D. Ill. 2001)); *Regional Props. v. Financial & Real Estate Consulting, Co.*, 678 F.2d 552, 562 (5th Cir. 1982). Defendant's conduct thus was sufficiently egregious to warrant an injunction.

The Court found that Defendant disregarded these requirements during a three year period, *Keener*, 2022 WL 196283, at *3, entering into *more than* 100 convertible notes with more than 100 different issuers. *Id*. at *4. The SEC also presented evidence that during the period July 2010 through April 2018, Defendant entered at least 272 convertible notes, made 692 payments totaling approximately $52 million to 201 issuers, and sold more than 38 billion shares of stock for gross proceeds exceeding $93 million.[6] DE 67-11 at ¶ 17-18 & Ex. 4 (Taveras Summary Declaration). Defendant's conduct was plainly recurrent.

[5] The SEC meets the *Calvo* requirement to show "a prima facie case of previous violations" because this Court has found that Defendant violated Exchange Act Section 15(a)(1). *See SEC v. Miller*, 744 F. Supp. 2d 1325, 1336 (N.D. Ga. 2010); *SEC v. Graham*, 823 F.3d 1357, 1363 (11th Cir. 2016) (quoting *Miller* for the proposition: "[N]umerous courts have found no requirement that a defendant must have committed violations before the ones at issue. Indeed, the 'previous' violations relied upon by federal courts as a basis for injunctive relief are frequently the same ones just proven in the liability portion of those cases.").

[6] For purposes of injunctive relief, the statute of limitations is 10 years, and Defendant also entered a one-year tolling agreement. 15 U.S.C. § 78u(d)(8)(B); DE 67 at ¶ 8 n. 1. The

Defendant has offered no assurances against future violations of Exchange Act Section 15(a)(1). Nor has he recognized the wrongful nature of his conduct. Indeed, while this Court was considering his motion to dismiss, he sold millions of dollars in stock that he obtained from convertible notes he had bought from Blink Charging Co. *See* DE 101 at ¶ 36 & Exs. 1, 2 (SEC's reply statement of facts providing account statements for sales of Blink Charging Co.).

There is also a strong likelihood that Defendant's occupation, as a self-employed participant in the financial markets, will present him with further opportunities to violate Exchange Act Section 15(a)(1). *See* DE 72 at ¶ 7 (Defendant admitted that he "invests his own money in many different instruments, including in 'stocks, bonds, mutual funds, CDs, T-Bills, private placements, public offerings, initial public offerings. Term loans, bridge loans, pretty much all of it through the years.'"). Unless enjoined, he will have the ability to resume his unregistered dealer business with minimal effort.[7] Given his background and ready access to capital, it would be easy for him to buy a new series of convertible notes. *See* DE 72-3 at 144:23 – 146:3 (Keener testified that his net worth in 2015 was "$50 to $100 million, I really don't know").

While scienter is an important factor in this analysis, "it is not a prerequisite to injunctive relief." *See Calvo*, 378 F.3d at 1216. Courts have frequently found injunctions to be appropriate for non-scienter based broker-dealer registration violations. *See, e.g., SEC v Almagarby,* No. 17-62255-CIV-COOKE/HUNT, 2021 WL 4459439, at *1 (permanently enjoining unregistered dealers); *SEC v. Sky Way Global*, No. 8:09-cv-455-T-23TBM, 2010 WL 3025033, at *2 (M.D.

Court may consider conduct dating back to March 24, 2009 in deciding whether to impose an injunction.

[7] Although FINRA barred Defendant from associating with any FINRA member, he would not need to do so to resume his unregistered dealer business. *See* DE 67 at ¶ 3. Only injunctive relief would preclude him from violating Exchange Act Section 15(a)(1) again.

Fla. July 29, 2010) (in default order, court found injunction against broker-dealer registration violations to be appropriate); *SEC v. Collyard*, 154 F. Supp. 3d 781, 793 (D. Minn. 2015), *aff'd in part and vac'd on other grounds*, 861 F.3d 760 (8th Cir. 2017); *SEC v. Offill*, No. 3:07-CV-1643-D, 2012 WL 1138622, at *4-5 (N.D. Tex. Apr. 5, 2012). This Court should reach the same conclusion.

B. Penny Stock Bar

Courts may enter a penny stock bar "against any person participating in, or, at the time of the alleged misconduct, who was participating in, an offering of penny stock[.]" *See* 15 U.S.C. § 78u(d)(6)(A). A "penny stock" includes an equity security bearing a price of less than five dollars, except as provided in 17 C.F.R. § 240.3a51-1. The Court may enter a penny stock bar "permanently or for such period of time as the court shall determine." *See* 15 U.S.C. § 78u(d)(6). In this case, "Defendant … admits that during the Relevant Period, he 'converted more than 100 [convertible] notes from more than 100 different microcap issuers' [*i.e.*, penny stock companies] and 'liquidated billions of shares of common stock[.]'" *Keener*, 2022 WL 196283, at *4. Thus, "at the time of the alleged misconduct," Defendant was "participating in . . . an offering of penny stock[.]" *See* 15 U.S.C. § 78u(d)(6)(B) (defining "person participating in an offering of penny stock" to include "any person engaging in activities with a[n] . . . issuer for purposes of issuing, . . . or inducing or attempting to induce the purchase or sale of, any penny stock").

In deciding whether to impose a penny stock bar, "the court examines the nature of the defendant's conduct and the likelihood that his occupation and experience will present further opportunities to violate the securities laws." *SEC v. BIH Corp.*, No. 2:10-cv-577-FtM-29DNF, 2014 WL 7499053, at * 6 (M.D. Fla. Dec. 12, 2014) (citation omitted). For the reasons that an injunction is appropriate, as discussed in Section A, *supra*, a penny stock bar is also appropriate.[8]

C. Disgorgement

The Court should order Defendant to disgorge the net profits from his unregistered dealer business, which Dr. Taveras's Summary Remedies Declaration shows were $17,557,840. *See id.* at ¶ 19 & Ex. A. "The SEC is entitled to disgorgement upon producing a reasonable approximation of a defendant's ill-gotten gains." *Calvo*, 378 F.3d at 1217. "Exactitude is not a requirement; so long as the measurement of disgorgement is reasonable, and risk of uncertainty should fall on the wrongdoer whose illegal conduct created that uncertainty." *Id.*; *see also SEC v. Hall*, 759 Fed. Appx. 877, 882 (11th Cir. 2019). Once the SEC provides a reasonable approximation of disgorgement, "the burden then shifts to the defendant to demonstrate that the SEC's estimate is not a reasonable approximation." *Calvo*, 378 F.3d at 1217; *Hall*, 759 Fed. Appx. at 883.

The fact that Defendant committed a non-scienter based violation of the securities laws does not diminish his obligation to pay disgorgement. "Disgorgement is not dependent on scienter, but is tied instead to the idea of unjust enrichment: the broad idea is that persons not profit from breaking the securities laws." *SEC v. Merchant Capital*, 397 Fed. Appx. 593, 595 (11th Cir. 2010). Thus, courts have not hesitated to order disgorgement where, as here, the violations do not require a finding of scienter. *See SEC v. Friendly Power*, 49 F. Supp. 2d 1363, 1372-73 (S.D. Fla. 1999) (ordering disgorgement for securities registration violations); *SEC v. Enviro Board Corp.*, No. CV 16-6427-R, 2017 WL 4586335, at *4 (C.D. Cal. May 9, 2017) (ordering disgorgement for securities and broker-dealer registration violations); *SEC v. Gibraltar*

[8] Defendant's FINRA bar (against associating with FINRA members) would not preclude him from participating in the offering of a penny stock. *See* DE 67 at ¶ 3.

Global Securities, Inc., No. 13 Civ. 2575 (GBD) (JCF), 2016 WL 153090, at *1 (S.D.N.Y. Jan. 12, 2016) (default judgment ordering disgorgement for broker-dealer registration violations).

In *Liu*, the Supreme Court upheld the authority of lower courts to order disgorgement pursuant to Section 21(d)(5) of the Exchange Act. 140 S.Ct. at 1940 (holding "disgorgement award that does not exceed a wrongdoer's net profits and is awarded for victims is equitable relief permissible under § 78u(d)(5) [Exchange Act Section 21(d)(5)]"). That statute provides that "the Commission may seek, and any Federal court may grant, any equitable relief that may be appropriate or necessary for the benefit of investors." 15 U.S.C. § 78u(d)(5). *Liu* identified two important features of equitable disgorgement. Courts "must deduct legitimate expenses before ordering disgorgement," which is defined as a defendant's "net profits from the wrongdoing." *Liu*, 140 S.Ct. at 1946. *Liu* also held that "[t]he equitable nature of the profits remedy generally requires the SEC to return a defendant's gains to wronged investors for their benefit," but did not rule out the possibility that an order directing disgorged funds to the Treasury could be "for the benefit of investors" and "consistent with equitable principles." *See id*. at 1948, 1949.

