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United States District Court, C.D. California.

SECURITIES AND EXCHANGE COMMISSION, Plaintiff,
v.
Donald J. KELLEN, Defendant.

CV 20-3861-RSWL-AGR
|
Signed 09/14/2021

Attorneys and Law Firms

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ORDER re: MOTION FOR SUMMARY JUDGMENT AGAINST DEFENDANT DONALD J. KELLEN [26]

RONALD S.W. LEW, Senior U.S. District Judge

***1** Plaintiff Securities and Exchange Commission (the "SEC") initiated this Action against Defendant Donald J. Kellen ("Defendant") for purported violations of Sections 17(a)(1) and (3) of the Securities Act and Section 10(b) of the Exchange Act, as well as Rules 10b-5(a) and (c) thereunder. The SEC avers that Defendant "cherry pick[ed] profitable trades for himself and allocat[ed] unprofitable trades to his clients." Mem. P. & A. in Supp. of Pl.'s Mot. for Summ. J. ("Mot.") 10:19-21, ECF No. 26-1.

Currently before the Court is the SEC's Motion for Summary Judgment [26] (the "Motion"). Having reviewed all papers submitted pertaining to this Motion, the Court **NOW FINDS AND RULES AS FOLLOWS:** the Court **DENIES** the Motion.

I. BACKGROUND

A. Factual Background

1. Defendant's Use of the Omnibus Account

Defendant has worked as an investment adviser representative with Laurel Wealth Advisors, Inc. ("LWA") since May 2011. Pl.'s Stmt. Of Uncontroverted Facts ("SEC's SUF") ¶ 2, ECF No. 26-2; Def.'s Resp. to SEC's SUF ¶ 2, ECF No. 31. LWA is an SEC-registered investment adviser that managed $1.2 billion in assets as of October 2019. SEC's SUF ¶ 4; Def.'s Resp. to SEC's SUF ¶ 4. During the relevant period of September 2011 through September 2015, Defendant served as the representative for approximately forty retail investor clients. SEC's SUF ¶ 8; Def.'s Resp. to SEC's SUF ¶ 8. Defendant also maintained two personal brokerage accounts. SEC's SUF ¶ 9; Def.'s Resp. to SEC's SUF ¶ 9.

From September 2011 to September 2015, Defendant used an omnibus account [1] with third-party brokerage provider Charles Schwab & Co., Inc. ("Schwab") to place securities trades for allocation to individual accounts. SEC's SUF ¶¶ 5, 10; Def.'s Resp. to SEC's SUF ¶¶ 5, 10. He also placed trades directly in his personal accounts and his clients' accounts. SEC's SUF ¶ 11; Def.'s Resp. to SEC's SUF ¶ 11. After executing orders in the omnibus account, Defendant directed Schwab by telephone as to the allocation of shares between him and his clients. SEC's SUF ¶¶ 12, 15; Def.'s Resp. to SEC's SUF ¶¶ 12, 15. Of thirty-two

investment advisory contracts produced to the SEC by LWA, Defendant retained discretionary trading authority over twenty-eight accounts. SEC's SUF ¶ 16; Def.'s Resp. to SEC's SUF ¶ 16. Defendant adduces no evidence of his intended allocations upon opening positions in the omnibus account. SEC's SUF ¶ 44.

Defendant does not dispute that, in 2015, Schwab detected irregularities in Defendant's trading patterns and thereafter limited his access to the omnibus account. SEC's SUF ¶¶ 54-55; Def.'s Resp. to SEC's SUF ¶¶ 54-55. In July 2015, Defendant signed a letter stating, among other things, that he would cease day trading in securities held by his clients and that he would place his personal trades directly in his own accounts. SEC's SUF ¶ 56; Decl. of Daniel O. Blau in Supp. of Pl.'s Mot. for Summ. J. ("Blau Decl.") Ex. 7, ECF No. 27-7. Schwab restricted Defendant's omnibus account access beginning in September 2015. SEC's SUF ¶ 58; Def.'s Resp. to SEC's SUF ¶ 58.

