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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

PUNCH TV STUDIOS, INC. and JOSEPH COLLINS,

Defendants.

CASE NO. 2:21-cv-07787-AB-AS

DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR REMEDIES AND ENTRY OF FINAL JUDGMENT

Date: March 15, 2024
Time: 10:00
Courtroom: 7B
Judge: Hon. André Birotte Jr.

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Nowhere in its complaint, motion for summary judgment, or its current Motion for Remedies and Entry of Final Judgment ("Remedies Motion," Dkt. 62) does plaintiff Securities and Exchange Commission's (the "SEC") even allege (much less prove) that Defendants Punch TV Studios, Inc. and Joseph Collins (the "Defendants") committed fraud, caused investors to suffer damages, or engaged in self-dealing or misuse of investor funds. Instead, the SEC's case involves a single claim: Defendants violated highly technical, non-fraud provisions of the federal securities offering registration requirements, involving in part a new and untested exemption to those registration provisions. Based on that non-fraud violation, and coupled with an inaccurate recitation of the legal principles at issue and an insufficient evidentiary record, the SEC asks this Court to order the Defendants to pay a financially ruinous amount of over $1.6 million.

Defendants respectfully submit this brief in opposition to the SEC's Remedies Motion pursuant to the Court's order on January 10, 2024. Dkt. 80.

I. INTRODUCTION

Citing no legal standard by which the Court can assess the merits of its Remedies Motion, and relying on little more than facially inapposite, third level hearsay, the SEC asks this Court to order Defendants to pay $1,201,154 in disgorgement, $132,000 in prejudgment interest, and a combined $300,000 civil penalty for grand total of $1,633,154. Remedies Motion at 4-6.

Neither disgorgement nor penalties is warranted in this case, and that conclusion is all the more true in light of the weak evidentiary record presented by the SEC in its Remedies Motion. As an initial matter, disgorgement is precluded by the recent Supreme Court case *Liu v. SEC* and its progeny because disgorgement would only serve as a punishment. 140 S. Ct. 1936, 1943 (2020). Moreover, the requested penny stock injunction and penalties exceed what is reasonable in a case involving no fraud and a reasonable belief in the legality of the offerings at issue. Neither the law nor the evidence in this case support imposing such draconian

punishment on a non-lawyer and his fledgling company for failing to recognize that the arcane and complex securities registration and exemption requirements had not been met. The Court should deny the SEC's Remedies Motion with prejudice, or, in the alternative, impose $0 in disgorgement and penalties against the Defendants.

II. THE SEC's REMEDIES MOTION IGNORES *HUSAIN*

Four months prior to filing its Remedies Motion in this case (and after it appeared that Defendants would not be represented by counsel), the SEC received an unfavorable decision in another case from the Ninth Circuit regarding obtaining remedies following a finding of liability on summary judgment. *SEC v. Husain*, 70 F.4th 1173, 1176 (9th Cir. 2023) (reversing and remanding District Court imposition of remedies on summary judgment record for failure to determine that no genuine issues of material fact exist and failing to resolve all factual uncertainty in favor of the non-moving party). Despite the SEC being the losing party in *Husain* and having both the resources and notice to be aware of this controlling decision, the SEC fails to cite (let alone address) *Husain* in its Remedies Motion.

While the SEC fails to articulate *any* standard for the Court to decide the Remedies Motion, the Ninth Circuit made the applicable standard clear in *Husain*. In that case, the Ninth Circuit was tasked with reviewing a district court's remedies order for abuse of discretion. The district court had imposed remedies for several securities law violations on a summary judgment record. *Id*. at 1177. The Ninth Circuit held that the district court had abused its discretion and remanded. *Id*. It explained that a district court can impose remedies "only after it has determined that no 'genuine issue of material fact exists' and all factual uncertainty is resolved in favor of the non-moving party." *Id*. at 1181 (citation omitted). Specifically, the Ninth Circuit found that the defendant had identified genuine issues of material fact on two crucial factors: (1) the degree of the defendant's scienter and (2) the defendant's recognition of the wrongful nature of his conduct. *Id*. at 1184. Notably, the Ninth Circuit acknowledged that Husain submitted a sworn declaration, which

stated that he relied on the advice of counsel in failing to disclose information to the SEC. This was enough to create a genuine of material fact to preclude the award of remedies on a summary judgment record. *Id*. at 1185.

