No. 22-______

In The
Supreme Court of the United States

RANDALL S. GOULDING,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI AND SUMMARY REVERSAL

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QUESTIONS PRESENTED

1. Whether a district court's award of disgorgement to the SEC based on the defendant's cash withdrawals from a business without considering whether the withdrawals were tethered to any alleged wrongdoing satisfies the net profits calculation required by *Liu v. SEC*, 140 S. Ct. 1936 (2020), when the business was legitimate and engaged in non-fraudulent activities.

2. Whether a district court may shift to a defendant the burden of calculating disgorgement when the SEC contends it cannot make such a calculation.

3. Whether a district court may order that disgorged funds be sent to the Treasury when the identities of the potentially aggrieved investors are known to the district court and the SEC has not demonstrated that it would be infeasible to distribute disgorged funds to the investors.

PARTIES TO THE PROCEEDINGS

Petitioner Randall S. Goulding was a defendant in the district court proceedings and appellant in the court of appeals proceedings.

Respondent Securities and Exchange Commission was the plaintiff in the district court proceedings and the appellee in the court of appeals proceedings.

The following were parties in the district court proceedings but did not participate in the court of appeals proceedings: The Nutmeg Group, LLC; David Samuel Goulding; David Goulding, Inc.; David Samuel, LLC; Financial Alchemy, LLC; Philly Financial, LLC; Eric Irrgang; Samuel Wayne; Barnes & Thornburg LLP; Michael Alonso; Lawrence Altholtz; Altholtz Family Limited Partnership; Karyn Blaise Irrevocable Trust; Melanie Altholtz Ilit; Richard J. Carr; Donald Chermel; Stephen R. Chipman; Clifford R. Cross; Melodie K. Cross; Delmonte Holdings, LLC; Lawrence Depaolo; Brad Cohen and Robyn Cohen as representatives of UTD 9-11-01; Dillard Coleman and Glenda Coleman, as representatives of the Coleman Living Trust 11/7/01; Kenneth Diamond; Kenneth Diamond as a representative of Pensco Trust Co. Custodian Ken Diamond DI1CP; Peter Dolan; Patricia Eitzen; Myra Fishman; Ronald J. Fishman, as a representative of Pensco Trust Co. Custodian FBO Ronald J. Fishman IRA; Zachary Fishman; Daniel Ford; Donna Ford; Douglas Ford; Dwain Ford; Rick Freedman, as a representative of the Rick Martin Freedman Trust; Jeffrey Friedman, as representative of the Jeffrey R.

PARTIES TO THE PROCEEDINGS—Continued

Friedman Revocable Trust; Robert M. Gale; Stanley Gottlieb; Paul Gougelman; Billy E. Grace and Glena C. Grace, as representatives of The Grace Family Trust; Ralph Gracia; Jerry L. Hall; Darren A. Hearns; Paula Heggerick; Scott Hill; Patricia S. Horvath; Jaffe Revocable Living Trust; Marshall Katzman; Harvey Levin; Glen Lundahl; Roberta Lundahl; Raymond Lutze; Kevin M. Lyons; Stuart P. Miller; Margaret Milstead, as a representative of Margaret M. Milstead LT 3-7-00; Donald S. Monopoli; Laura E. Monopoli; James O'Malley; Juan Pardo De Zela; Louis R. Pertz; Francie Pinkwater; Krisztina Pipo; Erik Poch; Katie Poch; Oskar R. Poch; Frank Ripa; Jackie Ripa; Ripa & Associates, LLC; Rivers Enterprises, FLLP; Nancy Rogers, as executrix for the estate of James P. Rogers and representative of Equity Trust Co. Custodian FBO James P. Rogers, IRA; Allen Rubens; Howard Salamon; Jason Elliot Salamon; Pamela Salamon; Samuel Salamon; Sheri Salamon; Ana Schuster; Georgene Schuster; Robert Schuster; Garland Sheats; Jeffrie Silverberg; Dennis L. Smith; Kenneth Snider; Mark Sperber; Patricia Sperber; Mark Sperber as a representative of Resources Trust; Larry A. Spindler; Ronald W. Stevens; John R. Troup; Sue S. Troup; Sean Underwood, as a representative of the Underwood Living Trust; Adam White; Brittany White; Randi White; Ashley Young; Brandt Young; Laurie Young; Michael Young; Leslie Weiss; Brandon Goulding, Ryan D. Goulding; Alan D Lasko; Lasko & Associates, P.C.