2. Alleged Cherry-Picking & The SEC's Expert Analysis

***2** From September 2011 to September 2015, Defendant executed trades via an omnibus account. SEC's SUF ¶ 10; Def.'s Resp. to SEC's SUF ¶ 10. Plaintiff avers that, after observing the performance of those trades, Defendant would allocate successful trades to his personal accounts and unsuccessful trades to his clients' accounts. See generally Mot.

The SEC's financial economist, Dr. Erin Smith, analyzed Defendant's brokerage accounts and trading behavior "to assess whether the economic and statistical evidence is consistent with the SEC allegations described in the Complaint." Decl. of Dr. Erin E. Smith in Supp. of Pl.'s Mot. for Summ. J. ("Smith Decl.") ¶¶ 6, 12, ECF No. 28. Dr. Smith divided the brokerage accounts subject to omnibus allocations into two categories: the accounts owned individually by Defendant (the "Defendant Accounts") and all other accounts that received an allocation from Defendant (the "Client Accounts"). [2] Id. ¶ 17.

Dr. Smith recorded the following data and observations from her review of the relevant records:

- Defendant made about 73% of stock allocations at least an hour after execution. Id. ¶ 19.

- Defendant made about 50% of stock allocations at least three hours after execution. Id. ¶ 20.

- Defendant usually bought stocks in the morning from the omnibus account and allocated these purchases toward the end of the trading day. Id. ¶ 21.

- 78% of stock allocations to the Defendant Accounts were profitable at the time of allocation, whereas 20% of stock allocations to the Client Accounts were profitable at that time. Id. ¶¶ 23-24.

- In the aggregate, the portfolio of stock allocations from the omnibus account lost 0.06% of value at the time the trade was allocated. Id. ¶¶ 25-26. However, that return was not evenly distributed: stock allocations to the Defendant Accounts earned profits of $165,751 at the time of allocation, whereas stock allocations to Client Accounts yielded losses of $193,300 at the time of allocation. Id. ¶¶ 27, 29.

Dr. Smith posits that the only criterion differentiating a stock allocation to the Defendant Accounts from that to the Client Accounts is the performance of the trade between execution and allocation. Id. ¶ 30. She performed four distinct statistical tests, comparing the profits and losses of the Defendant Accounts and the Client Accounts. Id. ¶¶ 32-36. Each of these tests showed "that the probability that random chance could result in the performance differences ... [is] less than one in one billion." Id. ¶ 37.

In short, Dr. Smith concludes that "Defendant allocated an inordinate proportion of positive trades to the [Defendant] Accounts and an inordinate proportion of negative trades to the Client Accounts" such that "the stark difference in performance between stock allocations ... does not support explanations other than cherry-picking." [3] Id. ¶¶ 46, 51.

B. Procedural Background

***3** The SEC filed its Complaint [1] against Defendant on April 28, 2020, asserting violations of Section 10(b) of the Exchange Act, Rule 10b-5(a) and (c), and Sections 17(a)(1) and (3) of the Securities Act. Following multiple joint stipulations extending time to answer, Defendant filed an Answer [13] on July 23. The SEC filed the instant Motion [26] on May 25, 2021. Defendant lodged his Opposition [32] on June 8, and the SEC filed a Reply [37] on June 29.

II. DISCUSSION

A. Legal Standard

Federal Rule of Civil Procedure 56(a) states that a "court shall grant summary judgment" when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." A fact is "material" for purposes of summary judgment if it might affect the outcome of the suit, and a "genuine" issue exists if the evidence is such that a reasonable factfinder could return a verdict for the nonmovant. Anderson v. Liberty Lobby, 477 U.S 242, 248 (1986). The evidence, and any inferences based on underlying facts, must be viewed in the light most favorable to the nonmovant. Twentieth Century-Fox Film Corp. v. MCA, Inc., 715 F.2d 1327, 1328-29 (9th Cir. 1983). In ruling on a motion for summary judgment, the court's function is not to weigh the evidence, but only to determine if a genuine issue of material fact exists. Anderson, 477 U.S. at 255.