As explained further below, the Remedies Motion on its face makes clear that significant issues of material fact remain relating to remedies, and the Court must resolve all factual uncertainty in Defendants' favor.[1] Even if no issues of material fact existed, the facts presented by the parties weigh in favor of awarding the SEC no disgorgement or civil penalties and not imposing a penny stock injunction.

III. GENUINE ISSUES OF MATERIAL FACT EXIST REGARDING DISGORGEMENT, WHICH SHOULD IN ANY EVENT BE $0

Applying the standards set forth by the Ninth Circuit in *Husain*, the Court should deny the SEC's Remedies Motion outright. However, even if the Court were to reach the issue of how much disgorgement is appropriate here, that amount should be $0.

A. The SEC Has Neither Alleged Nor Proven Investor Harm, and Therefore No Disgorgement is Appropriate.

The SEC's authority to seek disgorgement is not unfettered and must comport with the limits of equity principles. *Liu v. SEC*, 140 S. Ct. 1936, 1940 (2020).[2] The

[1] While the SEC's Remedies Motion makes clear that it is a continuation of its Motion for Partial Summary Judgment, the SEC's Remedies Motion does not comply with this Court's, the Central District of California's, or the Federal Rules of Civil Procedure's requirements for summary judgment motions. (Remedies Motion at 1:2-13, "On September 7, 2023, the Court granted the SEC's motion for partial summary judgment . . . The SEC now seeks additional remedies . . .").

[2] The SEC creates some ambiguity about whether it believes the Court's authority to impose disgorgement arises from the Court's equitable powers or from the National Defense Authorization Act for Fiscal Year 2021 (the "NDAA") and the adoption of 15 U.S.C. § 78u(d)(7). (Remedies Motion at 4:23 to 5:3). The weight of recent authority suggests that *Liu*'s equitable principles must still be followed even after the NDAA. *See*, *e.g.*, *SEC v. Johnson*, 2023 WL 2628678, at *19 (C.D. Cal. Feb. 17, 2023) (finding that the SEC "did not adequately specify how disgorging this amount would benefit investors or otherwise tie the requested

Supreme Court in *Liu* defined those equity principles and confined the SEC's ability to seek disgorgement to amounts that (1) do not exceed the wrongdoer's net profit and (2) are awarded to victims. 140 S. Ct. at 1940. The Supreme Court held that disgorgement "must do more than simply benefit the public at large by virtue of depriving a wrongdoer of ill-gotten gains." *Id*. at 1949. *Liu* further instructs that exceeding what is owed to investors transforms the remedy from one grounded in equity to a punishment. *Id*. at 1943.

As the Second Circuit recently explained about the implications of *Liu*, "[a]n investor who suffered no pecuniary harm as a result of the [violation] is not a victim." *SEC v. Govil*, 86 F.4th 89, 97 (2d Cir. 2023) (finding that the district court abused its discretion because it did not find that the investors suffered pecuniary harm and thus were not victims for purposes of disgorgement). The Second Circuit further explained:

> If we were to understand 'victim' as including defrauded investors who suffered no pecuniary harm—and thus to allow those investors to receive the proceeds of disgorgement—we would not be restoring the status quo for those investors. We would be conferring a windfall on those who *received the benefit of the bargain*.

Id (emphasis added).

Even a finding that investors were misled or lied to, which the SEC did not allege or attempt to prove in this case, without a showing of actual pecuniary harm, is not sufficient to establish that such investors are victims for purposes of

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disgorgement to the investors' losses[.]"); *SEC v. McDonald*, 2023 U.S. Dist. LEXIS 68734, at *9 (C.D. Cal. Apr. 17, 2023) (citing *Liu*'s holding); *SEC v. Garcia*, 2023 WL 2824395, at *5 (D. Colo. Mar. 29, 2023) (same); *SEC v. Johnson*, 2022 U.S. Dist. LEXIS 116263, at *45 (C.D. Cal. June 29, 2022) (analyzing disgorgement under § 78u(d)(7) and Liu); *SEC v. Meta 1 Coin Tr.*, 2023 WL 3069768, at *3 (W.D. Tex. Feb. 7, 2023), (same); *SEC v. Yang*, 2023 WL 3098353, at *14 (E.D. Wis. Apr. 26, 2023) (same).

disgorgement.[3] *Id*. at 104. This, of course, is consistent with *Liu*'s holding that disgorgement should only be used to compensate—not over-compensate—investors, so not to *punish* the defendants. *Liu*, 140 S. Ct. at 1938. As *Liu* instructs, disgorgement is not a penalty and cannot be used as a workaround to impose a penalty where the grounds supporting such a punishment are not present.

