Case No. 14-16733

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SECURITIES AND EXCHANGE COMMISSION

Plaintiff, Appellee

vs.

LYNDON, et al

Defendant, Appellant

APPELLANT'S OPENING BRIEF

Appeal from Final Judgments of the
U.S. District Court for the District of Hawaii
Hon. Susan Mollway, Presiding
(USDC Case No. CV13-00486 SOM-KSC)

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1. Exhibit "A" – Company's General Ledger from 2002-2012[1] (pages 2-494)
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3. Exhibit "AH" – Response letter to Lyndon from SEC counsel Richard Humes on behalf of SEC Chair Mary Jo White[3]

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TABLE OF AUTHORITIES

Cases

1. *Local 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 519 (1986) - quoting *United States v. ITT Continental Baking*, 420 U.S. 223, 235 (1975).

2. *Rufo v Inmates of Suffolk County Jail,* 502 U.S. at 378-79 (1992).

3. *United States v. Armour & Co.*, 402 U.S. 673, 681-83 (1971); and *ITT Continental Baking*, 420 U.S. at 236.

4. *Agrolinz Inc. v. Micro Flo Co.*, 202 F.3d 858, 861 (6th Cir. 2000); and *United States v. Sherwin-Williams*, 165 F. Supp. 2d 797, 803-4 (C.D. Ill. 2001).

5. *Allstate Ins. Co. v. Receivable Fin. Co.*, 501 F.3d 398, 413 (5th Circuit 2007) (citation omitted).

6. *SEC v. First City Fin. Corp.*, 890F.2d 1215, 1231 (D.C. Cir. 1989)

7. *Brady v. Maryland* 373 U.S. 83.

8. *West v. Love,* 776 F.2d 170, 176 (7th Cir. 1985); and *Peacock v. Board of School Commissioners of Indianapolis,* 721 F.2d 210, 213-14 (7th Cir. 1983); and *United States v. Walus,* 616 F.2d 283, 287-88 (7th Cir.1980).

9. Celotex Corporation v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); and *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); and *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

10. The district court cited this as an inappropriate authority in this case, as the circumstances are completely different from SEC v Lyndon; see Statement of Facts and Argument herein RE: *SEC v. Great Lakes Equities Co.*, 775 F. Supp. 211, 215 (E.D. Mich. 1991)

Statutes

RE: Summary Judgment
Rule 56(a) of the Federal Rules of Civil Procedure
Rule 56(c) of the Federal Rules of Civil Procedure
Rule 56(e) of the Federal Rules of Civil Procedure

RE: Introduction of New Evidence
Rule 60(b)(2) of the Federal Rules of Civil Procedure

And others referenced within various citations herein

DECLARATION OF TROY LYNDON

As advised by the appellate court clerk's office, as an unrepresented litigant, in accordance with FRAP Rule 30-1.2, I have not included excerpts.

Although references to "Lyndon" are in third-person, I request that this Court recognize any statements herein as part of my testimony and declaration under penalty of perjury – such that it may be referenced in a decision accordingly.

/s/ Troy Lyndon

OPPOSING PARTY'S POSITION

The opposing party, SEC (Appellee) has indicated opposition to this appeal.

STATEMENT OF JURISDICTION

The SEC filed this action in the District Court of Hawaii. This court has jurisdiction because this is an appeal from a final decision of the district court.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

This appeal requires the court to resolve one primary issue. After entering into a no-admit, no-deny settlement agreement with Lyndon, the SEC intentionally withheld financial documents from Lyndon and presented a false claim with underlying evidence that was fraudulent to wrongfully receive a financial judgment for ≈$3.7 million dollars.

Considering that the SEC has more attorneys than perhaps any other organization in the world, it has successfully built one piece of case law on top of another to grant it with more and more power, so that it can successfully overcome most challenges by those it enters into settlement agreements with.

But what is the constitutional basis for this "collective" advantage which has given the SEC such unlimited power that it can intentionally pursue a financial judgment against a defendant it knows has never taken any "ill-gotten" gains? And how is it able to pursue its desired end by using any necessary corrupt means to achieve it,

without any consequence whatsoever?

The SEC enjoys immunity from having to provide a legal defense for those it targets. But what is the constitutional basis for this when the SEC has publicly stated that Lyndon committed fraud, a criminal act? Does not the government have a legal obligation to defend Lyndon whether in civil or criminal cases in which it publicly states that a criminal act occurred?

If not, what is the constitutional basis that allows the SEC to bypass the obligation of the government to provide a legal defense for those it claims have committed criminal acts, while enjoying the benefits of being a government agency, immune from consequences resulting from lies, deceit, cover-ups, misrepresentations and outright fraud in presentations to the court in this case against Lyndon?

Perhaps it is time for this court to reconsider the constitutional basis for such awesome power given to the SEC which empowers it to maliciously prosecute an innocent defendant without any consequence.

Lyndon is a video game developer who has been trying to move on with his life. Prior to the allegations by SEC, Troy A. Lyndon has a spotless record of compliance for more than 5 years as a public company CEO, has no criminal record, and is an upstanding citizen and a recipient of the coveted Inc. Magazine Entrepreneur of the Year award, presented by Ernst & Young and Merrill Lynch. Lyndon is most well-known as the lead developer of the world's first 3D John Madden Football video game, as a game producer and software engineer.

STATEMENT OF THE CASE

This case never went to trial. Lyndon settled this case with the SEC which was formalized by Lyndon's Consent[4], which included a Judgment Attachment[5], which was later executed by the Court ("Judgment #1)[6].

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[4] See ECF 20
[5] See ECF 20-1
[6] See ECF 22

In such judgment, Judge Mollway ordered, *"In connection with the Commission's motion for disgorgement and/or civil penalties, the parties may take discovery, including discovery from non-parties."*

From Lyndon's first phone call with SEC's counsel, it became clear that the SEC was intending to violate the parties' settlement agreement by seeking monies which exceeded "ill-gotten" gains as stated in their settlement agreement[7]. Over a period of months, Lyndon had literally ten motions denied by the court due to the SEC's misrepresentations and deception of defining, after-the-fact, "ill-gotten" gains to mean any amount the SEC would later claim.[8]

Lyndon felt taken advantage of by the government because he wouldn't have entered into the settlement had he known they were going to hide documents and present their own fabricated documents to stake claim to a financial judgment.

Lyndon gave the SEC what they wanted in the settlement – his agreement to no longer be a public-company officer or director[9].

The Consent[10] and Judgment #1[11] - collectively the settlement agreement - was intended to resolve all issues between the parties except for the determination of any warranted disgorgement amounts. Such amounts were to be determined after discovery[12] was taken by the parties to determine the amount of "ill-gotten" gains, if any were warranted. This was the clear intent of the parties. The "discovery" issue was a vital settlement point for Lyndon because he was confident that the Company's financial records would support his assertion that he never received any "ill-gotten" gains[13], and he understood that the SEC had the Company's Audit File and auditor's audit work papers in their possession as a result of their testimony of the Company's

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[7] See ECF 28, Page 2, lines 22-27
[8] See ECFs 28, 36, 39, 41, 43, 101, 174, 187 and **200**
[9] See ECF 20, Page 2, lines 6-10
[10] See ECF 20
[11] See ECF 22
[12] See ECF 20, Page 3, lines 7-9
[13] See ECF 28, Page 1, lines 25-26

licensed, independent audit firm, Malone-Bailey[14].