B. Discussion

The SEC moves for summary judgment on two claims: (1) violation of Section 10(b) of the Exchange Act and Rule 10b-5(a) and (c) thereunder, and (2) Sections 17(a)(1) and (3) of the Securities Act. Pl.'s Notice of Mot. 1:6-10, ECF No. 26. However, before reaching the merits, the Court first addresses Plaintiff's argument that the relevant statute of limitations bars consideration of transactions that took place before March 2013.

1. Statute of Limitations

On January 1, 2021, Congress passed the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 (the "2021 Act"), which, among other things, increases the statute of limitations in SEC disgorgement actions for scienter-based securities violations from five years to ten years. Pub. L. No. 116-283, § 6501, 134 Stat. 4625-26 (2021). Congress directed that the amendment to the statute of limitations "shall apply with respect to any action or proceeding that is pending on ... the date of enactment of this [2021] Act." Id.

In opposition to the Motion, Defendant argues that the application of the ten-year statute of limitations violates the constitutional prohibition against ex post facto laws. Def.'s Opp'n to Pl.'s Mot. for Summ. J. ("Opp'n") 15:9-20, ECF No. 32. The Court disagrees.

The Ex Post Facto Clause proscribes retroactive punishment. See Smith v. Doe, 538 U.S. 84, 92 (2003); see also Landgraf v. USI Film Prods., 511 U.S. 244, 266 (1994) ("The Ex Post Facto Clause flatly prohibits retroactive application of penal legislation."). To determine whether a law constitutes forbidden punishment or a civil remedy, the Court must look first to legislative intent. See id. at 92, 99 (quoting United States v. Ward, 448 U.S. 242, 248 (1980)) (stating that "[a] court must first ask whether the legislature, 'in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other' "). If the legislature's "intention was to enact a regulatory scheme that is civil and nonpunitive, [the Court] must further examine whether the statutory scheme is 'so punitive either in purpose or effect as to negate [the State's] intention to deem it civil.' " Id. (quoting Kansas v. Hendricks, 521 U.S. 346, 361 (1997)). " '[O]nly the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." Id. (quoting Hudson v. United States, 522 U.S. 93, 100 (1997)).

***4** The SEC's mechanism for disgorgement—15 U.S.C. § 78u(d)—evinces a clear contemplation of disgorgement as a civil remedy. First, the newly enacted 2021 Act confers upon district courts the authority to order disgorgement in actions brought by

the SEC. 15 U.S.C. § 78u(d)(3)(A). Second, Congress granted the SEC authority to pursue disgorgement alongside its authority to pursue civil penalties. 15 U.S.C. § 78u(d)(3). Third, § 78u(d)(3) directs disgorgement of "any unjust enrichment by the person who received such unjust enrichment as a result of such violation." Disgorgement in an amount not to exceed the wrongdoer's ill-gotten gains has traditionally been viewed as an equitable principle and, in turn, a civil remedy. Cf. Liu v. Sec. & Exch. Comm'n, 140 S. Ct. 1936, 1942-44 (2020). Fourth, as the Fourth Circuit noted:

> [15 U.S.C.] § 77t(b) contemplates the SEC "transmit[ting] such evidence as may be available concerning such [improper] acts or practices to the Attorney General who may, in his discretion, institute the necessary criminal proceedings under this subchapter." The indication that different procedures must occur in order to initiate a criminal matter necessarily implies that an SEC enforcement proceeding over which the district court possesses jurisdiction is the opposite – that is, civil.

United States v. Bank, 965 F.3d 287, 297 (4th Cir. 2020) (internal citations omitted).

