UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. FREDERICK L. SHARP, ZHIYING YVONNE GASARCH, COURTNEY KELLN, MIKE K. VELDHUIS, PAUL SEXTON, JACKSON T. FRIESEN, WILLIAM T. KAITZ, AVTAR S. DHILLON and GRAHAM R. TAYLOR, Defendants.	Civil Action No. 1:21-cv-11276-WGY

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT GRAHAM R. TAYLOR'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO STRIKE PLAINTIFF'S COMPLAINT

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I. INTRODUCTION

This motion presents a matter of first impression. In 2017, in *Kokesh v. SEC*, the Supreme Court finally put a stop to the SEC's previous practice of filing district court actions seeking disgorgement for indefinite periods without statutory authority and held that the claims are subject to a five-year statute of limitations. Then squeezed into the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 (the "NDAA"), passed by Congress on January 1, 2021 over a presidential veto and made effective the same day, was section 6501, which statutorily authorized the SEC to seek disgorgement and set a 10-year statute of limitations for claims requiring proof of scienter, and a five-year for all others. The section states that it shall apply to any action "that is pending on, or commenced on or after, the date of enactment of this Act."

Plaintiff believes that language makes it expressly retroactive. While others may disagree, what is certainly clear is that is far from the end of the analysis. Applying a statute "retroactively" can reach at least two types of cases: cases where the prior statute of limitations had not yet expired at the time the new statute is enacted and cases where the prior statute had already expired and the claims were time barred before the new statute was enacted. Courts that have addressed the SEC's use of the new statute thus far have done so only in cases that were pending at the time of the Act's enactment and involved conduct that had taken place within the prior statute of limitations, even if the SEC subsequently sought to pull in older conduct into its pending claims.

The unique circumstances presented by Plaintiff's claims against Defendant Graham R. Taylor ("Taylor") here are that they were all time barred *for years* before the NDAA's enactment. Taylor is alleged to have had involvement with illegal trading in the securities of four companies and the last of his alleged conduct with respect to each occurred between August 2013 and October 2014. Therefore under the pre-NDAA statute of limitations, claims for disgorgement

relating to each were time barred as early as August 2018 and as late as October 2019. Plaintiff seeks to apply the NDAA to resurrect these claims that were laid to rest years earlier.

The reasons to decline such a draconian application are numerous. First, the language is not even a close call to that required by the Supreme Court to clearly state an intent for retroactive application. The language is virtually identical to that contained in the Sarbanes-Oxley Act, which courts have consistently held is not sufficient to revive time-barred claims.

Second, applying the NDAA to revive time-barred claims in this manner would violate the Constitution's *ex post facto* clause given that the Supreme Court has recognized the penal nature of disgorgement sought in SEC cases.

Third, permitting the government to bring claims years after they were time barred under the prior statute of limitations undermines the very purpose of statutes of limitations and is contrary to centuries old doctrine promoting certainty and justice by preventing unfair surprise. Permitting Taylor to have been free from suit for as long as nearly two and a half years on some claims and no less than 14 months on the rest (even using the January enactment date rather than the August filing date) and have them suddenly spring back to life is contrary to all notions of fairness.

All of Plaintiff's claims for civil monetary penalties and for disgorgement for alleged violations not requiring proof of scienter are subject to a five-year statute of limitations under both the old and new statutory schemes and are, therefore, plainly time-barred under any circumstances.

II. SUMMARY OF PLAINTIFF'S ALLEGATIONS

Plaintiff's Complaint alleges a scheme involving U.S. and foreign individuals and entities, spanning several years, to fraudulently sell stocks in United States markets. (Complaint, ¶ 1.) Nine individual defendants are alleged to been involved in providing offshore shell companies, arranging stock transfers, arranging money transmittals, providing encrypted accounting systems, providing encrypted communications systems, serving as control persons at relevant companies,

and promoting stocks to investors. (*See id.* ¶¶ 1–3, 22–30.) Taylor's alleged role in the scheme was receiving illegal stock sale proceeds in exchange for arranging a corporate merger and for controlling nominee shareholders who held and traded stock in concert with other defendants. (*Id.* ¶ 14.) Specifically, Plaintiff alleges that Taylor's conduct involved four companies: (1) Inovio Pharmaceuticals, Inc. ("Inovio"); (2) OncoSec Medical Incorporated ("OncoSec"); (3) Arch Therapeutics, Inc. ("Arch"); and (4) Stevia First Corp. ("Stevia First").[1]