Consistent with these principles, the SEC determined that Defendant's net profits under *Liu* were $17,557,840, based on his sales of stock (which he received from convertible notes and warrants that were bundled with convertible notes) between March 24, 2014 and January 31, 2018. Exhibit A to Dr. Taveras's Summary Remedies Declaration shows the steps that lead to this figure. Defendant's net proceeds from selling all stock were $34,008,376. *Id*. at Ex. A. He gained an additional $6,322,524 from selling stock that issuers paid him to satisfy the Original Issue Discount, interest, and penalties owed under convertible notes, but he lost $7,177,463 from notes that had to be written off. *Id*. Netting these figures against each other produces net income from all stock of $33,153,437. *Id*. Dr. Tavaras then subtracted $182,309 in proceeds from sales of stock that Defendant acquired in the open market or through syndicated offerings (*i.e.*, not from convertible notes) to arrive at net income from notes of $32,971,128. *Id.*

Next, Dr. Taveras credits Defendant for his business expenses under *Liu*. The SEC has adopted the $12,377,974 in *Liu* expenses Defendant's expert accounting witness (Flemmons) proposed, *see* DE 73-21 at Ex. 5, and added another $3,035,314 to account for the period between March and December 2014. *See* Summary Remedies Declaration at ¶¶ 14-17, n. 10. Defendant originally deducted all of these expenses on his federal tax returns. *Id.* at ¶ 14. Defendant's total business expenses for the relevant period were $15,413, 288. *Id.* at ¶ 18 & Ex. A. Offsetting this amount against Defendant's net income from notes ($32,971,128) produces net profits under *Liu* of $17,557,840, which the Court should order Defendant to disgorge. *Id.* at ¶ 19 & Ex. A.

The Commission intends to distribute any disgorgement it collects from Defendant to harmed investors. Specifically, the most directly harmed investors are the counterparties who purchased the shares that Defendant sold in the market. The distribution plan would target investors who lost money holding stock that they purchased from Defendant. Given Dr. Taveras's conclusion that 93% of issuers experienced stock price declines between Defendant's first and last sales, there should be no shortage of eligible recipients for the distribution. *See* DE 66-2 at ¶ 29 (Taveras Expert Rebuttal Report).

D. Prejudgment Interest

The Court should order Defendant to pay prejudgment interest on the amount of disgorgement it orders. The purpose of prejudgment interest is "to divest those found liable under the securities laws of any benefit accrued from the use of the ill-gotten gain." *SEC v. Yun*, 148 F. Supp. 2d 1287, 1293 (M.D. Fla. 2001), *aff'd in part and vac'd on other grounds*, 327 F.3d 1263 (11th Cir. 2001). Courts routinely use the IRS underpayment rate when calculating prejudgment interest in SEC enforcement actions because "[t]hat rate reflects what it would have cost to borrow the money from the government and therefore reasonably approximates one of the benefits the defendant derived from its fraud." *SEC v. Radius Capital Corp.*, No. 2:11-cv-116-FtM-29DNF, 2015 WL 1781567, at *7 (M.D. Fla. Apr. 20, 2015) (citations and quotations omitted). Using the IRS underpayment rate, and calculating prejudgment interest on the proposed disgorgement figure of $17,557,840, results in prejudgment interest of $5,141,461. *See* Summary Remedies Declaration at ¶¶ 20-22 (explaining the prejudgment interest calculation). The Court should order Defendant to pay both amounts for a total of $22,699,301.

E. Civil Penalty

The Court should order Defendant to pay a civil penalty of $1,750,000, equivalent to approximately 10% of the SEC's proposed disgorgement figure.

Section 21(d)(3) of the Exchange Act authorizes the Court to order penalties for violations of the federal securities laws, providing three tiers of escalating penalty amounts. 15 U.S.C. § 78u(d)(3). Even under the lowest tier for non-scienter based violations, courts may impose a penalty up to the amount of a defendant's gross pecuniary gain, which here totaled nearly $33 million from the sale of stock related to notes. *See* 15 U.S.C. § 78u(d)(3)(B)(i).

The decision whether to impose a penalty and in what amount falls within the Court's discretion. *SEC v. Aura Financial Services, Inc.*, No. 09-21592-Civ., 2010 WL 3419200, at *3 (S.D. Fla. July 14, 2010). Courts look to a number of factors, including: (1) the egregiousness of the defendant's conduct; (2) the degree of the defendant's scienter; (3) whether the defendant's conduct created substantial losses or the risk of substantial losses to other persons; (4) whether the defendant's conduct was isolated or recurrent; and (5) whether the penalty should be reduced due to the defendant's demonstrated current and future financial condition. *SEC v. Big Apple Consulting USA, Inc.*, No. 6:09-cv-1963-Orl-28GJK, 2013 WL 1352166, at *3 (M.D. Fla. Mar.

29, 2013), *aff'd*, 783 F.2d 786 (11th Cir. 2015). However, these factors are not a rigid checklist that must be satisfied in every case. *Id*. (while "these factors are helpful in characterizing a particular defendant's actions, . . . each case 'has its own particular facts and circumstances which determine the appropriate penalty to be imposed'") (citation and quotation omitted).

These factors weigh in favor of ordering Defendant to pay a substantial penalty. The violations were recurrent rather than isolated, involving thousands of transactions between 2010 and 2018. *See* DE 67-11 at ¶ 17-18 & Ex. 4. Given the drop in share price that routinely accompanied Defendant's trading as he flooded the market with newly issued shares of stock, *see* DE 66-2 at ¶ 29 (93% of issuers experienced stock price declines between Defendant's first and last sales), the conduct created substantial losses or the risk of substantial losses to other investors while Defendant obtained outsized gains. The importance of the dealer registration requirements, as previously noted, means his conduct was sufficiently egregious to warrant a penalty. Finally, Defendant's demonstrated current and future financial condition is no impediment to a substantial penalty as he has a net worth in the millions of dollars. *See* DE 72-3 at 144:23 – 146:3 (in SEC investigative testimony, Defendant estimated his net worth in 2015 to be between $50 million and $100 million).

Another factor that this Court should consider in deciding whether a penalty is appropriate is "the need to deter repetitive conduct from the defendant and others." *See SEC v. Sky Way Global*, *LLC*, No. 8:09-cv-455-T-23TBM, 2013 WL 12156317, at *2 (M.D. Fla. Mar. 1, 2013). Indeed, in promulgating Section 21(d)(3) of the Exchange Act, Congress recognized the need to "provide a financial disincentive to violations that reflect an unwillingness to incur the cost of full compliance with the securities laws, as opposed to engaging in affirmative conduct to defraud investors." Securities Law Enforcement Remedies Act of 1990, H.R. Rep. 101-616, 1990 WL 25646, at *1384 (July 23, 1990) (hereinafter "Remedies Act"). The House Report further noted that "[a] broker-dealer . . . may fail to comply with regulatory requirements simply because it is unwilling to devote the resources necessary to comply with these statutory objectives.…To the extent that such violations are motivated by a desire to maximize profits by reducing costs, the prospect of civil money penalties will improve compliance with the law and have a significant remedial effect." *Id.*

For violations that do not involve scienter, courts have found penalties to be appropriate where, as here, the violations encompassed numerous transactions that inundated the market with large amounts of stock. *Friendly Power*, 49 F. Supp. 2d at 1373 (ordering $100,000 penalty for violation of securities registration requirements); *SEC v. Lefkowitz*, No. 8:12-cv-1210-T35-MAP, 2013 WL 12170296, at *6 (M.D. Fla. Sep. 6, 2013) (in default motion, court imposed civil penalty equaling defendant's gross pecuniary gain based on violations of securities registration requirements); *Offill*, 2012 WL 1138622, at *4 (imposing penalty for section 5 violations because "defendants' violations involved multiple transactions in which millions of unregistered shares were sold resulting in millions of dollars of profit to them. Additionally, defendants' violations were committed, if not intentionally, at least with reckless disregard for the legality of the transactions."); *SEC v. Kahlon*, No. 4:12-CV-517, 2016 WL 5661642, at *6 (E.D. Tex. Sep. 30, 2016).

Here, there is a substantial need to deter Defendant and others from this type of conduct. Over the last several years, the SEC has filed a number of cases involving the same or a substantially similar business model as that used by Defendant in this case. *See, e.g.*, *SEC v. Almagarby*, 479 F. Supp. 3d 1266 (S.D. Fla. 2020); *SEC v. Fife*, SEC Release No. 24886, 2020 WL 5291429, at *1 (Sept. 30, 2020) (SEC announcement of lawsuit filed); *SEC v. Fierro,* No. 20-2104 (MAS) (DEA), 2020 WL 7481773 (D.N.J. Dec. 18, 2020); *SEC v. River North Equity, LLC,* 415 F. Supp. 3d 853 (N.D. Ill. 2019); *Ironridge Global Partners, LLC,* Exch. Act Rel. No.

81443, 2017 WL 3588037 (Aug. 21, 2017) (settled order); *IBC Funds, LLC,* Exch. Act Rel. No. 77195, 2016 WL 683557 (Feb. 19, 2016) (settled order). These actions, all of which involved substantially similar conduct resulting in similarly outsized gains, demonstrate the pervasiveness of Defendant's business model. A meaningful penalty in this case would deter others from engaging in this type of misconduct. *See* Remedies Act, 1990 WL 256464, at *1384 (the "authority to seek or impose substantial money penalties, in addition to the disgorgement of profits, is necessary for the deterrence of securities law violations that otherwise may provide great financial returns to the violator."); *SEC v. Koenig*, 532 F. Supp. 2d 987, 995 (N.D. Ill. 2007) ("Disgorgement and injunctive relief are not sufficient to deter [defendant] and others from committing future securities violations….Without civil penalties, the only financial risk to violators is forfeiture of their ill-gotten gains.").

For all of these reasons, the Commission recommends that the Court order Defendant to pay a civil penalty of $1,750,000. This figure represents approximately 10% of the SEC's proposed disgorgement figure. The proposed penalty is proportionally comparable to the penalty in *Almagarby*, which was approximately 9% of the disgorgement figure there. *See Almagarby,* 2021 WL 4459439, at *1 ($80,000 civil penalty versus disgorgement of $885,000).