As the Ninth Circuit recently explained in *Husain* in relation to evaluating pecuniary gain resulting from an offering's gross proceeds, "The district court did not identify victims other than the SEC and general market integrity. . . Viewing the evidence in the light most favorable to the non-movant, [Defendant's] scheme did not victimize any member of the investing public." 70 F.4th 1173, 1184-1185. Here, the SEC has not alleged any harm to investors in this non-fraud case. (Complaint, Dkt. 1). For example, the SEC has not alleged or proven any misuse of the proceeds from the securities offerings at issue in its complaint. Nor has the SEC alleged or proven any self-dealing by Mr. Collins or Punch TV. Finally, the SEC has not alleged or proven that any investor has availed himself or herself of the private rights of rescission sometimes available under the federal securities laws. (Collins Decl. ¶ 8, "No Punch TV investors have told me they would have preferred Punch TV to have incurred the expense necessary to conduct a registered stock offering. Similarly, no Punch TV investors have told me they are grateful the SEC filed this lawsuit or that they would have preferred Punch TV had conducted its securities offerings in better compliance with exemptions to the registration requirements"). The investors invested in Punch TV; the SEC has not alleged or suggested that investors' funds were used for anything other than to develop Punch TV. In the words of the Second Circuit in *Govil*, the investors received the benefit of the bargain. That the securities offerings failed to qualify for one of the many exemptions from the (non-fraud)

[3] Regardless, here the SEC has not alleged or proven fraud or even negligence connected to the sales of securities, because Defendants were only accused of registration violations and no evidence of scienter was offered.

registration provisions of the federal securities laws does not imply that any investors were harmed.

The SEC would have the Court ignore the absence of investor harm and transform disgorgement into a punishment. On that basis alone, the Court should deny the SEC's request for disgorgement.

B. The Facts Support No Disgorgement.

Even if the Court finds that disgorgement is permissible in the absence of investor harm, the facts in this case do not warrant the imposition of any disgorgement.

The SEC acknowledges that it has the burden of establishing "a reasonable approximation of the Defendants' *net profits* from their violations." (Remedies Motion at 5:11-14, emphasis added).[4] However, the SEC has utterly failed in this task. First, although the SEC characterized its $1,201,154 figure as "net profits," the SEC's figure only purports to include gross receipts and completely ignores any expenses. Second, the SEC's evidentiary submission in support of its $1,201,154 figure is truly astonishing and cannot possibly meet the standard of proof on a summary judgment record. (Remedies Motion at 5:4-12). The SEC's approximation is based entirely on multiple levels of hearsay, starting with declarations from an SEC accountant (the "Kim Declaration," Dkt. 62-4) and an SEC attorney (the "Kirka Declaration," Dkt. 62-3).

[4] After acknowledging its burden to establish "net profits" (Remedies Motion at 5:12), the SEC then contradicts itself and claims that it is *Defendants*' burden to prove the existence of expenses that would be required to arrive at a "net" profits figure. (Remedies Motion at 5:16-27). In support of its contention about the burden of proof of expenses, the SEC cites non-binding authority and authority that preceded *Liu*'s holding that disgorgement must be limited to "net profits". *Id*. In any event, as discussed below, Defendants are submitting herewith admissible evidence that overwhelmingly establishes expenses demonstrating Defendants' actual "net profits" were $0 or negative.

Both the Kirka and Kim declarations draw sweeping conclusions based on their "understanding" following review of unspecified documents and discussions with each other. This is highly improper, and the Court should reject every factual statement based on Ms. Kim's or Ms. Kirka's "understanding." *Cermetek, Inc. v. Butler Avpak, Inc.*, 573 F.2d 1370, 1372 (9th Cir. 1978) (holding that district court properly disregarded affiant's factual assertion preceded by "I understand"). For example, Ms. Kim declares, "I understand from my review" of a host of unspecified documents certain things about the unspecified "master spreadsheets," and she further "understands" that certain entries on the spreadsheets mean certain things. (Kim Decl. ¶ 6). Ms. Kirka's declaration is far more egregious in its sweeping factual conclusions based on her "understanding" or what she "learned" from review of unspecified documents and information. Ms. Kirka declares that from some unspecified "information obtained in the investigation" including some unspecified "investigative testimony taken during the investigation" she "learned that Punch TV maintained spreadsheets." According to Ms. Kirka (again without any reference to particular documents or testimony from which she gleaned such understanding), she declares that she "understands" certain things about the (unspecified) spreadsheets. (Kirka Decl. ¶¶ 5, 6, 8, 9 expressing Ms. Kirka's "understanding" about various things). As explained in the Request for Evidentiary Ruling filed by Defendants concurrently with this Opposition, the Court should reject any statement based on Ms. Kim's or Ms. Kirka's "understanding."