STATEMENT OF RELATED PROCEEDINGS

This case arises from and is directly related to the following proceedings in the U.S. District Court for the Northern District of Illinois and the U.S. Court of Appeals for the Seventh Circuit:

SEC v. Nutmeg Group, LLC, No. 09-cv-1775 (N.D. Ill.) (Nov. 12, 2019)

SEC v. Goulding, No. 20-1689 (7th Cir.) (July 7, 2022)

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STATUTES

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28 U.S.C. § 1254(1)..1

Petitioner Randall S. Goulding petitions for a writ of certiorari to review and summarily reverse the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit ("Seventh Circuit") (App. 1–10) is reported at 40 F.4th 558. The Findings of Fact and Conclusions of Law (App. 13–95), and the Final Judgment (App. 96–101) of the United States District Court for the Northern District of Illinois are unreported.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered its judgment on July 7, 2022 and denied rehearing on September 7, 2022. (App. 123.) On November 28, 2022, Justice Barrett extended the time for filing a petition for a writ of certiorari to and including January 20, 2023. (App. 173–74.) Jurisdiction in this Court is proper under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provision of the Securities Exchange Act of 1934, 15 U.S.C. § 78u(d)(5), is reproduced at App. 124–48.

INTRODUCTION

In 2020, the Supreme Court of the United States in *Liu v. SEC*, 140 S. Ct. 1936 (2020), restrained the SEC's ability to obtain disgorgement as equitable relief under 15 U.S.C. § 78u(d)(5). Applying long-standing principles of equity, the Court held that a disgorgement award is proper under section 78u(d)(5) if it: (1) does not exceed the defendant's net profit from wrongdoing and (2) is awarded for the benefit of investors. A disgorgement award that does not comply with these bedrock principles is a "penalty" that cannot be supported by equity and cannot be awarded under 15 U.S.C. § 78u(d)(5).

This case involves a glaring departure from *Liu*. Randall Goulding is the founder of Nutmeg Group, LLC ("Nutmeg"), a business that offered investment advisory services and had legitimate business activities. In 2009, the SEC sued Mr. Goulding for violating the Investment Advisers Act of 1940. Broadly speaking, the alleged violations stemmed from: (1) Nutmeg's failure to maintain accurate books and records; (2) Nutmeg's transfers of the funds' assets to third parties, either in the form of loans or other arrangements; (3) Mr. Goulding's use of the funds' assets to pay for his personal expenses; (4) errors in the funds' valuations which, in turn, resulted in inflated performance fees for Nutmeg; and (5) errors in Nutmeg's quarterly reports to investors concerning the funds' performance and positions. Crucially, the SEC never contended that Nutmeg was an entirely fraudulent enterprise because it was not. In late 2019, nearly two years after a bench

trial, the District Court found Mr. Goulding liable for several violations of the Investment Advisers Act and awarded disgorgement to the SEC. The award was not based on the net profits from Mr. Goulding's alleged wrongdoing, but rather on the cash flows from Nutmeg's bank accounts to Mr. Goulding, as set forth in an SEC exhibit (PX43). In other words, the District Court disgorged the difference between money Mr. Goulding withdrew from Nutmeg's accounts and the money he deposited, which totaled $642,422. Relying on a pre-*Liu* burden-shifting framework, the District Court reasoned that this calculation was the "cleanest" way to measure Mr. Goulding's allegedly ill-gotten gains because he commingled his funds with Nutmeg's. (App. 85–86, ¶¶ 51–52.) Mr. Goulding therefore had the burden of disproving the purported reasonableness of the award. The District Court's Final Judgment also directed the SEC to send the disgorged funds to the Treasury without requiring that the funds be distributed to alleged victim-investors or finding that such distribution would be infeasible. These decisions directly contradict the long-standing equitable principles espoused in *Liu*, which was decided while Mr. Goulding's appeal was pending.