Lyndon did not expect the SEC to violate the parties' settlement agreement by failing to provide the Company's accounting records, Audit File and audit work papers, or he would not have entered into the settlement. In an effort to cause SEC to provide the discovery as promised in the settlement/judgment, Lyndon filed 4 Motions to Compel[15], and the SEC further ignored two federal subpoenas for such discovery[16] with a complete disregard for their authority.

Lyndon was counting on the "discovery" he would receive from SEC, based upon his requests, because in SEC's possession, they had documents he had previously given to them as he stated in the parties' properly updated Rule 26 Joint Report[17], as Lyndon was seeking the documents from the SEC's 2.5+ year investigation of the Company, including the Company' financial documents (accounting records, Audit File and audit work papers from the Company's auditors, Transfer Agent records, etc.). Lyndon was also seeking the SEC's copy of the Company's Audit File and underlying audit work papers which were given to the SEC by the Company's audit firm, Malone-Bailey[18].

In Court, during Lyndon's Motion to Compel SEC provide such discovery[19], the SEC misrepresented Lyndon's requests, specific to the remaining issue in the case of disgorgement, by stating that *"none of the requests go to that."*[20] Magistrate Judge Chang went along with the SEC's determination that Lyndon's discovery requests and stated, *"The discovery sought by Mr. Lyndon is not relevant to the issue remaining before the Court, which is a determination with regards to the amount of disgorgement and civil penalties owed by Mr. Lyndon."*[21]. In other words, the district court

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[14] See ECF 166-37, Page 5, line 4
[15] See ECFs **76,** 32, 39 and 41
[16] See ECFs **60** and 42
[17] See ECF 75, from Page 6 line 26 to page 7 line 2
[18] See ECF 166-37, Page 5, line 4
[19] See ECF 172
[20] See ECF 172, Page 6, line 20
[21] See ECF 172, Page 8, lines 10-13

disregarded Lyndon's subpoenas which included requests for all financial records in SEC's possession[22] because he felt they would not be "relevant" to the calculation of the disgorgement amounts.

In court, Lyndon argued *"The Brady rule announced in the 1963 Supreme Court case Brady v. Maryland, prevents one-sided prosecutions in which the defendant is kept in the dark about information that might show that he's innocent. The government's job as prosecutor is not to obtain convictions, but to do justice."*[23]

Although SEC counsel denied Lyndon's argument in court, they provided no citation to support their authority as pointed out by Lyndon[24]. In the Judge's decision regarding Lyndon's Motion to Compel, Judge Chang made absolutely no mention to the Brady Rule or its validity to this case.[25] The court completely ignored Lyndon's argument despite his citation of SEC v Kovzen, providing him the authority to make the verbal argument[26] - an argument he was never able to make in his Motion for Reconsideration[27], which Judge Mollway denied, when she abruptly left the court room without allowing Lyndon to present his case relating to this motion on the scheduled day[28].

In the parties' properly updated Rule 26 Joint Report[29] prior to the entry of the financial judgment which occurred months later, Lyndon offered to provide assistance in the SEC's acquisition of the Company's Audit File stating, *"Lyndon maintains that he has had Malone Bailey's subpoenaed production delivered to a lawyer in Houston and that he has yet to receive them personally"*[30] - these records at the time represented

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[22] See ECF 60-1, Page 3, section 4 and page 6, Production Request No. B14
[23] See ECF 172, Page 3, lines 19-25
[24] See ECF 172, Page 7, lines 4-5
[25] See ECF 115
[26] See ECF 172, lines 11-16
[27] See ECF 112
[28] See ECF 138
[29] See ECF 75
[30] See ECF 75, Page 6, lines 5-7

the most accurate accounting records of the Company, second only to the Audit File's underlying audit work papers which were already in the SEC's possession[31], although hidden from the court and Lyndon until after they wrongfully received their financial judgment from the court. The SEC already had the Audit File and such underlying audit work papers in their possession and they omitted them from their required discovery to Lyndon and further, made no mention of it to the Court when filing their Motion for Summary Judgment against Lyndon – a noteworthy omission because this occurred after the parties entered into their settlement. The facts show that auditor Malone Bailey refused to submit the subpoenaed Audit File to Lyndon, but agreed to provide it to an independent attorney – and it was only the SEC that could obtain it – although they already had it and the underlying audit work papers in their possession. The SEC ignored the Audit File's delivery to the independent attorney because they already had the underlying audit file work papers in their possession and they knew the actual, real, legitimate and audited financial records would not support their financial claim.

Lyndon filed his own Opposition to SEC's Motion for Summary Judgment[32] and created a laundry list of flaws regarding the SEC's fabricated claim with false underlying evidence, including the failure of the SEC to properly represent staff Ms. Shau's expertise, as she was a staff accountant without any experience or licensing to represent the audited financials of a public company.

Additionally, in Ms. Shau's declaration, she misrepresented herself as a person with "personal knowledge", which the court used in lieu of the standards for summary judgment contained in Rule 56(c) of the Federal Rules of Civil Procedure.[33] The only "personal knowledge" Ms. Shau had was that she could read bank statements and stock sales receipts, add up deposits, and then she could arbitrarily make biased guesses about the categorization of expenses.

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[31] See ECF 166-37, Page 5, line 4
[32] See ECF 103
[33] See ECF 143, Page 14, lines 5-8

SEC's staff accountant Ms. Shau committed perjury by making statements in her declaration that were 'estimates' regarding an audited, public company, which were instead nothing more than 'guesses', which the record shows she knew were contrary to statements made by the Company's licensed auditors; Ms. Shau was present during testimony given by Company's auditors Jay Norris[34] and Frank Sharp[35] – such perjury is evidenced by her witness that the Company's licensed auditors never agreed with the SEC's assertions that fraud had been committed. In fact, Ms. Shau was present when lead auditor Jay Norris stated in his testimony to the SEC, *"You know, if somebody receives proceeds from their services and they decide to put those proceeds back into a legitimate business and then they used the proceeds to turn around and purchase product from a legitimate business, I don't know that that's necessarily an illegal act."*[36] The Company's public records show that although the auditors cooperated with SEC's investigation by providing testimony, it stood behind its audit and Lyndon's integrity 100%, without fail[37] for two years - until the SEC filed its lawsuit against Lyndon, falsely claiming that such auditors were deceived; and the court ignored Lyndon's arguments and evidences proving that auditors were never deceived.[38]

Further, Ms. Shau, by countering her witnessed testimony of the Company's auditors and guessing about expenses, conveniently included monies in her calculations which Lyndon had no control over, and monies which he never earned or received[39]. Quite surprisingly as well, Ms. Shau also "admittedly" included monies deposited into a separate corporation which was not owned and operated by the Company[40].