A. Inovio

Plaintiff alleges that Taylor directed the unregistered sale of Inovio shares—transferred by defendant Avtar Dhillon ("Dhillon") to a nominee company controlled by Taylor—from ***August 23, 2013 to September 13, 2013***. (*Id.* ¶ 179.) Plaintiff further alleges that Taylor paid money to Dhillon or for Dhillon's benefit from November 2013 through January 2014. (*Id.*) Plaintiff does not identify whether or how such payments relate to the sale of Inovio stock. (*Id.*)

B. OncoSec

Plaintiff alleges that from ***April 2, 2014 through June 19, 2014***, Taylor made unregistered sales of shares of OncoSec through a nominee shareholder that he controlled. (*Id.* ¶ 218.) Plaintiff further alleges that during the same time period, Taylor sent two wires for Dhillon's benefit from the account in which the proceeds from the sales of OncoSec shares were held. (*Id.* ¶ 219.)

C. Arch

Plaintiff alleges that Taylor received proceeds from sales of Arch's stock on a single day, ***August 22, 2013***. (*Id.* ¶ 172.) Plaintiff then alleges that from April 2014 through March 2016, Taylor directed payments to third parties for the benefit of Dhillon. (*Id.* ¶ 176.) A table identifying the payments, however, reflects that all but two were made prior to ***September 17, 2014***, around

[1] Stevia First is also referred to in the Complaint by reference to the name of its successor company: Vitality Biopharma, Inc. ("Vitality"). (*Id.* ¶¶ 8, 31, 63 n.4.) This change took place in 2016. (*Id.* ¶ 63 n.4.)

the same time as the latest conduct in which Taylor is alleged to have engaged concerning *any* of the companies. The remaining two payments allegedly made by Taylor to third parties for Dhillon's benefit did not occur until nearly *a year and a half later*, in February and March 2016—a year and a half after the next most recent payment and a year and a half after any alleged conduct. (*Id.* ¶ 176.) Plaintiff alleges that only *some* of those payments were derived from the sale of Arch or Stevia First stock, but does not specify which payments were or were not so derived. (*Id.*)

D. Stevia First

Plaintiff alleges the existence of four rounds of fraudulent stock sales relating to Stevia First and its successor company. (*See id.* ¶¶ 63–139.) In the first round, which took place in 2012, Plaintiff alleges that Taylor worked with others to facilitate the transfer of Stevia First's unrestricted stock from certain shareholders to certain defendant-administered nominee companies that held the stock for other defendants. (*Id.* ¶ 76.) Plaintiff further alleges that Taylor received proceeds from the sale of Stevia First stock into a bank account of a company he controlled and that he transferred 60% of that money to Dhillon between ***April 2012 and July 2012***. (*Id.* ¶ 82.)

In the second round, which took place in 2014, Plaintiff alleges that Taylor received proceeds from the sale of Stevia First stock at times between ***January and August 2014***. (*Id.* ¶¶ 85, 90, 96–97.) Plaintiff further alleges that Taylor arranged to transfer money for Dhillon's benefit from November 2013 through January 2015. (*Id.* ¶ 99.) In contrast to Paragraph 176 (discussed above in the "Arch" section because it alludes to payments relating to both Arch and Stevia First), Paragraph 99 does not include a table identifying the alleged payments; it is unclear if the payments alleged in Paragraph 99 are a subset of the nondescript payment allegations in Paragraph 176. Regardless, the only payments temporally related to any alleged stock sales involving Taylor ceased in September 2014 and none are identified between then and

January 2015 (or even February 2016). (*Id.* ¶ 99, 176) Further, Plaintiff does not allege that the transfers in Paragraph 99 consisted of proceeds from the sale of Stevia First stock. (*Id.* ¶ 99)

In the third round, Plaintiff alleges that Taylor directed two payments to Dhillon in March 2012 for the purchase of certain of Dhillon's Stevia First stock. (*Id.* ¶¶ 105–106.) Allegedly in exchange for the payments from Taylor, Dhillon transferred certain of his Stevia First stock to two nominee shareholders Taylor controlled. (*Id.* ¶ 107.) ***In October 2014***, Taylor allegedly transferred the Stevia First shares held by the two nominee shareholders in his control to certain other nominee shareholders administered and used by certain defendants. (*Id.* ¶¶ 113–114.)

Plaintiff does not allege involvement by Taylor in the fourth round. (*See id.* ¶¶ 130–139.)

