14-16733

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff-Appellee,

v.

TROY LYNDON,
Defendant-Appellant,

On Appeal from the United States District Court
for the District of Hawaii

BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, APPELLEE

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STATEMENT OF JURISDICTION

The district court had jurisdiction over the Securities and Exchange Commission's civil enforcement action against appellant Troy Lyndon pursuant to Sections 20(b), 20(d)(1), and 22(a) of the Securities Act of 1933 (Securities Act), 15 U.S.C. 77t(b), 77t(d)(1), 77v(a), and Sections 21(d)(1), 21(d)(3)(A), 21(e), and 27(a) of the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. 78u(d)(1), 78u(d)(3)(A), 78u(e), 78aa(a). Lyndon and the Commission resolved the action through a consent judgment, which the district court entered on November 1, 2013.

ER31–38.[1] The proceedings then entered a remedies phase, as contemplated by the terms of the consent judgment. The district court entered a final judgment on August 21, 2014, which the court certified pursuant to Federal Rule of Civil Procedure 54(b) due to the pending action against the other defendant in the case, Ronald Zaucha. Dkt. 148. Lyndon filed a timely notice of appeal on September 10, 2014 (ER1–13), and this Court has jurisdiction to review the final judgment pursuant to 28 U.S.C. 1291.

Two months after Lyndon filed his notice of appeal, he sought to vacate the judgment on the basis of claimed new evidence. Dkt. 174. The district court denied the motion because it no longer had jurisdiction. Dkt 175. Lyndon sought similar relief in this Court, which the Court construed as a motion for a limited remand and "denied without prejudice to filing a renewed motion accompanied by an indication that the district court is willing to entertain" Lyndon's Rule 60(b)(2) motion. App. Dkt. 4–6. On January 31, 2015, the district court issued an order indicating that it was unwilling to entertain the motion, which Lyndon did not appeal. Dkt. 197. Consequently, Lyndon's renewed attempt in his brief to seek a ruling on his Rule 60(b)(2) motion is not justiciable. *See infra* pp. 30–32.

[1] "ER" refers to the excerpts of record that Lyndon filed with his brief. "Dkt." refers to the district court docket. "App. Dkt." refers to the appellate docket.

STATEMENT OF THE ISSUES

Lyndon entered into a consent judgment that deferred a determination of the amount of certain monetary remedies until a later phase of the proceeding. For purposes of that remedies phase, Lyndon agreed that the district court would deem the allegations as true and that he would not deny his violations of the securities laws. Lyndon further agreed that he would not challenge the validity of the consent. Despite this language, Lyndon repeatedly denied the allegations, asserted that he did not violate the securities laws, and attacked the consent. The district court held Lyndon to the agreement he made with the Commission, and it issued a final judgment ordering him to disgorge almost $3.3 million in profits from the fraudulent scheme (plus prejudgment interest) and to pay a $150,000 civil penalty. Lyndon does not appeal the court's penalty decision. The issues are:

(1) Whether the district court, in entering the final judgment, properly held that Lyndon was bound by the consent judgment to which he voluntarily agreed.

(2) Whether the district court properly exercised its discretion to order disgorgement of approximately $3.3 million after Lyndon presented no evidence rebutting the Commission's reasonable approximation of his ill-gotten gains.

STATEMENT OF THE CASE

A. Nature of the Case

The Commission alleged that Lyndon violated the federal securities laws by orchestrating a fraudulent scheme in which he received millions of dollars from the unlawful sale of shares of his company, Left Behind Games, Inc. Rather than proceed to trial, Lyndon entered into a consent judgment, which stated that the court would order him to pay disgorgement and a penalty, with the amount of each to be determined during a later proceeding. Following the conclusion of that remedies phase, the Court entered a final judgment ordering Lyndon to disgorge $3,251,169 (plus $289, 897 in prejudgment interest) and pay a $150,000 penalty.

B. Statement of Facts

1. Lyndon engaged in a fraudulent scheme that involved unregistered sales of more than 1.7 billion shares of his company, Left Behind Games, from which he obtained approximately $3.3 million.

Lyndon was the founder, chief executive officer, chief financial officer, and chairman of Left Behind, a video game company. Dkt. 1 (Compl. ¶¶ 3, 13). Left Behind was unprofitable, severely undercapitalized, and in need of substantial funds. *Id*. at ¶¶ 4, 20–21, 36. Indeed, it never had a profitable year during its existence (2001–2011). *Id*. at ¶ 20.

The fraudulent scheme at issue began in 2009 when Lyndon caused Left Behind to issue unregistered shares to Ronald Zaucha—Lyndon's close friend,

who owned a company called Lighthouse Distributors that shared a building with Left Behind. *Id*. at ¶¶ 3, 14, 19, 58. Lyndon authorized the issuance of the shares to Zaucha for "consulting services," but Zaucha performed few, if any, such services. *Id.* at ¶¶ 3–4, 23–35, 38. This "consulting" arrangement was, in reality, a sham; its true purpose was to enable Zaucha to sell the shares and kick back a portion of the proceeds to the accounts of Left Behind, which Lyndon controlled. *Id*. at ¶ 36. In total, Zaucha received over 1.7 billion shares of Left Behind common stock for his " consulting services." *Id*. at ¶ 3.

At Lyndon's direction, Zaucha sold nearly all his Left Behind shares into the market for more than $4.6 million. *Id*. at ¶¶ 4, 48–49. Zaucha then kicked back approximately $3.3 million to Left Behind in three ways. First, Zaucha paid Left Behind $871,169 pursuant to a provision in his consulting agreement that required him to pay "early sell" fees to Left Behind if he rapidly sold his shares. *Id*. at ¶¶ 5, 25, 50, 57, 97(a). Second, Zaucha, through Lighthouse, purchased $1.38 million in inventory from Left Behind, some of which Lighthouse re-sold for a few thousand dollars but most of which Lighthouse gave away for free, indicating that the payment was not a legitimate purchase of goods worth $1.38 million. *Id*. at ¶ 6, 57–69. Third, pursuant to Lyndon's instructions, Zaucha paid Left Behind approximately $1 million by making over 80 transfers described as "investments" and "loans." *Id*. at ¶¶ 8, 97(c).

