UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

FEDERAL ENERGY REGULATORY COMMISSION,	)	
Plaintiff,	)	Civil Action No. 3:15-cv-00452 (MHL)
v.	)	
POWHATAN ENERGY FUND, LLC, HOULIAN "ALAN" CHEN, HEEP FUND, INC., and CU FUND, INC.	)	
Defendants.	)	

FEDERAL ENERGY REGULATORY COMMISSION'S
OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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REGULATORY COMMISSION

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INTRODUCTION

Defendants' Joint Motion to Dismiss In Part the Commission's First Amended Complaint (ECF 95) and supporting Memorandum of Law (ECF 96) (collectively, "Motion") should be denied. In moving to dismiss part of this case on statute of limitations grounds, Defendants mischaracterize or ignore the plain language of 28 U.S.C. § 2462 and controlling case law, instead urging a strawman analysis that re-litigates the Commission's adjudication procedures, rather than addressing the proper issue before the Court: when did the Commission's claim first accrue?

The present cause of action is timely. The Federal Power Act ("FPA"), 16 U.S.C. § 791a *et seq.*, requires the Commission to undertake a proceeding to adjudicate and impose penalties. It is long settled law in the majority of circuits that where an administrative proceeding is required, the agency must commence that proceeding within five years of the conduct. *See United States v. Meyer*, 808 F.2d 912 (1st Cir. 1987).[1] The Commission's order to show cause proceeding was commenced within five years of the violations and, therefore, satisfies § 2462. Having conducted the required administrative proceeding, a new five-year statute of limitations applies to an action in federal district court for the review and enforcement of the administratively-assessed penalty order. Thus, the present action "first accrued" 60 days

[1] *See, e.g., 3M Co. v. Browner*, 17 F.3d 1453 (D.C. Cir. 1994) (citing *Meyer* in holding that § 2462 applies to administrative proceedings); *SEC v. Mohn*, 465 F.3d 647 (6th Cir. 2006) (following *Meyer*); *United States Dep't of Labor v. Old Ben Coal Co.*, 676 F.2d 259 (7th Cir. 1982) (similar to *Meyer*); *United States v. Godbout-Bandal*, 232 F.3d 637 (8th Cir. 2000) (following *Meyer*); *Atl. States Legal Found. v. Al Tech Specialty Steel Corp.*, 635 F. Supp. 284 (N.D.N.Y. 1986) (similar to *Meyer*); *United States v. Great Am. Veal, Inc.*, 998 F. Supp. 416 (D.N.J. 1998) (following *Meyer*); *United States v. Sacks*, No. C10-534RAJ, 2011 WL 6883740 (W.D. Wash. Dec. 28, 2011) (following *Meyer*); *In re Donohoo*, 243 B.R. 139 (Bankr. M.D. Fla. 1999) (following *Meyer*).

after the Commission's penalty order was issued (because the FPA allowed Defendants 60 days to pay the assessed penalty before the Commission could file the instant suit).

In addition, Defendants' suggestion that this Court is powerless to require disgorgement of unjust profits, either because the claim is untimely or because the Court lacks authority to do so under the FPA, should also be denied.

For the reasons set forth below, Defendants' Motion should be denied.

STANDARD OF REVIEW

A motion to dismiss under Rule 12(b)(6) for failure to state a claim "tests the sufficiency of a complaint; importantly, it does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Jones v. Equifax, Inc.*, No. 3:14CV678, 2015 WL 5092514, at *1 (E.D. Va. Aug. 27, 2015) (citations omitted). "[A] plaintiff's well-pleaded allegations are taken as true and the complaint is viewed in the light most favorable to the plaintiff." *Id.* (citations omitted). In determining the substantive issue before this Court, statutes of limitations must be strictly construed in favor of the government. *See e.g.*, *Badaracco v. Comm'r of Internal Revenue*, 464 U.S. 386, 391 (1984) ("This Court long ago pronounced the standard: 'Statutes of limitation sought to be applied to bar rights of the Government, must receive a strict construction in favor of the Government.'")

