UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

Frederick L. Sharp, *et al.*,

Defendants.

Case No. 1:21-cv-11276-WGY

ORAL ARGUMENT REQUESTED

DEFENDANT PAUL SEXTON'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS COMPLAINT

Respectfully submitted,

/s/ Neil T. Smith

Neil T. Smith (BBO# 651157)
Neil.Smith@klgates.com
K&L Gates LLP
State Street Financial Center
One Lincoln Street
Boston, MA 02111
Tel: (617) 261-3100
Fax: (617) 261-3175

Counsel for Paul Sexton

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INTRODUCTION

The Securities and Exchange Commission has specific, but limited, authority to carry out its mission, and that authority is bounded by statute and court precedent. The charges leveled against Defendant Paul Sexton are an attempt to stretch that authority beyond its recognized and finite bounds. By no later than May 2020, the SEC's statute of limitations expired for its claims against Mr. Sexton. Months later, Congress extended the SEC's statute of limitations for certain unexpired causes of action that seek disgorgement, but made no effort to resurrect claims that were already time-barred. Although this newly created power, by its terms, has no application to this case, the SEC seeks to weaponize it to file an untimely lawsuit against Mr. Sexton in which asks the Court to revive expired claims. Despite the five-year limitations period in effect at all relevant times, this lawsuit was filed six years and three months after Mr. Sexton's last alleged action.

The remedies that the SEC seeks—disgorgement, injunctive relief, and civil monetary penalties—are time-barred under longstanding precedent and limitations on the SEC's authority. The new law passed by Congress does not authorize their revival, nor does any recognized exception toll the statute of limitations against Mr. Sexton. And neither the Constitution nor prior Supreme Court precedent permits the SEC to unilaterally exceed the bounds of its authority. As a result, the SEC cannot bring charges and has no available remedies in law or equity. Mr. Sexton therefore moves to dismiss all claims brought against him as untimely. Alternatively, if the Court determines that some but not all remedies are unavailable, Mr. Sexton seeks an order dismissing or striking any remedies the Court concludes are time-barred.

BACKGROUND

I. The SEC's Time-Barred Allegations

On their face, the SEC's allegations against Mr. Sexton lay bare the staleness of this case.

The SEC has charged Mr. Sexton with violations of Section 17(a) of the Securities Act of 1933 ("Securities Act") (Count I), Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 thereunder (Count II), Section 5 of the Securities Act (Count III), and Section 13(d) of the Exchange Act and Rule 13d-1 thereunder (Count IV). As relief, the SEC seeks a) disgorgement of allegedly ill-gotten gains, b) civil monetary penalties, and c) injunctive relief. According to the complaint, all of Mr. Sexton's alleged conduct occurred prior to May 2015.[1] Apart from one alleged receipt of funds by Mr. Sexton in 2016 (which in and of itself is not a violation of the federal securities laws and the SEC has not alleged to the contrary), the complaint does not allege any conduct by or involving Mr. Sexton after 2015.

The SEC alleges that Mr. Sexton participated in a series of impermissible Over the Counter stock market transactions as part of the so-called "Veldhuis Control Group." These transactions allegedly occurred over a period of years and through a variety of entities, ending (as it relates to Mr. Sexton) in 2015. In its first example, the SEC contends that Mr. Sexton was involved in efforts to "fraudulently sell Stevia First/Vitality" stock. Compl. ¶ 63. But Mr. Sexton's alleged participation ended in 2015, and his name is missing entirely from the 10 paragraphs describing alleged activity occurring between 2016 and 2018 relating to this scheme. *Id.* ¶¶ 130-139.

The SEC's second example, involving a company named Arch, is even more dated, with all of Mr. Sexton's alleged conduct occurring in 2013. *Id.* ¶¶ 169, 172. And in its final example, the SEC reaches still further back in time to allege that Mr. Sexton had some involvement in a

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[1] The only way the SEC attempts to tie Mr. Sexton's alleged conduct to particular dates is through encrypted messages that Mr. Sexton purportedly sent or received. The following is an exhaustive list of all of the messages, along with their dates, on which the SEC relies to establish Mr. Sexton's alleged conduct: Compl. ¶¶ 88 (February 25, 2014), 95-97 (August 6, 2014), 98 (August 7, 2014), 111 (October 24, 2014), 113 (October 28, 2014), 121 (March 13, 2015), 126 (May 6, 2015), 169 (August 13, 2013), 172 (August 20, 2013).

2011 scheme involving stock of OncoSec. *Id.* ¶ 196-219. Apart from listing Mr. Sexton's name, though, the SEC never alleges with particularity what it believes Mr. Sexton did with respect to OncoSec. This is in marked contrast to the SEC's detailed allegations about other defendants' purported involvement with OncoSec.