Ms. Shau never considered the Company's audit file, underlying audit work

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[34] See ECF 166-37, Page 3, line 8
[35] See ECF 166-38, Page 3, line 3
[36] See ECF 166-37, Page 8, lines 10-15
[37] http://www.sec.gov/Archives/edgar/data/13055/000115895711000255/f10k033111.htm
[38] See ECF 101, Page 5, lines 9-15 and Exhibits A & B
[39] See ECF 103, Page 4, section 9
[40] See ECF 68, Page 2, lines 10-16

papers or accounting records as a source of the SEC's calculations[41]. The court denied Lyndon's request to cross-examine Ms. Shau[42], preventing Lyndon from proving to the Court that the SEC already had the company's accounting records, Audit File and underlying audit work papers from the company's independent auditor, and such records were intentionally omitted in the creation of the SEC's financial claim for summary judgment.

On June 30, 2014, the Court was scheduled to hear all of Lyndon's Motions and the SEC's Motion for Summary Judgment. Within the first minute, the judge indicated her inclination to grant the SEC's Motion for Summary Judgment[43]. After some discussion, Lyndon asked Judge Mollway if she had read his Conforming Motion for Permanent Stay because she was acting as if she was unaware of the SEC's wrongdoing. She responded, *"I have"*, indicating that she had read it[44]. After another 10 minutes of discussion or so, Judge Mollway abruptly got up, and exited the court room indicating that she would take everything under advisement and issue her order[45]. By leaving in this manner, Judge Mollway deprived Lyndon of any right to present arguments specific to his motions in this case, including his Conforming Motion for Permanent Stay[46], Motion for Sanctions[47] and Motion to Compel SEC provide discovery[48].

The court granted the SEC with its Summary Judgment in Judgment #2, stating, *"He [Lyndon] does not attribute his financial straits to the SEC."*[49]. This assertion by the judge was completely wrong and a false misrepresentation of Lyndon's position on-

[41] See ECFs 68 and 103
[42] See ECF 138, Page 19, lines 6-9
[43] See ECF 138, Page 2, lines 17-19
[44] See ECF 138, Page 7, lines 11-14
[45] See ECF 138, Page 38, lines 5-7
[46] See ECF 101
[47] See ECF 81
[48] See ECF 76
[49] See ECF 143, Page 11, lines 11-12

the-record. Lyndon had twice clearly written that the SEC was responsible for his financial straits in his Conforming Motion for Permanent Stay, and in fact, he even underlined these statements "*which led to Lyndon's personal bankruptcy and his inability to pay for an attorney to provide an adequate defense in this case*"[50] and "*Lyndon's inability to pay for an attorney to provide an adequate defense in this case, is the direct result of SEC's actions prior to the filing of this case.*"[51] Such comment by the judge in Judgment #2 could explain why she refused and the court failed to allow Lyndon to present his unheard motions of this case in court – she clearly failed to read Lyndon's motions, otherwise she never would have made a statement which was clearly not-factual and provable within facts in the record. The only other explanation would be that she intentionally misrepresented facts in the record. The Judge's motive is irrelevant. She misrepresented Lyndon's position, period, as the record clearly shows. How could Judge Mollway have made this statement contrary to the record, when Lyndon himself also told her, more than once, the entire story in Court, *Later on in that year after being a public company CEO for about five years, Left Behind Games went to seek to do its first public financing of $10 million. We had lined up the bank to provide the funds, and we filed an S-1 with Security and Exchange Commission in early October of 2011. By February -- excuse me. By November of 2011 at FINRA's request I put them in touch with -- through our attorney with Miss Kirka, who is part of the counsel team for SEC, to speak with them specifically regarding, you know, the questions that they had -- all of which were specific to information that would have been in the public domain. Miss Kirka proceeded to wrongfully and illegally share information about the SEC's private investigation with FINRA, which resulted in their denial of our corporate action, which resulted in the lack of funding of the company, which resulted in the letting go of the employees in 2011, which, despite my cooperation in a six- or seven-hour deposition of SEC, was followed by my personal*

[50] See ECF 101, Page 8, lines 7-8
[51] See ECF 101, Page 8, lines 16-18

bankruptcy, all because of the actions that were taken by the SEC without providing me due process."[52]

Any reasonable person can see that the judge acted incompetently by stating in her order, "*He [Lyndon] does not attribute his financial straits to the SEC"*, when the court transcript and the record are quite contrary. Most astoundingly, Lyndon, in court, also said, *"Your Honor, this organization [SEC] is responsible for creating financial devastation in my life"*[53]as his answer to Judge Mollway's question, *"Why couldn't you go to an attorney?"* For clarification in court, Lyndon said, *"I could not afford an attorney solely based upon their actions to cut off the funding of my company, which resulted in my bankruptcy."*[54]

But the truth behind Judge Mollway's bias becomes evident as she continues writing in her Judgment #2, *"Nor is it clear that Lyndon has 'learned his lesson."*[55] Such statement clarifies Judge Mollway's state-of-mind – she saw Lyndon as guilty without-a-trial, failing to recognize Lyndon's numerous assertions in countless motions that he received no "ill-gotten" gains, and her failure to recognize the nature of Lyndon's no-admit, no-deny settlement, and his numerous denial of SEC's allegations. Her statement in the record shows that Judge Mollway criminalized Lyndon in her mind so that she could justify her denial of Lyndon's Motion to Compel SEC provide discovery, and ignore any of his arguments or evidence in other motions.

In Judgment #2, Judge Mollway stated, *"Paragraph 3 of the Consent, ECF No. 20, PageID # 92, allows this court to decide the present motion for summary judgment 'without regard to the standards for summary judgment contained in Rule 56(c) of the Federal Rules of Civil Procedure.' Accordingly, this court need not require a party to support factual assertions with evidence in the record, with evidence that would be admissible in evidence, or based on affidavits or declarations based on personal*

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[52] See ECF 138, Page 9, lines 7-25
[53] See ECF 138, Page 28, lines 23-24
[54] See ECF 138, Page 29, lines 11-13
[55] See ECF 143, Page 23, lines 16-17

knowledge."[56] Judge Mollway then goes on to misquote out-of-context from the settlement, *"Instead, for the purposes of the present motion, the parties agreed that 'the allegations of the Complaint shall be accepted as and deemed true."*

But any reasonable person can see the flaw here in that Mollway's out-of-context quote was specifically put in place of the actual text from the settlement which states, in full-context, *the Court may determine the issues raised in the motion on the basis of affidavits, declarations, excerpts of sworn deposition or investigative testimony, and documentary evidence, without regard to the standards for summary judgment contained in Rule 56(c) of the Federal Rules of Civil Procedure"*.[57] Clearly, Judge Mollway failed to properly consider two important phrases, namely (i) *"the Court may"* and (ii) *"on the basis of affidavits, declarations, excerpts of sworn deposition or investigative testimony, and documentary evidence"*. Judge Mollway also omitted the fact that the very next sentence in the same paragraph states, *"In connection with the Commission's motion for disgorgement and/or civil penalties, the parties may take discovery, including discovery from appropriate non-parties."*[58]