ARGUMENT

I. FERC Timely Filed Its Complaint

Defendants incorrectly argue that the "claims at issue here," namely the Commission's claim for enforcement of its Order in this district court proceeding, "'first accrued' between June 1 and August 3, 2010." Def. Mem. at 1. But, that claim did not "first accrue" until the Commission was authorized to bring suit under the FPA. Under long-settled law in the majority

of Circuits, where—as here—an agency's statute requires it to "assess [a] penalty, by order," before being able to bring an action to enforce the penalty, the "claim for 'enforcement' of an administrative penalty cannot possibly 'accrue' until there is a penalty to be enforced." *Meyer*, 808 F.2d at 914, 916 ("Outside of the Fifth Circuit, no court has ever held that, in a case where an antecedent administrative judgment is a statutory prerequisite to the maintenance of a civil enforcement action, the limitations period on a recovery suit runs from the date of the underlying violation as opposed to the date on which the penalty was administratively imposed. All of the analogous authority appears to concur with the general rule that '[i]f disputes are subject to mandatory administrative proceedings [before judicial action may be taken], then the claim does not accrue until their conclusion.") (footnote and citations omitted); *see also*, *Franks v. Ross*, 313 F.3d 184, 195 (4th Cir. 2002) (controversy relating to agency action is not ripe until the agency action is final).

Neither *Meyer*, nor the long line of cases adopting it, require this Court to review the mechanics of the agency assessment proceedings; rather, it is "the language of the statute, not . . . the nature of the administrative proceedings" that determines when a claim accrues for purposes of § 2462. *United States v. Worldwide Indus. Enters., Inc*., 220 F. Supp. 3d 335, 344 (E.D.N.Y. 2016) (citing *Old Ben Coal*, 676 F.2d at 261; *Mohn*, 465 F.3d at 653–54; *Godbout–Bandal*, 232 F.3d at 639).

Although Defendants attempt to ground their argument in the text of § 2462 and FPA § 31(d), Def. Mem. at 1-3, a simple reading of these statutes within the context of *Meyer* makes plain that the Commission's assessment proceeding is precisely the type of assessment proceeding contemplated by *Meyer* and its progeny. Because the FPA does not permit the Commission to bring suit unless and until "the civil penalty has not been paid within 60 calendar

days after the assessment order has been made," FPA § 31(d)(3)(B), 16 U.S.C. §823b(d)(3)(B), the Commission's claim did not—and could not—accrue until July 28, 2015, just three days prior to filing the initial Complaint with this Court. Defendants' reliance on a handful of distinguishable cases does not alter this result.

A. The plain language of 28 U.S.C. § 2462 and FPA § 31(d) demonstrates that the claim for civil penalty enforcement in this Court accrued when Defendants failed to pay the penalty.

This Court's inquiry should begin and end with the plain meaning of the statute of limitations in 28 U.S.C. § 2462 (establishing "accrual" as the starting point of the statutory clock), and the FPA §§ 316A and 31(d)(3), 16 U.S.C §§ 825*o*-1 and 823b (d)(3) (providing what the Commission must do before filing an enforcement action in this Court).

28 U.S.C § 2462. The applicable statute of limitations in this case is 28 U.S.C § 2462, which provides that, "an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first *accrued*." (emphasis added). As the Supreme Court recently re-articulated, "the 'standard rule' is that a claim accrues 'when the plaintiff has 'a complete and present cause of action.'" *Gabelli v. SEC*, 568 U.S. 442, 448 (2013); *see also Meyer*, 808 F.2d at 922 (holding that a claim accrues when all of the prerequisites to suit are met); *Old Ben Coal*, 676 F.2d at 261 ("[a] statute of limitations cannot begin to run until there is a right to bring an action.").

FPA §§ 316A and 31(d). The FPA imposes several statutory prerequisites which the Commission must meet before seeking enforcement of a penalty in district court. Section 316A of the FPA provides that any person who violates "any provision of part II [of the FPA] or any rule or order under any such provision" shall be subject to civil penalties of up to $1,000,000 per

day per violation. 16 U.S.C. § 825*o*-1. With respect to those penalties, FPA § 316A, 16 U.S.C. § 825*o*-1(b), provides that:

> Such penalty shall be assessed by the Commission, *after notice and opportunity for public hearing*, in accordance with the same provisions as are applicable under section 31(d) in the case of civil penalties assessed under section 31. In determining the amount of a proposed penalty, the Commission shall take into consideration the seriousness of the violation and the efforts of such person to remedy the violation in a timely manner.