III. LEGAL STANDARD

To survive a motion to dismiss pursuant to Rule 12(b)(6), a complaint "must contain sufficient factual matter . . . to state a claim to relief that is plausible on its face." *Abdisamad v. City of Lewiston*, 960 F.3d 56, 59 (1st Cir. 2020). In assessing the sufficiency of the complaint, the Court must "strip away and discard the complaint's conclusory legal allegations." *In re Montreal, Me. & Atl. Railway, Ltd.*, 888 F.3d 1, 6 (1st Cir. 2018). A defendant can raise a statute of limitations argument on a Rule 12(b)(6) motion to dismiss where the factual basis for such argument is clear from the face of the complaint. *Ora Catering, Inc. v. Northland Ins. Co.*, 57 F. Supp. 3d 102, 107 (D. Mass 2014) (granting motion to dismiss based on statute of limitations). Thus, "[w]hen the allegations in a complaint show that the passage of time between the events giving rise to the claim and the commencement of the action exceeds the applicable limitations period . . . [a] court should grant a 12(b)(6) motion by the defense if the complaint (and any other properly considered documents) fail to sketch a factual predicate that would provide a basis for tolling the statute of limitations." *Id.*

Under Federal Rule of Civil Procedure 12(f), a court may strike portions of a complaint that are, among other things, immaterial or impertinent. *See* FED. R. CIV. P. 12(f). This includes improper prayers for relief. *See, e.g.*, *Hagenah v. Cmty. Enters., Inc.*, No. 15-cv-30036, 2016 WL 1170963, at *8 (D. Mass. March 23, 2016) (granting motion to strike a plaintiff's request that the court impose civil penalties where such remedy was not available to the plaintiff).

IV. ARGUMENT

A. Plaintiff Is Time-Barred from Seeking Civil Monetary Penalties from Taylor

Plaintiff's claim for civil monetary penalties is subject to a five-year limitations period. *See, e.g.*, *Kokesh v. SEC*, 137 S. Ct. 1635, 1640–1641 (2017) ("[t]his Court has already held that the 5-year statute of limitations set forth in 28 U.S.C. § 2462 applies when the Commission seeks statutory monetary penalties"); *SEC v. Premier Links, Inc.*, No. 14-CV-7375, 2017 U.S. Dist. LEXIS 151170, at *29 (E.D.N.Y. Sept. 14, 2017) ("like with disgorgement, 28 U.S.C. § 2462 applies a five-year statute of limitations to civil monetary penalties in SEC enforcement actions"). None of Plaintiff's allegations regarding Taylor's conduct fall within the five years immediately preceding the filing of the Complaint on August 5, 2021.

Because it is clear from the face of the Complaint that Plaintiff's allegations against Taylor on which it bases its claims for civil monetary penalties all relate to conduct that took place more than five years prior to Plaintiff filing its Complaint, all of Plaintiff's claims against Taylor (whether scienter-based or not) should be dismissed with prejudice with regard to civil monetary penalties. *See, e.g.*, *Ora Catering, Inc. v. Northland Ins. Co.*, 57 F. Supp. 3d 102, 107 (D. Mass 2014) ("[w]hen the allegations in a complaint show that the passage of time between the events giving rise to the claim and the commencement of the action exceeds the applicable limitations period, a . . . court should grant a 12(b)(6) motion by the defense") (citing *Abdallah v. Bain Cap., LLC*, 752 F.3d 114, 119 (1st Cir. 2014)). Alternatively, Plaintiff's prayer for relief seeking civil

monetary penalties (based on all causes of action against Taylor, whether scienter-based or not) should be stricken as to Taylor. *See Hagenah*, 2016 WL 1170963, at *8 (striking a plaintiff's prayer for relief where it improperly sought imposition of a civil penalty).

The Complaint contains some allegations regarding payments made or directed by Taylor for the benefit of others, but such allegations should not be considered for purposes of this motion for a number of reasons. First, Plaintiff fails to adequately allege that such payments are related to any misconduct.[2] For example, one of Plaintiff's allegations against Taylor simply states that "[o]n various dates during approximately November 2013 through January 2014, Taylor paid hundreds of thousands of dollars to Dhillon or for Dhillon's benefit." (Compl. ¶ 179.) Plaintiff makes no effort to tie any specific payment by Taylor "to Dhillon or for Dhillon's benefit" to specific sales of a relevant company's stock or any other conduct. (*See id.*) Elsewhere in its Complaint, Plaintiff provides a table of payments purportedly "directed by Taylor to third parties for the benefit of Dhillon or otherwise associated with Dhillon." (*Id.* ¶ 176.) Yet the Complaint merely makes the broad, non-specific allegation that "*some of* [the payments in the table] were derived from Stevia First/Vitality and Arch stock sales proceeds." (*Id.* (emphasis added).) Plaintiff makes no effort to identify *which* payments listed in the table related to Stevia First, which relate to Arch, and which do not relate to the alleged misconduct at all. (*See id.*)