The Seventh Circuit did not apply *Liu* when it affirmed the District Court's disgorgement award. Instead, the Seventh Circuit held that the District Court's use of a calculation other than net profits from wrongdoing was proper because: (1) Mr. Goulding's own actions made it difficult to calculate how much of Nutmeg's money was ill-gotten; and (2) the award was a

"conservative estimate." *SEC v. Goulding*, 40 F.4th 558, 562 (7th Cir. 2022). Importantly, the Seventh Circuit found that Nutmeg was not an entirely fraudulent enterprise because it had "real assets" and performed legitimate functions aside from the fraud. *Id.* at 561–62. The Seventh Circuit nevertheless affirmed the District Court's disgorgement of *all* cash flows from Nutmeg to Mr. Goulding with no deductions. *Id.*

The Seventh Circuit's opinion is inconsistent with *Liu*. The SEC's threshold burden (and the District Court's ultimate responsibility) is to calculate *net profits from wrongdoing*, which is the only proper measure of disgorgement under *Liu*. For this reason, any burden-shifting scheme that coexists with *Liu* must be based on net profits from wrongdoing as well. Commingled funds and poor accounting do not give the lower courts a pass to ignore *Liu* and shift the burden of proof onto defendants based on some calculation other than net profits from wrongdoing. The Seventh Circuit should have remanded Mr. Goulding's case to allow the District Court to apply *Liu* by attempting to calculate any net profit from Mr. Goulding's alleged wrongdoing, which would require subtracting the legitimate revenue or business expenses from the disgorgement award. Given the Seventh Circuit's finding that Nutmeg was not an entirely fraudulent enterprise, it cannot be that *all* the cash flows to Mr. Goulding were ill-gotten. Moreover, the Seventh Circuit should have remanded Mr. Goulding's case to allow the District Court to determine whether distributing disgorged funds to

investors was infeasible before directing the SEC to deposit those funds with the Treasury.

Because the Seventh Circuit did not resolve the patent inconsistencies between the disgorgement award and *Liu*'s requirements, the award is a penalty that cannot be supported by equitable principles. Accordingly, this Court should grant the Petition, summarily reverse the Seventh Circuit's ruling, and remand to the District Court for proceedings consistent with *Liu*.

STATEMENT OF THE CASE

A. Factual Background

Mr. Goulding owns an investment advisory firm called Nutmeg Group, LLC ("Nutmeg"). Nutmeg managed 15 funds formed as limited partnerships. Nutmeg's investors were limited partners in the funds, while Nutmeg acted as an investment adviser and, for most of the funds, a general partner. These dual roles meant that Nutmeg both directed the funds' investment strategy and maintained their books and records. As compensation, Nutmeg received various administrative, performance, and valuation fees from the funds. These included a one-time four percent administrative fee deducted from the investors' original investment, valuation fees based on the assets under management, and performance fees ranging from 15 to 20 percent of the funds' profits. (App. 23–24, ¶¶ 65–68.)

When Nutmeg was created in 2003, it was too small to register with the SEC under the Investment Advisers Act of 1940. By 2007, Nutmeg had grown large enough that it was required to register, which it did on June 7, 2007. Nutmeg's growth outpaced some of its practices regarding record-keeping, account segregation, and internal controls. The SEC conducted an examination of Nutmeg and concluded on September 30, 2008 that Nutmeg was deficient in a number of these areas. Six months after the examination concluded, the SEC commenced this action against Mr. Goulding.

B. Procedural Background

After a 2018 bench trial, the District Court concluded that Mr. Goulding was liable for violating sections 206(1), 206(2), and 206(4) of the Investment Advisers Act. To calculate disgorgement, the District Court relied primarily on Schedule 2 of an SEC exhibit (PX43), which was admitted into evidence during trial. Schedule 2 is a summary prepared by an SEC accountant and "catalogues the money [Mr. Goulding] withdrew from Nutmeg's commingled bank accounts over and above what he deposited into those accounts." (App. 85, ¶ 51.) Schedule 2 does not describe the nature of any of these deposits or withdrawals, and the District Court made no attempt to determine whether the withdrawals represented legitimate business expenses or were otherwise associated with Nutmeg's legitimate business activities. In fact, the SEC's own accountant testified that Schedule 2 did not describe Mr.

Goulding's withdrawals as coming from a legitimate or illegitimate source. (App. 146–48.) Relying on Schedule 2, the District Court subtracted Mr. Goulding's deposits into Nutmeg's accounts from Mr. Goulding's withdrawals from those accounts and awarded the difference to the SEC as disgorgement. The District Court concluded that this difference totaled $642,422 for the five years preceding the SEC's 2009 lawsuit. (App. 85–86, ¶ 51.) This amount represents *the gross payments* Mr. Goulding received from Nutmeg over the relevant time period rather than Mr. Goulding's net profits from wrongdoing.