Although the SEC alleges that *others* within the large group of co-defendants continued to engage in prohibited conduct in 2016 and beyond, the complaint does not contain a single allegation of fraudulent conduct (or any conduct) by Mr. Sexton after 2015. At most, the complaint alleges that Mr. Sexton continued to receive payments after 2015—apparently for purported conduct that happened in 2015 and earlier. The complaint provides just one example: that a co-defendant's nominee purportedly "sent" $110,431.86 to a Colorado loan serving company and that this amount "was applied to pay a mortgage loan for [Mr.] Sexton's benefit." *Id.* ¶ 129. The SEC does not allege (and for purposes of this motion therefore cannot allege) that Mr. Sexton directed or authorized the payment, nor does it allege (nor could it) that the passive receipt of these funds is itself a violation of the securities laws that is within the SEC's powers to charge.[2]

II. Statutory Background

At the time of all of the conduct alleged in the complaint—whether by Mr. Sexton or any of his co-defendants—the SEC had five years "from the date when the claim first accrued" to file actions seeking disgorgement or civil penalties. *See* 28 U.S.C. § 2462; *see also Kokesh v. SEC*, 137 S. Ct. 1635, 1639 (2017) ("Disgorgement in the securities-enforcement context is a 'penalty' within the meaning of § 2462, and so disgorgement actions must be commenced within five years

[2] In a declaration accompanying the complaint, the SEC also appears to allege that Mr. Sexton received funds in 2018. ECF No. 1-13 ¶ 58. This allegation, however, is not part of the complaint, and in any event there is no suggestion of violative conduct in 2018.

of the date the claim accrues."); *Gabelli v. SEC*, 568 U.S. 442, 445 (2013) (same for civil monetary penalties). Under § 2462, the clock starts running when the "allegedly fraudulent conduct occurs," not when it is discovered. *Gabelli*, 568 U.S. at 448. As a result, based upon all allegations against Mr. Sexton, the SEC's claims expired by no later than May 2020.

Events occurring after all claims against Mr. Sexton became time-barred do not grant the SEC the power to bring these claims. In 2021, long after all the conduct referenced in the complaint, Congress established a new limitations period for disgorgement claims (while leaving untouched the five-year limitations period for civil monetary penalties). In particular, a provision now codified as 15 U.S.C. §78u(d)(8)(A)(ii) was inserted on page 1,239 of the 1,480-page National Defense Authorization Act ("NDAA"), and it extends the limitations period for certain scienter-based offenses to "not later than 10 years after the latest date of the violation that gives rise to the action or proceeding in which the Commission seeks the claim." The legislation provides that the new limitations period "shall apply with respect to any action or proceeding that is pending on, or commenced on or after, the date of [January 1, 2021] enactment of this Act." *See* NDAA for Fiscal Year 2021, Pub. L. 116-283, § 6501. However, as discussed below, it does not give the SEC the ability to revive expired claims. Nor does it alter the limitations period for civil monetary penalties.

III. Legislative History

The reference to cases "pending" on or "commenced on or after" the date of enactment traces back to a House bill from 2019. *See* Investor Protection and Capital Markets Fairness Act, H.R. 4344, 116th Cong. § 2 (2019).[3] The floor debate on that bill repeatedly made clear that the legislation was a direct reaction to the Supreme Court's decision in *Kokesh* to apply a five-year

[3] In H.R. 4344, the statute of limitations would have been 14 years as opposed to 10 years.

limitations period to the SEC's ability to seek disgorgement. A five-year window has always applied to the SEC's ability to seek civil monetary penalties. But prior to the decision in *Kokesh*, the SEC had taken the position that disgorgement was not a penalty and therefore was not subject to any limitations period except for the limits on a court's power to grant equitable relief. The language that ultimately became part of the NDAA was a response to *Kokesh*'s rejection of the SEC's argument and its longstanding practice.[4] Indeed, in just four pages of debate on the 2019 bill, there are 28 references to *Kokesh*. *See* Cong. Rec. at H8929-8932 (Nov. 18, 2019).

The SEC lobbied extensively for Congress to expand its authority after the *Kokesh* decision had made the restrictions on its power indisputable. Essentially, the SEC's argument was that a five-year window was not enough time to allow it to effectively recoup ill-gotten gains. *Id.* at 8932. There is not a single reference in the 2019 floor debate to retroactivity or to reviving stale claims. And because the relevant portion of the NDAA was "slipped into the Conference Report" without any "Congressional debate or discussion," there is not any reference to these themes elsewhere in the legislative history. *See SEC Disgorgement Authority May Be Limited Even After Recent Amendments to the Exchange Act*, American Bar Association (Jan. 27, 2021), *available at* https://www.americanbar.org/groups/business_law/publications/blt/2021/02/sec-disgorgement-authority/.