In Judgment #2, Judge Mollway wrongfully cites numerous cases including SEC v. Great Lakes Equities Co as a comparable authority to justify her decision as she wrote, "C*iting SEC v. Great Lakes Equities Co., 775 F. Supp. 211, 215 (E.D. Mich. 1991), for the proposition that obtaining such funds benefits the wrongdoer because it defrays the wrongdoer's obligations, the Ninth Circuit determined that the defendants were liable for all of the proceeds obtained from the securities violations, not just the money that they obtained for their personal use."*[59]

Judge Mollway failed to include District Judge Gadola's Finding of Fact, *"From*

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[56] See ECF 143, Page 14, lines 1-8
[57] See ECF 20, Page 3, lines 3-7
[58] See ECF 20, Page 3, lines 7-9
[59] See ECF 143, Page 15, bottom line

the evidence presented at the lengthy trial on the merits as well as from the evidence presented at this hearing on disgorgement, and being otherwise familiar in the premises, the court finds that defendant Sims dominated and controlled the activities of GLE so completely that the corporation had no separate mind, will, or existence of its own."[60]

Judge Mollway compared a different case involving a "lengthy trial" which revealed that Sims completely controlled his company and its monies – compared that case to Lyndon's case herein, in which he did NOT have control as one of three directors and whose case has never gone to trial and that he signed a "no-admit", "no-deny" settlement.

After such failures of the court, in Judgment #2, Judge Mollway granted almost all of SEC's Motion for Summary Judgment and accordingly, entered a financial judgment ("Judgment #2")[61] against Lyndon for $3,251,169 in disgorgement, $289,897.18 in prejudgment interest thereon, and a $150,000 civil penalty, which as Lyndon communicated, is more money than he has earned in his lifetime[62].

After the court granted the SEC its financial Judgment #2, Lyndon filed a new Motion to Stay and Vacate Based Upon New Evidence[63] in which he reiterated his prior claims that the SEC obtained its financial judgment for a fabricated claim based upon false underlying evidence presented to the court[64]. But this time, Lyndon accompanied his Motion with newly discovered evidence in accordance with Rule 60(b)(2) which included the Company's QuickBooks Enterprise file, reference to the auditor's Audit File, the Transfer Agent Stock Records, and more[65]. Lyndon, in his pleading, further explained how the SEC, by intentionally omitting the most relevant evidence regarding the facts in this case, *"were unlawful actions of any 'investigative*

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[60] *SEC v. Great Lakes Equities Co., 775 F. Supp. 211, 215 (E.D. Mich. 1991)*
[61] See ECF 143, page 24
[62] See ECF 41, Page 1, lines 25-26
[63] See ECF 174
[64] See ECF 174-main, Page 1, lines 18-21
[65] See ECFs 174-1, 174-2 and 174-3

or law enforcement officer,' acts taken which include 'abuse of process' and 'malicious prosecution', covered by the Federal Tort Claims Act (28 U.S.C § 2680(h); Millbrook v. United States, 133 S. Ct. 1441-2013)."[66]

The Court denied Lyndon's motion citing that the Appellate Court had jurisdiction.[67]

Lyndon then filed a Motion to this Appellate Court asking it remand the case back to the district court to consider such Rule 60(b)(2) motion·. Although this Appellate Court denied Lyndon's motion, it stated however that it would remand the case back to the district court if the district court indicated a willingness to entertain such motion[68].

Lyndon then filed his Motion for District Court to Respond Per Appellate Court Order to Hear Lyndon's Rule 60(b)(2) Motion to Introduce New Evidence, Stay and Vacate Judgments in district court.[69]

The SEC responded with its Memorandum in Opposition[70] claiming that Lyndon's newly presented evidence was on a password protected flash-drive, despite evidence to the contrary from SEC's own declaration. By stating, *"When I attempted to open the flash drive, I discovered that I could not access the information on the flash drive because it was password protected"*[71], SEC staff IT Specialist Andrew Kovacs committed perjury by later stating, *"I was able to determine that the files are QuickBook back-up files. In order to open the files, however it is necessary to restore and update them. Although I was able to restore the files, I was unable to update them.*[72]*"*

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[66] See ECF 174, Page 2, lines 22-25
[67] See ECF 175
[68] See ECF 186
[69] See ECF 187
[70] See ECF 192
[71] See ECF 192-2, Page 2, lines 3-4
[72] See ECF 192-2, Page 2, lines 7-10

In Lyndon's Reply to SEC's Opposition[73], Lyndon argued, that the SEC's declaration *"provides evidence to the Court that the SEC, Ms. Matteson and Mr. Kovacs earlier determinations that the "flash drive was password protected" was false and a fraudulent misrepresentation to this Court – because it is a well-known fact that password protected flash drives do not reveal the contents which they hold."*[74] After citing Mr. Kovacs statement, *"Although I was able to restore the files, I was unable to update them"*, Lyndon further argued that this statement *"provides further evidence to the Court that the SEC, Ms. Matteson and Mr. Kovacs earlier determinations that the "flash drive was password protected" was false and a fraudulent misrepresentation to this Court because it is a well-known fact that password protected flash drives do not provide access of files so that they can be 'restored', but not 'updated'. These facts also provide evidence to the Court of the SEC, Ms. Matteson and Mr. Kovacs willful intention to defraud Lyndon of all his evidence as included on the flash drive and his lawful right to have his motion heard in accordance with Rule 60(b)(2)."*[75]

In Lyndon's Reply, he continues to provide additional noteworthy arguments debunking every claim made by the SEC relating to file access and passwords regarding the evidence submitted to them on a flash drive. But just to make sure the SEC and the Court could no longer state that such evidence was unavailable to them without committing fraud, Lyndon's Reply included, *"In order to prove the degree of SEC's fraud and intent to mislead this Court, Lyndon has created a video capture session to demonstrate to the Court how Lyndon and any party is able to both properly install an earlier version of QuickBooks Enterprise to read the restored file, as well as promptly and efficiently restore and update the QuickBooks Enterprise file evidence provided by Lyndon. Such video can be reviewed by SEC and this Court at* [*http://www.leftbehindgames.com/QuickBooks.html*](http://www.leftbehindgames.com/QuickBooks.html)*"*[76]

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[73] See ECF 193
[74] See ECF 193, Page 2, lines 17-20
[75] See ECF 193, Page 2, lines 23-28
[76] See ECF 193, Page 3, lines 11-16

Lyndon went on to state that the QuickBooks Enterprise evidence is on DropBox online, still available online by the SEC, the court and the public at*:* *https://www.dropbox.com/sh/389mmkvvoftf37k/AADoTZY0erI2eD1DfdqkMBbYa?dl=0*[77].