FPA § 31(d), 16 U.S.C. § 823b(d)(1) states the means by which the Commission provides notice of the proposed penalty and the available procedures for the "hearing." Regardless of which hearing procedures are elected, the FPA requires the Commission to "assess [the] penalty, by order." *Compare* FPA § 31(d)(2)(A), 16 U.S.C. § 823b(d)(2)(A) *and* FPA § 31(d)(3)(A), 16 U.S.C. § 823b(d)(3)(A). Where, as here, Defendants do not pay the penalty, "within 60 calendar days after the assessment order has been made . . . the Commission shall institute an action in the appropriate district court of the United States for an order affirming the assessment of the civil penalty." FPA § 31(d)(3)(B), 16 U.S.C. § 823b(d)(3)(B).

These statutory prerequisites *must* be met before the Commission has the "right to bring an action." *Old Ben Coal*, 676 F.2d at 261; *see also Gabelli*, 568 U.S. at 448 (a claim accrues when there is a "complete and present cause of action"); *Meyer*, 808 F.2d at 914 ("no suit to recover a civil penalty can be mounted . . . unless and until the penalty has first been assessed administratively"). Indeed, if the Commission were to attempt to file a complaint in district court seeking penalties for an FPA violation before meeting the above-described requirements,

the Commission's claim would not be ripe. *Texas v. United States*, 523 U.S. 296, 300 (1998) (a matter is unripe if it hinges on "contingent future events").[2]

That the above described procedures constitute necessary prerequisites is clear from recent case law. In 2017, the Fifth Circuit held that a challenge to FERC's jurisdiction over alleged violations of the Natural Gas Act ("NGA"), whose penalty assessment provisions parallel, in relevant part, those of the FPA, was not ripe because the Commission had not yet completed the statutorily required "hearing." *TOTAL Gas & Power N. Am., Inc. v. FERC*, 859 F.3d 325, 340 (5th Cir. 2017), *petition for cert. filed* (U.S. Jan. 9, 2018) (No. 17-975). The concurrence to that opinion was even more explicit on this key issue, noting that "no penalty can be said to have been 'assessed' until the conclusion of all FERC proceedings." *Id*.

The District of Massachusetts held similarly in the context of an FPA enforcement action, explaining that "FERC could not have brought this action without first completing its adjudication." *FERC v. Silkman*, 177 F. Supp. 3d 683, 700 (D. Mass. 2016).[3] Therefore, "[b]y initiating formal proceedings within five years of the alleged violation, FERC complied with § 2462. After those proceedings reached their conclusions, FERC's claims for the enforcement of civil penalties in federal court ripened. FERC then had five years within which to bring those enforcement actions." *Id*. at 700-01.

[2] These contingent future events would include whether the Commission, as opposed to its Office of Enforcement, determined a violation had occurred, the result of the statutorily required analysis of the severity of that violation, and whether the wrongdoer timely paid the assessed penalty (*i.e.*, within the 60-day window).

[3] Concurrent with this order, the *Silkman* case was transferred to the District of Maine. Memorandum and Order Regarding Transfer, *FERC v. Silkman, et al.*, No. 1:13-CV-13054-DPW (D. Mass. Apr. 11, 2016). Cross-motions for summary judgment are currently pending. *FERC v. Silkman*, No. 1:16-CV-00205-JAW.

Defendants simply wave away the Commission's procedures (and the statutory language requiring them) as a nullity, thus conveniently evading the weight of the applicable case law and the above-described statutory language, which shows that the Commission's claim could not have "first accrued" until after the relevant statutory preconditions were met.

B. The Court should adopt *Meyer* and rule that the Commission's claim accrued when it was authorized to bring suit in district court.