STANDARDS

A motion to dismiss pursuant to Rule 12(b)(6) tests the legal sufficiency of a complaint. To survive a motion to dismiss, the complaint "must contain sufficient factual matter . . . to state

[4] Although the SEC has been on notice since *Kokesh* was decided in 2017 that it faced potential time bars in disgorgement cases, there is no evidence that the agency even attempted to bring a timely case against Mr. Sexton. The filing of this case in August 2021—more than a year after the claims became stale—was the first time Mr. Sexton became aware that he was under investigation.

a claim to relief that is plausible on its face." *Abdisamad v. City of Lewiston*, 960 F.3d 56, 59 (1st Cir. 2020) (internal quotation marks omitted). A defendant "can raise the statute of limitations as an affirmative defense in a Rule 12(b)(6) motion to dismiss, so long as the underlying factual basis for the defense is clear on the face of the plaintiff's pleadings." *Ora Catering, Inc. v. Northland Ins. Co.*, 57 F. Supp. 3d 102, 107 (D. Mass 2014) (internal quotation marks omitted).[5] When all of the remedies sought in a complaint are time-barred, the claims themselves are likewise untimely. *See SEC v. Cohen*, 332 F. Supp. 3d 575, 587-88 (E.D.N.Y. 2018).

ARGUMENT

By the time the NDAA took effect in 2021, any claims the SEC had against Mr. Sexton were time-barred. They had expired by no later than May 2020, months before passage of the NDAA. Nonetheless, in filing a suit against Mr. Sexton, the SEC seeks to exploit this later-passed law as a vehicle for reviving expired disgorgement claims. But resurrecting the claims is neither an appropriate interpretation of the statute nor a constitutionally permissible result. There is a strong presumption against breathing new life into stale causes of action, and the action against Mr. Sexton was time-barred for 15 months before this complaint was filed. To counteract this presumption, Congress must speak clearly and unambiguously, which it indisputably did not do when passing the NDAA. Indeed, as discussed below, under remarkably similar circumstances, courts throughout the country have previously rejected attempts to rely on a new statute to reinstate expired securities fraud claims. Moreover, any use of the NDAA to resurrect time-barred claims

[5] The SEC has not argued (nor can it) that there is any basis for tolling the statute of limitations. For instance, although the SEC alleges that Mr. Sexton resides in Canada, there is no allegation that he has not been present in the United States. To the contrary, Mr. Sexton made frequent trips to the United States during the time period at issue in the complaint. As a result, his residency abroad does not lead to any tolling.

would violate the prohibition on *ex post facto* laws. Or, at the very least, it would raise sufficiently serious constitutional questions such that the Court should avoid interpreting the NDAA in a manner that could potentially result in an *ex post facto* punishment. Finally, the requests for injunctive relief and civil monetary penalties have also been time-barred since at least May 2020. With no allegations of violative conduct by Mr. Sexton within the past five years, and no ability to bring charges or seek relief for time-barred conduct, the SEC's complaint against Mr. Sexton should be dismissed.

I. Under Established Case Law, the NDAA Does Not Revive Time-Barred Claims

To overcome the presumption that time-barred claims cannot be brought back to life, Congress must draft a law in such a way that no other interpretation is available. There are words Congress can use to make such an intention unambiguous, but it employed none of them here. Instead, it chose virtually the same language it used in the Sarbanes-Oxley Act—a law that courts, including in this District, have frequently held does not revive expired securities fraud claims. The lack of a clear congressional statement, coupled with the undeniable prejudice that Mr. Sexton would face from the resurrection of stale claims, means that the SEC's disgorgement claims cannot proceed. Finally, allegations related to events after 2015 are patently insufficient to support claims within the SEC's authority to charge, and the SEC's counterargument is unpersuasive.

A. The SEC Cannot Overcome the Strong Presumption Against Reviving Expired Claims

"When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach." *Landgraf v. USI Film Prod.*, 511 U.S. 244, 280 (1994). To apply a statute retroactively, the Court must have a "firm conviction" that the statute can only be read one way. *Lattab v. Ashcroft*, 384 F.3d 8, 14 (1st Cir. 2004). This is a "demanding" standard that requires an "express congressional command." *Peralta v. Gonzales*, 441 F.3d 23, 29 (1st Cir. 2006) (internal quotation marks omitted). If there is any ambiguity, the Court must default to the "presumption that Congress did not intend the statute to apply retrospectively." *Lattab*, 384 F. 3d at 14. In applying that presumption, the Court must prevent the statute from having any "retroactive effect" on a defendant's rights. *Landgraf*, 511 U.S. at 280.

The presumption against retroactivity applies with full force to attempts to "revive previously stale securities fraud claims." *Enter. Mortg. Acceptance Co., LLC, Sec. Litig. v. Enter. Mortg. Acceptance Co.*, 391 F.3d 401, 406 (2d Cir. 2004), *as amended* (Jan. 7, 2005); *see also Lieberman v. Cambridge Partners, L.L.C.*, 432 F.3d 482, 490-91 (3d Cir. 2005), *as amended* (Feb. 8, 2006). In those cases, the Second and Third Circuits rejected attempts to rely on the Sarbanes-Oxley Act to breathe new life into expired causes of action. In particular, the courts found that the statute did not "unambiguously" restore these expired claims. *Enterprise Mortgage*, 491 F.3d at 406; *Lieberman*, 432 F.3d at 490-91.