The District Court could not determine the source of money in Nutmeg's accounts and did not determine whether the money consisted of legitimate management, performance, or other fees to which Nutmeg and Mr. Goulding were contractually entitled. (App. 85–86, ¶¶ 51–52.) The District Court blamed Mr. Goulding's "pervasive commingling of monies" for its inability to determine the source or nature of the funds (i.e., whether they were legitimate or illegitimate), and found that the $642,422 in gross payments to Mr. Goulding represented "the cleanest calculation of ill-gotten gains." (App. 85–86, ¶ 51.) The District Court did not consider Nutmeg's legitimate revenue when calculating disgorgement. For example, the District Court did not consider that Nutmeg received a four percent administrative fee up front, or that any over-valuation of Nutmeg's funds (which would have affected valuation-based fees) was only 5.5 to 6 percent. (App. 23–24, ¶¶ 65–66; App. 47, ¶¶ 205–06.)

Finally, although the District Court found that Nutmeg had 328 investors, the District Court did not require that the SEC distribute the disgorgement award to any allegedly aggrieved investors. Rather, the District Court's final judgment ordered the SEC to "send the funds paid pursuant to this Final Judgment to the United States Treasury." (App. 100.)

The Seventh Circuit affirmed. Despite this Court's intervening decision in *Liu v. SEC*, 140 S. Ct. 1936 (2020), the Seventh Circuit declined to remand Mr. Goulding's case to the District Court to reconsider the disgorgement award. Although the District Court did not deduct legitimate business expenses and could not determine the source of the disgorged proceeds, the Seventh Circuit concluded that the District Court's disgorgement award was "conservative" and the "definition of net unjustified proceeds." *Goulding*, 40 F.4th at 562. The Seventh Circuit did not explain why it considered the award "conservative," and Mr. Goulding firmly disagrees.

Like the District Court, the Seventh Circuit also blamed Mr. Goulding for any problems in calculating the disgorgement award. (*Id.*) Importantly, the Seventh Circuit determined that Nutmeg was not a business whose entire profit resulted from wrongdoing. (*Id.* at 561–62.) Nutmeg performed some legitimate functions and its funds "had real assets, if risky and hard-to-value ones." (*Id.*)

On September 7, 2022, the Seventh Circuit denied Mr. Goulding's petition for rehearing and rehearing en banc.

REASONS FOR GRANTING THE PETITION

I. THE DISGORGEMENT AWARD DOES NOT SATISFY THE NET PROFITS CALCULATION REQUIRED BY *LIU* BECAUSE THE AWARD WAS BASED ON NUTMEG'S GROSS PAYMENTS TO MR. GOULDING WITHOUT CONSIDERING NUTMEG'S LEGITIMATE BUSINESS REVENUES AND EXPENSES.

Disgorgement is limited by "longstanding equitable principles," *Liu*, 140 S. Ct. at 1946, that were imported into the Exchange Act through 15 U.S.C. § 78u(d)(5) (authorizing the SEC to seek "any equitable relief that may be appropriate or necessary for the benefit of investors"). Disgorgement must be "circumscribe[d]" by these principles to "avoid transforming it into a penalty." *Id.* at 1941, 1943–44 (quoting *Marshall v. City of Vicksburg*, 82 U.S. (15 Wall.) 146, 149 (1872)). "[E]quity never 'lends its aid to enforce a forfeiture or penalty.'" *Id.*

As explained in *Liu*, one of equity's key limitations is that disgorgement must be "tethered to a wrongdoer's net unlawful profits." *Id.* at 1943. In other words, courts "may not enter disgorgement awards" greater than a defendant's "net profits from wrongdoing after

deducting legitimate expenses." *Id.* at 1946, 1949. The only exception is where the defendant's business is "an entirely fraudulent scheme." *Id.* at 1950 (quoting *Root v. Lake Shore & M.S. Ry. Co.*, 105 U.S. 189, 203 (1881)).

The fraudulent scheme exception does not apply to Mr. Goulding's case. The Seventh Circuit expressly found that Nutmeg "does not fit [the fraudulent scheme] proviso" because "its funds had real assets, if risky and hard-to-value ones." *Goulding*, 40 F.4th at 561–62. Similarly, the District Court's factual findings confirm that Nutmeg had legitimate revenue and expenses. The District Court concluded that Nutmeg received administrative fees—which would not have been affected by any securities law violation—and that any overvaluation of the funds that may concern valuation-based fees was marginal. (App. 23–24, ¶¶ 65–68; App. 47, ¶¶ 205–06.)