Further, Ms. Kim's Declaration purports to reach the ultimate "determination" of the amount of money Punch TV raised from investors using a deeply flawed (and frankly inscrutable) methodology. Ms. Kim reaches this "determination" *solely* by providing a description of conclusions she drew after reviewing two spreadsheets that she acknowledges "are incomplete" (Kirka Decl. ¶ 7) "and other documents and records obtained in the investigation and my consultation with Ms. Kirka." The Kim Declaration attaches no documents whatsoever – not the spreadsheets, and not the

unnamed "other documents" relied upon to establish net profits. The Kim Declaration further fails to state what Ms. Kirka and Ms. Kim discussed that would tend to support or undermine the SEC's purportedly "reasonable approximation of the Defendants' *net profits*." The Kim Declaration falls woefully short of any standard of admissible evidence, including the standards set forth in Federal Rule of Civil Procedure 56(c). *See* Request for Evidentiary Ruling filed concurrently herewith.

Even when the SEC purports to rely on the deposition of Mr. Collins, the SEC misstates the record in the attempt to determine the "net profits" the SEC purports to be calculating. The SEC cites and attaches excerpts from Mr. Collins's May 5, 2023 Deposition (citing deposition pages 92:5-94:9; 152:19-154:24; 156:6-157:9; 161:6-161:16). The SEC claims that this deposition testimony supports the SEC's $681,924 and $367,711 disgorgement figures, but Mr. Collins's deposition testimony does nothing of the sort.

To be sure, Mr. Collins testified that two documents entitled "Master Investors File April 2020.xls" and "Master Spreadsheet 022020.xls" are true, accurate and complete "to the best of his knowledge." But then Mr. Collins goes on to testify that the $681,924 and $367,711 figures in the SEC's complaint are *incorrect, much too high, and are "100 percent wrong"* and must be compared against "company records" including bank records. When the SEC asks Mr. Collins what they should look at to determine the actual number, he concurs with their leading question that they should refer to "the company's records . . . like the shareholder lists, those spreadsheets we talked about." But Mr. Collins never says Punch TV's shareholder lists and spreadsheets could be used in isolation to determine "net profits." In fact, in the very deposition excerpts attached to Ms. Kirka's declaration, Mr. Collins responds to a question about relying on "the company's records" by saying:

> Q: Okay. And we'd go back to the to the [sic] company's records?
>
> A: I'm not saying where to tell you to go. You guys would have a better angle on that or not but what I'm saying is that I don't believe this [SEC investor proceeds number] is accurate because of those two events that happened.
>
> Q: Okay. All right. But fair to say, if we went to the company's records and we took a look at the shareholder list, we took a look at the master investors spreadsheet, we'd be able to arrive at the correct number from the company's own figures?
>
> A: I would imagine you could. I can't say you will, but I would imagine you could.
>
> Q: Okay.
>
> A: Depending on, you know, how you're looking at it. But I think this number came from the bank records, I believe.

Pressed further to adopt the SEC's net investor proceeds figures, Mr. Collins finally says, "So your numbers are 100 percent wrong." (Kirka Decl., Exh. 1, 152:19 – 157:9).

In his declaration filed concurrently herewith, Mr. Collins clarifies what is clear from any reasonable reading of his deposition testimony, which he stands by. (Declaration of Joseph Collins filed concurrently herewith, "Joseph Decl.") The SEC's figures are incorrect; Punch TV's "company records" are generally accurate; the shareholder spreadsheets alone cannot be used to accurately substantiate the SEC's figures; other company records beyond the spreadsheets, including bank records, would be required to ascertain the amount of funds received by Punch TV in any given period with any level of certainty.

While the SEC at least attempted to explain how it derived the *income* side of what it characterizes as a "net profits" figure, the SEC says not a word about any expenses it used to derive a "net" figure. (Remedies Motion at 5:11-12, "The

$1,201,154 total represents a reasonable approximation of the Defendants' *net profits* . . ." (emphasis added)). As it happens, for the relevant period, Punch TV's expenses greatly exceeded the SEC's $1.2 million "net profits" figure. We know this from Punch TV's Quickbooks records, which Punch TV produced to the SEC in 2020. (Collins Decl. ¶¶ 2 & 3). The expenses incurred by Punch TV for the period January 9, 2018 through August 30, 2020, were at least $1.5 million. *Id*. While the SEC had the information about expenses to calculate a reasonable "net profits" figure, the SEC failed to do so. Instead, the SEC ignored information about Punch TV's expenses and falsely characterized its $1.2 million figure as "net profits."