Furthermore, Defendant lacks the "clearest proof" that disgorgement is a criminal penalty. See Dyer, 908 F.3d 995 at 1002 (quoting Hudson, 522 U.S. at 100). Defendant advances no argument, nor does he cite a case, for the proposition that disgorgement constitutes severe punishment as to exceed the bounds of civil remedies. [4] In fact, several circuits, including the Ninth Circuit, have held that disgorgement indeed works as a civil remedy, not a criminal penalty. See, e.g., Bank, 965 F.3d at 296-97 (concluding that disgorgement in an SEC action is not a criminal penalty); United States v. Dyer, 908 F.3d 995, 1002-03 (6th Cir. 2018) (same); United States v. Melvin, 918 F.3d 1296, 1299-1301 (11th Cir. 2017) (same); United States v. Van Waeyenberghe, 481 F.3d 951, 958-59 (7th Cir. 2007) (same); United States v. Gartner, 93 F.3d 633, 635 (9th Cir. 1996) (same). Thus, disgorgement remains beyond the constraints of the Ex Post Facto Clause.

The ten-year statute of limitations as applied here is properly considered retroactive civil legislation. While courts generally disfavor retroactive legislation, the Court cannot ignore plain congressional intent. See Landgraf, 511 U.S. at 265, 270. Congress has directed that the augmented statute of limitations "shall apply" to any action pending on January 1, 2021. § 6501, 134 Stat. at 4626. And the Supreme Court has noted that "Congress may indeed direct courts to apply newly enacted, outcome-altering legislation in pending civil cases." Bank Markazi v. Peterson, 136 S. Ct. 1310, 1325 (2016) (citing Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 226 (1995)). Because this Action was pending on January 1, the SEC may revive previously time-barred claims and, under the facts in this case, consider Defendant's alleged violations dating back to 2011. See U.S. Sec. & Exch. Comm'n v. Ahmed, No. 3:15cv675 (JBA), 2021 WL 2471526, at *4 (D. Conn. June 16, 2021) (concluding that the 2021 Act's "attendant modifications" applied because the action was pending on January 1, 2021); see also Landgraf, 511 U.S. at 273-74 (stating that "a court should apply the law in effect at the time it renders its decision, even though that law was enacted after the events that gave rise to the suit").

***5** In short, the recently amended statute of limitations makes actionable the alleged securities violations dating back to 2011.

2. Alleged Securities Violations

According to the SEC, Defendant's cherry-picking, as well as his failure to inform clients of his cherry-picking, violate Rule 10b-5 and Section 17(a). Id. at 10:19-11:4.

a. Preliminary Considerations

As a preliminary matter, the Court may, contrary to the SEC's position, consider Defendant's declaration in assessing this Motion. The SEC cites to a 2011 case from this district, Batiz v. Am. Comm. Sec. Servs., 776 F. Supp. 2d 1087 (C.D. Cal. 2011), for the proposition that "uncorroborated and self-serving" declarations need not be considered in evaluating whether a triable issue of fact exists. Pl. SEC's Evidentiary Objs. to Def.'s Evid. 47:14-28, ECF No. 37-4 (citing Batiz, 776 F. Supp. 2d at 1098). However, in Batiz, the court's determination that the nonmovant's declaration failed to establish a genuine issue of

material fact was premised not only on the declaration being "uncorroborated and self-serving" but also on its being "inherently implausible." 776 F. Supp. 2d at 1098.

Indeed, the Ninth Circuit has rejected the notion that a district court may disregard a declaration solely on the basis that it is "uncorroborated and self-serving." Nigro v. Sears, Roebuck & Co., 784 F.3d 495, 497-98 (9th Cir. 2015). "The district court can disregard a self-serving declaration that states only conclusions and not facts that would be admissible evidence." Id. at 497. Accordingly, the Ninth Circuit has found declarations deficient not only where they are uncorroborated and self-serving but also where they lack personal knowledge, irreconcilably contradict facts in the record, or offer conclusory or unsupported legal assertions. See, e.g., Fed. Trade Comm'n v. Neovi, Inc., 604 F.3d 1150, 1159 (9th Cir. 2010) (affirming the district court's determination that no genuine issue of fact existed where defendant advanced only "bald, uncorroborated, and conclusory assertions rather than evidence"); Van Asdale v. Int'l Game Tech., 577 F.3d 989, 998 (9th Cir. 2009) (citation omitted) ("The general rule in the Ninth Circuit is that a party cannot create an issue of fact by an affidavit contradicting his prior deposition testimony."); Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1059 n.5 (9th Cir. 2002) (affirming the district court's grant of summary judgment where plaintiff failed to articulate any basis for personal knowledge in her affidavit concerning matters to which she testified); Kennedy v. Applause, Inc., 90 F.3d 1477, 1481 (9th Cir. 1996) (affirming the district court's holding that no genuine issue of material fact existed where plaintiff's testimony "flatly contradict[ed] both her prior sworn statements and the medical evidence").