By stating that such evidence was not new in this case, the SEC again committed perjury as clarified by Lyndon in his Reply to SEC's Opposition, *"Other than hearsay, SEC has provided no evidence to disprove Lyndon's claims regarding the subject evidence in his new Rule 60(b)(2) motion."* In fact, Lyndon addressed every one of SEC's Opposition assertions in his Reply.[78]

In Judge Mollway's denial of Lyndon's new evidence she writes, *"The court is not willing to say that it will entertain Lyndon's request for relief, as Lyndon fails to demonstrate how any of his so-called 'newly discovered evidence' justifies relief."*[79] Referring to Lyndon's motion, without providing any explanation whatsoever, Judge Mollway writes, *"None of the material in that document justifies a grant of relief from either the first or the second Judgment in this case."*

Judge Mollway further states, *"Lyndon's stipulation in the Consent contradicts this assertion"*[80], which was a misrepresentation of the record. Lyndon entered into a "no-admit", "no-deny" settlement. No "dollar amount" of "ill-gotten" gains or business monies for "personal use" were stated anywhere.

Judge Mollway also quotes Judgment #2, stating, *"Lyndon was a signatory on all Left Behind bank accounts and that he 'treated corporate accounts as his own, withdrawing funds for his personal use.'"* – but fails to mention that this statement was from the plaintiff's original complaint and that (A) no evidence had been reviewed in support of their claim – or (B) that the court ignored all evidence presented by Lyndon to the contrary. Most importantly, Judge Mollway (C) fails to mention that the SEC's statement itself fails to mention the dollar amount of business monies that were

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[77] See ECF 193, Page 3, lines 18-20
[78] See ECF 193, Page 3, lines 23 to page 6, line 13
[79] See ECF 197, bottom 2 lines of page 3 to 2 lines at top of page 4
[80] See ECF 197, Page 4, lines 19-20

allegedly for "personal use". So assuming that 100% were for "personal use", was an invention of both the SEC and the court.

Judge Mollway misrepresents the facts in-the-record by stating, *"The court does not even have an electronic copy of these files. It appears that while these electronic files were given to the SEC, they were never submitted to the court such that they became part of the court's files. In any event, other than his bald statement about what the files show, Lyndon points to nothing supporting his claim. This court cannot be expected to obtain evidence for a party."*[81]

Judge Mollway's statements make it absolutely clear that she never read Lyndon's Reply to SEC's Opposition of his motion, The online link to the files as provided in Lyndon's Reply was intentionally placed therein by Lyndon to insure that the SEC and this court could no longer lie, misrepresent or commit fraud against Lyndon by claiming that it didn't have access, a behavior Lyndon predicted based upon the SEC and Judge's mutual behaviors of factual representations as recorded in the record as stated and referenced above. Judge Mollway also fails to acknowledge that her court clerk does not accept USB flash drives, which were also attached to Exhibit "BA", which is why Lyndon originally sent it to the SEC in the first place – this is evidenced by Lyndon's hand-written modification that such USB flash drive would be *"mailed directly to SEC as relevant evidence"*.[82]

Judge Mollway stated, *"Nor is it clear that the alleged data is new evidence previously unavailable to Lyndon"*[83], making it abundantly clear that she is unaware of Lyndon's claims in his Motion and Reply. Judge Mollway cited no legal authority or reference to Lyndon's Motion or Reply, or SEC's Opposition in making her determination that such evidence was not new in accordance with Rule 60(b)(2) or otherwise.

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[81] See ECF 197, from Page 4, line 21 to page 5
[82] See ECF 174-1
[83] See ECF 197, Page 5, lines 5-6

Judge Mollway further states, *"Lyndon owned and operated Left Behind as his own company"*[84] making it abundantly clear that she never reviewed Lyndon's Opposition to SEC's Motion for Summary Judgment where Lyndon states, *"the Company was run by its Board of Directors. Lyndon was one of three members, representing 1 of 3 votes regarding all decisions involving the Company's ongoing operations"*[85] under the paragraph heading "9. *Lyndon did not control certain monies as declared by SEC."* This was the precise document Lyndon wrote to defend himself against SEC's Motion for Summary Judgment. Judge Mollway's misrepresentation of facts therein makes it clear again that Judge Mollway ignored it or conveniently forgot it.

As Judge Mollway discusses the Audit File referred to as new evidence, she writes, *"Even if Lyndon was inexplicably unaware of the information, nothing before the court suggests that he even sought to obtain the information before entering into the Consent."*[86] Clearly Judge Mollway must also have forgotten that Lyndon had mentioned the Company's Audit File in the parties' properly updated Rule 26 Joint Report[87] many months earlier and she also failed to read Lyndon's recent Reply to [Mollway's] Request for Information Re: Audit File[88] where Lyndon stated, *"Under Federal subpoena, the company's auditors refused to provide the Audit File to Lyndon. Only upon receipt of a second subpoena (Dkt 65), naming an <u>independent law firm</u> which is NOT Lyndon's attorney, did the auditor comply."*[89] Judge Mollway also failed to read the statement therein, *"Lyndon has never seen, reviewed or had possession, custody or control of the Audit File"*[90].

It's no wonder that Judge Mollway's final comment in her denial provided no details - she simply sought to get rid of this case by stating, "The record does not

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[84] See ECF 197, Page 5, lines 7-8
[85] See ECF 103, Page 4, lines 5-7
[86] See ECF 197, Page 5, lines 15-18
[87] See ECF 75, Page 6, lines 3-9
[88] See ECF 195
[89] See ECF 195, Page 1, lines 18-20
[90] See ECF 195, Page 1, line 21

suggest that such a motion would do anything other than cause delay."[91]

The record clearly shows that Judge Mollway misrepresented the court's inability to access the electronic files, and that she never reviewed facts substantiating that Lyndon's evidence was new, and failed to read Lyndon's Reply to her request for information relating to the Company's Audit File.

The web page, which is still available at http://www.leftbehindgames.com/QuickBooks, includes tutorials and a link to the most important subject evidence, so that the SEC, the district court, this court and the public can download the files, update and upgrade the Company's accounting file and see for themselves that SEC's financial claim as presented to the court was based upon false underlying evidence in order to fraudulently obtain a financial judgment.

Because Judge Mollway was still not satisfied, Lyndon filed a modified Rule 60(b)(2) "Conforming Motion" to Introduce New Evidence and Stay Judgments, in which he provided the "print outs" Mollway had previously stated in her previous denial were not included[92]. Lyndon's Motion included two exhibits, "Exhibit A" which represented hundreds of pages representing every transaction of the Company from 2002-2012 and "Exhibit B", a QuickBooks Enterprise Report regarding monies received by Lyndon for the period in question. In Lyndon's Motion, two of his three requests of the court were to ask the court to simply review the documents, as Lyndon was hopeful, finally, that Judge Mollway would see the numbers in black and white which prove that the SEC's financial judgment should have been $0.00, rather than the $3.7+ million she ordered – and that their documents were fabricated and clearly false.