Although the Fourth Circuit has yet to address the issue before the Court, the First Circuit's decision in *Meyer* represents the majority view and should be adopted by this Court.[4] In *Meyer*, the Department of Commerce ("Commerce") began the administrative proceeding required by the controlling statute within five years of the alleged violations, and assessed a civil penalty approximately six years after the conduct at issue. *Meyer,* 808 F.2d at 913. "[M]ore than five years after the infractions themselves occurred, but within five years of the assessment of the penalty," Commerce brought an enforcement suit in district court. *Id.*

In holding that Commerce satisfied § 2462, the First Circuit found that § 2462 requires that the agency begin an administrative proceeding within five years of the violation and then concluded that "[Section] 2462 affords an *additional* five year period following final administrative assessment of a civil penalty during which the government may sue to enforce the sanction." *Id.* at 914. The *Meyer* Court held that an action "accrues" when all of the prerequisites for a suit required by the governing statute are met. *Id.* Thus, while the underlying violation triggered the five-year clock on Commerce's administrative action, a second five-year clock began to run only once the enforcement action was ripe: "it is abundantly clear that no suit to recover a civil penalty can be mounted under the [applicable statute] unless and until the penalty has first been assessed administratively." *Id.* This is because of the "obvious

[4] *See* n.1, *supra*, citing cases following *Meyer*.

proposition" that "a claim for 'enforcement' of an administrative penalty cannot possibly 'accrue' until there is a penalty to be enforced." *Id., see also Crown Coat Front Co. v. United States*, 386 U.S. 503, 515 (1967) (court cannot review a decision "which has not yet been made").

Though Defendants imply otherwise, the *Meyer* Court did not evaluate or place any requirements on the sufficiency of a "proceeding" for purposes of § 2462. *Compare* Def. Mem. at 20-22 *with Meyer*, 808 F.2d at 922. While the First Circuit contrasted the administrative adjudication required in *Meyer* with mere decisions to prosecute in other cases, the critical factor was not that it was an adjudication, but that it was a statutory prerequisite to filing in court.

The court in *Worldwide* recently addressed this very issue in determining when the statute of limitations accrued where the agency conducted a paper hearing under the Federal Communications Act, similar to that provided under FPA § 31(d)(3). The *Worldwide* Court found the defendant's "reliance on the nature of the administrative proceeding is misplaced," because, "[i]n *Meyer*, the court did not decide the limitations issue based on the adjudicatory nature of the EAA [Export Administration Act] proceeding but on '[t]he phraseology of 28 U.S.C. § 2462, its juxtaposition and interrelationship with the mechanics of statutes like the EAA, the better-reasoned caselaw, and policy concerns (to the extent appropriate).'" *Worldwide*, 220 F. Supp. 3d at 344 (citing *Meyer*, 808 F.2d at 922). The *Worldwide* Court noted that the other courts to have addressed this issue "have focused on the language of the statute, not on the nature of the administrative proceedings." *Id.* (citing *Old Ben Coal*, 676 F.2d at 261; *Mohn*, 465 F.3d at 653–54; *Godbout–Bandal*, 232 F.3d at 639). The Court concluded that "even had the First Circuit relied heavily on the adjudicatory nature of the proceedings, such reliance was not necessary after it concluded that the statutory language was 'susceptible to but a single

reasonable reading,' because the Supreme Court has made clear that where 'the words of the statute are unambiguous, the judicial inquiry is complete.'" *Id.*

Meyer has been applied by the majority of courts, including by the District of Massachusetts in *Silkman*, where, in a FERC penalty enforcement and review action, the Court rejected precisely the same arguments Defendants make here. Applying *Meyer*, the *Silkman* Court evaluated FERC's show cause proceeding and found that it was an "adjudicatory administrative proceeding" and "significantly more than a prosecutorial determination." *Silkman*, 177 F. Supp. 3d at 700.[5] The *Silkman* Court observed that "[f]or the present claims to come into existence, several preconditions [under the FPA] had to be met": (1) "FERC was required to give notice of the proposed penalty to the Respondents as required by FPA Section 31(d)(1)," which it did when it issued the show cause orders; (2) "FERC was required to issue a penalty assessment order, which it did . . . after receiving Respondents' election"; and (3) "[o]nly sixty days after that, if the penalty remained unpaid, could FERC bring suit." *Id.* at 699. Therefore, under the plain language of FPA § 31(d)(3), the Court concluded that "FERC could not have brought this action without first completing its adjudication," and that "[b]y initiating formal proceedings within five years of the alleged violation[s], FERC complied with Section 2462." *Id.* at 700.