The SEC's purported $1.2 million "net profits" figure is not reasonable in any way. The figure is derived solely from the inadmissible "understandings" of two members of the SEC staff who claim to have reviewed certain unspecified documents and discussed unspecified topics with each other to reach their "understandings." The SEC's figure is further based on spreadsheets and other documents that are nowhere in the record and that have not been authenticated. The SEC mischaracterized Mr. Collins's deposition testimony to incorrectly and improperly suggest his belief that the spreadsheets alone could substantiate the SEC's number. And the SEC ignored documents in its possession such as bank records and Quickbooks information to arrive at what the SEC misleadingly calls a "net profits" figure when it in fact does not reflect any expenses "netted" whatsoever. Had the SEC bothered to evaluate documents to arrive at a reasonable estimate of "net profits," the SEC would have determined that Punch TV's legitimate business expenses exceeded $1.5 million, and a more accurate "net profits" estimate would have been negative.

The SEC has presented no legal or factual basis for the Court to impose any disgorgement figure above $0. *SEC v. Todd*, No. 03CV2230, 2007 WL 1574756, at *18 (S.D. Cal. May 30, 2007) (no disgorgement where the SEC failed to show that the amount it sought represented the defendant's unjust enrichment and was a

reasonable approximation of the defendant's ill-gotten gains); *SEC v. Jones*, 476 F. Supp. 2d 374, 386 (S.D.N.Y. 2007) (no disgorgement where the SEC was "unable to set forth any evidence of specific profits subject to disgorgement"); *SEC v. Cohen*, No. 4:05CV371, 2007 WL 1192438, at *21 (E.D. Mo. April 19, 2007) (no disgorgement where the SEC had "not shown that defendant obtained any ill-gotten gains or unjust enrichment from his actions").[5]

IV. GENUINE ISSUES OF MATERIAL FACT REMAIN REGARDING PENALTIES, WHICH SHOULD IN ANY EVENT BE $0

The SEC requests that the Court penalize Defendants at the lowest, "first tier" available under the federal securities laws. (Remedies Motion at 2:24-25 "Where, as here, the violations do not involve fraud, first-tier penalties apply"). But in making this request, the SEC would (again) have this Court ignore the requirements the Ninth Circuit set forth in *Husain*. Namely, to award *any* penalty on the current record, the Court must first determine that no genuine issues of material fact remain and must view all evidence in the light most favorable to Defendants relating to Defendants' scienter and likelihood of future violations. *Husain*, 70 F.4th 1185; *SEC v. Koracorp, Inc.*, 575 F.2d 692, 697 (9th Cir. 1978) (reversing decision on injunctive relief on summary judgment record in light of triable issues of fact regarding likelihood of future violations). Even if the Court were to reach the issue of how much civil penalty to impose against Defendants, the Court should decline to impose any penalty.

A. Triable Issues of Fact Preclude a Penalty.

The SEC argues that the Court's decision whether to impose a penalty or not turns on the same factors as the Court's decision whether to impose an injunction: the degree of scienter; the isolated or recurrent nature of the infraction; the

[5] For the same reasons it should not impose disgorgement, the Court should not impose pre-judgment interest. *SEC v. Rubin*, No. 91 CIV. 6531, 1993 WL 405428, at *7 (S.D.N.Y. Oct. 8, 1993) (declining to impose prejudgment interest against a defendant where there was no evidence of "[ ]either profit . . . [ ]or any discernible benefit" to the defendant from the violation).

defendant's recognition of the wrongful nature of his conduct; the likelihood that future violations might occur; and the sincerity of the defendants' assurances against future violations. (Remedies Motion at 3:12-20).

Central to the "degree of scienter," the "likelihood that future violations might occur," and "the sincerity of the defendants' assurances against future violations" is the Defendants' state of mind. Astonishingly, however, the SEC presents no evidence in its Remedies Motion relating to the Defendants' state of mind. Instead, the SEC relies heavily on the Court saying in its Summary Adjudication Order that the Defendants "were at least reckless." (Remedies Motion 3:21, quoting from the Court's September 6, 2023, Order Granting SEC's Motion for Summary Adjudication of Liability and Permanently Enjoining Defendants, Dkt. 57, "Summary Adjudication Order"). But the Court's previous statement that the Defendants acted "recklessly" came about under circumstances that the Court should revisit for purposes of the SEC's Remedies Motion.