F. Fair Fund

Section 308(a) of the Sarbanes Oxley Act of 2002 [15 U.S.C. § 7246] provides that, if the SEC obtains a penalty in any litigation for violation of the federal securities laws, "the amount of such penalty shall, on the motion . . . of the Commission, be added to and become part of a disgorgement fund or other fund established for the benefit of the victims of such violation." As mentioned previously, the SEC intends to distribute any disgorgement and prejudgment interest collected to investors. This Court should include in any final judgment a provision allowing the SEC to establish a Fair Fund for whatever penalty amount the Court orders in this case.

G. Surrender and Cancellation of Remaining Shares and Conversion Rights

The SEC requests that the Court order Defendant to surrender for cancellation any remaining shares of stock of, and conversion rights under convertible notes issued by, the issuers identified in Exhibit 1 (attached).[9] *See* DE 122-1. In addition to preventing Defendant from profiting further from his violative conduct, these surrender actions will benefit shareholders by eliminating the prospect of further shareholder dilution caused by Defendant's sales of additional stock or his exercise of conversion rights.

Section 21(d)(5) of the Exchange Act permits a federal court to grant "any equitable relief that may be appropriate or necessary for the benefit of investors." 15 U.S.C. § 78u(d)(5). Orders for the cancellation or return of shares are within the Court's equitable powers. *See, e.g., Almagarby*, 2021 WL 4459439, at *2 (ordering unregistered dealer to surrender shares for cancellation); *SEC v. Save the World Air, Inc.*, No. 01 Civ. 11586 (GBD) FM, 2005 WL 3077514, at *20 (S.D.N.Y. Nov. 15, 2005) (on summary judgment, ordering CEO to disgorge stock in company for cancellation in addition to $7.5 million in disgorgement and officer and director bar); *see also SEC v. Tasty Fries, Inc.*, SEC Release No. 20194, 2007 WL 2011040, at *2 (July 12, 2007) (settled case in which principal of company ordered to return all stock to company for cancellation as equitable remedy, in addition to injunction, officer and director bar, and disgorgement); *SEC v. U.S. Wind Farming, Inc.*, SEC Release No. 19886, 2006 WL 3039783, at *1 (Oct. 25, 2006) (settled case that included order to return all stock to company for cancellation, in addition to injunction, disgorgement, and penny stock bar). Such an order is

[9] Under the terms the SEC is proposing, Defendant may continue to collect money he is owed under convertible notes, even if he surrenders his conversion rights, so long as repayment occurs in cash and not stock.

appropriate and necessary for the benefit of investors, as it will ensure that Defendant ceases his illegal conduct.

CONCLUSION

For the foregoing reasons, the Court should enter an order imposing the remedies the SEC has requested: an injunction, a penny stock bar, cancellation of shares and conversion rights, disgorgement of net profits of $17,557,840, prejudgment interest of $5,141,461, and a civil penalty of $1,750,000. A proposed Final Judgment incorporating the remedies and terms the SEC has requested in this Motion is attached as Exhibit 4. *See* DE 122-4.

DATE: March 18, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 18, 2022, I filed Plaintiff Securities and Exchange Commission's Motion For Remedies Against Defendant Justin W. Keener d/b/a JMJ Financial and Supporting Memorandum of Law through the Court's CM/ECF system, which automatically sends notices to counsel of record in this case.

/s/Joshua E. Braunstein
Joshua E. Braunstein

ATTORNEY FOR PLAINTIFF SECURITIES AND EXCHANGE COMMISSION

KEENER Attachment 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. JUSTIN W. KEENER D/B/A JMJ FINANCIAL, Defendant.	CASE NO. 1:20-CV-21254-BLOOM/LOUIS

DEFENDANT JUSTIN W. KEENER'S OPPOSITION TO PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S MOTION FOR REMEDIES

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I. INTRODUCTION

The remedies the SEC demands against Mr. Keener are neither consistent with the law nor proportional to the violation in this case. Mr. Keener invested in microcap issuers who needed financing. He invested through a variety of instruments, including convertible notes that he later converted to stock. The issuers publicly disclosed the terms of his investments in SEC filings. He sold all stock through his registered brokerage firms, after confirming with attorneys that the sales complied with applicable securities laws. The Court found that after considering the volume of sales of stock he obtained through note conversions, he became subject to dealer registration requirements. *See* Omnibus Order, ECF No. 118 at 21-22. But there is no evidence that his unlicensed status had anything to do with any proceeds he generated or that his counterparties—likely market makers and other sophisticated actors—suffered any losses. The SEC's demand to disgorge $22.7 million with prejudgment interest thus fails as a matter of law. Nor do the SEC's numbers bear any relation to Mr. Keener's actual net profits, when he lost millions of dollars on his investments.

The SEC's disgorgement demand fails first because the SEC does not attempt to and cannot show that any of Mr. Keener's proceeds were generated *because of* the registration violation. The Court lacks jurisdiction to disgorge profits not causally connected to the violation. *CFTC v. Sidoti*, 178 F.3d 1132, 1138 (11th Cir. 1999). Yet the SEC does not even mention this requirement let alone try to meet it, because it cannot. The SEC has offered no evidence that a single fact about Mr. Keener's transactions or proceeds—from the terms of his investments to the price at which he sold—would have been different had he registered.

Second, the SEC's disgorgement demand contravenes the plain language of the authorizing statute and Supreme Court precedent. The SEC must demonstrate that the disgorgement is "appropriate or necessary for the benefit of investors," *see* 15 U.S.C. § 78u(d)(5), and specifically that the disgorgement amounts would be "awarded for victims," *Liu v. SEC*, 140 S. Ct. 1936, 1940 (2020). The SEC does not and cannot make such a showing. There are no "victims." There is no evidence that any counterparty who acquired stock from Mr. Keener was a retail investor who lost money, and in fact, his counterparties had many opportunities to make a profit. Nor is there any evidence that Mr. Keener's unlicensed status impacted his counterparties in any way.

Third, the SEC's demand is also not a reasonable approximation of net profits. The transactions at issue are Mr. Keener's "Quick Loan" convertible note investments, which Mr. Keener stopped making in 2017 because they were no longer profitable. His other investments—*e.g.*, bridge loans and stock and warrants obtained through syndicates and public offerings—bore no resemblance to the Quick Loan investments and did not involve note conversions at all. The SEC arrives at its $22.7 million demand by improperly including proceeds from all of these other investments. Nonetheless, even considering all of his investments together since 2014, Mr. Keener has ***lost*** more than $5 million. He took substantial risk and incurred major expenses. The SEC cannot be allowed to cherry-pick wins and ignore losses. Its disgorgement demand cannot stand.

At bottom, remedies are about fairness. Mr. Keener always acted in good faith, and through multiple gatekeepers (*i.e.*, registered broker-dealers, clearing firms, securities attorneys, and stock transfer agents). Attorneys specifically advised him that he was not a securities dealer. Many persons who engaged in the exact same activity as Mr. Keener (*i.e.*, trading a large volume of securities for their own account) are not registered. The Court found a single Section 15(a) registration violation. But when considering culpability and fairness—which are highly relevant to the remedies analysis—the SEC's demands are unjustified.

A brand-new rule proposal issued by the Commission on March 28, 2022 highlights the injustice of the SEC's position in this case. In the rule proposal, the Commission purports to "further define" the statutory phrase "as part of a regular business" to clarify that some of the largest, most sophisticated investment funds have always had to register as dealers. *See* SEC Release No. 34-94524 (Mar. 28, 2022), https://tinyurl.com/2ekh8s7j, at 4. Instead of seeking to bankrupt these firms in a retroactive enforcement action—as the SEC tries to do to Mr. Keener here—the Commission is giving *these* firms (politically connected hedge funds) notice and a full year to register. *Id.* at 34.

Mr. Keener was never given that notice. Instead, he was hit with a lawsuit in which the SEC demands $24.5 million in disgorgement, prejudgment interest, and penalties. In a statement issued in connection with the rule proposal, SEC Commissioner Hester Peirce commented on this exact disparity:

> I particularly appreciate the use of the rulemaking process to clarify the scope of the term "dealer." Using the notice-and-comment rulemaking process to solicit public input to inform the Commission's response to market and technological evolution, ***in lieu of extending ambiguous provisions of the law through enforcement actions against unsuspecting market participants***, demonstrates a commitment to transparency and good government that should be the hallmark of all our work at the Commission.

Peirce, Statement on Proposal (Mar. 28, 2022), https://tinyurl.com/2p8msfv2, at 1 (emphasis added). The Commission's singling out of Mr. Keener runs headlong into the equal protection component of the Fifth Amendment. *See Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). There is no basis to punish Mr. Keener to the extent the SEC seeks. Mr. Keener respectfully requests that the SEC's Motion be denied.

II. ARGUMENT

A. Disgorgement Is Not Warranted

There are two separate reasons why the SEC's disgorgement demand fails as a matter of law: (1) it is not limited to profits obtained as a result of the violation; and (2) it will not be "awarded for victims" as required by *Liu*. These points are addressed in Sections II.A.1 and II.A.2 below.

1. Disgorgement Is Barred Because There Is No Causal Connection Between the Alleged Violation and Any Profits

The Court should not award disgorgement because Mr. Keener did not generate any proceeds *as a result of* the registration violation. Disgorgement must be limited to "property causally related to the wrongdoing"; it cannot extend to profits "obtained without the aid of any wrongdoing." *Sidoti*, 178 F.3d at 1138; *see also SEC v. ETS Payphones, Inc.*, 408 F.3d 727, 735 (11th Cir. 2005) ("[T]he power to order disgorgement extends only to the amount with interest by which the defendant profited from his wrongdoing. Any further sum would constitute a penalty assessment."); *SEC v. Razmilovic*, 738 F.3d 14, 31 (2d Cir. 2013) (SEC "must distinguish between the legally and illegally derived profits" and identify those profits "causally connected to the violation").