Second, some of the payments are far too attenuated temporally to infer any relation at all. This is especially apparent given that the only specific Arch-related misconduct attributed to Taylor in the Complaint took place ***on August 22, 2013***, and the specific Stevia First-related

[2] Rule 9(b) requires Plaintiff to "state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). This "entails specifying in the . . . complaint the time, place, and content of the alleged false or fraudulent representations." *S.E.C. v. Patel*, 2008 WL 782483, at *5 (D.N.H. Mar. 24, 2008) (applying Rule 9(b) against the Commission's Securities Act claims "grounded in fraud."). "Allegations of fraud must be organized into discrete units that are, standing alone, each capable of evaluation." *Id.* (quotations omitted). Such claims must be well-pled and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Evans v. Boston Red Sox*, 2014 WL 4966081 (D. Mass. Sept. 30, 2014).

misconduct attributed to Taylor in the Complaint took place from ***2012 through October 2014***; yet the table purporting to list payments directed by Taylor for Dhillon's benefit, while mostly in line with that time period, contains two complete outliers in February and March ***2016***—over *two and a half years* after Taylor's last alleged involvement with Arch and nearly *one and a half years* after Taylor's last alleged involvement with Stevia First—with no explanation as to whether, or how, such payments are in any way related to Arch, Stevia First, or any other company relevant to Plaintiff's claims. (*See id.* ¶¶ 76, 82, 85, 90, 96–97, 99, 105–107, 113–114, 172, 176.). Those two alleged payments are far too attenuated from any trading, receipt of proceeds, or any other conduct whatsoever to reasonably be tied to Plaintiff's claims.

Regardless, no such payments are alleged within five years of filing of the Complaint, and Plaintiff's claims for civil monetary penalties against Taylor are plainly time-barred on their face.

B. Plaintiff Is Also Time-Barred from Seeking Disgorgement from Taylor

In *Kokesh*, the Supreme Court unanimously held that "[t]he 5-year statute of limitations in §2462 therefore applies when the SEC seeks disgorgement." 137 S. Ct. at *1644; *see also SEC v. Premier Links, Inc.*, No. 14-CV-7375, 2017 U.S. Dist. LEXIS 151170, at *24–25 (E.D.N.Y. Sept. 14, 2017) ("the *Kokesh* Court unequivocally concluded that disgorgement was a penalty for purposes of 28 U.S.C. § 2462, meaning that the five-year limitations period applies to any SEC enforcement action seeking disgorgement"). The five-year limitations period that governs Plaintiff's disgorgement claims against Taylor began 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) (quotations omitted).

Disgorgement is limited to "a wrongdoer's net profits." *Liu v. SEC*, 140 S. Ct. 1936, 1940 (2020). Consequently, Taylor's alleged conduct for which Plaintiff might seek disgorgement is narrower than that for which it might seek civil monetary penalties (if not time barred) because it

must exclude allegations that Taylor merely *sent*, or caused to be *sent*, money to others. Amounts paid *from Taylor to others* could only serve to *reduce* the amount subject to disgorgement.[3] None of the alleged misconduct by Taylor that could serve as the basis for disgorgement extends beyond ***October 2014***. Consequently, all of Plaintiff's claims against Taylor—insofar as they seek disgorgement—were time-barred ***years*** before Plaintiff filed its Complaint on August 5, 2021. And such claims were also even time-barred ***years*** before the NDAA became law:

ALLEGATIONS RELATING TO TAYLOR AND A RELEVANT COMPANY				
Company	**Dates**	**Complaint Paragraphs**	**Date Time-Barred**	**Time-Barred Before Enactment of NDAA**
Inovio	August 23, 2013 to September 13, 2013	179	September 13, **2018**	~ 2 years and 3 ½ months
OncoSec	April 2, 2014 through June 19, 2014	218	June 19, **2019**	~ 1 year and 6 ½ months
Arch	August 22, 2013	172	August 22, **2018**	~ 2 years and 4 ½ months
Stevia First	2012 through October 2014	76, 82, 85, 90, 96–97, 105–107, 113–114	October 31, **2019** (at latest)	~ 1 year and 2 months

Because it is clear from the face of the Complaint that Plaintiff's allegations against Taylor on which it bases its claims for disgorgement all relate to conduct that took place more than five years prior to Plaintiff filing its Complaint, Plaintiff's claims against Taylor should be dismissed with prejudice with regard to disgorgement. *See, e.g.*, *Ora Catering, Inc.*, 57 F. Supp. 3d at 107. Alternatively, Plaintiff's prayer for relief seeking disgorgement should be stricken as to Taylor. *See Hagenah*, 2016 WL 1170963, at *8.