To be sure, the Summary Adjudication Order does say, "the Court concludes that permanent injunctions against future violations of Section 5 are warranted. First, Defendants were at least reckless . . ." As the Court will recall, those words appeared verbatim from the SEC's Memorandum of Points and Authorities in Support of its Motion for Partial Summary Judgment ("SEC's MSJ," Dkt 46-1). What the Court may not recall is that the SEC cited to no evidence or case law to support its assertion of recklessness in the SEC's MSJ. At a time when the Defendants did not have funds to pay their counsel, who had sought to withdraw from the case, and had not yet obtained *pro bono* counsel, no one pointed out to the Court the absence of evidence or legal authority supporting the SEC's conclusory statement about recklessness. Similarly, no one (including the SEC) informed the Court of Ninth Circuit authority directly on point precluding a scienter finding on the record presented: *SEC v. Koracorp, Inc.*, 575 F.2d 692 (9th Cir. 1978).

In *Koracorp*, the SEC and defendants filed cross-motions for summary judgment. As to one of the key factors the SEC cites as relevant to the imposition of an injunction and a penalty, the likelihood of future violations, the Ninth Circuit held that the party moving for summary judgment:

> has the burden of clearly establishing the lack of any triable issue, although the opposing party would at trial have the burden of proof on a particular issue. It is not the function of the trial court at the summary judgment hearing to resolve any genuine factual issue, including credibility; and for the purpose of ruling on the motion all factual inferences are to be taken against the moving party and in favor of the opposing party, and the appellate court will do likewise in reviewing the trial court's grant of summary judgment. Discretion plays no real role in the grant of summary judgment: the grant of summary judgment must be proper under the above principles or the grant is subject to reversal.

SEC v. Koracorp, 575 F.2d at 698 (citations omitted).

The Ninth Circuit proceeded to conclude "expressions of the defendants' states of mind . . . are relevant to a determination of the likelihood of repetition," and "summary judgment is singularly inappropriate where credibility is at issue. Only after an evidentiary hearing or a full trial can these credibility issues be appropriately resolved." *Id*. at 699.

Because Defendants could not afford counsel to refer the Court to the Ninth Circuit's decision in *Koracorp*, and because the SEC failed to do so, the Court did not hold an evidentiary hearing or have an opportunity to consider any evidence on the issue of whether the Defendants acted "recklessly" before adopting the SEC's language in the Summary Adjudication Order. Accordingly, the Court should not rely on the Summary Adjudication Order's reference to "recklessness" in determining whether to a impose a penalty as the SEC suggests the Court should do in response to its Remedies Motion.

As the moving party, the SEC has "the burden of clearly establishing the lack of any triable issues" concerning the Defendants' scienter and the likelihood of future violations, but the SEC has not submitted any facts in support of its Remedies Motion that touch on either issue. In fact, the conduct of Mr. Collins and Punch TV was the opposite of reckless as they both acted in good faith, and they are not at all likely to commit future violations.

B. Even if the Court Were to Impose a Penalty, the Appropriate Amount is $0.

The SEC concedes that the statutory maximum for the requested first tier penalty is $11,162 for individuals and $111,614 for entities. (Remedies Motion at 2:17 – 4:12). However, the SEC contends that the Court should exceed those statutory maximums and impose penalties of $50,000 and $250,000 here because (1) the Defendants committed "two" violations, and (2) those violations were "egregious" and "flagrant" because Defendants acted "recklessly."[6] *Id*. The SEC's arguments miss the mark. In this case, even if the Court were to consider the issue of penalties on the record before it, no penalties are warranted.