Lyndon directed the disposition of these proceeds. He allowed Zaucha to retain about $1.28 million, which he used to purchase property, pay living expenses, and fund Lighthouse's operations. Dkt. 1 (Compl. ¶¶ 9, 46, 97(d)).[2] The remaining proceeds went to Left Behind's accounts, which Lyndon controlled as their signatory. *Id*. at ¶ 36. Lyndon treated these accounts as his own source of funds, withdrawing nearly $1 million for personal use. *Id*.; *see also* Dkt. 68-2 (Shau Decl. ¶¶ 5–8).

Lyndon took several steps to perpetrate—and cover up—this scheme. The Left Behind shares issued to Zaucha were restricted and could not be sold until a six-month holding period expired. *Id*. at ¶ 40, citing Commission Rule 144, 17 C.F.R. 230.144. To circumvent this holding period, Lyndon made numerous misrepresentations—including misstating the date of issuance. *Id*. at ¶¶ 42–47. As a result of these misrepresentations, Zaucha was enabled to freely and quickly sell the shares into the market. *Id.* at ¶ 47.

To conceal the scheme, Lyndon lied to Left Behind's auditors about Left Behind's true relationship with Zaucha. *Id*. at ¶¶ 51–55, 70–80. Lyndon also caused Left Behind to file false or misleading periodic reports with the Commission that failed to disclose the related-party nature of the inventory sale to

[2] In January 2015, the district court entered a final judgment against Zaucha, which ordered him to disgorge $1.28 million (plus prejudgment interest) and to pay a $1.28 million civil penalty. Dkt. 199. Zaucha has not appealed, and the time to file a notice of appeal has expired.

Lighthouse and that failed to disclose the arrangements that allowed Left Behind to effectively pay for its own revenue by issuing stock to Zaucha that he then sold. *Id*. at ¶¶ 7, 81–96. Moreover, these reports overstated Left Behind's revenues, in part because Lyndon caused Left Behind to immediately recognize the $1.38 million from the sale of inventory to Lighthouse, which accounted for more than 86% of Left Behind's revenues in 2011. *Id*. at ¶¶ 7, 20, 63. This method of revenue recognition diverged from Left Behind's usual method under which revenue would not be recognized until a distributor like Lighthouse re-sold product to the end customer. *Id*. at ¶¶ 63–67, 97(b). If Left Behind had used its normal method of revenue recognition, virtually none of the revenue from the inventory sale would never have been recognized because Lighthouse received almost nothing from its distribution of the games. *Id*. at ¶ 69.

2. The Commission initiated this civil action against Lyndon, which he resolved by entering into a consent judgment.

In late September 2013, the Commission filed its complaint alleging that Lyndon and Zaucha violated numerous provisions of the federal securities laws. Dkt. 1, Compl. 26–33. At the outset of the litigation Lyndon was represented by counsel. Dkt. 29 (Matteson Decl. & Exs. 1–3). Lyndon signed a consent that was submitted to the court along with a proposed consent judgment on October 16. Dkt. 6. The court requested that the parties clarify the consent so that it better tracked the language of the proposed judgment. Dkt. 16. As a result, Lyndon

signed a second, revised consent on October 23, and the court entered the consent judgment on November 1. Dkt. 20, 22; ER 31–38.

The consent and the judgment (which incorporated the terms of the consent) addressed remedies in two ways. ER17 (¶ 7); ER 38 (Section XII). The consent judgment permanently enjoined Lyndon from violating enumerated provisions of the securities laws and imposed officer-director and penny-stock bars. ER15–16 (¶ 2); ER 31–37 (Sections I through X).[3] Lyndon has not challenged the imposition of this injunctive relief.

With regard to monetary relief, the consent judgment stated that the court would impose three types of monetary remedies, with the *amount* to be determined during a later phase of the proceedings. The consent judgment provided "that the Court *shall* order disgorgement of ill-gotten gains, prejudgment interest thereon, and a civil penalty" and that "the amounts of the disgorgement and civil penalty shall be determined by the Court upon motion of the Commission." ER16 (¶ 3); ER 37 (Section XI) (emphasis added).

The parties agreed on a framework for the remedies phase. Lyndon agreed that the allegations would "be accepted as and deemed true by the Court" for purposes of determining monetary relief and that he was precluded from arguing

[3] The judgment permanently enjoined Lyndon from violating the provisions of the securities laws that he was alleged to have violated by conducting his fraudulent scheme. *Compare* Dkt. 1 (Compl. 26–33) *with* ER 31–36 (Sections I–VIII).

"that he did not violate the federal securities laws as alleged in the complaint." ER16–17 (¶ 3); ER 37 (Section XI). Lyndon further agreed that he could not use the remedies phase to "challenge the validity of the Consent or the Judgment." ER17 (¶ 3); ER 37 (Section XI). Moreover, the consent judgment stated that, "[i]n connection with the Commission's motion" for monetary relief, "the parties may take discovery, including discovery from appropriate non-parties." *Id*.

The consent contained other provisions that are relevant here. Lyndon represented that he was entering "into this Consent voluntarily" and that "no threats, offers, promises, or inducements of any kind" were made by any Commission employee "to induce Defendant to enter into this Consent." ER17 (¶ 6). Lyndon also agreed that, consistent with a Commission rule regarding consent judgments without admissions, he would neither "take any action" nor "make any public statement" denying the allegations in the complaint or "creating the impression that the Complaint is without factual basis. ER18–19 (¶ 11), citing 17 C.F.R. 202.5(e). Finally, Lyndon waived the right "to appeal from the entry of the [j]udgment." ER17 (¶ 5).

3. Even though he agreed not to challenge the consent judgment, Lyndon made numerous attempts to renege on his agreement.

Despite the plain terms of the consent judgment, Lyndon repeatedly attacked the consent and denied the allegations in the complaint. In filing after filing, Lyndon presented the same argument: that the Commission tricked him into

signing the consent judgment and that he was "innocent" of any wrongdoing. Dkt. 28–29, 32, 36, 39, 41, 43 Finding no evidence of any deception by the Commission, the district court held him to the agreement. Dkt. 38, 40, 44, 45.

4. Under the terms of the consent, the Commission produced documents in its possession regarding remedies and subsequently asked the court to order disgorgement, interest, and a civil penalty.