This applies to Plaintiff's claims for disgorgement for its *non-scienter-based* claims against Taylor (i.e., pursuant to Sections 17(a)(3) and 15(b) of the Securities Act for aiding and abetting

[3] Even allegations that a defendant *received* money may be insufficient to serve as the basis for a disgorgement claim. For example, 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). In this case, Plaintiff has not even alleged the "thin gruel" of receipt of payments by Taylor during the five years prior to passage of the NDAA.

Defendant Dhillon's Section 5 violations) because even the NDAA states that the five-year limitations period for disgorgement established by *Kokesh* applies to non-scienter-based claims. This also applies to Plaintiff's claims for disgorgement for its *scienter-based* claims against Taylor (i.e., pursuant to Section 17(a)(1) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder) because the NDAA does not apply here for the reasons set forth below.

C. The National Defense Authorization Act's 10-Year Limitations Period for Disgorgement Claims Does Not Apply to Plaintiff's Claims against Taylor

1. *The NDAA*

On January 1, 2021, Congress passed the NDAA. Squeezed into the NDAA, without much fanfare or discussion, was Section 6501, entitled "Investigations and Prosecution of Offenses For Violations of the Securities Laws." This section amended Section 21(d) of the Exchange Act by, in relevant part, including statutory authority for the SEC to seek—and federal courts to order—disgorgement in any action brought by the SEC under the securities laws,[4] and establishing a five-year limitations period for the SEC's disgorgement claims, except that in cases of scienter-based violations of the securities laws the SEC may bring a claim for disgorgement "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."[5] NDAA, Pub. L. No. 116-283, § 6501(a)(3). Section 6501(b) notes that the amendments to Section 21(d) of the Exchange Act "shall apply with respect to any action

[4] The NDAA does not purport to change the scope of disgorgement (i.e., Taylor's net profits from his alleged unlawful conduct) available to Plaintiff based on the United States Supreme Court's holding in *Liu v. SEC*. *See* DAA, Pub. L. No. 116-283, § 6501. Plaintiff notes in its Complaint that it seeks disgorgement of "ill-gotten gains," which definitionally would exclude money paid—or directed to be paid—to others by Taylor. (Complaint, ¶ 19.) Elsewhere, Plaintiff admits that its remedies are based only on "Taylor's proceeds from his participation in the various schemes." Plaintiff's Memorandum of Law in Support of Its Emergency *Ex Parte* Motion for a Temporary Restraining Order, Order Freezing Assets, and Order for Other Equitable Relief, Docket # 4, p. 32. These descriptions (and, more importantly, the scope of disgorgement that Plaintiff is legally entitled to based on *Liu v. SEC*) definitionally exclude money paid—or directed to be paid—*to others by Taylor*.

[5] The NDAA did not change the five-year limitations period for SEC claims for civil monetary penalties. *See, e.g.*, *SEC v. Fowler*, 6 F.4th 255, 260, n.5 (2d Cir. 2021) ("[t]he SEC's claim for civil penalties . . . remains subject to § 2462's five-year statute of limitations").

or proceeding that is pending on, or commenced on or after, the date of enactment of this Act." *Id.* § 6501(b).

2. *Congress Did Not Expressly Call for the NDAA to Revive Expired Claims*

When determining whether Congress intended for retroactive application of a statute (here, to revive Plaintiff's expired claims against Taylor under the NDAA), courts follow a two-step test established by the Supreme Court in *Landgraf v. USI Film Prod.*, 511 U.S. 244 (1994). *Lattab v. Ashcroft*, 384 F.3d 8, 14 (1st Cir. 2004). First, courts must determine whether Congress clearly stated an intent for retroactive application; second, absent such clear direction from Congress, courts must determine whether the statutory application at issue would have an "impermissibly retroactive effect." *Id.*

With respect to the first step, this Court must determine whether Congress "expressly prescribed" the NDAA's reach. *Landgraf*, 511 U.S. at 280 ("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."). In order for a statute to apply retroactively, a court must be firmly convinced that the statute can *only* be read to apply retroactively. *Lattab*, 384 F.3d at 14. This standard is "demanding" and requires an "express congressional command." *Peralta v. Gonzales*, 441 F.3d 23, 29 (1st Cir. 2006) (quotations omitted). Ambiguity is resolved in favor of the "presumption that Congress did not intend the statute to apply retrospectively." *Lattab*, 384 F. 3d at 14. Application of this presumption avoids a "retroactive effect" on a defendant's rights. *Landgraf*, 511 U.S. at 280. Courts have applied this presumption in the context of securities fraud claims. Specifically, both the Second and Third Circuits have rejected efforts to revive expired claims via the Sarbanes-Oxley Act ("SOX"), finding that SOX did not restore expired 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).