Despite Nutmeg having legitimate revenue, however, the District Court did not apply *Liu*'s net-profits-from-wrongdoing analysis. Instead, the District Court calculated disgorgement by relying on Schedule 2 of an SEC trial exhibit (PX43). (App. 151–72.) Schedule 2 shows Mr. Goulding's deposits and withdrawals from Nutmeg's bank accounts. The District Court merely subtracted Mr. Goulding's deposits into these accounts from his withdrawals and awarded the difference as disgorgement. Contrary to the principles espoused in *Liu*, the District Court made no attempt to determine whether these cash flows were connected to legitimate business revenues and expenses. (App. 85–86 at ¶ 51); *see also Liu*, 140 S. Ct. at 1950 ("[C]ourts must deduct legitimate expenses before ordering disgorgement under

§ 78u(d)(5).”). The SEC’s own accountant testified that Schedule 2 of PX43 did not characterize Mr. Goulding’s withdrawals as coming from a legitimate or illegitimate source. (App. 146–48.) In other words, the formulaic cash flow calculation on which the District Court relied did not consider whether Mr. Goulding’s deposits and withdrawals were for legitimate business purposes.[1]

Because neither the District Court nor the Seventh Circuit attempted to apply *Liu*’s net profits analysis, this Court should grant the Petition, summarily reverse the Seventh Circuit’s opinion, and remand to the District Court for an opportunity to apply *Liu* in the first instance. *See*, *e.g.*, *SEC v. Team Res., Inc.*, 815 F. App’x 801 (5th Cir. 2020) (memorandum opinion) (“In this case, the district court did not have the benefit of *Liu*’s guidance when it determined the amount of disgorgement. Application of *Liu* to the facts of this case should be left in the first instance to the district court’s sound judgment.”).[2]

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[1] Because the District Court incorrectly began its analysis with cash flows rather than net profits, it deprived itself of the opportunity even to consider business expenses. On remand, the District Court should start from a blank slate and consider all of Nutmeg’s legitimate revenues and expenses before awarding disgorgement. For example, Nutmeg made several payments to Mr. Goulding’s law firm. (App. 149.) The Court made no attempt to discern what portion of these payments was for legitimate legal services that Mr. Goulding provided. On remand, the District Court should determine whether this expense and others should be considered when calculating disgorgement.

[2] The Seventh Circuit previously remanded for consideration of *Liu* in a case involving an improperly calculated disgorgement award by a different agency. *See CFPB v. Consumer First Legal Grp., LLC*, 6 F.4th 694, 710 (7th Cir. 2021) (holding that a district

II. THE DISTRICT COURT INCORRECTLY SHIFTED TO MR. GOULDING THE BURDEN OF DISPROVING THE REASONABLENESS OF THE DISGORGEMENT AWARD.

More than thirty years before *Liu*, circuit courts began adopting a burden-shifting framework for calculating disgorgement. The first step in this pre-*Liu* framework requires the SEC to demonstrate that its disgorgement amount "reasonably approximates the amount of unjust enrichment." *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1232 (D.C. Cir. 1989). If the SEC satisfies its burden, the burden shifts to the defendant to rebut the presumption of reasonableness by demonstrating "a clear break in or considerable attenuation of the causal connection between the illegality and the ultimate profits." *Id.* (citing *SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1104 (2d Cir. 1972)). "Every regional circuit has . . . adopted or applied [this] framework." *SEC v. Hallam*, 42 F.4th 316, 329 (5th Cir. 2022). If the SEC cannot meet its threshold burden—and if the underlying business is not an entirely fraudulent enterprise—then the district court should not award disgorgement. *See SEC v. Lemelson*, 596 F. Supp. 3d 227, 238 (D. Mass. 2022) (holding disgorgement was not appropriate because "stock volatility and confounding events" prevented the SEC from creating a reasonable approximation of the defendant's pecuniary gain), *aff'd*, No. 22-1630, 2023 WL 21546 (1st Cir. Jan. 3, 2023).

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court's pre-*Liu* use of "gross receipts minus any refunds issued" as a basis for equitable disgorgement was improper and remanding for "re-calculation based on net profits").