Regarding the Defendants' scienter, it is uncontested that Defendants engaged many professionals, including accountants and lawyers, to assist in compliance issues, including compliance with the complex securities registration issues present in this case. (Collins Decl. ¶ 6). The SEC has documented Punch TV's continuous efforts to engage an accountant that would satisfy the registration requirements: In April, 2016, Punch TV's initial offering statement included an accounting firm's

[6] The SEC tries to further support its penalty request by suggesting the Court could impose a penalty equal to Defendants' "pecuniary gain," which, the SEC submits would be even higher than the amounts requested. The SEC has never alleged or proven Defendants misused investor proceeds and has not identified any investor victims that would come close to supporting a "pecuniary gain"-based penalty. *Husain*, 70 F.4th 1184-1185 (reversing penalty based on pecuniary gain and noting, "Viewing the evidence in the light most favorable to the non-movant, [Defendant's] scheme did not victimize any member of the investing public").

opinion letter, but that accountant later informed Punch TV he was not a CPA.[7] Punch TV informed the SEC in a public filing of this development, and over the next year kept the SEC (and the public) apprised of its efforts to engage a second and finally a third accountant. *Id*. At no point has the SEC ever alleged that Punch TV or Mr. Collins acted in bad faith in connection with the engagement of any of these accounting professionals. The fact is, Punch TV and Mr. Collins sought out the advice of professionals over a period of many months. This is simply the antithesis of recklessness or acting in bad faith. *See*, *e.g.*, *SEC v Present*, 2017 U.S. Dist. LEXIS 120351 (D. Mass. Jul. 31, 2017) (evidence that defendant engaged counsel to ensure compliance with legal counsel was admissible to the extent relevant to whether defendant acted in good faith and/or with due care); *Howard v SEC*, 376 F.3d 1147 (D.C. 2004) (engaging counsel can be evidence of good faith, a relevant consideration in evaluating defendant's scienter); *SEC v. Harwyn Indus. Corp.*, 326 F. Supp. 943, 956 (S.D.N.Y. 1971) (good faith reliance on counsel's interpretation of Section 5 relevant to court's remedies analysis).

As to the other factors cited by the SEC as relevant to the Court's consideration, none support a civil penalty here. Concerning the "isolated or recurrent nature of the infraction," even by the SEC's count, this case involves only "two violations of Section 5 by conducing two unregistered offerings." (Remedies Motion, 4:3-5). Concerning Defendants' assurances regarding future violations, Defendants have declared under oath that they understand the importance of the federal securities laws and will continue to uphold those laws in the future. (Collins Decl. ¶ 9). The SEC normally discounts defendants' assurances and contrition by observing that the defendants are defending themselves in the

[7] The SEC's Complaint (Dkt. 1, ¶ 29) references the SEC's Suspension Order, which describes Punch TV's engagement of accountants: *In the Matter of Punch TV Studios, Inc.*, Securities Act of 1933 Rel. No. 10452 (Jan. 9, 2018) (available at https://www.sec.gov/files/litigation/admin/2018/33-10452.pdf).

litigation, but of course defendants "are not to be punished because they vigorously contested the government's accusations." *SEC v. Gowrish,* 2011 WL 2790482, at *5 (N.D. Cal. July 14, 2011) (citation omitted). Defendants' defense of a registration action centers in part on relatively novel and complex legal issues does not demonstrate a lack of contrition. The Defendants' assurances are sincere and meaningful and weigh in favor of the Court imposing no civil penalty.

Whether to impose any penalty or none at all is within the Court's discretion, and courts may conclude no penalty should be imposed based on the facts and circumstance of a particular case. *See*, *e.g.*, *SEC v. Snyder*, 2006 U.S. Dist. LEXIS 81830 (S.D. Tex. Aug. 22, 2006) (holding that "although the jury found that the defendant was at least severely reckless in his actions, in light of these other circumstances, civil penalties are not warranted," including the defendant's evidence of good faith, the financial hardship and extreme emotional toll suffered, the lack of egregiousness of the violations, the isolated nature of defendant's actions, and the sincerity of defendant's assurances against future violations). Even though there has been no trial or evidentiary hearing, this is a case where the Court should impose no penalty.

V. NO PENNY STOCK INJUNCTION MAY BE IMPOSED WITHOUT AN EVIDENTIARY HEARING

The SEC asks the Court to impose additional injunctive relief beyond what it asked for in connection with its motion for summary adjudication. That is, the SEC now requests the Court to enter an order barring Defendants from participating in any penny stock offering. (Remedies Motion, 7:23 to 9:16). Once again, the SEC avoids discussion of the standard the Court should apply in considering this request. *SEC v. Koracorp., Inc.*, 575 F.2d 692, 697 (9th Cir. 1978) (reversing grant of injunction on summary judgment record in part because disputed facts presented triable issues: "Assessing the likelihood of recurrent violations of the securities laws requires a prediction of future conduct, and that, in turn, requires the court to

prove the defendants' states of mind"); *Husain*, 70 F.4th 1185 (applying *Koracorp* in context of case involving SEC request for penny stock bar). The SEC acknowledges that its request for a penny stock injunction requires proof of "the likelihood that misconduct will recur," but the SEC fails to address the requirements that no genuine issues of material fact remain and that the Court must view all evidence in the light most favorable to Defendants. For the same reasons discussed above regarding imposition of a civil penalty, the Court should deny the SEC's request for penny stock bars.