Here, Defendant's declaration is a product of personal knowledge concerning client communications and trading strategies, among other things. See generally Decl. of Donald J. Kellen in Supp. of Opp'n to Mot. for Summ. J. ("Kellen Decl.") ¶ 28, ECF No. 33. Even if Defendant's declaration may be considered "uncorroborated and self-serving," there is nothing in the record that renders it implausible. The absence of records in support of Defendant's testimony more fittingly speaks to the weight of the evidence—an issue not presently before this Court—than its admissibility.

***6** To the extent the Court has relied on additional evidence to which the parties object, the Court has considered those objections and hereby **OVERRULES** those objections.

b. Genuine Disputes of Material Fact

While there are critical nuances between the securities violations alleged here,[5] each of the claims requires, at bottom, proof of a scheme or practice that "operate[s] as a fraud" or is "fraudulent." See 15 U.S.C. § 77q(a); 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5(a), (c). Cherry-picking axiomatically constitutes as much. See Sec. & Exch. Comm'n v. K.W. Brown & Co., 555 F. Supp. 2d 1275, 1304 (S.D. Fla. 2007) (noting that, "by its very nature, the cherry-picking scheme operated as a fraud on the [a]dvisers' clients"); see also In re The Dratel Grp., Inc., Exchange Act Release No. 77396, 2016 WL 1071560, at *1 (S.E.C. Mar. 17, 2016) ("By directing the more profitable trades toward preferred accounts, a securities professional is effectively stealing from one customer to enrich himself or other preferred customers."). Defendant does not dispute this. See generally Opp'n. He does dispute, however, the SEC's allegation that he engaged in any such scheme. Id. at 13:14-15:6.

Defendant advances sufficient evidence at this stage to survive summary judgment. The SEC fixates on pervasive asymmetry in first day profits between the Defendant Accounts and the Client Accounts, but Defendant's Opposition and accompanying declarations suggest that those discrepancies may well be justified by legitimate trading strategies and, ultimately, realized profits. See Kellen Decl. ¶ 28 (explaining that Defendant "had significant tax loss carry forwards from 2008" and that "[t]hese loss carry forwards were an integral part of [his] short term trading strategy at the time as many of the trades in 2013 through 2015 had no tax consequences for [him]"); see also id. ¶ 9 (stating that "some of the trades are client initiated"); Decl. of Debra Lynn Sherman in Supp. of Opp'n to Pl.'s Mot. ("Sherman Decl.") ¶ 4, ECF No. 34 (deemphasizing the significance of unrealized profits or losses and stating that she has "no recollection of any security that [Defendant] placed in [her] account that [they] had not discussed because it was in some type of losing position"). The Court cannot conclude at this juncture that first day returns are a dispositive metric, especially in the face of long-term profits realized by those same trades. Furthermore, the

declaration of Defendant's client, Debra Lynn Sherman, evidences a client's satisfaction with Defendant's trading strategies and thereby supports the legitimacy of those strategies. See Sherman Decl. ¶¶ 5-6. Of course, an investment adviser may employ a fraudulent scheme even upon an unwitting client, but there is conflicting evidence here such that Defendant's participation in such a scheme is a question best left for the factfinder.