B. The NDAA Lacks Any of the Language Necessary To Restore Time-Barred Claims

To conclude that the NDAA does not restore expired claims, this Court need look no further than *Enterprise Mortgage*, *Lieberman*, and other decisions interpreting the effect of virtually identical language from Sarbanes-Oxley. That statute contains the following language: "EFFECTIVE DATE.—The limitations period provided by section 1658(b) of title 28, United States Code, as added by this section, shall apply to all proceedings addressed by this section that are commenced on or after the [July 30, 2002,] date of enactment of this Act." *Enterprise Mortgage*, 491 F.3d at 406. Similarly, the NDAA provides: "APPLICABILITY.—The amendments made by subsection (a) shall apply with respect to any action or proceeding that is pending on, or commenced on or after, the date of enactment of this Act." *See* Pub. L. 116-283,

§ 6501.The lone distinction, which is that the NDAA expressly applies to cases pending as of the effective date, whereas Sarbanes-Oxley does not, is immaterial because the present case was not pending at the time of the NDAA's enactment.[6] Instead, the SEC appears to be relying, just like the plaintiffs in *Enterprise Mortgage* and *Lieberman*, solely on the statement that the provision applies to claims filed "on or after" the date of enactment. That reliance is misplaced.

In rejecting the use of Sarbanes-Oxley to revive stale claims, the Second Circuit found dispositive the fact that the statute "contains none of the unambiguous language" necessary to have such an effect. *Enterprise Mortgage*, 391 F.3d at 406-07. When Congress wants to resurrect expired claims, it uses much clearer language, such as "the Corporation may bring an action . . . on such claim without regard to the expiration of the statute of limitation applicable under State law," or "no limitation shall terminate the period within which suit may be filed." *Id.* at 407 (quoting Riegle–Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103–328, § 201(a), 108 Stat. 2338, 2368; Higher Education Technical Amendments of 1991, Pub. L. No. 102–026, § 3, 105 Stat. 123, 124) (internal quotation marks omitted); *see also Landgraf*, 511 U.S. at 257 ("A statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date.").

Although the First Circuit has not addressed the retroactive effect of Sarbanes-Oxley, courts in this District have agreed with the Second and Third Circuits. *See, e.g.*, *Quaak v. Dexia S.A.*, 357 F. Supp. 2d 330, 337 (D. Mass. 2005) ("This Court agrees with the overwhelming majority of courts, which have found that Sarbanes–Oxley did not revive time-barred claims."); *Swack v. Credit Suisse First Bos.*, 383 F. Supp. 2d 223, 234 n.10 (D. Mass. 2004) ("If the question

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[6] Because this case was commenced after, and was not pending on, the date of enactment of the NDAA, it presents a matter of first impression. *See* ECF No. 127 at 18-19.

were simply whether the statute and legislative history supported a colorable argument that Congress intended to revive moribund actions, this would present a close case. Since the standard is far stricter, however, I cannot find that Congress intended § 804 of the Sarbanes–Oxley Act to apply to actions that were time-barred on July 29, 2002.").[7] The Court should apply the same reasoning in this case.

The intended outcome in cases such as this is particularly clear cut because Congress, when drafting the NDAA, is presumed to have understood how courts interpreted Sarbanes-Oxley. *See Lorillard v. Pons*, 434 U.S. 575, 580 (1978) (noting that "Congress is presumed to be aware of an administrative or judicial interpretation of a statute"); *Gordon v. Ill. Army Nat. Guard*, 215 F.3d 1329 (7th Cir. 2000) ("Congress is also presumed to be aware of prior judicial interpretations of similar statutory provisions."). If Congress wanted a different result with the NDAA, it would have used different language, as it has in other cases when it has wanted to revive expired claims.

Nor can the SEC salvage its position by resorting to legislative history. In evaluating retroactivity, a court may consider a statute's history. *See Peralta*, 441 F.3d at 29. But as with the text itself, history only helps if it expressly and unambiguously reveals an intention to revive stale claims. *See Conservation L. Found., Inc. v. Busey*, 79 F.3d 1250, 1270 (1st Cir. 1996) (noting that legislative history that expressly stated that an act was designed to undo a prior court decision "left no doubt" as to its temporal reach). Here, as is the case with Sarbanes-Oxley, the legislative history does not mention retroactivity. *Cf. Enterprise Mortgage*, 391 F.3d at 408 (noting that nothing in the legislative history "indicates that the extension of the statute of limitations was intended to revive expired claims or that Congress was even considering such a thing"). Although the

[7] After expressing agreement with the consensus view, the Court in *Swack* noted that it did not have to expressly reach the question to resolve the case. *Swack*, 383 F. Supp. 2d at 234 n.10.

legislative history of the NDAA does reveal that Congress was concerned about wrongdoers keeping ill-gotten gains, that merely explains why Congress lengthened the statute; it says nothing about reviving stale claims. Congress's "keen[] interest[]" in an issue is not a clear and explicit directive for retroactive application *See Wallace v. Reno*, 194 F.3d 279, 287 (1st Cir. 1999).