The same rule should apply here. The Commission could not have brought suit against Defendants without first completing the necessary administrative adjudication required by the

[5] The Court rejected the argument that an FPA penalty assessment order is a mere prosecutorial determination, explaining that "[t]he Commission made extensive findings of facts and applied the law to those facts. It did not merely suggest penalties to be sought later; it ordered Respondents to pay those penalties to the United States Treasury. That the statutory scheme makes the Commission's determinations only the first step in a legal process does not strip those determinations of their content and shrink them into the equivalent of a 'charging letter.' FERC did more than decide to bring suit. It conducted an adjudication." *Id.*

FPA. *Meyer* therefore applies and renders this action timely because that administrative proceeding was filed within five years of the conduct and this judicial proceeding was filed within five years of the Order Assessing Penalties.

The Commission's show cause proceedings cannot be anything other than "administrative proceedings" required as conditions precedent under the FPA, within the meaning of *Meyer*. Such a holding is not precluded by the Court's December 28, 2017 Memorandum Opinion, and the Court should resist Defendants' attempts, Def. Mem. at 10, citing Mem. Op. at 10-13, to conflate its rulings on the adequacy of the Commission's proceedings for purposes of determining the scope of *de novo* review in a way that extends them to the separate issue of whether the Commission's procedures constitute "administrative proceedings" under *Meyer*. This Court decided "that Congress intended the district court's *de novo* review to be a plenary trial," Mem. Op. at 18; it did not decide that the Commission failed to conduct proceedings or that those proceedings were *ultra vires*, *cf.* Def. Mem. at 10-12.

Accordingly, under the plain language of the statute of limitations and the FPA, and by well-established precedent, the Commission had a five year period to begin the administrative action required by the FPA and a five year period following the completion of that action to file a complaint in district court. Both were met. Here, the Commission commenced administrative proceedings and assessed civil penalties within five years of the violations. The Commission's cause of action ripened on July 28, 2015, 60 days after the Order Assessing Civil Penalties and only three days before it was filed with this Court.

C. Defendants' argument is insufficiently supported.

1. Defendants rely on *Core*, which is an outlier. The First Circuit explicitly declined to follow *United States v. Core Labs., Inc.*, 759 F.2d 480 (5th Cir. 1985) ("*Core*"). The *Meyer* Court found "the Fifth Circuit's reasoning—the core of *Core*, as it were—to be

unconvincing," concluding instead that "[a] critical examination of 28 U.S.C. § 2462, its relationship to the penalty assessment and enforcement mechanisms of the [statute at issue], the relevant caselaw, and the broader policies which undergird statutes of limitations, leads us to an opposite result." *Meyer*, 808 F.2d at 913. Specifically, the *Meyer* Court was concerned that were it to adopt the holding in *Core*, that the five-year statute of limitations "runs from the date of the predicate violation, rather than from the date of the administrative assessment of the sanction," then it would "create[] a wretched sort of anomaly" because "the statute of limitations would have expired before the right to sue arose." *Id.* Further, as a practical matter, under *Core*, "[a] suspected violator would . . . have considerable incentive to employ the available procedures to work delay" during the administrative proceeding, to prevent the agency from timely bringing suit in court. *Id.*[6]

Since it was issued in 1987, the vast majority of courts in judicial circuits around the country have adopted *Meyer*, some in direct repudiation of *Core*. *See, supra* n.1; *see also Donohoo*, 243 B.R. at 141-142. The only case outside the Fifth Circuit that Defendants cite as having followed the decision in *Core* is *Barclays* which, as discussed below, is neither precedential nor persuasive.