Sidoti is directly on point. That case concerned an individual, Sidoti, who provided capital for a brokerage house in exchange for 90% of the profits. *Sidoti*, 178 F.3d at 1134. The Commodity Futures Trading Commission charged Sidoti with failing to register as a principal of that brokerage house and sought to disgorge all profits he obtained from the brokerage house. *Id.* at 1135. The district court granted the CFTC's disgorgement request, but the Eleventh Circuit reversed. The CFTC argued that Sidoti's failure to register "provides the nexus for deeming illegal all profits received by him," but the Eleventh Circuit rejected that argument, and instead held as follows:

> Sidoti's ***failure to register, by itself, is not causally related to [any] ill-gotten profits***. Indeed, the CFTC has not cited and we are not aware of any case in which a court has disgorged profits from a defendant whom it finds liable solely for failure to register as a principal. A district court may not disgorge profits, unless there is record evidence the defendant is liable (either directly or indirectly) for fraud.

Id. at 1138 (emphasis added).[1]

[1] The Eleventh Circuit's ruling that disgorgement is improper when "there [is] no record evidence of fraud" is yet another reason why the SEC's disgorgement demand is unwarranted. *Sidoti*, 178 F.3d at

It is the SEC's burden to demonstrate a causal connection. *SEC v. Gane*, 2005 WL 90154, at *19 (S.D. Fla. Jan. 4, 2005). In other words, the SEC must show that, "but for" the registration violation, Mr. Keener would not have generated the profits. *SEC. v. Wyly*, 56 F. Supp. 3d 394, 405 (S.D.N.Y. 2014). Yet ***the SEC skips this step entirely*** and does not attempt to show Mr. Keener's unregistered status caused any profits. In fact, there is no relationship between the two. There is no evidence that any specific transactions would have been different had Mr. Keener registered. Nor is there any evidence that he was able to obtain better terms on his convertible note investments or sell converted stock at a higher price *because of* his unregistered status. There is no evidence that the public or FINRA would have reacted differently to Mr. Keener's convertible note investments had he registered. The details about Mr. Keener's investments were already disclosed to the public in issuer filings. *See* Def.'s Statement of Facts in Supp. of Mot. for Summ. J. ("DSOF"), ECF No. 72, ¶ 26. The brokerage firms that executed his transactions were registered, and they disclosed his transaction details to FINRA in real time, and FINRA never objected to those transactions. *Id.* at ¶ 53. In short, there is no evidence that Mr. Keener's lack of registration had anything to do with any of the profits he generated, let alone caused them. In fact, as discussed below, there were no net profits at all. *See* Sec. II.B, *infra*. In such circumstances, disgorgement is not warranted. *See, e.g.*, *Gane*, 2005 WL 90154, at *19 (denying disgorgement when "there is no record evidence of any causal connection at all").[2]

Compare this scenario to the scenario of the unlicensed lawyer considered in *CFTC v. Southern Trust Metals, Inc.*, 894 F.3d 1313, 1330-31 (11th Cir. 2018). As the Court concluded, whether or not the lawyer was licensed would have no causal relationship to the fees he generated or the outcome in his client's cases, which could depend on a variety of factors. *Id.* ("[A] client might well prevail in court despite the lawyer's unlicensed status. Or, if there is a loss, the loss might flow from . . . unfavorable precedent, judicial error, or a jury's caprice."). Also consider the scenario of a ride-share driver who failed to or could not obtain a driver's license. All the profits this driver generated from chauffeuring passengers around town would not be "ill-gotten" gains subject to disgorgement by the state just because the driver was not licensed. In both scenarios, the unlicensed status did not *cause* any profits generated. The same is true for Mr. Keener—the fact that he was not registered as a

1138. It is undisputed that Mr. Keener's registration violation was a non-scienter Section 15(a) registration violation, and there was no fraud.

[2] The court in *Almagarby* stated that the profits the defendant generated "are connected to" the registration violation. *SEC v. Almagarby*, 2021 WL 4461831, at *3 (S.D. Fla. Aug. 16, 2021). But the court did not explain how the profits were *causally* connected to the violation or address *Sidoti*.

securities dealer had nothing to do with the profits he generated (to the extent such profits even exist). There is no evidence that his unlicensed status resulted in "any market distortion, price impact, or profit," and thus disgorgement is unwarranted. *Wyly*, 56 F. Supp. 3d at 269.

At most, the SEC conflates correlation with causation—claiming that because Mr. Keener generated proceeds and because he was unregistered, the latter must have caused the former. But the Eleventh Circuit has already rejected that argument. *Southern Trust Metals.*, 894 F.3d at 1330 (vacating restitution award that "conflate[d] correlation with causation"). And although he was barred from becoming a principal of a FINRA member firm (*see* DSOF Ex. 51, ECF No. 73-2), there is still no evidence that the transactions would have been different if carried out by a registered person. Indeed, the only fact that would have been different had Mr. Keener registered is he would have incurred the specific expenses associated with registration. According to SEC, the cost would have been approximately $520,000 for the initial registration plus annual fees. *See* SEC Release No. 34-94524 at 135 n.268. As the SEC itself highlighted, the purpose behind disgorgement is to ensure individuals "incur the cost of full compliance with the securities laws." Pl.'s Mot. for Remedies ("Mot."), ECF No. 122, at 11 (quoting Congressional history). Here, the cost of full compliance is orders of magnitude less than the disgorgement the SEC seeks.

2. Disgorgement Is Barred Under *Liu* Because the SEC Cannot Identify Any Victims

Moreover, the Court should not award disgorgement because the SEC's demand does not comply with the Supreme Court's holding in *Liu*. Under *Liu*, a disgorgement award must be "awarded for victims" to be proper equitable relief rather than an unlawful penalty. *Liu*, 140 S.Ct. at 1940. The Court specifically rejected the SEC's argument that the purpose of disgorgement was to take away "ill-gotten gains," and held that a disgorgement award must do "more than depriv[e] a [defendant] of his net profits alone," and instead must be "'appropriate or necessary for the benefit of investors.'" *Id.* at 1948 (quoting 15 U.S.C. § 78u(d)(5)). Otherwise, the direction in 15 U.S.C. § 78u(d)(5) that equitable relief must be "appropriate or necessary for the benefit of investors" would be meaningless. *Id.* The Court further held that in order to satisfy this direction, the disgorgement award "must do more than simply benefit the public at large" and instead must be "for the benefit" of specific "investors." *Id.* at 1948.

Accordingly, after *Liu*, courts only authorize disgorgement awards after the SEC has identified a discrete set of specific victims. *See, e.g.*, *SEC v. Blackburn*, 15 F.4th 676, 682 (5th Cir. 2021) (affirming disgorgement award "[b]ecause the SEC has already identified the defrauded [] investors"); *SEC v.*

Dang, 2021 WL 1550593, at *7 (D. Conn. Apr. 19, 2021) (SEC identified two investor victims). Indeed, in those cases where the SEC failed to demonstrate that the disgorgement award would benefit a specific set of victims, the court refused to award disgorgement. *SEC v. Bevil*, 2020 WL 7048263, at *2 (D. Nev. Nov. 30, 2020) (denying disgorgement because of the SEC's "failure to identify whether the disgorgement award is for the benefit of investors"); *SEC v. Janus Spectrum LLC*, 811 Fed. App'x 432, 434 (9th Cir. 2020) (remanding disgorgement award for the same reason).[3]

The SEC's disgorgement demand should be rejected because the SEC has not identified, and cannot identify, specific victims as required by *Liu*. There are no victims here. Mr. Keener made convertible note and other investments in companies that were struggling to find financing. *See, e.g.*, Rule 144 Holding Period, 86 Fed. Reg. 5063, 5074 (proposed Jan. 19, 2021) (these issuers "have limited options to raise capital" and rely on convertible notes). His investments benefited the companies' employees and existing shareholders. For instance, Mr. Keener invested several million dollars in Advanced Cell Technology ("ACTC"), which develops treatments for eye diseases; ACTC was thereafter able to uplist from the Over-the-Counter ("OTC") market to NASDAQ, and was subsequently acquired by a global pharmaceutical company for nearly $400 million. DSOF Ex. 29, ECF No. 72-31, at -468; *see also* Pl.'s Statement of Material Facts ("PSOF") Ex. 9, ECF No. 67-9, at 18 (CEO describing how company "was able to expand its operations and subsequently launch a wider range of product offerings" because of Mr. Keener's investment). Without his investments, some of these companies may have gone out of business, wiping out shareholders. Indeed, as the SEC itself recently recognized, without these kinds of investments, issuers would face "***an increase in the cost of financing and a decrease in total access to financing***." 86 Fed. Reg. at 5074 (emphasis added). The SEC ignores the benefits that Mr. Keener's investments provided to shareholders.

Nor is there evidence that any of Mr. Keener's counterparties, *i.e.*, the persons who purchased the stock that he sold, experienced losses. His counterparties were likely the registered brokerage firms where he held accounts or other sophisticated market participants. *See, e.g.*, OTC Markets,

[3] *Almagarby* is the exception. That court held that disgorgement can be awarded under *Liu* even if the SEC does not "identify specific victims," or "return [disgorged funds] to investors," and that no analysis of how the award would benefit victims is necessary. *Almagarby*, 2021 WL 4461831, at *3. Respectfully, that contradicts the central holding of *Liu*: a disgorgement award must be "for victims" and "must do more than simply benefit the public at large." *Liu*, 140 S.Ct. at 1940, 1948. As described above, it also contradicts all the other cases following *Liu*, where the SEC was required to demonstrate how disgorgement would benefit victims.