Judge Mollway did not ask the SEC to respond to Lyndon's evidence which contradicted their financial claim, but she instead denied Lyndon's motion with a brief paragraph stating, *"The court has received a new motion from Troy Lyndon. It is not clear to the court whether this new motion is intended to be a motion for*

[91] See ECF 197, Page 6, last two lines
[92] See ECF 197, Page 4, lines 21-22

reconsideration of this court's January 13 order or a brand new motion. If the former, the motion is denied because it fails to show a basis for reconsideration. If the latter, the motion is denied because the court lacks jurisdiction to consider it (and is not inclined to grant it if jurisdiction is returned to it).”[93]

Judge Mollway’s final comment, which she placed in parenthesis, *“and is not inclined to grant it if jurisdiction is returned to it”* provides clarity that the district court will not consider any evidence whatsoever, whether or not rightfully presented in accordance with Rule 60(b)(2) or any other statute.

SUMMARY OF ARGUMENT

The record in this case shows that the US Securities and Exchange Commission, with remarkable cooperation from the US District Court of Hawaii, has been granted a financial judgment which has no basis of fact.

The fact that the SEC intentionally withheld information contrary to their financial claim and fraudulently submitted a financial claim for summary judgment is a disgrace to this justice system and the integrity of the Securities and Exchange Commission.

The record shows how the SEC has intentionally omitted the most important evidence, misrepresented facts to the court and committed perjury in its pursuit of and defense of the multimillion dollar judgment it wrongfully, successfully obtained.

The record also shows how the court judges have also misrepresented the facts, ignored and suppressed arguments and evidence presented by Lyndon and further took every action possible to cover-up the government’s wrongdoings.

What follows is an itemized list of most of the court’s relevant failures with arguments supporting each.

ARGUMENT

A. The SEC intentionally withheld documents and Lyndon didn’t discover this until after he entered into the settlement agreement. Lyndon expected his government to act honorably and with integrity – and he had no idea they would intentionally withhold financial records or audit work papers, which the facts show were in their possession, facts which prove that Lyndon never received any “ill-gotten”

[93] See ECF 202, only in Docket in Addendum #1, Page 100

gains or wrongfully used corporate monies for personal expenses[94].

B. The SEC materially breached the settlement (judgment[95]) between the parties by failing to provide "discovery" relating to the remaining issue before the court of any warranted disgorgement amount, and therefore the settlement agreement should be null and void.

    1. The SEC refused to provide all such documents requested by Lyndon[96] which would show that Lyndon never received any "ill-gotten" gains – details of precise statements by SEC and the court are provided above in Statement of Facts pages 3-6 and below in the following arguments.
    2. The SEC failed to provide production in accordance with the settlement agreement and 4 subpoenas (two in the SEC's administrative hearing and two in this case[97]).
    3. The SEC opposed Lyndon's Motion to Compel SEC provide production in accordance with the parties' settlement agreement, which prevented Lyndon from being able to prove that the disgorgement amount should have been $0 because he never received any "ill-gotten" gains. In addition to the numerous evidences provided by Lyndon throughout this case, the most definitive proof ignored by the Court is from the Company's audited QuickBooks Enterprise accounting files in a report specific to Lyndon[98], attached hereto also as Addendum #2, Exhibit B.

C. As the record shows, the SEC received documents and testimony from the Company's audit firm which resulted in interviews from auditors Jay Norris[99] and Frank Sharp[100] of Malone-Bailey on July 6, 2012, more than a year before

[94] See ECF 76, from Page 1, line 21 to page 2, line 9
[95] See ECF 22, Page 7, lines 26-28
[96] See ECF 76
[97] See ECFs **60** and 42
[98] See ECF 200
[99] See ECF 166-37 Company auditor –Jay Norris Testimony
[100] See ECF 166-37 Company auditor - Frank Sharp Testimony

the filing of this case, bringing to light that such testimony and information received from the Company's auditors was part of the "discovery" expected by Lyndon under the terms of the settlement, which the SEC disregarded - violated.

D. As the record shows, the Company's auditor Jay Norris actually referenced his "work papers" indicating that the SEC had the auditors' work papers in their possession prior to such interviews on July 6, 2012[101].

E. As the record shows, the SEC hid these "work papers" and other financial documents, including testimony of the Company's auditors from Lyndon until it after wrongfully receiving their financial judgment – after which, the SEC filed a motion for summary judgment against co-defendant Zaucha on October 21, 2014, more than two months after obtaining their financial judgment against Lyndon – proof that such documents were "hidden" from Lyndon.

F. The court has only been provided "excerpts" of the Company auditor's testimony as referenced in Argument E. By providing only "excerpts", the SEC has taken out-of-context, specific language to meet their needs while intentionally omitting the fact that Company auditors explained that they never witnessed any potential acts of fraud by Lyndon or Zaucha, as evidenced by the fact that they stood behind their publicly filed financial audits of Company. Within the limited "excerpts" provided by SEC to the court, Jay Norris attacks the basis for the SEC's entire case against Lyndon, statements which the SEC ignored and omitted prior to their malicious prosecution against Lyndon, *"You know, if somebody receives proceeds from their services and they decide to put those proceeds back into a legitimate business and then they used the proceeds to turn around and purchase product from a legitimate business, I don't know that that's necessarily an illegal act."*[102]

[101] See ECF 166-37 Jay Norris Testimony, Page 5, lines 4-5 (referencing testimony excerpt page 84)
[102] See ECF 166-37, Page 8, lines 10-15

G. This testimonial evidence from Company auditors reveals the SEC's actions of Ms. Kirka, Ms. Shau and Mr. Blau were intentional acts and omissions, which are "*unlawful actions of any 'investigative or law enforcement officer,' acts taken which include 'abuse of process' and 'malicious prosecution', covered by the Federal Tort Claims Act (28 U.S.C § 2680(h); Millbrook v. United States, 133 S. Ct. 1441-2013)"*[103].

H. The SEC's failure to provide the Company's documents substantially prejudiced Lyndon because had he received the documents, he could have shown the court that he had never taken or received any "ill-gotten" gains or used corporate monies for "personal expenses"[104].

I. As the record shows, the court committed error in each wrong decision as the courts decisions were prejudiced against Lyndon while rewarding the SEC's failure to disclose documents which would have proven that Lyndon never received any "ill-gotten" gains or used corporate monies for "personal expenses".

J. As the record shows, the SEC filed a financial claim contrary to the facts including (A) Company's accounting records, (B) auditor's Audit File and (C) underlying audit work papers.