C. Applying the NDAA in This Case Would Have an Impermissible Effect

Given the lack of a clear command, the only remaining inquiry under *Landgraf* is whether applying the NDAA to Mr. Sexton's "circumstances would have an impermissibly retroactive effect." *Lattab*, 384 F.3d at 15. Because the SEC's disgorgement claim against Mr. Sexton had expired prior to passage of the NDAA, there is no doubt that this prong is satisfied. Indeed, the Supreme Court has already stated that "extending a statute of limitations after the pre-existing period of limitations has expired impermissibly revives a moribund cause of action." *Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939, 950 (1997). It does not matter that securities fraud was "already unlawful" prior to passage of the NDAA; instead, it is the revival of stale claims that offends traditional notions of fair play. *See Goncalves v. Reno*, 144 F.3d 110, 130 (1st Cir. 1998). That is so because "reviv[ing] a plaintiff's claim that was otherwise barred under the old statutory scheme . . . would alter the substantive rights of a party and increase a party's liability." *Hughes Aircraft*, 520 U.S. at 939 (quoting *Chenault v. U.S. Postal Serv.*, 37 F.3d 535, 539 (9th Cir. 1994)) (internal quotation marks omitted).

D. The SEC Cannot Rely on Allegations of Post-2015 Receipt of Funds by Mr. Sexton

The SEC cannot escape this conclusion merely by alleging that Mr. Sexton received money within five years of the passage of the NDAA. Violations of the securities laws, not receipt of ill-gotten gains, are what matters when evaluating the timeliness of disgorgement claims. For that reason, a court in this District rejected as "pretty thin gruel" the SEC's argument that the "passive receipt of commission payments" from allegedly fraudulent conduct could restart the five-year clock. *SEC v. Jones*, 300 F. Supp. 3d 312, 316 & n.7 (D. Mass. 2018); *see also Cohen*, 332 F. Supp. 3d at 591 ("[T]he statute of limitations runs from when Defendants allegedly engaged in misconduct, not when they received compensation in connection with that misconduct."). The SEC's charges and purview do not extend to conspiracy or other claims, and Mr. Sexton has not been sued as a relief defendant in possession of ill-gotten gains. The SEC has not alleged *any* conduct by Mr. Sexton following 2015. As a result, the statute of limitations had expired prior to the NDAA's passage notwithstanding any funds Mr. Sexton allegedly received in 2016 or later.

Even if the SEC had alleged some chargeable conduct by Mr. Sexton in 2016 or later, that still would not be sufficient. Prior to the passage of the NDAA, the clock started to run "when the plaintiff ha[d] a complete and present cause of action." *SEC v. Kokesh*, 884 F.3d 979, 982 (10th Cir. 2018) (internal quotation marks omitted). In the context of a "continuing violation," a claim can accrue "even before the last act of the violation where the conduct that has already occurred is sufficient to support a claim." *Id.* (internal quotation marks omitted). Here, the SEC has alleged a continuous scheme lasting from "2010 through at least 2019," Compl. ¶ 42, but there are no allegations that Mr. Sexton took any actionable steps after 2015. The SEC does, however, allege pre-2016 violations with respect to each relevant transaction. As a result, even assuming Mr. Sexton continued to receive allegedly ill-gotten gains in 2016 or later, the SEC's claims had long since accrued. And by the effective date of the NDAA in 2021, those same claims had expired.

Even if the SEC could clear all of these hurdles, it has still at the very least failed to plead with sufficient detail what it believes Mr. Sexton did within the five-year window. Because the SEC alleges securities fraud, it "must state with particularity the circumstances constituting fraud."

Fed. R. Civ. P. 9(b). This means that the complaint must specify "the time, place, and content of an alleged false representation." *Doyle v. Hasbro, Inc.*, 103 F.3d 186, 194 (1st Cir. 1996).

In its response to Defendant Jackson Friesen's motion to dismiss, the SEC suggests that it is enough to plead that others were involved in conduct after Mr. Sexton's alleged actions came to an end in 2015. *See* ECF No. 124 at 3 (citing Compl. ¶¶130-140 to buttress claims against Defendants Friesen and Sexton). But paragraphs 130-139 do not mention Mr. Sexton at all, and paragraph 140 purports to outline proceeds received "during the period of time subject to this Complaint," which in turn is defined to mean to "2010 through at least 2019." *See* Compl. ¶ 42. The SEC cannot merely "lump[] [Mr. Sexton] together" with other defendants and argue that their more recent conduct is attributable to him, particularly when the SEC makes no particularized allegation that Mr. Sexton participated in that conduct. *See SEC v. Durgarian*, 477 F. Supp. 2d 342, 354 (D. Mass. 2007). Nor can the SEC escape the requirements of Rule 9(b) in attempting to keep Mr. Sexton involved in a case in which it has no specific evidence to charge him.