Trading, otcmarkets.com/learn/market-101/trading (describing typical broker-dealer practice after receiving investor sale order as "execut[ing] the trade internally" or "attempt[ing] to execute the trade with another broker-dealer").[4] And Mr. Keener's brokerage firms were fully aware of the details of his convertible note investments because they conducted extensive due diligence before accepting a sale order from Mr. Keener. DSOF ¶¶ 39-47. Moreover, the market generally was aware of the terms of his convertible note investments before he sold any stock, including the amount invested and the conversion price, because issuers were obligated to disclose this information in their public filings. *See, e.g.*, DSOF Ex. 25, ECF No. 72-27, (excerpted public filings disclosing notes); Ex. E (excerpt from ACTC Form S-1 filing disclosing number of Mr. Keener's shares) at 3-4; Ex. K (list of hundreds of SEC filings describing Mr. Keener's investments) at App'x C. Indeed, the SEC actively reviewed issuer disclosures about Mr. Keener's investments and has been aware of those investments for years. *See, e.g.*, Ex. J (sample SEC letter reviewing disclosure about Mr. Keener's investment) at 1.

Mr. Keener's counterparties would also have made money when the stock price of the companies he invested in went up after his sales. For instance, the trading price of biotechnology company Advaxis, Inc. ("ADXS") more than doubled during the time of Mr. Keener's sales within the relevant period, and then almost doubled again two weeks after his last sale. Ex. C at 3. ***Ninety-nine percent*** of his counterparties in ADXS sales had an opportunity to make a profit. Ex. A (Mayhew Decl.) at Ex. 1. The SEC nevertheless seeks to disgorge nearly $4.8 million in ADXS sale proceeds. The same is true for Northwest Biotherapeutics, Inc. ("NWBO")—the SEC seeks to disgorge $4 million in NWBO sales, but ***ninety-nine percent*** of his counterparties here too had a profit opportunity. *Id.*; DSOF Ex. 2, ECF No. 72-4, at 120 (showing net proceeds for ADXS and NWBO). In fact, the NWBO trading price increased during Mr. Keener's sales and a few months after his last sale, the price was up 50%. Ex. C at 1.

The SEC claims it has complied with *Liu* through the conclusory assertion that "there should be no shortage" of victims because "93% of issuers experienced stock price declines between Defendant's first and last sales." Mot. at 9. Not so. The length of time between Mr. Keener's first and last sales was hundreds of days and in many cases more than a thousand days. Ex. A at Ex. 1. But the average microcap investor holds for less than a month—not for the hundreds or even

[4] The SEC assumes Mr. Keener's counterparties were retail "investors" rather than broker-dealers and market makers. Mot. at 9. But the SEC provides no basis for this assumption and has refused to identify any specific counterparties in this case.

thousands of days between Mr. Keener's first and last sales—thus, the SEC's statistic is meaningless. Ex. A ¶ 5. The date of the counterparty's actual purchase and sale (which the SEC has refused to determine) matters. In fact, the SEC's own analysis demonstrates that if that counterparty purchased on the day of Mr. Keener's last sale, and sold a week later, then it is more likely that the counterparty did not lose money and may even have *made money*. Ex. A at Ex. 4 (chart summarizing SEC's "Week After Last Sale" analysis). Indeed, a comprehensive analysis of the trading price of these issuers demonstrates how important it is to identify the counterparty's actual purchase and sale date: in the vast majority of cases, the issuer's stock price increased on certain dates following Mr. Keener's sales; and if his counterparty sold on those dates, *that counterparty would have made money*. Ex. A at Ex. 1. Specifically, on average, ***ninety percent*** of his counterparties had an opportunity to avoid a loss and make a profit. *Id.*

Moreover, even assuming that some counterparties lost money—and it is only an assumption because the SEC has not identified any counterparty that actually lost money—there are no "victims" of Mr. Keener's unregistered status because that status did not cause any losses. *See, e.g.*, *Southern Trust Metals,* 894 F.3d at 1331 (11th Cir. 2018) (vacating restitution award when the defendant did not cause investor losses). The SEC already conceded that there was no causal relationship between Mr. Keener's conduct and any particular losses. *See* Taveras Dep. (July 27, 2021), ECF No. 66-13, at 161:5-7 ("I don't show causation. . . . As I sit here today, I think it would be hard, or impossible, perhaps.").[5] There are dozens of factors that would have impacted the stock price of any particular company, from the company's business performance to industry trends to world events. Nor would the dollar amount of any investor loss have any relationship, causal or otherwise, to the dollar amount of Mr. Keener's proceeds. Simply put, there is no basis to find that if any particular counterparty lost money, that loss had anything to do with Mr. Keener or the fact that he was not registered.

Because it cannot identify any victims, the SEC seeks to postpone its obligation to identify victims until some indeterminate point in the future when Mr. Keener no longer has the opportunity to challenge its analysis. Mot. at 9 (planning to later identify "investors who lost money holding stock that they purchased" from Mr. Keener). The SEC's approach not only contravenes *Liu* and subsequent caselaw; it also violates the Federal Rules of Civil Procedure and the Due Process Clause.

[5] Indeed, in some cases, the company's stock price ***did not*** fluctuate during Mr. Keener sales, and only fluctuated during long periods in which Mr. Keener held the stock, which shows there was no causal connection. *See* Ex. C.

Litigants are required to timely disclose the evidence they intend to rely on and allow the adversary a chance to challenge that evidence. *Guevara v. NCL (Bahamas) Ltd.*, 920 F.3d 710, 719 (11th Cir. 2019) (compliance with disclosure rules is required and "is not merely aspirational"). If a party fails to timely disclose evidence, fundamental fairness and the Federal Rules bar it from later using that evidence. *See* Fed. R. Civ. P. 37(c)(1).

The SEC has not complied with its disclosure obligations—it has not identified any alleged victims, any specific losses allegedly suffered by those victims, or any causal connection between those losses and Mr. Keener's unregistered status. The one witness the SEC listed regarding counterparties (Robert Nesbitt) has not identified a single counterparty and indeed cannot determine whether they suffered any losses. *See* SEC's Rule 26(a) 2d Supp. Discl., ECF No. 69-13, at 4 (Nesbitt's role is "to identify counterparties"); DSOF Ex. 65, ECF No. 73-16, (Nesbitt Tr.) at 103:23-104:22 ("I typically do not get involved in [] issues [relating to harm]"). Nor did the SEC produce any of the data that would be required to do this analysis. *Id.* at 107:19-108:5.

The SEC's conduct is neither substantially justified nor harmless; instead, it is highly prejudicial because it deprives Mr. Keener of the ability to challenge the SEC's analysis that any particular counterparties were victims and show the counterparties did not suffer losses or that losses were caused by other market forces. *See, e.g.*, *Beaubrun v. Geico Gen. Ins. Co.*, 2017 WL 3025852, at *3 (S.D. Fla. July 17, 2017) (finding late disclosure of evidence harmful and prejudicial to defendants). The appropriate sanction is that the SEC be barred from later identifying alleged victims. *See, e.g.*, *Hinds v. Am. Sec. Ins. Co.*, 2016 WL 8677901, at *3 (S.D. Fla. Dec. 7, 2016) (excluding evidence when defendant was "deprived of the opportunity to investigate" and challenge it); *Glob. Digit. Sols., Inc. v. Grupo Rontan Electro Metalurgica*, 2020 WL 8816214, at *3-4 (S.D. Fla. Dec. 1, 2020) (same when late disclosure "deprived [party] of a meaningful opportunity to conduct discovery" regarding the evidence).

Finally, it is clear that the SEC will ultimately ask for "an order directing disgorged funds to the Treasury" rather than to any individual investors, because it will never be able to identify any specific wronged investors. Mot. at 8. The SEC claims that *Liu* "did not rule out [this] possibility," and by implication the Court can order the same here. *Id.* The SEC is wrong. The Supreme Court specifically held that prior disgorgement orders that "deposit[ed disgorgement proceeds] in Treasury funds instead of disbursing them to victims" were problematic and "test[ed] the bounds of equity." *Liu*, 140 S.Ct. at 1946. The only question the Court left open was whether in those instances where "it is infeasible to distribute the collected funds to investors" as a practical matter, for instance if the investors are deceased or cannot be located, the disgorgement award could be deposited with the

Treasury. *Id.* at 1948. The SEC offers no reason why distribution to individual victims—if any exist—would be "infeasible." It cites no logistical impediment to such distribution. Instead, the SEC seeks an escape hatch because it knows finding any victims is impossible—Mr. Keener's activity did not cause any losses suffered by any individual investor. *Liu* does not allow this. "[L]ower courts should view requests for disgorgement skeptically where the SEC intends to deposit disgorgement funds with the United States Treasury." *SEC v. Cope*, 2021 WL 653088, at *2 (S.D.N.Y. Feb. 19, 2021).

B. **The SEC's Disgorgement Calculation Is Not a Reasonable Approximation of Net Profits**

If the Court finds that disgorgement is warranted, the Court should nevertheless reject the SEC's amount because the $17.6 million in disgorgement the SEC demands grossly exceeds any net profits Mr. Keener made from his convertible note investments. In order to obtain disgorgement, the SEC must "produc[e] a reasonable approximation of a defendant's ill-gotten gains." *SEC v. Calvo*, 378 F.3d 1211, 1217 (11th Cir. 2004). Under *Liu*, that amount must be limited to "net profits" and must deduct "legitimate expenses." *Liu*, 140 S. Ct. at 1940, 1950.