The cases applying the presumption against retroactive statutory effect to SOX—which has nearly identical relevant language to the NDAA—clearly demonstrate that Congress did not intend the NDAA to revive claims that had expired prior to its enactment. With respect to its application, SOX states: "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 Mortg.*, 491 F.3d at 406. With respect to its application, the NDAA states: "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."[6] NDAA, § 6501(b). As with the plaintiffs in *Enterprise Mortgage* and *Lieberman*, Plaintiff in this case appears to rely on the language stating that the NDAA applies to claims filed "on or after" the date of enactment.[7]

In *Enterprise Mortgage*, the Second Circuit rejected use of SOX to revive stale claims because the statute "contain[ed] none of the unambiguous language" necessary to restore time-barred claims. *Enterprise Mortg.*, 391 F.3d at 406–407. The court noted that Congress has

[6] The lone material difference between the SOX language and NDAA language—that the NDAA expressly applies to cases pending as of the date of enactment—does not apply here because this case was not pending as of the January 1, 2021 effective date of the NDAA.

[7] Courts may look to legislative history when assessing retroactive application of a statute, but the legislative history—like the statutory text itself—must expressly and unambiguously reveal an intention to revive stale claims. *See Peralta*, 441 F.3d at 29; *see also 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 with SOX, there is no legislative history discussing retroactivity. *Cf. Enterprise Mortg.*, 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"); *see also Wallace v. Reno*, 194 F.3d 279, 287 (1st Cir. 1999) (Congress's "keen[] interest[]" in a perceived problem is not an expression of a desire for retroactive application).

historically used much more explicit language when seeking to revive expired claims, 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) (quotations 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."). Courts in this district have ruled consistently with the Second and Third Circuits when confronted with efforts to revive expired claims based on SOX. *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 [SOX] 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 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 [SOX] to apply to actions that were time-barred on July 29, 2002.").[8] Given the nearly identical relevant language in SOX and the NDAA, the result should be identical here.

Given the absence of clear direction from Congress for retroactive application of the NDAA, the Court must next determine whether applying the NDAA to Taylor's circumstances "would have an impermissibly retroactive effect." *Lattab*, 384 F.3d at 15. Because Plaintiff's disgorgement claims against Taylor had expired ***years prior*** to enactment of the NDAA, there can

[8] 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.

be no doubt that application of the NDAA would have such an effect. As the Supreme Court has already stated, for purposes of the second step of the *Landgraf* inquiry, "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). Stated alternatively, "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." *Id.* (quoting *Chenault v. U.S. Postal Serv.*, 37 F.3d 535, 539 (9th Cir. 1994)) (quotations omitted).

3. *Plaintiff's Desired Application of the NDAA against Taylor Violates the Ex Post Facto Clause of the United States Constitution*

Revival of Plaintiff's expired claims against Taylor via the NDAA would violate the Constitution's *ex post facto* clause, which "prohibits the enactment of laws that either impose punishment for acts not punishable at the time they were committed or increase punishment over that previously prescribed." *Louis Vuitton S.A. v. Spencer Handbags Corp.*, 765 F.2d 966, 971–972 (2d Cir. 1985). The prohibition on *ex post facto* laws can apply where "a statute changes the legal consequences of acts completed before its effective date." *Id.* at 972 (quotations omitted); *see also Massachusetts v. Schering-Plough Corp.*, 779 F. Supp. 2d 224, 233 (D. Mass. 2011). Civil laws trigger the *ex post facto* prohibition if they are (1) retroactive and (2) penal. *See DeVeau v. Braisted*, 363 U.S. 144, 160 (1960) ("The mark of an *ex post facto* law is the imposition of what can fairly be designated punishment for past acts.").

Here, there is no dispute that Plaintiff is seeking retroactive application of the NDAA, as all allegations against Taylor occurred years prior to enactment of the NDAA. The question, then, is whether Plaintiff's desired application of the NDAA is also penal in nature. A seven-factor test is used to make this determination: "[1] [w]hether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as a punishment, [3] whether it comes

into play only on a finding of scienter, [4] whether its operation will promote the traditional aims of punishment—retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963) (footnotes omitted). For *ex post facto* purposes, only four of these factors must be met to "transform the [law] into a criminal penalty." *Schering-Plough Corp.*, 779 F. Supp. 2d at 238. All seven factors are met in this case.

First, disgorgement awards can involve "an affirmative disability or restraint" because 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) ("A disgorgement order is an ancillary remedy available to the SEC under SEC law in original actions and is enforced through the contempt power of the court including incarceration.") (quotations omitted). While civil remedies necessarily do not result in direct or automatic incarceration, the possibility that disgorgement could trigger incarceration means that it involves an affirmative disability or restrain.