Perhaps more importantly, Congress explicitly rejected the reasoning of *Core* when passing amendments to the Export Administration Act, the statute at issue in *Meyer*. See H.R. Rep. No. 180, 99th Cong., 1st Sess. 64 (1985). In a report accompanying the amendments, the Conference Committee said:

> The intent of the committee of conference is that the [agency] must bring its administrative case within 5 years from the date the violation occurred. Thereafter, if it is necessary for the Government to seek to enforce collection of

[6] We note here, for example, Defendants requested and received multiple extensions throughout the investigation and subsequent administrative adjudication.

> the civil penalty, the complaint must be filed in Federal court within 5 years from the date the penalty was due, but not paid. Any other interpretation would have the [agency] discover, investigate, prosecute, and file a complaint in U.S. District Court to collect the penalty imposed, but not paid, in the administrative proceeding all within 5 years from the date of the violation. In many instances . . . such a task would be impossible.

This Court should be reluctant to become the first court in the Fourth Circuit to endorse *Core*, thereby joining the clear minority of courts on this issue, especially when there is a good reason to believe that it does not reflect the will of Congress.

2. *Gabelli* is inapplicable where, as here, an agency's assessment of a penalty by order is a prerequisite to filing suit. Defendants' contention that *Gabelli* "broadly sweeps away FERC's position," does not withstand scrutiny. Def. Mem. at 3. The question in *Gabelli* was whether or not the so-called "discovery rule" applied to matters where the SEC sought to impose civil penalties for fraud under the Investment Advisors Act ("IAA"). *Gabelli*, 568 U.S. at 449. Under the IAA, unlike under the governing portions of the FPA, the SEC is authorized to file an action in district court "whenever it shall appear" that someone is violating or has violated the IAA, and the court shall determine in the first instance whether the conduct at issue violated the IAA (i.e., as opposed to requiring an order to that effect from the agency). *See* 15 U.S.C. § 80b–9.

The Supreme Court found that the "discovery rule" applies in cases for damages for fraud (because it may take some time for the plaintiff to discover the injury necessary to perfect his claim) but not in cases for penalties for fraud, because the SEC is capable of investigating fraud irrespective of damages. *Gabelli*, 568 U.S. at 454.

Gabelli does not support Defendants' Motion for two key reasons. *First*, in contrast with *Gabelli*, the Commission has never argued that the "discovery rule" applies to Defendants' violations. *Second*, unlike the SEC in *Gabelli*, the Commission did not have the right to file a

complaint in this court seeking penalties "whenever it should appear" that Defendants had committed a violation. On the contrary, the Commission had no right to file until after multiple statutory predicates had been satisfied.

Three courts have recently considered arguments in which litigants, similar to Defendants here, attempted to dismiss actions via citation to *Gabelli*. Two of those three rejected those arguments—*Silkman* and *Worldwide*. Criticizing the invocation of *Gabelli* in the FPA § 31(d)(3) context as "somewhat facile and superficial," the *Silkman* Court found that *Gabelli* neither superseded *Meyer* nor was relevant because "*Gabelli* did not concern a case in which administrative proceedings preceded an action in federal court; there, the SEC sued directly in court." *Silkman*, 177 F. Supp. 3d at 699. The *Worldwide* Court likewise refused to dismiss a similar action based on *Gabelli* because "*Gabelli* concerned a statute that did not require an agency to assess a forfeiture before the government could file suit." *Worldwide*, 220 F.Supp.3d at 345 n.3. The third decision, *Barclays*, was wrongly decided for reasons discussed below.

3. Defendants' reliance on *Barclays* is misplaced. Defendants rely on an unreported decision in *FERC v. Barclays Bank PLC* to buttress their obvious misreading of *Gabelli*. Def. Mem. at 13. *Barclays*, which focused on the interpretation of a tolling agreement, is inconsistent with the weight of case law and was incorrectly decided. The *Barclays* Court did not consider relevant case law on the applicability of the statute of limitations where, as here, the Commission is statutorily-required to assess a penalty by order before it can bring an action in court to enforce that penalty. *See generally FERC v. Barclays Bank PLC*, No. 2:13-CV-02093-TLN-DB, 2017 WL 4340258 (E.D. Cal. Sept. 29, 2017). Ignoring *Meyer*, the *Barclays* Court relied heavily on *Gabelli* and *3M Co*, which it also misconstrued. *Id.* at *8-*9. Contrary to *Barclays*, *3M* did not hold that an agency must conduct a formal administrative adjudication