With the consent judgment having narrowed the issues, discovery was limited to documents and testimony related to the amount of the monetary remedies. Accordingly, on January 31, 2014, the Commission made initial disclosures and produced "all documents in its possession, custody, or control that it may use to support its remaining claims, which concern the amounts of disgorgement and civil penalties owed by Lyndon." Dkt. 75 at 2. In total, the Commission produced over 20,000 pages of material. *Id*. These documents included all the bank and brokerage records underlying the Commission's request for disgorgement and a penalty. Dkt. 68-2 (Shau Decl. ¶¶ 6, 9). Lyndon did not make any disclosures to the Commission as part of this discovery. Dkt. 75 at 1.

The Commission filed its motion for relief in March 2014, seeking disgorgement of $3.3 million (and prejudgment interest) corresponding to the proceeds from the sale of Left Behind stock that Zaucha kicked back to Left Behind. Dkt. 68-1, at 8. The Commission also sought a third-tier penalty of $150,000—the statutory maximum for one violation of the securities laws. *Id*. at

13–17. The Commission based its request on the allegations in the complaint, which were accepted as true pursuant to the consent, as well as the declaration of a Commission accountant, who analyzed Left Behind's bank account records and produced a 458-page summary that was served on Lyndon. Dkt. 68-2 (Shau Decl. ¶ 6); Dkt. 87, at 2.

Notwithstanding the SEC's voluminous production, Lyndon propounded several additional requests for documents. Lyndon demanded, among other things: evidence regarding the factual allegations in the complaint, even though they were no longer in dispute for purposes of the remedies phase; documents relating to alleged short selling of Left Behind stock, an unrelated issue outside the scope of the Commission's enforcement action; documents that were exclusively in the possession, custody or control of third parties; and copies of documents that Lyndon had produced to the SEC during the course of its investigation. Dkt. 87.

The Commission did not produce these materials, and Lyndon filed a motion to compel. Dkt. 76. The district court (Magistrate Judge Chang) denied his motion, stating that the "discovery sought by Lyndon is not relevant to the issue remaining before the Court, which is a determination with regards to the amounts of disgorgement and civil penalties owed by Lyndon." Dkt. 115.

While the Commission's remedies motion was pending, Lyndon continued to attack the consent. He filed motions to sanction the Commission for "[i]llegal

[i]ntimidation" (Dkt. 81), to quash the Commission's motion for summary judgment (Dkt. 90), and to stay the consent judgment (Dkt. 101). Eventually, the district court barred Lyndon from filing any new motions (without leave) until after the court ruled on the various pending motions. Dkt. 120.

The district court (Chief Judge Mollway) held a hearing on the Commission's remedies motion, as well as Lyndon's multitude of filings, in June 2014. Lyndon participated in the hearing and presented his arguments to the court. Dkt. 138 (transcript of June 30 hearing). As is Chief Judge Mollway's practice, the court informed the parties that the court was inclined to grant the Commission's motion (with an adjustment to the disgorgement amount) and to deny Lyndon's efforts to escape the consent. *See* Judge's Requirements, Chief Judge Mollway, http://www.hid.uscourts.gov/ reqrmts/SOM/somdoc1-13.pdf ("It is Judge Mollway's practice, whenever possible, to notify attorneys and pro se parties scheduled to argue motions before her of her inclinations on the motions and the reasons for the inclinations. This is part of Judge Mollway's normal practice, rather than a procedure unique to a particular case * * * .").

Almost immediately after the hearing, Lyndon sought Chief Judge Mollway's recusal. Dkt. 131–32. Chief Judge Mollway referred the motion to Judge Kobayashi, who found that Chief Judge Mollway's conduct did not reveal any bias. Dkt. 142 at 9. With regard to the June hearing in particular, Judge

Kobayashi emphasized that "the transcript demonstrates that Lyndon was permitted to speak at length, without criticism or interruption, about himself and his business experiences, and to present his arguments." Dkt. 142 at 10.

5. The district court ordered Lyndon to disgorge his ill-gotten gains (plus interest) and pay a penalty.

After Lyndon's recusal motion was denied, the district court granted the Commission's remedies motion. The court noted that the Commission was "not seeking to hold Lyndon liable for disgorgement of all proceeds obtained from the sale of Left Behind stock by Zaucha," but rather for a lesser amount equal to the money Zaucha kicked back to Left Behind. ER57. The court found that the Commission met "its burden of demonstrating that $3,251,169 is a 'reasonable approximation' of Lyndon's illicit gains based on the violations of various securities laws." ER57. The burden then shifted to Lyndon, who failed to show that this amount was "not a 'reasonable approximation'" because, as the court wrote, "[h]is opposition to the motion and arguments at the hearing cast no doubt on that figure." ER58. The court assessed prejudgment interest of $289,897 based on this disgorgement amount. *Id*. at 19.

As to the penalty, the court agreed that a $150,000 third-tier penalty was "reasonable" after noting that the Commission could have sought "a $150,000 penalty for each of Lyndon's violations or a penalty equal to the gross amount of pecuniary gain." ER62. The court explained that the penalty was justified because

"[o]ver a lengthy period of time, Lyndon perpetrated a fraud that caused people buying shares of Left Behind to invest about $4.6 million in a company that was not financially solvent" and because it was not clear that "Lyndon has 'learned his lesson'" after he "filed numerous pleadings in which he denies wrongdoing" despite executing a consent that precluded "him from denying that he violated securities laws." *Id*. Lyndon has not appealed the court's penalty decision.

In the same order, the court affirmed Magistrate Judge Chang's denial of Lyndon's motion to compel discovery and rejected Lyndon's additional challenges to the consent. ER47–51. The court held that Lyndon was bound by the consent because any regret he had about signing the agreement did "not give rise to a right to retract the agreement and to posit different facts." ER50.

Lyndon nonetheless filed several more motions that attacked the consent and sought reconsideration of the court's disgorgement/penalty order on identical grounds to those rejected previously. Dkt. 144, 146. The court denied these motions because Lyndon had provided "no reason for this court to reconsider" its remedies order, and the court reiterated that Lyndon's arguments amounted to nothing more than a collateral attack on the underlying consent. Dkt. 145, 147 (stating that Lyndon's motions were "based on the proposition that Lyndon did not violate securities laws," a proposition that "has been addressed by this court more than once"). The clerk entered a final judgment on August 21, 2014. Dkt. 148.