VI. THE REMEDIES SOUGHT BY THE SEC ARE AGAINST PUBLIC POLICY

From the day it filed this case, the SEC has had a tin ear toward the important public policy implications presented. The SEC's press release announcing the case on September 30, 2021, trumpeted, "SEC Charges Recidivist TV Production Company and Its Founder."[8] Whatever meaning the SEC intended by characterizing Defendants as "recidivists," as a Black CEO of a company with many investors in the Black community, the meaning attributed to that phrase by most readers of the press release would surely have been the definition that appears in the leading legal dictionary: "recidivist: a person who is a habitual criminal."[9] (Collins Decl. ¶ 7). Of course, this case is not a criminal case, and neither Mr. Collins nor Punch TV has ever been convicted of a crime. Nevertheless, the SEC set a particular tone from the outset of the case, which it has now revisited with its Remedies Motion.

The SEC's request for disgorgement equal to the entire amount received from investors (mischaracterized by the SEC as "net proceeds") is not how the SEC treats all non-fraud, registration cases. For example, in 2018 the SEC announced

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[8] Litigation Release No. 25237, September 30, 2021 (available at https://www.sec.gov/litigation/litreleases/lr-25237).

[9] Black's Law Dictionary, 2nd Ed (1910).

settlements with two companies that raised investor funds in offerings that were allegedly neither registered nor exempt from registration.[10] In those cases, the SEC sought no disgorgement despite the fact that one company raised $15 million and the other raised $12 million – both far in excess of what is alleged in this case. In those cases, the respondent companies and SEC agreed that each company would undertake certain things, including issuing a press release "informing all persons and entities that purchased [the securities] from Respondent . . . of their potential claims under Section 12(a) of the Securities Act, including the right to sue 'to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if [the purchaser] no longer owns the security' . . . ." The respondent companies agreed pay the amount due under Section 12(a) of the Securities Act to purchasers who submitted a claim before a prescribed deadline on a form provided by the issuer. This approach is consistent with the historical approach companies undertook to cure an unregistered offering: make a rescission offer, which is a process detailed in many states' securities law statutes. The SEC itself recognizes that not every violation of the registration requirements warrants requiring disgorgement of every penny raised as a result of those violations. But in this case against so-called "recidivists," the SEC requests an order imposing nearly $1.5 million in disgorgement and pre-judgment interest.

In its 2023 Annual Report, the SEC's Office of the Advocate for Small Business Capital Formation ("SEC Report") pointed out, "Entrepreneurs continue to face a considerable gap in accessing capital through every stage of the business cycle. While there have been some advances in identifying and addressing barriers

[10] Available at https://www.sec.gov/litigation/admin/2018/33-10574.pdf; https://www.sec.gov/litigation/admin/2018/33-10575.pdf.

to accessing capital, there is much more work to do."[11] The SEC Report goes on to observe:

> Even as available pathways to raising capital have expanded in recent years, the complexity of our regulatory framework remains. Women and diverse entrepreneurs often lack access to the same networks, experienced mentors and advisors, or supportive entrepreneurial communities as their counterparts and therefore face an uneven playing field when navigating that complexity.

Report at 70.

The SEC's demand for disgorgement in this case is against public policy. The SEC recognizes that not every violation of the securities offering registration provisions requires disgorgement of the investment proceeds. The SEC Report further recognizes that the "complexity of our regulatory framework" presents barriers to accessing capital, particularly for diverse entrepreneurs. The Court should deny the SEC's request for disgorgement on the basis that it is against public policy.

VII. CONCLUSION

For the foregoing reasons, the Court should deny the SEC's Remedies Motion. This denial should be with prejudice, in accordance with this Court's policies permitting "only one motion for summary judgment per party in this case." In the alternative, if the Court is inclined to grant the SEC's Remedies Motion, Defendants

[11] U.S. Securities and Exchange Commission Office of the Advocate for Small Business Capital Formation Annual Report (Fiscal Year 2023) (available at https://www.sec.gov/files/2023-oasb-annual-report.pdf)

respectfully submit the Court award a total combined disgorgement, prejudgment interest, and penalty amount of $0.

DATED: February 2, 2024

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