The SEC's numbers are not a reasonable approximation. Instead, the SEC draws every factor in its own favor to artificially exceed by leaps and bounds any reasonable approximation of Mr. Keener's actual net profits. First, the SEC's calculation includes transactions beyond those that allegedly turned him into a securities dealer. The SEC previously cited only those convertible note investments where he was able to convert at a "deep discount[] . . . from the prevailing market price" and quickly resell to "lock in his profits." Compl. ¶¶ 2, 8, 13. That is why this Court also focused on his convertible notes and the conversion discount in finding he was a dealer. ECF No. 118 at 21-25 (dealer activity was "convert[ing] more than 100 convertible notes" into stock at a "discount to the trading price" and selling that stock). Yet, the SEC now seeks to disgorge the proceeds of the sale of every single share of microcap stock regardless of the terms of his investments and whether they bore any resemblance to the convertible notes. This is improper because the other investments were different. For instance, the two largest investments (ADXS and NWBO) were bridge loans where Mr. Keener was to be repaid in cash out of the proceeds of a larger stock offering; although he later obtained stock, it was at the companies' request (as opposed to a conversion at his election) and he held that stock for years. *See* Exs. C and D (NWBO and ADXS agreements and stock sale dates); *see also* Def's Opp. to PSOF, ECF No. 91, ¶ 12. The SEC has never attempted to justify disgorging these bridge loan proceeds, which account for $8.8 million of the net proceeds. *See* ECF No. 72-4 at 120.

The SEC also has errors in its numbers. For instance, the SEC agreed that proceeds obtained through open market purchases or syndicated offerings should be excluded. *See* Mot. Ex. 3 ¶ 3.d. Yet the SEC improperly included more than $600,000 in proceeds from warrants that were obtained through syndicated offerings or open market purchases. Ex. B (Flemmons Decl.) ¶ 10. Moreover, the SEC also improperly included $3 million in cash repayments in its entry for "OID, Interest and Penalties," which were not proceeds from stock sales at all. *Id* ¶ 9. Thus, by the SEC's own terms, its disgorgement calculation must be reduced by millions of dollars.

Furthermore, the SEC manipulates the date range in its favor. The SEC previously identified the relevant period as January 2015 through January 2018. *See* Ex. F (Pl.'s 1st Reqs. for Admis.) at 4 (defining "Relevant Period" as "from January 2015 through January 2018") and (Pl.'s 1st Interrogs.) at 6 ("The term 'Relevant Period' means January 2015 through January 2018."). But now the SEC seeks to extend the time period back to March 24, 2014, which by its own calculation more than doubles its disgorgement demand from $8.7 million to $17.6 million. The SEC's tactics are particularly unfair when most of Mr. Keener's proceeds from 2014 were from sales of ADXS and NWBO, which were bridge loan investments and his counterparties likely made substantial profits because the stock price increased after his sales. *See* Sec. II.A.2, *supra.*

Mr. Keener's accounting expert (Jason Flemmons, the former Deputy Chief Accountant at the SEC's Division of Enforcement) properly calculated Mr. Keener's net profits based on the SEC's allegations in the Complaint—that is, based on proceeds from sales of converted stock obtained at a discount during the 2015 to 2018 time period. He concluded that Mr. Keener generated approximately $10 million in gross proceeds, and at the same time incurred approximately $12.4 million in expenses. DSOF Ex. 70, ECF No. 73-21, (Flemmons Report) ¶¶ 35-36, 46. Accordingly, Mr. Keener suffered a net loss of almost $2.5 million based on the activity singled out in the Complaint. Virtually all of Mr. Keener's expenses were tied to the labor-intensive convertible note investments. *See* DSOF ¶¶ 55, 59, 65. Yet even with the expenses prorated to the percentage of overall revenue related to converted stock, Mr. Keener's net profits from this time period were only $3 million. *See* Ex. B (Flemmons Decl.) at Ex. 2.

Nor is there any basis for the SEC's end date of January 31, 2018, which also results in an inflated disgorgement figure. Mr. Keener suffered substantial losses in 2018 and 2019 from earlier investments—notably, he lost more than $17 million dollars from a failed bridge loan in a company called Connekt Media Inc. ("Connekt"). *See* DSOF Ex. 1, ECF 72-2, at 183:14-186:4; Ex. G (showing $17.2 million investment) at 3; Ex. H (2019 tax return) at 3, 9-10 (showing losses). Thus, even assuming the relevant period began on March 24, 2014, and disgorgement is expanded beyond convertible notes, Mr. Keener lost money and there are no profits to disgorge.[6] If the Court believes it is appropriate to award disgorgement, the amount should take into account Mr. Keener's substantial losses after January 2018, which includes losses for investments in earlier years in both bridge loans and convertible notes. Ex. B at Ex. 1. Mr. Flemmons' summary of Mr. Keener's investment activity from 2014 to 2019 demonstrates clearly that his securities investments were not profitable and his net losses since 2014 were more than $5 million. *Id.*

C. **Prejudgment Interest Is Not Warranted**

Nor is the additional $5.1 million in prejudgment interest demanded by the SEC equitable in this case. First, prejudgment interest is calculated based on disgorgement, and disgorgement is unwarranted here. *See* Sec. II.A, *supra.* Yet even if the Court awards disgorgement, it should still decline to impose prejudgment interest. The Court has wide discretion to determine whether to impose prejudgment interest. *See, e.g.*, *Indus. Risk Insurers v. M.A.N. Gutehoffnungshütte GmbH*, 141 F.3d 1434, 1446-47 (11th Cir. 1998). The purpose of awarding prejudgment interest is *not* to penalize the defendant or to disgorge ill-gotten gains; instead, the purpose is to "compensate[] the plaintiff for the use of funds that were rightfully his." *Id.*; *see also Hanna Yachts, LLC v. Caribbean Breeze Marine A.C., X, LLC*, 2013 WL 12141336, at *4 (S.D. Fla. Mar. 19, 2013) (the "purpose of awarding prejudgment interest is compensatory").

Courts consider several factors in determining whether to impose prejudgment interest: "(1) the need to fully compensate the wronged party for actual damages suffered, (2) considerations of fairness and the relative equities of the award, (3) the remedial purpose of the statute involved and/or (4) such other general principles as are deemed relevant by the court." *SEC v. Monterosso*, 2012 WL 12950028, at *7 (S.D. Fla. Feb 16, 2012).

The SEC neither identifies nor applies these factors, which weigh in Mr. Keener's favor. First, as described above, there is no "wronged party" or "actual damages suffered." The SEC has not identified any victims or harm suffered, let alone harm that would not be "fully compensate[d]" by the disgorgement award. *See, e.g.*, *Gov't Emps. Ins. Co. v. KJ Chiropractic Ctr. LLC*, 2017 WL 9939048, at

[6] Deducting the Connekt loss is proper under *Liu.* The SEC has conceded that it is appropriate to deduct losses. *See* Mot. Ex. 3 ¶ 3.c. As the Supreme Court held: "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.*" *Liu*, 140 S. Ct. at 1949-50 (emphasis added). The purpose of disgorgement is to "restore[] the status quo," not to punish the defendant. *Id.* at 1943.

*2 (M.D. Fla. Aug. 22, 2017) (denying prejudgment interest when it would give plaintiff—who was "adequately compensate[d]" by the damages award—a windfall); *Validsa, Inc. v. PDVSA Servs., Inc.*, 424 Fed. Appx. 862, 878-79 (11th Cir. 2011) (same).

Second, considerations of fairness and the relative equities also weigh in Mr. Keener's favor. He stopped investing in convertible notes five years ago, and he made those investments after attorneys confirmed the transactions complied with applicable securities laws. *See* Sec. II.D, *infra.* Moreover, he invested virtually all of his proceeds earned between 2014 and 2018 into Connekt but lost his full investment when Connekt went out of business. *See* Sec. II.B, *supra.* Accordingly, he did not obtain any benefit at all from these proceeds. And courts "routinely refuse[] to award prejudgment interest when defendants are unable to use or secure a benefit from" the disgorged profits. *SEC v. E-Smart Techs., Inc.*, 2016 WL 183503, at *8 (D.D.C. Jan. 14, 2016).[7]

Even if the Court believes prejudgment interest is warranted, the amount calculated by the SEC is unjustifiably large. This Court has wide discretion to determine both the rate and the time period for accrual. *See, e.g.*, *SEC v. Carrillo*, 325 F.3d 1268, 1273 (11th Cir. 2003). If prejudgment interest is imposed, the time period for accrual should begin no earlier than the end of the relevant period for disgorgement, as the court adopted in *Almagarby* (at the SEC's request). *Almagarby*, 2021 WL 4461831, at *3. The SEC instead demands here that the court calculate prejudgment interest separately for each year during the relevant period. But the SEC's choice to deviate from *Almagarby* is unjustified and improperly increases the prejudgment interest by millions of dollars.

D. Injunctive Relief Is Not Warranted

The permanent injunction the SEC seeks against Mr. Keener is also unwarranted. The SEC can only obtain injunctive relief when it demonstrates that a "person is engaged or is about to engage in" a violation of the securities laws. 15 U.S.C. § 78u(d)(1). Accordingly, the SEC must show not only a prior violation, but also a reasonable likelihood that the wrong will be repeated. *Calvo*, 378 F.3d at 1216. That is, the SEC "must offer positive proof of the likelihood that the wrongdoing will recur." *SEC v. Blatt*, 583 F.2d 1325, 1334 (5th Cir. 1978).