Lyndon filed a motion for a new trial, which the court denied, and he filed a notice of appeal on September 10. Dkt. 151–52.

6. During this appeal, Lyndon moved in the district court to vacate the judgment on the basis of supposedly new evidence.

More than two months after he appealed, Lyndon asked the district court "to stay and vacate" the judgment based on supposedly new evidence. Dkt. 174. The "new" evidence consisted of: (1) a "General Ledger" for Left Behind—what Lyndon calls a "QuickBooks Enterprise File"; (2) a spreadsheet purporting to list shares issued by Left Behind; and (3) emails sent and received by Lyndon. Dkt. 174, Exs. BA, BB, BC. The district court denied the motion; it wrote that due to Lyndon's appeal, "it is the Ninth Circuit that has jurisdiction over that portion of this case." Dkt. 175. When Lyndon sought similar relief in this Court, the Court construed his motion as one for a limited remand and denied it "without prejudice to filing a renewed motion accompanied by an indication that the district court is willing to entertain the" proposed motion. Dkt. 186; App. Dkt. 6.

The district court stated that it was unwilling to entertain Lyndon's motion because "[t]he record does not suggest that such a motion would do anything other than cause delay." Dkt. 197, at 6. The court stated that rather than demonstrating that the evidence was newly discovered or that it justified relief from the final judgment, Lyndon had simply made another attempt "to unwind everything that has occurred in this case." *Id*. at 3–5.

STANDARD OF REVIEW

The district court's decision to hold Lyndon to the consent judgment is reviewed for an abuse of discretion. *Turtle Island Restoration Network v. United States Dep't of Commerce*, 672 F.3d 1160, 1165 (9th Cir. 2012); *Retail Clerks Union Joint Pension v. Freedom Food Ctr.*, 938 F.2d 136, 137–38 (9th Cir. 1991); *accord SEC v. Citigroup Global Mkts.*, 752 F.3d 285, 291 (2d Cir. 2014). This Court also reviews the final judgment ordering Lyndon to pay disgorgement for an abuse of discretion because "a district court has broad equity powers to order the disgorgement of ill-gotten gains obtained through the violation of the securities laws." *SEC v. Platforms Wireless Int'l Corp.*, 617 F.3d 1072, 1096 (9th Cir. 2010) (internal quotation marks omitted); *SEC v. JT Wallenbrock & Assocs.*, 440 F.3d 1109, 1113 (9th Cir. 2006) (affirming district court's disgorgement determination in a bifurcated proceeding where an initial consent judgment precluded the defendants from denying that the violated the federal securities laws as alleged).

SUMMARY OF ARGUMENT

As in the district court, Lyndon tries to escape from the consent judgment he signed, but he is bound by its terms. The consent made clear that the court would impose monetary remedies of disgorgement, prejudgment interest, and a penalty in a later phase of the proceedings where the operative question was not "if" but "how much." And the consent established guidelines for that remedies phase: the parties could seek discovery in connection with the amount of disgorgement, and Lyndon could not deny the allegations in the complaint or challenge the validity of the consent. The Commission adhered to the consent judgment. Lyndon did not, fighting it every step of the way. He continues that battle here. But Lyndon cannot enter into an agreement that allows him to avoid trial and defer remedies to a later phase only to attempt to renege because he disagrees with the relief that the court eventually ordered. Lyndon suggests that the consent judgment should be vacated because the Commission breached its terms, but the only party who has violated the consent judgment is Lyndon—and he has done so repeatedly.

As to the final judgment and the amount of disgorgement it imposed—the only issue properly before this Court—Lyndon has failed to show that the district court erred when it ordered him to disgorge nearly $3.3 million plus prejudgment interest. The district court acted within its discretion when it found that the Commission's approximation of Lyndon's ill-gotten gains—the kick-backs from

Zaucha—was reasonable based on the allegations in the complaint and the evidence presented to the court. The district court was correct in accepting the Commission's estimate, particularly when Lyndon did not present any rebuttal evidence.

Lyndon's claims of error are misguided. He contends he could not amass evidence regarding disgorgement, but he received a substantial amount of discovery from the Commission and had access to his own company's records. Instead of presenting evidence regarding the monetary remedies, Lyndon chose to use the remedies phase as another platform to attack the underlying consent. Lyndon had ample opportunity to present his arguments to the court during a hearing that Lyndon dominated, and his assertions of judicial bias are reckless because they spring from nothing more than disagreement with the judge's rulings.

Lyndon further contends that the final judgment should be vacated because of supposedly new evidence, but his Rule 60 motion is not justiciable in large part because this Court has already denied that motion. And even if it were procedurally viable, Lyndon's motion is flawed in substance. The evidence Lyndon cites is not newly discovered because it was in his possession or could have been obtained with reasonable diligence. Moreover, even if it were newly discovered, it would not have affected the final judgment because it has no bearing on the calculation of Lyndon's ill-gotten gains.

ARGUMENT

I. Lyndon is bound by the consent to which he voluntarily agreed.

On appeal, Lyndon again tries to renege on the consent judgment that binds the parties in this case. Br. 1–2, 30. Lyndon insinuates that the Commission somehow deceived him into signing the consent, but he voluntarily entered into the consent judgment to resolve the charges against him. ER17 (¶ 6) ("Defendant enters into this Consent voluntarily * * * ."). Lyndon had ample opportunity over the course of a month to review the proposed consent, to negotiate changes to the language, and to refuse to sign if he disagreed with its terms. But he did none of those things. Instead, he signed the consent—twice—and struck a deal with the Commission that allowed the parties to avoid the expense and uncertainty of trial. Lyndon is bound by the consent's terms, and he cannot use this appeal as a vehicle to collaterally attack it. *SEC v. Adair*, 549 Fed. Appx. 699, 700 (9th Cir. 2013) (unpublished order), citing *United States v. Harris*, 628 F.3d 1203, 1205 (9th Cir. 2011); *SEC v. AMX Int'l, Inc.*, 7 F.3d 71, 75 (5th Cir. 1993) (per curiam).[4]

[4] *See also Siris v. SEC*, 773 F.3d 89, 95–96 (D.C. Cir. 2014) (holding that a settling defendant could not collaterally attack his consent in a subsequent administrative proceeding); *SEC v. Universal Express, Inc.*, 646 F. Supp. 2d 552, 558 n.2 (S.D.N.Y. 2009), *aff'd* 438 Fed. Appx. 23, 26 (2d Cir. 2011) (summary order) (holding defendant to consent in which he agreed not to challenge allegations); *SEC v. Fox*, 2013 U.S. Dist. Lexis 58 (N.D. Okla. Jan. 2, 2013), *aff'd* 2013 U.S. App. Lexis 14684 (10th Cir. 2013) (unpublished) (finding that a defendant was bound by the terms of the consent he knowingly and voluntarily signed).