***7** Another point of dissension concerns the time between a trade's execution and its allocation. Dr. Smith found that "[a]bout 73% of stock allocations occurred at least an hour after the execution" and "[a]bout 50% of stock allocations occurred three hours or more after the execution." Smith. Decl. ¶¶ 19-20. Dr. Smith then concluded that the protracted period between execution and allocation, in conjunction with Defendant's disproportionate first day profits, forecloses any "explanations other than cherry-picking." Smith Decl. ¶ 51. Defendant counters that his technological inadequacies explain the temporal delays between trade execution and allocation. Kellen Decl. ¶¶ 6, 8. Assuming it to be true, this fact contradicts Dr. Smith's conclusion that the protracted period between trading and execution could only have been a product of cherry-picking. Finally, Defendant proffers evidence that he spoke with clients prior to executing many of the trades at issue in this case. [6] Id. ¶ 11; Sherman Decl. ¶ 4. A reasonable jury could conclude that no manipulative or fraudulent device existed where clients ratified trades, or were at least made aware of those trades, prior to their execution.

The SEC cites several cases in support of its Motion, but none of those cases lend credence to its position here. In Sec. & Exch. Comm'n v. RRBB Asset Mgmt., LLC, for instance, the court held that the SEC's complaint "raised an inference of cherry-picking" based on allegations similar to the ones here. No. 20-12523 (KM) (ESK), 2021 WL 3047081, at *3-4 (D.N.J. July 20, 2021) (denying defendant's motion to dismiss based on the SEC's "statistical allegations" and defendant's "removal from the Schwab platform"). But whether the SEC can raise an inference of cherry-picking at the pleading stage is a far cry from whether the SEC can prove such a claim at the summary judgment stage. [7] See Sec. & Exch. Comm'n v. Strong Inv. Mgmt., 2018 WL 8731559, at *6 (C.D. Cal. Aug. 9, 2018) (finding it "sufficiently plausible" that defendants engaged in a cherry-picking scheme based on statistical allegations but declining to address at the pleading stage "whether the statistics proffered by the SEC were the result of differing investment strategies or the product of fraud").

The SEC also cites to two cases in which courts found defendants liable for cherry-picking schemes following respective bench trials. See Sec. & Exch. Comm'n v. World Tree Fin. LLC, No. 6:18-CV-01229, 2021 U.S. Dist. LEXIS 22740, at *18-21 (W.D. La. Jan. 15, 2021) (finding defendants liable for a cherry-picking scheme after a bench trial); see also Sec. & Exch. Comm'n v. K.W. Brown & Co., 555 F. Supp. 2d 1275, 1295-96 (S.D. Fla. Dec. 19, 2007) (finding that defendants committed securities violations by "allocating favorable trades to the [defendants' proprietary account] at the expense of their advisory clients"). However, those courts acted as factfinders after sitting for bench trials, whereas this Court's inquiry is more limited on summary judgment. Additionally, one of the cases cited by the SEC tends to undercut its position. In K.W. Brown & Co., the court concluded that defendant operated a scheme wherein investors suffered realized losses over the course of several years. 555 F. Supp. 2d at 1295 (finding that "at least 175 clients' accounts ... lost money over a three-year period ... when all the market indexes went up"). Contrarily, here, Defendant's clients often had realized profits resulting from the trades at issue, which may legitimize Defendant's purported trading strategies.

***8** Lastly, Defendant cites the compelling case Sec. & Exch. Comm'n v. Slocum, Gordon & Co., 334 F. Supp. 2d 144 (D.R.I. Sept. 28, 2004). In Slocum, the court found after a bench trial that defendants did not engage in a cherry-picking scheme despite short-term profits 98% of the time on firm securities compared to short-term profits approximately 47% of the time on client securities. 334 F. Supp. 2d at 172-73. The court concluded that defendants' legitimate trading strategies and long-term client success rebutted the accusation of cherry-picking. Id. at 172-76. The fact that a district court found defendants not to be liable for securities violations, despite stark statistical disparities like the ones here, supports this Court's conclusion that summary judgment is improper. Defendant justifies the SEC's statistical allegations with the same two reasons advanced in Slocum: legitimate trading strategies and long-term client success. At this stage, the Court cannot weigh the evidence or make credibility determinations to discern the validity of Defendant's proffered explanations.