[7] Nor does the third factor (the "remedial purpose of the statute") justify the SEC's demand. As the SEC itself highlighted, the purpose of imposing remedies for dealer registration violations is to "provide a financial disincentive to violations that reflect an unwillingness to incur the cost of full compliance." Mot. at 11. And as discussed above, the cost of "full compliance" was far less than the SEC demands. *See* Sec. II.A.1, *supra.*

There is no possibility of a recurrent violation, let alone the "cognizable danger" of an imminent violation that the SEC must show. *SEC v. Steadman*, 967 F.2d 636, 648 (D.C. Cir. 1992); *see also SEC v. Ingoldsby*, 1990 WL 120731, at *2 (D. Mass. May 15, 1990) (injunctive relief requires showing that "recurring violations are a relatively imminent threat"). Mr. Keener is out of the convertible note business. His last investment in a new convertible note was in 2017, one year before the SEC began investigating him and three years before it filed this lawsuit. DSOF ¶ 56. He stopped investing in convertible notes because they were not profitable, after considering the substantial expenses associated with those investments. DSOF ¶ 65 ("[I]t just turned out to be not a good way to make money. . . . I have no interest in reentering that business whatsoever again."). Mr. Keener is willing to surrender any remaining conversion rights and converted stock. *See* Sec. II.G, *infra*. Thus, there is no chance that the conduct that forms the basis of the SEC's lawsuit will recur.

The other factors courts consider in assessing the likelihood of a future violation also weigh against injunctive relief. Those factors are (1) the degree of scienter involved; (2) the egregiousness of the conduct; (3) the isolated or recurrent nature of the infraction; (4) the sincerity of defendant's assurances against future violations; (5) the defendant's recognition of the wrongful nature of the conduct; and (6) the likelihood that the defendant's occupation will present opportunities for a future violation. *Calvo*, 378 F.3d at 1216.

First, it is undisputed that Mr. Keener did not act with scienter. *See* Order, ECF No. 45 at 2 ("SEC does not allege scienter."). He did not overlook the dealer registration requirements knowingly or even recklessly. To the contrary, he routinely confirmed with attorneys that his transactions complied with applicable securities laws. DSOF ¶¶ 48, 49. During the relevant time period, three separate attorneys told him that he was not a securities dealer. *Id.* (citing letters from counsel stating that Mr. Keener "has not acted as a dealer" and "is not a dealer"). Moreover, his investing activity was similar to that of many other participants in the securities industry who were not registered dealers, including hedge funds, family offices, and high frequency traders. DSOF ¶¶ 91-95. At most, he was engaged in a "technical violation," not one deserving of injunctive relief. *Steadman*, 967 F.2d at 648 (denying injunctive relief when violation was not "flagrant or deliberate" but was "merely technical in nature" and defendant had relied on "advice of counsel" in good faith).[8]

[8] While scienter is not an absolute prerequisite to imposing injunctive relief, it is "highly relevant" to the analysis. *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979) ("[W]hile scienter is not required

For the same reason, there was no "egregious" misconduct warranting injunctive relief. *SEC v. Perez*, 2011 WL 5597331, at *3 (S.D. Fla. Nov. 17, 2011) (egregious conduct requires "flagrant" rather than "merely technical" violation); *see also Gane*, 2005 WL 90154, at *18 (denying injunctive relief in light of "mere technical violations"). The SEC argues Mr. Keener's conduct was "egregious" because the dealer registration requirements are "importan[t]." Mot. at 4. Yet the SEC finds no support in the case law for its argument that a violation of an "important" law makes the conduct "egregious." Indeed, if this was the correct standard, then every securities violation would automatically be egregious—surely, there are no "unimportant" securities laws. To the contrary, conduct is egregious only if it is "flagrant," if it constituted a "breach of fiduciary duty," if it "caused others to suffer significant financial loss," or if it "arose out of a complex scheme to defraud." *Perez*, 2011 WL 5597331, at * 2. Not one of those circumstances is present here.

Regarding the third factor, whether the conduct was isolated or recurrent, there was only one registration violation. *See, e.g.*, *In re David B. Havanich, Jr.*, SEC Release No. 935, 2016 WL 25746, at *11 (Jan. 4, 2016) ("The events at issue will be considered as one course of action—Respondents' operations as an unregistered broker-dealer from 2010 to 2012."); *In re Spring Hill Cap. Mkts.*, SEC Release No. 919, 2015 WL 7730856, at *19 (Nov. 30, 2015) (finding that "SHCP's operations as an unregistered broker-dealer" was one violation). The SEC argues the conduct was "recurrent" based solely on the number of investments Mr. Keener made, as though each purchase or sale of a security was a separate violation. Mot. at 4. Not so—there was only one violation. *See also* Sec. II.F, *infra*.[9]

Regarding the fourth factor, Mr. Keener's assurances against future violations—as noted above, he is out of the convertible note business. And as to recognizing the wrongful nature of the

to make out violations of several of the statutory sections involved here, the respondent's ***state of mind is highly relevant*** in determining the remedy to impose. It would be a gross abuse of discretion to bar an investment adviser from the industry on the basis of isolated negligent violations.") (emphasis added); *see also SEC v. Pros Int'l Inc.*, 994 F.2d 767, 769 (10th Cir. 1993) ("Although no single factor is determinative . . . the degree of scienter bears heavily on the decision.") (citing *SEC v. Haswell*, 654 F.2d 698, 699 (10th Cir. 1981)). In the SEC's own cases, the courts only granted injunctive relief ***after finding defendant acted with scienter***. *See SEC v. Sky Way Glob.*, 2010 WL 3025033, at *1 (M.D. Fla. July 29, 2010) (defendant "demonstrates a high degree of scienter"); *SEC v. Collyard*, 154 F. Supp. 3d 781, 791 (D. Minn. 2015) (defendant's conduct "was at least reckless"); *SEC v. Offill*, 2012 WL 1138622, at *5 (N.D. Tex. Apr. 5, 2012) (defendant acted "at least with reckless disregard . . . if not intentionally").

[9] Although *Almagarby* imposed an injunction against the defendant for a registration violation, that was because the defendant had multiple active companies with no apparent purpose other than to engage in alleged dealer activity, which is not the case here. *Almagarby*, 2021 WL 4461831, at *2.

conduct, although he chose to litigate against the SEC, this fact is irrelevant. *See, e.g.*, *Ingoldsby*, 1990 WL 120731, at *3 ("While the defendant has not publicly acknowledged the wrongfulness of his conduct, I find that this is not evidence of a propensity . . . to commit future violations. . . [T]he defendant should not be prejudiced for presenting a vigorous defense and requiring the SEC to meet its proper evidentiary burden."). The SEC claims that because Mr. Keener sold the stock of a company named Blink Charging last year, he "has [not] recognized the wrongful nature of his conduct." Mot. at 5. The SEC is mistaken. In fact, Mr. Keener obtained that Blink Charging stock after he made a simple loan in 2018 with no conversion rights that the company later requested to repay in stock—not through the Quick Loans at issue in this case. *See* Ex. I (Jan. 24, 2018 email confirming loan and Feb. 1, 2018 request from company to repay out of public offering); *see also* Def's Opp. to PSOF ¶ 36 (describing different investments in Blink Charging).

As to the final factor, whether the occupation presents opportunities for future violations, Mr. Keener has shifted entirely to other types of investments. He has invested in blue chip stocks and "retirement type investments." DSOF ¶ 66. Last year, he acquired a reference and education website. *Id.* The SEC claims because he is "self-employed" and has "access to capital," it would be "easy for him to buy a new series of convertible notes." Mot. at 5. But he made a conscious decision years ago to stop investing in convertible notes because it was not profitable. There is no basis to conclude he is now going to change his mind. Ultimately, "an injunction is a drastic remedy, not a mild prophylactic, and should not be obtained against" someone like Mr. Keener who was "acting in good faith." *Aaron v. SEC*, 446 U.S. 680, 703 (1980) (concurring opinion); *see also In re Havanich,* 2016 WL 25746, at *11 ("No Commission opinion in a litigated administrative proceeding has imposed a bar on a respondent solely for operating as an unregistered broker-dealer.").

Finally, the injunction requested by the SEC is also improper because it is an "obey the law" injunction that merely parrots the language of the Exchange Act. The Eleventh Circuit has clearly and repeatedly struck down "obey the law" injunctions:

> Repeatedly we have said that, in the context of SEC enforcement actions and otherwise, 'obey the law' injunctions are unenforceable. . . . In particular, an injunction which merely tracks the language of the securities statutes and regulations . . . will not clearly and specifically describe permissible and impermissible conduct as required by Federal Rule of Civil Procedure 65(d). . . . We condemn these injunctions because they lack specificity and deprive defendants of the procedural protections that would ordinarily accompany a future charge of a violation of the securities laws.

SEC v. Graham, 823 F.3d 1357, 1362 n.2 (11th Cir. 2016); *see also SEC v. Smyth*, 420 F.3d 1225, 1233 n.14 (11th Cir. 2005) (directing district court to find obey the law injunction that "track[ed] the provisions of the statute" unenforceable). The SEC's proposed injunction does nothing more than recite Sections 3(a)(5) and 15(a)(1) of the Exchange Act. *See* Mot. Ex. 4 at 1. It gives Mr. Keener no specificity as to what conduct would constitute a violation and is unwarranted for this additional reason.[10]

E. A Penny Stock Bar Is Not Warranted

The SEC also seeks a permanent bar preventing Mr. Keener from "participating in an offering of penny stock." Mot. Ex. 4 at 2. In assessing the propriety of a penny stock bar, courts examine (1) the "nature of the defendant's conduct" and (2) "the likelihood that his occupation and experience will present further opportunities to violate the securities laws." *SEC v. BIH Corp.*, 2014 WL 7499053, at *6 (M.D. Fla. Dec. 12, 2014). Neither factor weighs in favor of a bar.

With regards to the nature of the conduct, as described above, the SEC has alleged a technical, non-scienter violation. *See* Sec. II.D, *supra*. This technical violation is far from the examples of conduct warranting a penny stock bar described in prior cases—namely conduct that is so egregious that it indicates the defendant "*cannot ever operate in compliance* with the law," and he must be made an example of to serve as a "deterrent to others." *BIH Corp.*, 2014 WL 7499053, at *6 (emphasis added). The SEC does not even attempt such a showing.