before an Administrative Law Judge to comply with § 2462. *3M*, 17 F.3d 1453, 1457 (D.C. Cir. 1994). Rather, like *Meyer*, *3M* held that where an agency commences a proceeding to assess a civil penalty, that proceeding satisfies § 2462. *Id.* ("Given the reasons why we have statutes of limitations, there is no discernible rationale for applying § 2462 when the penalty action or proceeding is brought in a court, but not when it is brought in an administrative agency.") Thus, *3M* stands for the same proposition as *Meyer*, that the first statute of limitations in this case was met when the Commission began an "assessment proceeding" to "impose civil penalties" against Defendants. *Id.* at 1459 ("Because assessment proceedings under TSCA seek to impose civil penalties, they are proceedings for the 'enforcement' of penalties and § 2462 thus applies.") (footnote omitted).

In determining the question of whether the Commission conducted a proceeding when it assessed a penalty by order pursuant to FPA § 31(d)(3), the *Barclays* court put inordinate weight on one case—*Marshall v. Jerrico*. *See, Barclays*, 2017 WL 4340258, *11-14 (citing *Marshall v. Jerrico*, 446 U.S. 238 (1980)). In so doing, the *Barclays* court mis-analogized the role of the Employment Standards Administration's assistant regional administrator under the Fair Labor Standards Act ("FLSA") to that of the Commission under the FPA. Under the FLSA's penalty scheme, the assistant regional administrator makes a penalty determination prior to an opportunity for hearing. Under the FPA, by contrast, the Commission makes a penalty determination only *after* an opportunity for hearing. Unlike the assistant regional administrator, who "performs no judicial or quasi-judicial functions," and "rules on no disputed factual or legal questions," the Commission is invested with precisely such a role under the FPA and performs this role in issuing civil penalty orders. *Compare Marshall*, 446 U.S. at 247-250, with FPA §§ 308, 309, 16 U.S.C. §§ 825g, 825h. The assistant regional administrator is much more like the

Office of Enforcement, whose role in "assessing a violation is akin to that of a prosecutor or civil plaintiff" under FERC's rules for assessing civil penalties. *Id.* By mis-applying the *Marshall* Court's discussion of the administrator's prosecutorial function to the Commission's statutory duty to make a formal finding of liability and assess a corresponding penalty under the FPA, the *Barclays* Court undermined the second of only two foundations underlying its decision.

The *Barclays* Court further erred in focusing almost exclusively on the distinction between the two penalty assessment regimes provided under FPA § 31(d). That distinction may illuminate the proper role of this Court in reviewing a civil penalty assessment order, but it does little to address the question presented here − whether the Commission's proceeding was required by the FPA and met the requirements of § 2462. The clear answer under *Meyer*, *3M*, and the many other cases adopting the same view is, "yes;" nothing in *Barclays* or the cases underpinning that decision changes that.

4. The Walsh-Healy Act cases relied upon by Defendants are distinguishable.

Defendants place significant weight on a line of cases arising under the Walsh-Healey Act, suggesting that these cases stand for the proposition that "agency proceedings, though authorized, did not stop the statute of limitations clock." Def. Mem. at 5, 17-19. This entire line of cases is readily distinguishable (and has been distinguished by the Supreme Court) because under Walsh-Healey, "the government was at liberty to file suit without any antecedent administrative proceeding." *Meyer*, 808 F.2d at 917; *accord United States v. Lovknit Mfg. Co.*, 189 F.2d 454, 458 (5th Cir. 1951) ("the Act in plain language give[s] the Attorney General alone the authority to sue upon a breach," (emphasis added) and any proceeding undertaken by the Secretary of Labor "is not a prerequisite to the Attorney General's suit"); *and see*, *Crown Coat*, 386 U.S. at 516-17 (distinguishing precedent under the Walsh-Healey Act). Here, by contrast,

FERC was not at liberty to file suit until after a penalty had been assessed by order following notice and opportunity for public hearing.