The burden-shifting framework is only compatible with *Liu* so long as courts use net profits from wrongdoing to calculate disgorgement. *Liu*, 140 S. Ct. at 1946. Any burden-shifting framework that relies on a prima facie calculation of something *other* than net profits from wrongdoing is not compatible with the equitable principles described in *Liu*.

In Mr. Goulding's case, the lower courts rationalized shifting the burden onto him because the alleged commingling of funds and poor record-keeping made it "difficult" to calculate net profits from wrongdoing. This rationale does not comport with *Liu* for two critical reasons. (App. 85–86, ¶¶ 51–52.) *First*, as explained above, the District Court's award fails step one of the burden-shifting framework because the award was based on Nutmeg's cash flows, not net profits from wrongdoing. *See supra* Part I; *Liu*, 140 S. Ct. at 1946. *Second*, alleged commingling and poor accounting practices do not justify departing from *Liu*'s net profits requirement. The *Liu* case also involved comingling of assets and poor accounting practices that made it difficult to calculate ill-gotten gains. *See SEC v. Liu*, No. SACV 16-00974-CJC (AGRx), 2021 WL 2374248, at *5 (C.D. Cal. June 7, 2021) ("What makes the Court's task of dividing legitimate expenses from 'wrongful gains under another name' challenging . . . is how difficult it is to know precisely where money raised was spent and who benefitted from the various payments."). Nevertheless, on remand, the Central District of California ultimately deducted over $5 million in legitimate expenses, such as leasing costs and equipment costs. *Id.* at *10. The Ninth Circuit affirmed. *SEC v. Liu*, No. 21-56090,

2022 WL 3645063, at *2–3 (9th Cir. Aug. 24, 2022). The District Court in Mr. Goulding's case made no attempt to deduct legitimate revenue from the disgorgement award, even though at least some of the funds in Nutmeg's bank accounts were not connected to any wrongdoing. (App. 23–24, ¶¶ 65–68; App. 47, ¶¶ 205–06); *see also Goulding*, 40 F.4th at 561–62.

None of the lower courts' justifications for the disgorgement award cures the fault in their reasoning. The Seventh Circuit and District Court repeatedly deemed the award "conservative" and stated that $642,422 was the "cleanest" calculation of Mr. Goulding's supposedly ill-gotten gains. (App. 85–86, ¶ 51; App. 90, ¶ 59); *Goulding*, 40 F.4th at 562. But *Liu* does not allow courts to replace net profits from wrongdoing with alternative calculations that purportedly seem more "conservative" or "clean." As this Court made clear, courts "*must* deduct legitimate [business] expenses." *Liu*, 140 S. Ct. at 1950 (emphasis added). Given that Nutmeg undisputedly had legitimate revenues, any disgorgement award that disgorges *all* cash flows from Nutmeg to Mr. Goulding—with no deduction whatsoever for legitimate payments—cannot be "conservative." If the District Court had accounted for legitimately earned revenues, then Mr. Goulding's disgorgement award, if any, would have been substantially less.

In the absence of any appropriate rationale for shifting the burden to Mr. Goulding, this Court should grant the Petition, summarily reverse the Seventh Circuit's opinion, and remand to the District Court for an opportunity to apply the burden-shifting framework in

a manner consistent with *Liu*. This framework necessarily would mean placing the initial burden *on the SEC* to provide a reasonable approximation of net profits from wrongdoing.

III. THE DISTRICT COURT IMPROPERLY ORDERED THE SEC TO SEND DISGORGED FUNDS TO THE TREASURY EVEN THOUGH THE IDENTITIES OF NUTMEG'S INVESTORS WERE KNOWN, AND DISTRIBUTING FUNDS TO THE INVESTORS WAS NOT INFEASIBLE.

Equity jurisprudence restricts disgorgement "to an individual wrongdoer's net profits to *be awarded for victims*." *Liu*, 140 S. Ct. at 1943 (emphasis added). "The equitable nature of [disgorgement] generally requires the SEC to return a defendant's gains to wronged investors for their benefit." *Id.* at 1948. Otherwise, as explained *supra*, disgorgement becomes a "punitive sanction," which equity does not permit. *Id.* at 1941, 1943 (quoting *Marshall*, 82 U.S. at 146, 149). Section 78u(d)(5) incorporates the equitable principles restated in *Liu* by limiting equitable relief to "that which 'may be appropriate or necessary for the benefit of investors.'" *Id.* at 1947 (quoting 15 U.S.C. § 78u(d)(5)).