With regards to whether Mr. Keener has "opportunities" for further violations, as described above, Mr. Keener has left the convertible notes business and has no interest in returning. *See* Sec. II.D, *supra*. The SEC does not and cannot demonstrate otherwise. To obtain a permanent penny stock bar, the SEC must "specifically articulate[] compelling reasons for such a sanction." *Steadman*, 603 F.2d at 1140. The SEC has not met its burden.

F. A Civil Penalty Is Not Warranted

Nor is a penalty warranted in this case. The Court may only impose a penalty "upon a proper showing" that one is warranted. 15 U.S.C. § 78u(d)(3)(A)(i). In assessing whether a penalty is warranted, courts look at (1) the degree of scienter; (2) the egregiousness of the conduct; (3) whether the conduct created substantial losses or the risk of substantial losses to other persons; (4) whether the conduct was isolated or recurrent; and (5) whether the penalty should be reduced due to the defendant's demonstrated current and future financial condition. *SEC v. Big Apple*, 2013 WL 1352166, at *3 (M.D. Fla. Mar. 29, 2013). None of these factors support the SEC's request.

[10] For instance, it does not specify whether he is allowed to purchase stock on the open market, to hire accountants to administer any investments, or to attend investment conferences.

First, it is undisputed that Mr. Keener did not act with scienter. *See* Sec. II.D, *supra*. Nor was his failure to register "egregious." *See, e.g.*, *Gane*, 2005 WL 90154, at *17 (defendant's conduct was not egregious when he "had continuously been consulting counsel"). Indeed, every sale was only executed after being approved by an attorney, transfer agent, clearing firm, and broker-dealer, and none of those third-party intermediaries ever raised concerns that he might be subject to the dealer registration requirements. DSOF ¶¶ 36-47. Mr. Keener's conduct—investing in microcap companies in need of financing and selling stock after the sales were approved by multiple gatekeepers—does not come close to the conduct that other courts have found "egregious." *See, e.g.*, *SEC v. US Pension Tr. Corp.*, 2010 WL 3894082, at *25 (S.D. Fla. Sept. 30, 2010) (defining "egregious" conduct as conduct similar to "ponzi schemes"). Not to mention, his unregistered status was consistent with thousands of other market participants who buy and sell securities in tremendous volumes yet are unregistered. DSOF ¶¶ 91-95.

Moreover, there is no evidence that Mr. Keener's unregistered status created substantial losses or the risk of such losses. As described above, there is no evidence of specific losses, let alone evidence Mr. Keener's unregistered status caused those losses. *See* Sec. II.A.2, *supra*; *see also* Taveras Dep. (July 27, 2021) at 161:5-7 (SEC conceding it doesn't "show causation. . . . As I sit here today, I think it would be hard, or impossible, perhaps."). To the contrary, Mr. Keener's counterparties had many opportunities to generate a profit. Ex. A at Ex. 1.

The SEC's main argument is that Mr. Keener should be punished because the "violations were recurrent rather than isolated" if each stock sale is treated as a separate violation. Mot. at 11. The SEC does not support this argument with a citation to any case law. To the contrary, the case law is clear that the failure to register is one violation. *See* Sec. II.D, *supra*; *SEC v. J.W. Korth & Co.*, 991 F. Supp. 1468, 1473 (S.D. Fla. 1998) (rejecting the "SEC's assessment regarding the number of violations" and finding only one technical violation).

The SEC claims a penalty is needed "to deter Defendant and others from this type of conduct." Mot. at 12. But there is no need to "deter" Mr. Keener because he has not invested in a convertible note in five years. *See* Sec. II.D, *supra*. And the SEC's reference to "others" (Mot. at 12-13) only highlights the unfairness of the SEC's approach. Every firm in the convertible lending industry engaged in the same conduct as Mr. Keener, which is evidence of the reasonable, widespread belief that Mr. Keener's conduct was lawful. Moreover, the SEC's desire to punish Mr. Keener and make an example of him stands in stark contrast to the SEC's approach to certain principal trading firms. As described above, the Commission recently issued a new rule proposal to clarify that some of the largest, most sophisticated investment firms have actually been "dealers" under the existing statutory framework all along. SEC Release No. 34-94524. Yet the SEC is not seeking to investigate them; it is not seeking to file enforcement actions against them; it is not seeking to disgorge all of their profits; and it is not seeking to punish them in any way. There is no "rational basis for [this] difference in treatment." *Olech*, 528 U.S. at 564.

If the Court believes a penalty is warranted here, the facts and circumstances do not justify the $1.75 million penalty the SEC seeks. 15 U.S.C. § 78u(d)(3)(B)(i) (penalty amount "shall be determined by the court in light of the facts and circumstances"). The Exchange Act authorizes three tiers of penalties in increasing severity, but only the first and lowest tier applies here because the SEC only alleges one non-scienter violation against Mr. Keener. For a non-scienter violation against an individual, the first tier provides for an inflation-adjusted penalty of $10,360. *Id.*; 17 C.F.R. § 201.1001.[11] Courts within the Eleventh Circuit routinely award this tier of penalty for violations like Mr. Keener's failure to register. *See, e.g.*, *Gane*, 2005 WL 90154, at * 20 (tier one penalty for "technical violations"); *SEC v. Calmes*, 2011 WL 13174658, at *5 (S.D. Fla. Nov. 10, 2011) (tier one penalty for registration violations). The SEC provides no reason to deviate from this statutory framework. Indeed, the SEC advocated for, and the court adopted, the statutory tier-one penalty in *Almagarby*. *See Almagarby*, 2021 WL 4461831, at *4. None of the SEC's cases justify deviating so dramatically from the inflation-adjusted statutory penalties.[12]

The statute allows in the alternative that the penalty can go up to "the gross amount of pecuniary gain to such defendant as a result of the violation." 15 U.S.C. § 78u(d)(3)(B)(i). For the Court to award a penalty under this provision, the SEC "must demonstrate" that the "financial gain that the defendant enjoyed" was "*because of the violation* that the penalizing court found him to have committed." *SEC v. Huff*, 2010 WL 148232, at *3 (S.D. Fla. Jan. 12, 2010) (emphasis added). But for the reasons set forth above, the SEC has not met this burden—it has not identified any way in which Mr. Keener's unregistered status caused his pecuniary gain. *See* Sec. II.A.1, *supra*. The SEC claims Mr.

[11] The Exchange Act authorizes the tier one penalty "for each violation," *see* 15 U.S.C. § 78u(d)(3)(B), and there was only one violation here—the failure to register as a securities dealer under Section 15(a). *See SEC v. Miller*, 744 F. Supp. 2d 1325, 1345 (N.D. Ga. 2010) (number of violations depends on "the number of statutes the defendant violated").

[12] *See Offill*, 2012 WL 1138622, at *3-4 ($120,000 penalty); *SEC v. Friendly Power Co.*, 49 F. Supp. 2d 1363, 1373 (S.D. Fla. 1999) ($100,000 penalty); *SEC v. Kahlon*, 2016 WL 5661642, at *5 (E.D. Tex. Sept. 30, 2016) ($200,000 penalty); *SEC v. Lefkowitz*, 2013 WL 12170296, at *4 (M.D. Fla. Sept. 6, 2013) (default judgment over an alleged scheme to evade the securities laws by recidivist violator).

Keener made "outsized gains," *see* Mot. at 11, but that does not mean any of his gains were caused by his unregistered status. Not to mention Mr. Keener did not generate outsized gains, and instead lost money overall. Regardless, the SEC ignores this statutory causation requirement and does not show that any gain was caused by his unregistered status.

Finally, the specific penalty amount demanded by the SEC—"approximately 10% of the SEC's proposed disgorgement figure" (Mot. at 13)—is arbitrary, and thus improper. *See, e.g.*, *SEC v. Aerokinetic Energy Corp.*, 2010 WL 5174514, at *7-8 (M.D. Fla. Sept. 10, 2010) (cutting SEC's penalty demand in half when it failed to "articulate[ ] any cogent basis for" the specific amount).

G. Mr. Keener Is Willing to Surrender and Cancel His Remaining Shares

Mr. Keener is willing to surrender any remaining shares in the hundreds of companies listed in Exhibit 1 to the SEC's Motion, and to stipulate that he will not convert any convertible note of those companies. Mr. Keener stopped investing in convertible notes years ago because these investments were not profitable, and he has no interest in returning to them. *See* Sec. II.D, *supra.* However, the SEC's proposed order also requires Mr. Keener to provide "copies of correspondence evidencing the surrender," which is not possible. Mot. Ex. 4 at 5. Many of the companies have gone out of business, and there are no persons to "correspond" with to demonstrate the surrender.

III. CONCLUSION

The remedies the SEC seeks are unwarranted, unfair, and all out of proportion to the license violation at issue here. There is no basis to force Mr. Keener to pay more than $24 million, when the failure to register did not cause harm to others or cause Mr. Keener to earn profits he would not otherwise have made. Nor is it justified when his unregistered status was consistent with an entire industry of thousands of persons buying and selling securities for a living. Mr. Keener made convertible note investments for a few years and has now moved on. No further sanctions—and certainly not of the level the SEC seeks—are justifiable here. For these reasons, and all the others set forth herein, Mr. Keener respectfully requests that the SEC's Motion be denied.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served via ECF a true and correct copy of the foregoing Defendant Justin W. Keener's Opposition to Plaintiff Securities and Exchange Commission's Motion for Remedies to the following:

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This, 15th day of April, 2022

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