Lyndon asks the Court to vacate the parties' agreement based on a purported "material breach" by the Commission—a supposed failure to provide discovery. Br. 19–20, 30. Even if Lyndon could make such a request at this juncture as a procedural matter, there are no grounds to alter the consent judgment because the Commission complied with its discovery obligations when it produced over 20,000 pages of material relevant to the remedies proceeding. Dkt. 75, at 2. Lyndon, by contrast, produced nothing, in violation of *his* obligations under the consent. Lyndon suggests that the fact that he filed a motion to compel somehow demonstrates the Commission's breach of its obligations. Br. 20, 24–26. But the district court properly denied his motion because it agreed with the Commission that the material Lyndon sought was irrelevant to the only issues left in the case—the disgorgement and penalty amounts. *See infra* pp. 27–29.

Lyndon's contention that the consent judgment should be vacated because of the Commission's conduct is ironic because Lyndon is the party who has repeatedly violated its terms. As a prime example, Lyndon's request on appeal that this Court vacate the consent judgment contravenes the waiver of his right "to appeal from the entry of the Judgment." ER17 (¶ 5); *see Harris*, 628 F.3d at 1205 ("Where an appeal raises issues encompassed by a valid, enforceable appellate waiver, the appeal generally must be dismissed."). As another example, despite agreeing that he would "be precluded from arguing that he did not violate the

federal securities laws" and that he would "not challenge the validity of this Consent or the Judgment," he has repeatedly asserted that he did not violate the securities laws and has repeatedly challenged the consent judgment. ER16–17 (¶ 3). And even though Lyndon agreed not to deny the allegations in the complaint—in compliance with the Commission's policy regarding settlements without admissions, *see* 17 C.F.R. 202.5(e)—he has denied the allegations and created "the impression that the Complaint is without factual basis," including in his opening brief in this appeal. ER 18–19 (¶ 11).

II. The district court properly exercised its discretion when it ordered Lyndon to disgorge nearly $3.3 million in ill-gotten gains from the money kicked back to Left Behind by Zaucha.

Lyndon's challenge to the final judgment fails because he has not shown that the district court abused its discretion when it found that the Commission reasonably approximated his ill-gotten gains from the fraudulent scheme and that Lyndon failed to offer any evidence rebutting that approximation. Lyndon argues that he was not afforded the chance to assemble and present evidence regarding disgorgement, but the record reveals that Lyndon had ample opportunity to do both. And while Lyndon seeks relief from the final judgment based on supposedly new evidence, his request is not justiciable, and it is unavailing as a matter of substance because the evidence he discusses was not newly discovered and has no relevance to the disgorgement amount.

A. The district court properly found that Lyndon failed to rebut the Commission's reasonable approximation of his ill-gotten gains.

The district court correctly applied this Court's law of disgorgement to the evidence presented. The purpose of disgorgement is "to deprive a wrongdoer of unjust enrichment, and to deter others from violating securities laws by making violations unprofitable." *SEC v. First Pac. Bancorp*, 142 F.3d 1186, 1191 (9th Cir. 1998) (internal quotation marks omitted). While disgorgement "should include all gains flowing from the illegal activities," *JT Wallenbrock*, 440 F.3d at 1114 (internal quotation marks omitted), the amount need be "only a reasonable approximation of profits causally connected to the violation," *First Pac. Bancorp*, 142 F.3d at 1192 n.6 (internal quotation marks omitted). The Commission bears the initial burden of approximating the amount of unjust enrichment, and the burden then shifts to the defendant to demonstrate that the Commission's disgorgement figure is not a reasonable approximation. *Platforms Wireless*, 617 F.3d at 1096. Any risk of uncertainty falls on "the wrongdoer whose illegal conduct created that uncertainty." *Id*., citing *SEC v. First City Fin. Corp*., 890 F.2d 1215, 1232 (D.C. Cir. 1989).

The district court properly exercised its discretion when it found that the Commission's approximation of Lyndon's ill-gotten gains was reasonable. The Commission quantified Lyndon's ill-gotten gains as the amount of Zaucha's kick-backs to Left Behind from his sale of its stock. The Commission based its figure

on the allegations in the complaint—which were assumed to be true and which Lyndon could not deny pursuant to the consent judgment, ER 16–17 (¶ 3)—as well as on evidence submitted to the court in the remedies phase. Dkt. 68–69. The total was $3,215,169 in kick-backs, which took three forms: (1) $871,169 in "early-sell fees" that Zaucha paid to Left Behind for rapidly selling his stock; (2) Lighthouse's purchase of about $1.38 million in Left Behind inventory that Lighthouse mostly gave away for free; and (3) about $1 million in "loans" and "investments" that Zaucha made to Left Behind. Dkt. 1 (Compl. ¶¶ 4–8). These funds were paid into Left Behind's accounts, which Lyndon controlled and used for his own personal expenses. *Id*. (¶ 36); Dkt. 68-2 (Shau Decl. at 5–8).

Once the Commission satisfied its burden of presenting a reasonable approximation of the ill-gotten gains, the burden shifted to Lyndon, and the district court properly found that he failed to present any evidence casting doubt on the Commission's figure. ER 58. On appeal, Lyndon does not explain how the court abused its discretion in making this finding. He argues that the court erred because it should have found that he owed *no disgorgement,* Br. 18, 20, 22, but Lyndon previously agreed "that the Court *shall* order disgorgement of ill-gotten gains" with only the "amount" to be determined subsequently. ER 16 (¶ 3) (emphasis added). Given the language of the consent, Lyndon cannot claim that the court erred because it did not order *zero* disgorgement.