In short, whether Defendant engaged in a cherry-picking scheme to defraud clients is not a question to be summarily resolved by this Court. Defendant adduces sufficient evidence such that a reasonable jury could determine that Defendant was not involved in a cherry-picking scheme but rather a legitimate practice motivated by valid trading strategies, realized profits, and client preferences.

III. CONCLUSION

Because there are extant disputes of fact concerning Defendant's participation in an alleged cherry-picking scheme, summary judgment is improper. The Court **DENIES** the SEC's Motion.

IT IS SO ORDERED.

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Footnotes

1 The SEC describes an omnibus account as a "trading account [which] allows an investment adviser to buy and sell securities on behalf of multiple clients simultaneously, without identifying to the broker in advance the specific accounts for which a trade is intended." Mot. 3:2-4. "Rather than placing individual orders in each client account, the adviser can place an aggregated order ... in an omnibus account and subsequently allocate the trade among multiple accounts using an average price." Id. at 3:5-7.

2 Dr. Smith excluded one client's trades from her analysis of the Client Accounts. Id. ¶ 17. She explains the exclusion thus:

> The [e]xcluded [c]lient's trades are significantly larger than trades made on behalf of other clients, with allocations over twelve times the size of allocations made to [Defendant] or to [Defendant's] other [c]lients. As a result, it would be difficult to allocate trades intended for the [e]xcluded [c]lient to other accounts. I also understand that the [e]xcluded [c]lient did not give discretionary trading authority to [Defendant].

Id. ¶ 18.

3 "Cherry picking ... is a practice by which an investment adviser purchases a security, waits to evaluate its performance, and then allocates it to himself or his firm rather than clients if it 'pops,' or goes up quickly within a short period of time." Sec. & Exch. Comm'n v. Slocum, Gordon & Co., 334 F. Supp. 2d 144, 161 (D.R.I. 2004).

4 Although Plaintiff cites the Supreme Court's decision in Kokesh v. Sec. & Exch. Comm'n, that case stands only for the proposition that disgorgement constitutes a civil penalty under 28 U.S.C. § 2462. See 137 S. Ct. 1635, 1642 n.3 (2017) ("The sole question presented in this case is whether disgorgement, as applied in SEC enforcement actions, is subject to § 2642's limitations period."). Kokesh does not hold that disgorgement rises to the level of a criminal penalty. See Bank, 965 F.3d at 301 (citation omitted) (quoting with approval the district court's observation that "because Kokesh was expressly limited to the application of 28 U.S.C. § 2642, it did not ... declare disgorgement to be a criminal punishment"); Dyer, 908 F.3d at 1001 (recognizing that the Supreme Court "did not say [in Kokesh] that SEC civil disgorgement is a criminal punishment").

5 One important distinction, for instance, is that violations of Rule 10b-5 or Section 17(a)(1) require scienter, which is "a mental state embracing intent to deceive, manipulate, or defraud." Sec. & Exch. Comm'n v. Retail Pro, Inc., 673 F. Supp. 2d 1108, 1132 (S.D. Cal. 2009) (quoting Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 n.12 (1976)).

6 The SEC contends that Defendant's statement fails to establish a triable issue of fact because it contradicts his prior deposition testimony. See Pl. SEC's Resp. to Def.'s Stmt. Of Add'l Material Facts ¶ 10, ECF No. 37-3. The Court

disagrees. Defendant stated in his deposition that, when he obtains authorization for a trade, he does so "anywhere from weeks in advance to the day of the trade." Suppl. Decl. of Daniel O. Blau in Supp. of Pl. SEC's Mot. for Summ. J. Ex. 3, at 32:16-20, ECF No. 37-1. That he subsequently admitted to obtaining trade authorization after execution in some instances, id. at 89:4-8, does not rule out the possibility that he received client approval in other cases.

7 In any event, the court's analysis in RRBB Asset Mgmt., LLC debases the SEC's position. There, the court noted the fact-sensitive nature of this issue because "statistical disparities can sometimes be explained by legitimate strategies" and "some clients ... will tolerate early negative returns in favor of improved longer-term performance." RRBB Asset Mgmt., 2021 WL 3047081, at *3.

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