Second, 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, 1643; *see also 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.").

Third, the NDAA's plain language makes it clear that the disgorgement claims to which a 10-year limitations period applies are exclusively scienter-based. *See* NDAA § 6501(a)(3)

(extending the limitations period to ten years for violations of 15 U.S.C. §§ 78j(b), § 77q(a)(1), and § 80b-6(1), as well as "any other provision of the securities laws for which scienter must be established").

Fourth, the disgorgement sought by Plaintiff purports to promote "deterrence," which is one of the "traditional aims of punishment." *Schering-Plough Corp.*, 779 F. Supp. 2d at 235–36. The Supreme Court has held in the securities fraud context that it is "clear that deterrence is not simply an incidental effect of disgorgement" and that "courts have consistently held 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 (quotations omitted).

Fifth, it is beyond dispute that securities fraud—as alleged by Plaintiff in this case—can be a criminal offense. For example, the Department of Justice has already brought criminal charges against some of the 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, disgorgement can sometimes serve to return ill-gotten gains to victims. However, disgorgement as obtained by Plaintiff is not required to be returned to victims and often goes directly into the United States Treasury. The Supreme Court specifically addressed this in *Kokesh*, noting that "[e]ven though district courts may distribute the funds to the victims, they have not identified any statutory command that they do so. . . . [and] [w]hen 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." *Kokesh*, 137 S. Ct. at 1644.

Finally, seventh, the amount of disgorgement frequently exceeds the claims of known, identifiable victims. *See id.* Because the disgorgement sought by Plaintiff is not capped at the

amount that can feasibly be distributed to victims of the alleged misconduct, such disgorgement is excessive in relation to any compensatory purpose.

Because Plaintiff seeks retroactive application of the NDAA to obtain a remedy that is penal in nature, such application of the NDAA violates the prohibition on *ex post facto* laws.[9]

4. *Plaintiff's Attempt to Revive Its Claims against Taylor Based on the NDAA Undercuts the Very Purpose of Statutes of Limitations*

Statutes of limitation trace their roots to Roman law and can be seen in English law dating back to at least 1236. *See* Developments in the Law: Statutes of Limitation, 63 Harv. L. Rev. 1177, 1177 (1950). The very statute underlying the pre-NDAA five-year limitations period for disgorgement and civil monetary penalty claims by the SEC "finds its roots in a law enacted nearly two centuries ago." *Kokesh*, 137 S. Ct. at 1642. The Supreme Court has identified the purpose of this fundamental legal concept in cases in which it specifically ruled against Plaintiff. In *Kokesh*, for example, a unanimous Supreme Court noted in no uncertain terms that "[s]tatutes of limitations set a fixed date when exposure to the specified Government enforcement efforts end," and that "[s]uch limits are vital to the welfare of society and rest on the principle that even wrongdoers are entitled to assume that their sins may be forgotten." 137 S. Ct. at 1641–42 (citing *Gabelli v. SEC*, 568 U.S. 442 (2013) (quotations omitted)).

In *Gabelli*, where the Supreme Court unanimously upheld a district court's dismissal of SEC claims that were not brought within five years of the occurrence of the alleged misconduct, the Court identified "certainty about a plaintiff's opportunity for recovery and a defendant's

[9] The doctrine of "constitutional avoidance" also cuts against utilizing the NDAA to revive Plaintiff's expired disgorgement claims against Taylor. Courts have held that "[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 971–972 (barring retroactive application due to constitutional avoidance concerns because a "new punitive treble damages provision, if applied retroactively, would present a potential *ex post facto* problem"). Any "substantial" question is sufficient to trigger this doctrine. *See United States v. Dwinells*, 508 F.3d 63, 70 (1st Cir. 2007); *see also In re Ashe*, 712 F.2d 864, 865–866 (3d Cir. 1983) (noting that a "non-frivolous constitutional issue" can be sufficient).

potential liabilities" as one of the "basic policies of all limitations provisions." 568 U.S. at 448–449 (quotations omitted). The *Gabelli* Court further stated that statutes of limitations "are intended to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared" and noted that statutes of limitations "provide security and stability to human affairs." *Id.* at 448 (quotations omitted). Accordingly, the *Gabelli* Court refused to apply the discovery rule to the SEC's five-year limitations period, quoting Chief Justice Marshall for the proposition that "it would be utterly repugnant to the genius of our laws if actions for penalties could be brought at any distance of time." *Id.* at 452 (quoting *Adams v. Woods*, 2 Cranch 336, 342, 2 L.Ed. 297 (1805) (C.J. Marshall) (quotations omitted)). What Plaintiff seeks to do here—revive already-expired claims against Taylor based on a statute that was passed years after the expiration of Plaintiff's claims—is directly contrary to the underlying purposes of a centuries old doctrine.