Moreover, Lyndon is incorrect that the court erred by not accounting for "legitimate expenses." Br. 22. While Lyndon offers no details on those expenses, this Court has held that "the manner in which" a defendant chooses "to spend the illegally obtained funds has no relevance to the disgorgement calculation." *JT Wallenbrock*, 440 F.3d at 1116. A defendant like Lyndon "who controls the distribution of illegally obtained funds is liable for the funds he or she dissipated as well as the funds he or she retained." *Platform Wireless*, 617 F.3d at 1098. As this Court has made clear, Lyndon cannot operate a business using unlawfully obtained money. *JT Wallenbrock*, 440 F.3d at 1114 ("[I]t would be unjust to permit the defendants to offset against the investor dollars they received the expenses of running the very business they created to defraud those investors into giving the defendant the money in the first place.").

In sum, the district court did not abuse its discretion when it ordered Lyndon to disgorge nearly $3.3 million in ill-gotten gains, particularly since, as the district court implied, the Commission could have argued that Lyndon was liable for *all* the proceeds from the sale of the stock (approximately $4.6 million). ER 57; *see Platforms Wireless*, 617 F.3d at 1096 (ruling that all the proceeds of sales that violate Section 5 are a "reasonable approximation of the profits obtained from the unlawful sales").

The district court also properly exercised its discretion when it ordered Lyndon to pay prejudgment interest on his ill-gotten gains. ER 58. Lyndon does not object to the imposition of prejudgment interest—and he could not do so under the terms of the consent. ER 16 (¶ 3) (agreeing that the court "shall" order "prejudgment interest" on disgorgement). Nor does he challenge the district court's calculation of prejudgment interest by a method that accords with circuit precedent. ER 58, citing *Platform Wireless*, 617 F.3d at 1099.

B. Lyndon had ample opportunity to develop and present evidence regarding the amount of his ill-gotten gains.

The record belies Lyndon's contention that the court somehow erred because Lyndon was unable to amass evidence and mount a challenge to the Commission's disgorgement calculation. Lyndon's assertion that the Commission failed to provide discovery, e.g., Br. 25, ignores the fact that the Commission served Lyndon with all the documents in its possession, custody, or control that could be used to support its claims regarding the disgorgement and penalty amounts—over 20,000 pages. Dkt. 75, at 2. In doing so, the Commission complied with the Federal Rules of Civil Procedure and the consent judgment, which stated that "[i]n connection with the Commission's motion for disgorgement and/or civil penalties, the parties may take discovery." ER 17 (¶ 4). Lyndon, by contrast, produced nothing. Dkt. 76, at 2.

Lyndon's accusations about withheld documents are baseless. For the most part, he vaguely asserts that the Commission failed to produce "the Company's documents." Br. 22. But he does not identify the documents he is referring to or how they relate to disgorgement. Nor does Lyndon confront the fact that as founder, CEO, and CFO of Left Behind, he had primary access to those materials.

Lyndon also suggests that the Commission withheld documents created by Left Behind's auditor—a firm that his own company retained. Br. 20. But Lyndon reported to the district court in April 2014 that he had received production from the auditor. Dkt. 75, at 5–6. Notably, Lyndon failed to produce this material to the Commission despite *his* discovery obligations. Moreover, Lyndon does not explain how these documents—"work papers" from his own company's auditor—have any relevance to the remedies issues. Given the Commission's production of over 20,000 pages of material—all the documents it possessed related to remedies—and the fact that Lyndon had access to the materials he accuses the Commission of withholding, his assertion lacks merit.

Lyndon's invocation of *Brady v. Maryland*, 373 U.S. 83 (1963) is also misguided. Br. 25. *Brady* requires prosecutors in criminal cases to turn over exculpatory material, but *Brady* does not apply in civil actions. *SEC v. Neil*, 2014 U.S. Dist. Lexis 88223, at *14–15 (N.D. Cal. Jun. 27, 2014); *SEC v. Pentagon Capital Mgmt.*, 2010 U.S. Dist. Lexis 120247, at *3 (S.D.N.Y. Nov. 12, 2010). In

any event—and to the extent that evidence regarding calculation of a monetary remedy can be considered exculpatory—the Commission disclosed in the course of ordinary discovery all the materials it had that were relevant to the calculation of the disgorgement amount.

Lyndon also points to the Commission's opposition to his motion to compel as proof that he was denied access to relevant material. Br. 20. But he ignores the Commission's well-founded reasons for its opposition, with which the district court concurred. The problem was that Lyndon sought material that was not relevant to the determination of the disgorgement amount, including (1) material that pertained to Lyndon's suspicions about short selling of Left Behind stock, a separate issue that has no bearing on this case; (2) material that the Commission could not produce because it was in the possession of third-party entities, such as FINRA; (3) material that Lyndon already possessed; and (4) confidential information regarding the Commission's settlements with dozens, if not hundreds, of other defendants across a 7-year time span. Dkt. 60-1, at 3–5; Dkt. 87. Particularly given the district court's denial of Lyndon's motion and the limited scope of discovery authorized by the consent judgment, the Commission's opposition was justified. ER 17 (¶ 3).

Lyndon has not demonstrated that the district court erred when it refused to compel production of irrelevant material. *Hallett v. Morgan*, 296 F.3d 732, 751

(9th Cir. 2002) ("We review for abuse of discretion the district court's denial of [a] motion to compel discovery."). After reviewing the parties' arguments, Magistrate Judge Chang denied Lyndon's motion, finding that the discovery he sought was "not relevant to the issue remaining before the Court, which is a determination with regards to the amounts of disgorgement and civil penalties owed by Lyndon." Dkt. 115, at 1. The court further noted that, to the extent Lyndon "sought information which he believes would vindicate him or establish that he acted properly, such issues are not before the Court." *Id*. Lyndon sought review of the Magistrate's ruling by Chief Judge Mollway, who also ruled that "discovery with respect to liability issues" was improper. ER 51–52. Lyndon disagrees with this ruling, but he does not explain how Chief Judge Mollway abused her discretion when she refused to compel the production of material that had no bearing on the remaining issues in the litigation.

Just as Lyndon had access to relevant evidence, he had the opportunity to present that evidence to the court. Lyndon filed an opposition to the Commission's request for disgorgement, but he did not support his arguments with any actual evidence. While Lyndon claims that he "provided the court with proper evidence," his filing was a five-page document to which he appended no documents or other material. Br. 26, citing Dkt. 103.