E. The SEC's Counterargument Is Unpersuasive

The SEC's response to Defendant Friesen's similar argument about reviving time-barred claims misses the mark. The SEC relies primarily on a statement from *Landgraf* that a statute referring to "all proceedings pending on *or commenced* after the date of enactment" contained "an explicit retroactivity command." *See* ECF No. 124 at 5 (quoting *Langdraf*, 511 U.S. at 255-56 & n.8) (emphasis added by SEC). This argument attacks a strawman. There is an established distinction, which the SEC ignores, between applying new statutory authority to conduct that predates its enactment but was not yet stale versus interpreting such a statute to revive expired claims. As the Eighth Circuit has explained:

> Providing that a statute of limitations should be "applied retroactively" is a broad brush approach to what is actually a more specific inquiry. Retroactive application can reach two

> categories of cases: first, a group on which the statute has not run at the time the statute is amended; and second, cases on which the existing statute has run at the time of amendment. The second group is affected not only by questions of the retroactive application of the statute, but also by the need to consider the question of revival of barred claims.

Kansas Pub. Emps. Ret. Sys. v. Reimer & Koger Assocs., Inc., 61 F.3d 608, 615 (8th Cir. 1995); *see also Weingarten v. United States*, 865 F.3d 48, 57 (2d Cir. 2017) ("[R]etroactively revoking a vested statute of limitations defense is different from retroactively extending the filing period for a still-viable claim.").

The NDAA, by its own terms, arguably has some retroactive effects. Imagine, for instance, a case that the SEC brings in 2023 alleging conduct that occurred in 2017. Under the NDAA, such a claim might be timely even though it was filed outside the then-existing five-year statute of limitations because the NDAA was passed prior to the claim's expiration. Applying the NDAA in such a manner would give meaning to the reference to cases filed "on or after" the effective date.

But, as the Third Circuit recognized in the Sarbanes-Oxley context, it is another matter entirely to conclude that a statute's reference to cases filed "on or after" a particular date revives stale claims. *See Lieberman*, 432 F.3d at 489 ("Even assuming, without deciding, that Section 804(b) clearly provides for retroactive application, it does not necessarily follow that Section 804(b) thereby clearly provides for the resurrection of moribund claims."). As previously noted, Congress knows how to write statutes to revive expired claims, and the language of the NDAA comes nowhere near the type of clear statement that is required.

Tellingly, the SEC does not respond in its opposition brief to Defendant Friesen's argument about Sarbanes-Oxley, even though Defendant Friesen cited both *Enterprise Mortgage* and *Quaak*. *See* ECF No. 110 at 14. Although the SEC relies on *Landgraf* to argue that the Supreme Court has already held that statutes that use the term "on or after" are retroactive, the Sarbanes-Oxley cases apply *Landgraf* to conclude that any such retroactivity does not include revival of time-barred claims. *See Enterprise Mortgage*, 291 F.3d at 406 (concluding, "[i]n accordance with *Landgraf*," that Sarbanes-Oxley "does not unambiguously revive previously stale securities fraud claims"); *Lieberman*, 432 F.3d at 492 ("In accordance with *Landgraf* then, we decline to apply Section 804 to revive Lieberman's and L–3's expired claims."); *Quaak*, 357 F. Supp. 2d at 336 (citing *Landgraf*). Based upon this precedent, *Landgraf* cannot plausibly be read to compel (or even support) revival of expired claims against Mr. Sexton.

II. Revival of Stale Claims Would Constitute an Unlawful *Ex Post Facto* Punishment

Applying the NDAA to revive expired claims would also violate the prohibition on *ex post facto* laws. "Although the prohibition generally applies to criminal statutes, it may also be applied in civil cases where the civil disabilities disguise criminal penalties." *Louis Vuitton S.A. v. Spencer Handbags Corp.*, 765 F.2d 966, 972 (2d Cir. 1985); *see also Massachusetts v. Schering-Plough Corp.*, 779 F. Supp. 2d 224, 233 (D. Mass. 2011) (same). Civil laws trigger the *ex post facto* prohibition if they are retroactive and penal. *See DeVeau v. Braisted*, 363 U.S. 144, 160 (1960) (pl. op.) ("The mark of an *ex post facto* law is the imposition of what can fairly be designated punishment for past acts."); *see also Kokesh*, 137 S. Ct. at 1639 (concluding that SEC disgorgement serves "punitive purposes").

In assessing whether remedies are sufficiently penal, courts look to the following seven factors: "[w]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963) (internal footnotes omitted). A conclusion that four of these factors point in the direction of punishment is sufficient to "transform the [law] into a criminal penalty for *ex post facto* purposes." *Schering-Plough Corp.*, 779 F. Supp. 2d at 238. Here, all seven factors point in that direction.

First, disgorgement awards can involve "an affirmative disability or restraint" (*i.e.*, incarceration). Courts have broad latitude to enforce disgorgement orders, including by using civil contempt powers to incarcerate defendants who fail to pay. *See, e.g.*, *United States v. Badger*, 818 F.3d 563, 575 (10th Cir. 2016). Although disgorgement does not lead directly or automatically to incarceration, neither does any civil remedy. As a result, the possibility that it can be enforced through incarceration means that it is as punitive as a civil measure can be.