   1. The SEC's financial claim is equal to 100% of corporate bank statement deposits without regard for any legitimate expenses whatsoever, and definitely contrary to the accounting records presented to the court by Lyndon from incorporation date of 2002 until 2012, (attached hereto in Addendum #2 as "Exhibit A") and the auditors independently developed Audit File and underlying audit work papers of the Company's finances, both of which were in the SEC's possession the entire time.
   2. The SEC's financial claim is also substantially contrary to the monies paid by the Company to Lyndon evidenced by the Company's audited

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[103] See ECF 174, Page 2, lines 22-25

[104] See ECF 76, from Page 1 line 26 to page 2, line 9

accounting records and the QuickBooks Enterprise Report of monies paid to Lyndon for the period in question, which was previously submitted to the court and attached hereto in Addendum #2 as Exhibit B.

K. As the record shows, the court failed to properly interpret and enforce the parties' settlement agreement, while misrepresenting facts within it.

1. While Lyndon honored the terms of the settlement agreement at great expense, the SEC disregarded its obligation to provide "discovery".

   a. Consent decrees "have attributes both of contracts and of judicial decrees." [105]

   b. A Consent stands as a Judgment of the court for purposes of enforcement and modification.[106]

   c. A Consent's interpretation is governed by general principles of contract law.[107]

   d. A settlement's interpretation and scope are discerned by general contract principles, a Consent's preclusive effect is governed by the intent of the parties.[108]

   e. The record shows that the court failed to enforce the parties' agreement (consent & judgment) by (i) denying Lyndon's Motion to Compel SEC provide discovery; and by (ii) failing to uphold plain-English terms within the settlement agreement, including (a) "ill-gotten gains" and (b) when referring to the SEC's original complaint, corporate monies use for "personal use".

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[105] see *Local 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 519 (1986) (quoting *United States v. ITT Continental Baking*, 420 U.S. 223, 235 (1975)); *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 378 (1992)

[106] see *Rufo v Inmates of Suffolk County Jail,* 502 U.S. at 378-79

[107] see *United States v. Armour & Co.*, 402 U.S. 673, 681-83 (1971); *ITT Continental Baking*, 420 U.S. at 236.

[108] see *Agrolinz Inc. v. Micro Flo Co.*, 202 F.3d 858, 861 (6th Cir. 2000); *United States v. Sherwin-Williams*, 165 F. Supp. 2d 797, 803-4 (C.D. Ill. 2001).

2. As the record shows, both Judge Chang and Judge Mollway failed to recognize that both of Lyndon's subpoenas included relevant financial documents necessary to properly calculate if any disgorgement amount was warranted. Lyndon's subpoena requests included, *"invoices, statements, bills, accounting and financial statements, work papers, computer-stored information"* and *"Request for Production No. B14: Produce all documents referring to one or more Defendants or Company"*[109].
3. As the record shows, the term, *"Documents"* within Lyndon's subpoena request included *"testimony"*[110] and therefore, the court failed to recognize SEC's omission of testimony taken from the Company's auditors, Jay Norris and Frank Sharp of Malone-Bailey, and their references to the audit work papers, which are the underlying documents supporting the Company's audit file, which is consistent with the Company's QuickBooks Enterprise accounting records as provided herein in Addendum #2, Part 1, as Exhibit "A", expected "discovery" stated in the parties' settlement/judgment.
4. As the record shows, the court failed to properly interpret the fact that within the settlement agreement, Lyndon's waiver of Rule 56(c) of the Federal Rules of Civil Procedure was contingent upon the SEC providing "affidavits, declarations, excerpts of sworn deposition or investigative testimony, and documentary evidence" as stated in the parties' settlement and judgment. Lyndon argued and the record shows that SEC's staff accountant Ms. Shau does not qualify as a credible source because (a) she has had no experience auditing a public company's records, (b) she intentionally omitted the Company's accounting records, Audit File and underlying audit work papers, as provided by the Company's SEC

[109] See ECF 60, ECF 60-1, Page 3, section 4 and page 6, Production Request No. B14
[110] See ECF 60-1, Page 3, section 4

licensed, independent auditors Jay Norris and Frank Sharp of Malone Bailey, (c) while she, herself, within her own declaration, totaled the SEC's claim based upon 100% of corporate bank deposits, which far exceeded her own calculations for any *potential* "ill-gotten" amounts or corporate funds for "personal use" based upon her extensive categorization which had no factual basis; and (d) Ms. Shau omitted all of Company's financial records which were either in the SEC's possession or within the SEC's scope of reach as disclosed by Lyndon in the parties' properly updated Rule 26 Joint Report[111]; and (e) Ms. Shau provided all such declarations regarding monies to the court which she knew were contrary to the Audit File and underlying audit work papers in the SEC's possession as provided by Company's auditors.

5. As the record shows, the court failed to uphold the law regarding the SEC's refusal to provide "discovery" and provide any evidence in its possession or control which could have benefited Lyndon.
    a. Government prosecutors cannot suppress evidence. The Brady rule prevents one-sided prosecutions; based upon the 1963 Supreme Court decision[112].
6. As the record shows, the court failed to uphold the law regarding the calculation of disgorgement amounts, if any existed.
    a. The party seeking disgorgement must distinguish between gains that were legally and illegally obtained.[113]
    b. Because the remedy is remedial rather than punitive, "it is limited to 'property causally related to the wrongdoing' at issue"[114].

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[111] See ECF 75
[112] see *Brady v. Maryland* 373 U.S. 83
[113] See *SEC v. First City Fin. Corp.*, 890F.2d 1215, 1231 (D.C. Cir. 1989)
[114] See *Allstate Ins. Co. v. Receivable Fin. Co.*, 501 F.3d 398, 413 (5th Circuit 2007) (citation omitted)

L. As the record shows, because the SEC did not satisfy the conditions of the waiver of Rule 56(c) of the Federal Rules of Civil Procedure within the parties' settlement agreement, the court failed to follow appropriate law.

1. The Supreme Court clarified the standard for summary judgment in three important cases.[115]
2. As the record shows, Lyndon provided the court with proper evidence in his Opposition to SEC's Motion for Summary Judgment[116] in accordance with Rule 56(e), which included arguments and evidence to strongly suggest that the SEC's claim was based upon underlying evidence which was false. As the record shows, Lyndon was never given the opportunity to articulate his claims, including an opportunity to cross-examine SEC's staff accountant in court when he requested it[117] on the scheduled date as a result of Judge Mollway's abrupt leave from the court room[118].

M. As the record shows, Judge Mollway lost her objectivity once she made the determination that Lyndon was guilty without a trial – and accordingly, was unable to provide impartial enforcement of the parties' settlement agreement as evidenced by her comment, *"nor is it evident that Lyndon has learned his lesson"*[119]; evidence that Judge Mollway did not recognize the nature of Lyndon's "no-admit", "no-deny" settlement or the SEC's obligation therein.

N. As the record shows, to justify the amount of the judgment against Lyndon, Judge Mollway cited numerous inappropriate authorities, for example (RE: *SEC v Great*

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[115] See *Celotex Corporation v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).
[116] See ECF 103
[117] See ECF 138, Page 19, lines 6-9
[118] See ECF 138
[119] See ECF 143, Page 23, lines 16-17

Lakes Equities Co., 775 F. Supp. 211, 215 (E.D. Mich. 1991)[120], comparing discovery and evidence vetted through a lengthy trial to this case, in which no evidence has proven Lyndon's guilt; as he signed a "no-admit", "no-deny" settlement and has since denied the SEC's allegations.