Lyndon also distorts the record when he claims that he "was never given the opportunity to articulate his claims" during the hearing because of "Judge Mollway's abrupt leave from the court room." Br. 26–27. The transcript from that hearing exposes the falsity of this claim. The hearing lasted 66 minutes, and most of the court's time was spent in a dialogue with Lyndon, which takes up 31 of the 38 transcript pages. Far from taking an "abrupt leave" from her courtroom, Chief Judge Mollway patiently listened to Lyndon. Dkt. 138. As Judge Kobayashi stated in rejecting Lyndon's recusal motion, "the transcript demonstrates that Lyndon was permitted to speak at length, without criticism or interruption, about himself and his business experiences, and to present his arguments in this case." Dkt. 142, at 10.

Lyndon tries to impugn Chief Judge Mollway, as he accuses her of losing "her objectivity once she made the determination that Lyndon was guilty without a trial." Br. 26. This is not the first time Lyndon has attacked Chief Judge Mollway; he previously accused her of bias when he sought her recusal. He lost that battle, as Lyndon "failed to establish that Chief Judge Mollway's actions and statements were the result of prejudice or bias stemming from an extrajudicial source." Dkt. 142, at 10. He has not appealed the denial of his motion to recuse, nor would he have any legitimate grounds to do so. *Pesnell v. Arsenault*, 543 F.3d 1038, 1043 (9th Cir. 2008) ("The denial of a recusal motion is reviewed for abuse of

discretion."). Lyndon's only objection to Judge Mollway is his disagreement with her rulings, which is not a sufficient justification for recusal. *Liteky v. United States*, 510 U.S. 540, 555 (1994) ("[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion."). Moreover, the premise of Lyndon's claim of bias—that she deprived Lyndon of a trial—is misguided because it was Lyndon—not Judge Mollway—who made the determination that there would be no trial when he agreed to the consent.

C. While Lyndon's motion for relief from the judgment is not justiciable, there are, in any event, no grounds to grant such a motion because the evidence he identifies was not newly discovered and would not have changed the outcome.

Lyndon asserts that the final judgment should be vacated on the basis of "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)." FED. R. CIV. PROC. 60(b)(2). But Lyndon's request for relief from judgment is not justiciable, and it is substantively flawed.

1. As a threshold matter, Lyndon's arguments regarding his Rule 60(b)(2) motion cannot be heard. More than two months after Lyndon appealed from the district court's final judgment, Lyndon filed what was in essence a Rule

60(b)(2) motion.[5] The district court properly denied the motion because it lacked jurisdiction due to the pendency of the appeal. Dkt. 175; *Katzir's Floor & Home Design, Inc. v. M-MLS.COM*, 394 F.3d 1143, 1148 (9th Cir. 2004) and *Carringer v. Lewis*, 971 F.2d 329, 332 (9th Cir. 1992) (en banc) (both holding that the filing of a notice of appeal divests the district court of jurisdiction to rule on a Rule 60 motion).

When Lyndon made the same request here, this Court construed the motion as a request for a limited remand and denied it "without prejudice to filing a renewed motion accompanied by an indication that the district court is willing to entertain the proposed" Rule 60(b)(2) motion. Dkt. 186. Thus, the Court gave Lyndon a chance to obtain a limited remand—which would have given the district court the power to rule on his request for relief—if he could show that the district court was willing to hear the motion. Lyndon cannot make that showing; the district court indicated on January 13, 2015 that it was *unwilling* to entertain the motion because it would not "do anything other than cause delay." Dkt. 197, at 6.

[5] In his district court and appellate motions, Lyndon argued that the purportedly new evidence justified relief from the consent judgment, as well as the final judgment. Dkt. 196, at 3. Any request for relief from the consent judgment was untimely because it was filed on November 25, 2014, more than a year after entry of the consent judgment. FED. R. CIV. PROC. 60(c)(1) ("A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of judgment or order or the date of the proceeding.").

Therefore, Lyndon's efforts to restate the grounds for his Rule 60(b)(2) motion in his brief are misguided because there is nothing for this Court to review and nothing for this Court to decide. There is no district court ruling on the merits of the motion. And because of the district court's indicative ruling, Lyndon cannot satisfy the condition that this Court imposed when it denied his motion for a limited remand without prejudice. Thus, the Court's denial remains in place. If Lyndon is asking this Court to reconsider its denial, he has neither stated "with particularity the points of law or fact" that he believes "the Court has overlooked or misunderstood" nor "stated with particularity" any "[c]hanges in legal or factual circumstances" that would entitle him to relief. Cir. R. 27-10(a)(3).

To the extent that Lyndon's brief could be construed as challenging the district court's indicative ruling, there is an additional problem. "When relief is sought in the district court during the pendency of an appeal," a new notice of appeal is "necessary in order to challenge the district court's disposition of the motion." FED. R. APP. PROC. 12.1, ADV. COMM. NOTES, citing *TAAG Linhas Aereas de Angola v. Transamerica Airlines, Inc.*, 915 F.2d 1351, 1354 (9th Cir. 1990) ("[W]here a 60(b) motion is filed subsequent to the notice of appeal and considered by the district court after a limited remand, an appeal specifically from the ruling on the motion must be taken if the issues raised in that motion are to be considered by the Court of Appeals."). Lyndon did not file a separate notice of

appeal from the district court's January 2015 ruling, and the 60-day window to do so expired in March 2015. FED. R. APP. PROC. 4(a)(1)(B); *United States v. Sadler*, 480 F.3d 932, 937 (9th Cir. 2007) ("[W]e must dismiss civil appeals that are untimely for lack of jurisdiction.").[6]

2. Even if this Court could reach the merits of Lyndon's Rule 60(b)(2) motion, there is no basis for vacating the final judgment. To prevail on a Rule 60(b)(2) motion, Lyndon would have to show that the evidence was "newly discovered"—that it was not in his possession during the remedies phase—and that the evidence could not have been discovered with reasonable diligence. *Feature Realty, Inc. v. City of Spokane*, 331 F.3d 1082, 1093 (9th Cir. 2003). Moreover, Lyndon would have to show that the evidence is "of 'such magnitude that production of it earlier would have been likely to change the disposition of the case.'" *Id.*, quoting *Coastal Transfer Co. v. Toyota Motor Sales, U.S.A., Inc.*, 833 F.2d 208, 211 (9th Cir. 1987).