Liu held that depriving a wrongdoer of his ill-gotten gains is not enough to vindicate the interests of victims. *Liu*, 140 S. Ct. at 1948 ("[T]he SEC's equitable, profits-based remedy must do more than simply benefit the public at large by virtue of depriving a

wrongdoer of ill-gotten gains."). The SEC's practice of depositing indefinitely the disgorged funds into the Treasury would serve only to deprive wrongdoers of their gains without vindicating any victims' interests. This practice "is [therefore] in considerable tension with equity practices." *Id.* at 1946. According to *Liu*, the practice "may be justified" only if the SEC shows that it is "infeasible to distribute the collected funds to investors." *Id.* at 1948.

In Mr. Goulding's case, the District Court directed the SEC to deposit indefinitely the disgorged funds with the Treasury despite finding that "[t]he investors in [Nutmeg's] Funds were 328 individuals and entities who invested money with the Funds as limited partners." (App. 15, ¶ 7.)[3] Distributing funds to these aggrieved investors, who were known to the parties, cannot be infeasible. *See SEC v. Blackburn*, 15 F.4th 676, 682 (5th Cir. 2021) (approving a disgorgement award where "the SEC . . . identified the victims and created a process for the return of disgorged funds" and observing

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[3] The District Court's order that the disgorgement award be sent to the Treasury (instead of being distributed for the benefit of victims) underscores the importance of the net profits analysis required by *Liu*. Indeed, any plan by a district court for distributing an erroneously calculated award to victims would not comport with the equitable principles underlying section 78(u)(d)(5), because such distribution (despite being made to victims) would not be tethered to the actual harm—that is, the net profits of the alleged wrongdoing. With the investors already identified here, the District Court in all likelihood would have entered a distribution plan returning those disgorged funds to investors if it had calculated the disgorgement award that appropriately was tethered to the harm caused to those investors.

that "it is not only feasible to identify the victims to whom the funds will be distributed, that work has already been done"). Absent any showing of infeasibility, the disgorgement award against Mr. Goulding is a "punitive sanction." 140 S. Ct. at 1943. Such a sanction cannot be supported by the equitable principles espoused in *Liu* and embodied in section 78u(d)(5). *Liu*, 140 S. Ct. at 1943 (quoting *Marshall*, 82 U.S. (15 Wall.) at 149).

To comply with *Liu*, the SEC should provide the District Court with a plan for distributing the disgorgement to investors (including specific names and corresponding amounts). The District Court then should provide Mr. Goulding an opportunity to object. *See*, *e.g.*, *SEC v. AR Cap., LLC*, No. 19 Civ. 6603 (AT), 2021 WL 1988084, at *3 (S.D.N.Y. May 18, 2021) (approving distribution plan for disgorged funds over defendant's objections and stating, "[a]s long as the Plan returns the Funds to 'victims,' therefore, it does not run afoul of *Liu*."). Because the parties already know the specific investors in Mr. Goulding's case, creating a distribution plan should not be an onerous task. If the SEC cannot create such a plan, then it should be required to make a showing of infeasibility. If the SEC fails to make that showing, then no disgorgement should be awarded. *Cf. Lemelson*, 596 F. Supp. 3d at 238 (refusing to grant disgorgement in part because "the SEC has not provided any evidence that it could identify victims and has left open whether it is feasible to create a Fair Fund").

This Court should grant the Petition, summarily reverse the Seventh Circuit's opinion, and remand to

the District Court with instructions to calculate net profits and create a plan for distributing the funds to investors, or to strike the disgorgement award. Alternatively, if the issue of infeasibility has not been mooted by the District Court's previous factual finding about the number of investors (App. 15, ¶ 7), the Court should remand with instructions for the District Court to determine whether distributing the disgorgement funds to investors would be infeasible. *See Liu*, 140 S. Ct. at 1948 (stating that the question of infeasibility was for "the lower courts" to "evaluate in the first instance").

CONCLUSION

The Petition for a writ of certiorari should be granted, the opinion of the Seventh Circuit should be summarily reversed, and the case should be remanded to the District Court for proceedings consistent with this Court's decision.

Respectfully submitted,

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