O. As the record shows, on the date in which Lyndon's motions were to be heard (June 30, 2014), the court never allowed Lyndon to present his arguments and evidence before the court as a result of Judge Mollway's abrupt leave from the court room[121]. These motions include Lyndon's Opposition to SEC's Motion for Summary Judgment[122], Conforming Motion for Permanent Stay[123], Motion for Reconsideration of Motion to Compel SEC provide production[124] and Motion for Sanctions for Illegal Intimidation, Threat and Violation of Defendant Lyndon's 14th Amendment Rights[125], granting SEC such power that it was not held accountable for their unlawful acts committed against Lyndon during this case.

P. As the record shows, the court failed to acknowledge and misrepresented its access to the electronic files provided by Lyndon, which remain online at www.leftbehindgames.com/quickbooks[126] – as the Statement of Facts details in pages 16-18 above.

Q. As the record shows, the court failed to establish that Lyndon's reference to the Company's audit file was not new, that (A) SEC had both access to the Audit File from an independent attorney[127] and (B) that the SEC already had the underlying audit work papers in its possession from Company's auditors, which it disclosed

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[120] See ECF 143, Page 15, bottom line
[121] See ECF 138
[122] See ECF 103
[123] See ECF 101
[124] See ECF 112
[125] See ECF 81
[126] See ECF 193, Page 3, lines 11-16
[127] See ECF 195, Page 1, lines 18-20

to the court only after obtaining their financial judgment from Lyndon.[128]

R. As the record shows, the court failed to address evidence in SEC staff declarations which contain perjured statements contradictory to their own statements regarding Lyndon's QuickBooks Enterprise accounting files[129], which present the Company's financial in substantially the same state as the Company's Audit File and audit work papers produced by independent auditors.

S. As the record shows, the court failed to recognize Lyndon's right to introduce new evidence in accordance with Rule 60(b)(2).

    1. A judgment will be vacated on the basis of newly discovered evidence where (1) the evidence was in existence at the time of the summary judgment motion, (2) the failure to produce the evidence was not caused by the movant's lack of due diligence, and (3) the evidence is likely to change the outcome.[130]

T. As the record shows, the court failed to require the SEC to respond to any of Lyndon's evidence provided to the court in accordance with Rule 60(b)(2), namely Company's QuickBooks Enterprise file, reference to the auditor's Audit File or underlying audit work papers, Transfer Agent Stock Records, and more.

U. As the record shows, the court failed to conduct ANY reasonable review of the Company's QuickBooks Enterprise accounting details submitted in Lyndon's last motion, in printed-out form, which include all Company transactions from 2002-2012 and a report showing monies involving Lyndon which strongly contradict the underlying evidence presented by the SEC to the court. Such ignored records are attached hereto in Addendum #2 for your convenience.

V. As the record shows, the court granted the financial judgment without asking the

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[128] See ECF 166-37 Jay Norris Testimony, Page 5, lines 4-5

[129] See ECF 192-2, Page 2, lines 7-10

[130] *West v. Love,* 776 F.2d 170, 176 (7th Cir. 1985); *Peacock v. Board of School Commissioners of Indianapolis,* 721 F.2d 210, 213-14 (7th Cir. 1983); *United States v. Walus,* 616 F.2d 283, 287-88 (7th Cir.1980).

SEC a single question[131], abusing its discretion to vet SEC's evidence, even in a much more limited capacity than that required by law was warranted.

W. As the record shows, Lyndon previously alerted SEC chair Mary Jo White to wrongful and unlawful behavior on behalf of its investigative and litigation staff members as this case progressed. On her behalf, SEC counsel wrote Lyndon, *"Because your allegations have been raised in that case, we do not plan to take any action in response to your email."* Lyndon provided this letter to the Court on June 16, 2014 in Exhibit "AH" [132] and the court clearly failed its obligation under law, even as expected by the SEC chairman's own office, to make certain that SEC staff acted honorably with integrity. The court failed by ignoring this letter from the SEC chair's office, from plaintiff Headquarters in Washington, DC, in which they clearly expected the judge to address any of Lyndon's concerns relating to any wrongful or unlawful behavior of SEC staff members.

X. As the record shows, the court abused its discretion in its last comment in the record in which Judge Mollway indicated that she will never reconsider the judgment, even if this case is remanded[133].

Y. Virtually none of the legal citations presented by the SEC or by the court in this case as an 'authority' have provided any relevant match to the circumstances of this case; namely, cases in which the SEC violated a settlement agreement and intentionally withheld documents ordered by a consent judgment.

Z. Lyndon challenges SEC to provide this court, in their Response to this Appeal, with declarations from SEC's staff Ms. Broderick, Mr. Berger, Ms. Kirka, Ms. Shau, Mr. Blau and Ms. Matteson which states nothing more than this:

> "We all sign under penalty of perjury that we are unaware of and have never retained any financial documents relating to the Company's financials, other than those provided to Lyndon and the court and therefore, the SEC never

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[131] See ECF 144, Page 7, Lines 4-5
[132] See ECF 127, Exhibit "AH"
[133] See ECF 202, only in Docket in Addendum #1, Page 100

> violated its obligation to provide 'discovery' under its settlement agreement with Lyndon."

In the event the SEC were to provide all such declarations in their response, Lyndon hereby withdrawals this appeal and will seek an independent remedy in a Federal Tort Claim action against the SEC and its staff members who could then be held personally liable for investigative omissions and malicious prosecution.

CONCLUSION

Lyndon requests this court reverse and vacate the district court's financial judgment based upon its numerous failures and abuse of discretion as outlined above.

Lyndon further requests this court reverse and vacate the district court's original judgment, which represents the parties' settlement agreement, based upon SEC's material breach and the court's numerous failures and abuse of discretion as outlined above.

Lyndon requests that this court order the SEC to produce all discovery production as requested within Lyndon's subpoenas, which they disregarded, and do so within 30 days from such order.

Lyndon also requests this court order the SEC to discontinue its ongoing online campaign which places SEC web pages regarding this case near the top of Google search results for "Troy Lyndon", by omitting their name in the page title, causing Lyndon to be unable to find gainful employment and afford legal representation.

Dated: April 2, 2015 Respectfully submitted,

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/s/Troy Lyndon, Appellant

STATEMENT OF RELATED CASES

Appellant is unaware of any related cases sharing similar or identical facts.

CERTIFICATE OF COMPLIANCE

I certify under Ninth Circuit Rule 32-1 that this brief complies with the type-volume limitation in Fed. R. App. P., Rule 32(a)(7), that this brief uses a proportionally spaced 14-point Times New Roman font and contains 10,119 words.

____
/s/Troy Lyndon, Appellant

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 2, 2015. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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/s/Troy Lyndon, Appellant