Lyndon cannot make this showing for any of the three pieces of evidence he discusses. He asserts that the following was newly discovered : (1) a lengthy document that purports to be Left Behind's "General Ledger" for 2002–2012 and

[6] Federal Rule of Appellate Procedure 4(a)(4)(A)(vi), which extends the time to file a notice of appeal once a Rule 60 motion is filed, could not apply here because Lyndon's Rule 60 motion was not filed within 28 days after entry of judgment. Rather, Lyndon filed his Rule 60 motion more than 90 days after the entry of judgment. *Compare* Dkt. 148 *with* Dkt. 174.

that Lyndon calls the "Quick Books Enterprise file" (attached as Addendum #2 to his brief); (2) a spreadsheet that purports to list the shares issued by Left Behind; and (3) various emails sent or received by Lyndon. Br. 27–29; Dkt. 174 (with exhibits). This evidence was not "newly discovered" because it was in Lyndon's possession or could have been obtained through the exercise of reasonable diligence. Moreover, this evidence has no bearing on the determination of the proper disgorgement amount.

Lyndon's request for relief "fails at the first hurdle" because Lyndon has admitted that he had this evidence in his possession, and thus it was not "newly discovered." *Feature Realty*, 331 F.3d at 1093. In an April 2014 filing—four months before the district court entered the final judgment—Lyndon represented that he "attained the electronic audit file and computer from the corporation's auditor" and would "cooperate with [the] SEC to insure that delivery is made and a copy received by [the] SEC as soon as practical." Dkt. 75, at 6. Thus, Lyndon represented to the district court that he had the evidence he describes as "new" for at least five months before the district court entered its final judgment in late August 2014. And he told this Court (in his Rule 60(b)(2) motion filed in December 2014) that his "new evidence" was "recovered through *a year and a half search*" through computer files, which is a concession that he possessed this material since mid-2013. CA9 Dkt. 5, at 2 (emphasis added). Because this

evidence was "in the possession of the party before the judgment was rendered," it is not "newly discovered." *Coastal Transfer Co.*, 833 F.2d at 212 (internal quotation marks omitted).

Even if Lyndon's admissions did not demonstrate that he had possession of these materials long before the district court entered the final judgment, Lyndon could have acquired this "new evidence" through the exercise of due diligence. The evidence that Lyndon wants the court to consider consists of Left Behind's business records and Lyndon's emails. Lyndon was Left Behind's founder, CEO, CFO, and Chairman; he could have obtained his company's records through the exercise of even the most minimal diligence. The same is true of emails that were addressed to or were sent by Lyndon. Indeed, Lyndon has never attempted to explain how he "could not with reasonable diligence have discovered and produced such evidence" during the remedies phase. *Frederick S. Wyle P.C. v. Texaco, Inc.*, 764 F.2d 604, 609 (9th Cir. 1985) (internal quotation marks omitted).

Finally, even if the evidence were "newly discovered," Lyndon has failed to demonstrate that its earlier production "would have been likely to change the disposition of the case." *Coastal Transfer*, 833 F.2d at 211. Lyndon focuses on Left Behind's "General Ledger". *E.g.*, Br. 28. But this ledger does not rebut the

Commission's reasonable approximation of his ill-gotten gains.[7] While Lyndon's arguments are opaque, he appears to claim that the ledger reveals the legitimacy of Left Behind's business expenses. Lyndon nowhere explains *how* these records accomplish that task, Br. 22, but the legitimacy of Left Behind's business expenses is beside the point because the "'overwhelming weight of authority holds that securities law violators may not offset their disgorgement liability with business expenses.'" *JT Wallenbrock*, 440 F.3d at 1115.

Lyndon also claims that the General Ledger somehow exposes wrongdoing on the Commission's part, but the accusations that he sprinkles throughout his brief are recklessly unmoored from the facts. He does not explain how these financial records contradict the allegations in the complaint—which Lyndon agreed not to contest—that Left Behind received kick-backs from Lighthouse and Zaucha totaling almost $3.3 million. He does not explain how this ledger contradicts the exhibits accompanying the Commission's motion for remedies, which demonstrated how Left Behind's bank account records confirmed that the company received almost $3.3 million from Zaucha and that Lyndon extracted nearly $1 million from those accounts for personal expenditures. Dkt. 68-2 (Shau Decl. 4–

[7] Lyndon erroneously contends that the Commission's "financial claim is equal to 100% of corporate bank statement deposits." Br. 22. The Commission never suggested that every dollar received by Left Behind constituted ill-gotten gains. Instead, the Commission argued—and the district court agreed—that the money Zaucha kicked back to Left Behind constituted the ill-gotten gains.

8). And Lyndon certainly does not explain how the General Ledger reveals that the Commission's filings "contain perjured statements." Br. 28.

The other categories of supposedly "new evidence" similarly would have had no bearing on the disgorgement determination. With his motion, Lyndon introduced a document that he claims is Left Behind's "Transfer Agent Equity Report." Dkt. 174, Ex. BB. On its face, this document appears to be a spreadsheet of Left Behind shares that were issued by the company. Putting aside questions about this document's authenticity (the spreadsheet is not accompanied by any document from any transfer agent), Lyndon does not explain how information about the number of shares issued rebuts the Commission's reasonable approximation of Lyndon's ill-gotten gains from kick-backs on the sale of those shares by Zaucha. If authentic, this document serves to support the district court's imposition of a third-tier penalty—a decision that Lyndon has not appealed—because it shows that a large number of investors experienced "substantial losses" because of Lyndon's fraud. 15 U.S.C. 77t(d)(2)(C)(II), 78u(d)(3)(B)(iii)(bb). Similarly, Lyndon does not offer any insight into how 48 pages of emails sent to and by Lyndon that concern Left Behind's quarterly and yearly filings have any bearing on the amount of kick-backs received. If anything, these emails could be considered relevant to his liability for making misleading statements in filings with

the Commission, but he agreed in the consent that his liability would be assumed for purposes of determining disgorgement.

CONCLUSION

For the foregoing reasons, the final judgment of the district court should be affirmed.

Respectfully submitted,

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June 2015

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 8,928 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I also certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief 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 June 1, 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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STATEMENT OF RELATED CASES

The Securities and Exchange Commission is not aware of any related cases, as defined in Circuit Rule 28-2.6, that are currently pending before this Court.

June 1, 2015

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