Second, disgorgement in SEC cases is "regarded as a punishment." The Supreme Court has expressly held that "[d]isgorgement in the securities-enforcement context is a 'penalty,'" in part because it "is imposed for punitive purposes." *Kokesh*, 137 S. Ct. at 1639. Apart from using the word "punitive," the Supreme Court also defined a "penalty" (which is what disgorgement is) as a "punishment." *Id.* at 1642 (internal quotation marks omitted).[8] Although *Kokesh* was decided recently, it applies a longstanding interpretation. *Cf. NLRB v. Loc. 176, United Brother. of Carpenters & Joiners of Am., AFL-CIO*, 276 F.2d 583, 586 (1st Cir. 1960) ("In view of the fact that their conduct was recognized as unlawful only after it had occurred . . . a disgorgement order would seem to us to be an *ex post facto* penalty.").

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[8] The Supreme Court later suggested that disgorgement can be a penalty in some contexts but not others. *See Liu v. SEC*, 140 S. Ct. 1936, 1946 (2020). However, for present purposes, the fact that all seven factors point toward it being punitive is determinative.

Third, the NDAA's 10-year limitations period applies exclusively to scienter-based offenses. The statute only extends to 10 years the period for violations of 15 U.S.C. §§ 78j(b), § 77q(a)(1), and § 80b-6(1) (all of which require scienter), as well as "any other provision of the securities laws for which scienter must be established." *See* 15 U.S.C. §78u(d)(8)(A)(ii).

Fourth, SEC disgorgement promotes "deterrence," which is one of the "traditional aims of punishment." Indeed, the Supreme Court has noted in the securities fraud context that the "primary purpose of disgorgement orders is to deter violations of the securities laws by depriving violators of their ill-gotten gains." *Kokesh*, 137 S. Ct. at 1643 (internal quotation marks omitted).

Fifth, the "behavior to which [SEC disgorgement] applies is already a crime." As just one example, the Department of Justice has already criminally charged certain of the co-defendants in this case for the same alleged conduct at issue in this civil suit. *See United States v. Sharp*, No. 1:21-mj-7182-JCB, ECF No. 3 (D. Mass Aug. 4, 2021).

Sixth, there is no "alternative purpose" other than punishment. Although disgorgement sometimes serves to return ill-gotten gains to victims, disgorgement obtained by the SEC does not need to be distributed to victims and in many cases goes directly into the Treasury. *See Kokesh*, 137 S. Ct. at 1644 ("When an individual is made to pay a noncompensatory sanction to the Government as a consequence of a legal violation, the payment operates as a penalty.").

Finally, to the extent any non-punitive purpose exists, SEC disgorgement is "excessive in relation" to that purpose. Although it is theoretically possible for SEC disgorgement to go to victims, the amount of disgorgement frequently exceeds the claims of known, identifiable victims. *See id.* Because disgorgement is not capped in those cases at the amount that can feasibly be distributed to victims, it is excessive in relation to any compensatory purpose.

In sum, SEC disgorgement is exactly what the Supreme Court has already held that it is: "punitive." *Id.* at 1639. For that reason, expired claims cannot be revived. Although one court has reached a contrary conclusion, its analysis is neither persuasive nor consistent with First Circuit precedent. *See SEC v. Kellen*, No. CV 20-3861-RSWL-AGR, 2021 WL 4907238, at *4 (C.D. Cal. Sept. 14, 2021) (rejecting *ex post facto* argument in context of SEC disgorgement). *Kellen* is not persuasive because it fails to apply the *Kennedy* factors, and its conclusion that disgorgement is not sufficiently penal is contrary to the First Circuit's determination that "a disgorgement order would seem to us to be an *ex post facto* penalty." *See Local 176*, 276 F.2d at 586.

III. The Constitutional Avoidance Doctrine Supports Dismissal

Although application of the NDAA to allow a suit against Mr. Sexton would clearly constitute an *ex post facto* punishment, the Court can reach the same result on narrower grounds through the doctrine of constitutional avoidance. When constitutional questions loom, a "cardinal principle" is that courts must "ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided." *United States v. Sec. Indus. Bank*, 459 U.S. 70, 78 (1982) (internal quotation marks omitted). With that principle in mind, "[w]here a statute may be construed to have either retrospective or prospective effect, a court will choose to apply the statute prospectively if constitutional problems can thereby be avoided." *Louis Vuitton*, 765 F.2d at 971. The answer to the constitutional question need not be clear cut; any "substantial" question is sufficient to trigger the doctrine. *See United States v. Dwinells*, 508 F.3d 63, 70 (1st Cir. 2007).