5. *Cases Applying the NDAA to Date in Favor of Plaintiff Are Plainly Distinguishable from the Facts Here*

Several federal courts have had the opportunity to assess the impact of Section 6501 of the NDAA on the timing associated with SEC disgorgement claims. However, each such case appears to be one in which (a) the case was already pending at the time the NDAA was enacted, and (b) the SEC had asserted its claims while at least some of the relevant conduct was still within the pre-NDAA five-year limitations period for disgorgement claims. In other words, the NDAA has only been applied, to date, in cases where the SEC timely asserted its claims under the five-year limitations period and then availed itself of the ten-year limitations period to address older conduct during the pendency of the case. *See SEC v. Fowler*, 6 F.4th 255 (2d Cir. 2021) (case already pending when NDAA was enacted, and related to conduct that was not time barred under then-effective five-year limitations period); *SEC v. Morrone*, 997 F.3d 52 (1st Cir. 2021) (same); *SEC v.*

Navellier & Assocs., 17-cv-11633, 2021 U.S. Dist. LEXIS 212209 (D. Mass. Sept. 21, 2021) (same); *SEC v. Sneed*, No. 3:20-CV-2988, 2021 U.S. Dist. LEXIS 179239 (N.D. Tex. Sept. 10, 2021) (same); *SEC v. Ahmed*, No. 3:15-cv-675, 2021 U.S. Dist. LEXIS 112987 (D. Conn. June 16, 2021) (same); *SEC v. Sidoti*, EDCV 20-2178, 2021 U.S. Dist. LEXIS 80055 (C.D. Cal. Mar. 19, 2021) (same); *SEC v. Liberty*, No. 2:18-cv-00139, 2021 U.S. Dist. LEXIS 31296 (D. Me. Feb. 19, 2021) (same). In at least two other cases, the SEC has cited the NDAA as supplemental authority, but those cases are similar to those above. *See SEC v. Gallison*, No. 15-cv-5456 (S.D.N.Y.) (case already pending when NDAA was enacted, and related to conduct that was not time barred under then-effective five-year limitations period); *SEC v. Sason*, No. 19-cv-1459 (S.D.N.Y.) (same).

Here, Plaintiff seeks to do something altogether different. Plaintiff does not allege conduct on the part of Taylor after October 2014, and so its claims against him with respect to each of the four companies were time barred on various dates all the way back to 2018, but in no event later than October 2019 (more than a year before the NDAA was enacted).[10] This critical difference between applying a statute to conduct that was not yet time-barred at the time the statute was enacted versus applying a statute to conduct that was already time-barred as of the date of enactment was directly acknowledged in *Ahmed* where the court specifically noted that "[b]ecause the SEC does not seek permission to initiate suit against Defendant for previously time-barred claims . . . the ex post facto clause does not apply to this case." *Ahmed*, 2021 U.S. Dist. LEXIS 112987, at *15. Other courts have addressed this distinction as well. As the Eighth Circuit noted:

> 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

[10] The only exceptions are two dates appearing in a chart pasted into the Complaint which purport to show that Taylor ***paid money*** to a third party for Dhillon's benefit years after the alleged misconduct. But as discussed above, Taylor's payment of money a year and a half or more after any alleged trading, receipt of money, or other conduct, cannot form the basis for disgorgement anyway. Even his mere *receipt* of money cannot. *SEC v. Jones*, 300 F. Supp. 3d 312, 316 & n.7 (D. Mass. 2018). Plaintiff only included Taylor as a defendant because it believes the NDAA revived time-barred claims against Taylor that had never been asserted.

> 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 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."); *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."). Unlike in *Fowler*, *Morrone*, *Navellier*, *Sneed*, *Ahmed*, *Sidoti*, *Liberty*, *Gallison*, and *Sason*, the application of the NDAA sought by Plaintiff is insufficiently supported by a clear expression of congressional intent to revive expired claims, violates the Constitution's prohibition on *ex post facto* laws, and runs afoul of centuries of law regarding the purpose and application of statutes of limitation.

V. CONCLUSION

For the foregoing reasons, Mr. Taylor respectfully requests that the Court grant his Motion and dismiss with prejudice Plaintiff's claims for civil monetary penalties and disgorgement as against him in relation to Counts I, II, and VII or, alternatively, strike Plaintiff's prayers for relief seeking civil monetary penalties and disgorgement against and from Taylor.

Respectfully submitted,

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