If nothing else, reviving time-barred claims and allowing the SEC to pursue a previously expired remedy that the Supreme Court has described as punitive raises "substantial" constitutional questions. Given that the statute is at the very least susceptible to multiple readings, the Court should avoid the one that would raise serious constitutional concerns. *Cf. Louis Vuitton*, 765 F.2d at 972 (barring retroactive application because a "new punitive treble damages provision, if applied retroactively, would present a potential *ex post facto* problem").

IV. The Request for Injunctive Relief Is Untimely

The requested injunction is also a time-barred penalty under 28 U.S.C. § 2462. *See Cohen*, 332 F. Supp. 3d at 594 (dismissing SEC's request for injunctive relief as untimely because it "would function at least partly as a penalty, and thus is subject to § 2462"). Importantly, the requested injunction does not serve the remedial purposes of equitable relief. The SEC has not alleged any misconduct by Mr. Sexton after 2015, and it provides no basis to believe that he will commit any future violations. This runs directly contrary to the requirement for the SEC to show that "future violations" are "likely" to occur. *See SEC v. Sargent*, 329 F.3d 34, 39 (1st Cir. 2003).

Even so, the SEC wants the Court to enter an injunction essentially compelling Mr. Sexton to do what every other person conducting business in the United States must do: comply with the federal securities laws.[9] As the court in *Cohen* explained:

> [T]he requested injunction would operate at least in part as a penalty. Based exclusively on allegations that Defendants engaged in misconduct five to ten years before the SEC filed suit, the Commission seeks to enjoin them to comply with the securities laws they allegedly violated before. As the parties agree, this injunction would impose no duties on Defendants beyond their existing duty to obey the law. What this injunction would do, however, is mark Defendants as lawbreakers and stigmatize them in the eyes of the public.

Cohen, 332 F. Supp. 3d at 594 (internal quotation marks, internal citations, and alteration omitted). This stigmatization is a penalty. *See Gabelli*, 568 U.S. at 452 (noting that penalties operate to "label defendants wrongdoers"). Thus, the request for an injunction should be dismissed as untimely. Although the NDAA creates a 10-year limitations period for injunctions, *see* 15 U.S.C.

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[9] Although such injunctions do not impose any obligations beyond what the law already requires, they are problematic because they subject defendants to potential contempt of court for simple misunderstandings. *See, e.g.*, *SEC v. Goble*, 682 F.3d 934, 951 (11th Cir. 2012).

§78u(d)(8)(B), that provision cannot be used to revive time-barred claims for the same reasons addressed above with respect to disgorgement.

V. The Request for Civil Monetary Penalties Is Untimely

Civil monetary penalties are—and always have been—subject to the five-year period in 28 U.S.C. § 2462. *See Gabelli,* 568 at 445. Nothing about the NDAA changed that. Indeed, unlike with disgorgement and injunctions, the NDAA does not even purport to change the limitations period going forward for civil monetary penalties. Because, as noted, the SEC fails to allege any conduct by Mr. Sexton beyond May 2015, any ability to seek civil monetary penalties expired at least by May 2020.[10] As is the case with disgorgement, it does not matter if Mr. Sexton received funds within the five-year window, as the SEC has not pled any violative conduct during the relevant timeframe. *See Jones*, 300 F. Supp. 3d at 316 & n.7; *Cohen*, 332 F. Supp. 3d at 591.[11]

CONCLUSION

The SEC's remedies, and therefore its claims, became time-barred no later than May 2020. A law that took effect in 2021 cannot revive them. The law does not purport to reinstate stale claims, and the Constitution and a wealth of precedent prohibit the SEC from resurrecting them. As a result, all claims against Mr. Sexton should be dismissed as untimely. In the alternative, Mr. Sexton seeks an order dismissing or striking any remedies the Court concludes are time-barred.

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[10] In the event this case is allowed to proceed, Mr. Sexton reserves the right to argue that, with respect to particular allegations, the statute of limitations expired prior to May 2020.

[11] Although this motion attacks as time-barred the remedies sought by the SEC as opposed to its claims of violations of the securities laws, the result is the same. Without any timely remedies, the SEC has nothing to pursue. *See Cohen*, 332 F. Supp. 3d at 587-88.

Respectfully submitted,

/s/ Neil T. Smith

Neil T. Smith (BBO# 651157)
Neil.Smith@klgates.com
K&L Gates LLP
State Street Financial Center
One Lincoln Street
Boston, MA 02111
Tel: (617) 261-3100
Fax: (617) 261-3175

/s/ Stephen G. Topetzes

Stephen G. Topetzes*
Stephen.Topetzes@klgates.com
Robert S. Silverblatt*
Rob.Silverblatt@klgates.com
K&L Gates LLP
1601 K St. NW
Washington, DC 20006
Tel: (202) 778-9328
Fax: (202) 778-9100

**Admitted pro hac vice*

Counsel for Paul Sexton

Dated: November 17, 2021

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was filed through the Electronic Court Filing system on November 17, 2021, and a copy thereof will be sent electronically to the registered recipients and counsel of record as identified on the Notice of Electronic Filing.

/s/ Neil T. Smith

Neil T. Smith