5. The Commission's construction of the statute would not "allow the government an unlimited period of time to bring a court action." Defendants suggest that "[a]ccepting FERC's view [of Section 2462] would turn the statute of limitations into an ever-receding horizon," such that once a show cause order were issued, there would be "no limitation on what happens next." Def. Mem. at 11. Because there are no express sanctions if FERC fails to act "promptly," Defendants claim that "the threat of court action to impose civil penalties could hang over the potential defendant forever." *Id*. Defendants are wrong. Under FPA § 31(d)(3), not only must FERC initiate district court proceedings within five years of a penalty assessment order, but it must issue that penalty assessment order "promptly." Moreover, the Administrative Procedure Act ("APA") requires that, "within a reasonable time, each agency shall proceed to conclude a matter presented to it." 5 U.S.C. § 555(b). This directive is judicially enforceable pursuant to 5 U.S.C. § 706(1), which authorizes courts to "compel agency action unlawfully withheld or unreasonably delayed." *See Telecomm. Research & Action Center v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984) ("*TRAC*") (enumerating six factors other courts have subsequently applied). As in *TRAC* itself, requests for relief under § 706(1) are not infrequently presented together with a request for mandamus pursuant to 28 U.S.C. § 1651. *See Southern Utah Wilderness Alliance*, 542 U.S. 55, 63 (2004) (Section 706(1) "carried forward the traditional practice . . . when judicial review was achieved through use of . . . writs of mandamus").

Three things are therefore clear: *First*, between the FPA's directive that a penalty assessment be made "promptly" and the APA's authorization to compel agency action

unreasonably withheld, the threat of court action cannot hang over a potential defendant forever. *Second*, by issuing its penalty assessment order less than six months after commencing the order to show cause proceeding (and less than four months after Defendants' answers), FERC acted "promptly." *Third*, this action for review and enforcement, filed only three days after it became ripe, has not been hanging over defendants "forever."

D. The Order to Show Cause Proceeding was not a decision to prosecute.

Defendants are also wrong in their argument that the Commission's Order Assessing Penalties was a mere "decision to prosecute" and thus somehow fails to satisfy the first statute of limitations under *Meyer*. *See* Def. Mem. at 22. As discussed above, the Commission could not simply decide to file in court upon discovering the violations; it needed to satisfy the statutory prerequisites. The case law has not defined any bright-line minimum requirements for a proceeding to satisfy § 2462, but under any reasonable construction of such requirements, the Commission's procedures satisfy them.

1. A proceeding was required by the FPA and the Commission conducted one. The FPA requires a proceeding: it requires that the Commission provide "notice and opportunity for public hearing" prior to any civil penalty assessment. *See* 16 U.S.C. § 825*o*-1(b). It further requires that the Commission must consider and analyze mandatory statutory factors when determining the appropriate civil penalty. *Id.* To do so in a manner that survives the arbitrary and capricious standard of review available for appeals of such orders, necessarily mandates a proceeding that allows for a detailed assessment of the relevant facts and law. *See, e.g.*, *Clifton Power Corp. v. FERC*, 88 F.3d 1258, 1270 (D.C. Cir. 1996) (invalidating FERC penalty order for failure to "adequately explain[] the seriousness of [the defendant's] violation in relation to the amount of the penalty.").

The FPA's mandate that the penalty must be assessed *by order* is further evidence that the FPA requires a proceeding. 16 U.S.C. § 823b(d); *see also Writer's Guild, Inc. v. FCC*, 423 F. Supp. 1064, 1079 (C.D. Cal. 1976), *vacated on other grounds*, 609 F.2d 356 (9th Cir. 1979) ("At the very least, the term 'order' implies a formal agency mandate issued at the *culmination* of some regulatory agency proceeding.") (emphasis added). Under long-standing administrative law principles, agency processes ending in an "order" are "proceedings" or "adjudications." The APA is instructive in this regard. It, like the FPA, recognizes two types of adjudication: formal "on the record" adjudications, 5 U.S.C. § 554(a), 556 (2012), and informal adjudications, *Id.* § 555. Under the APA, an "agency proceeding" means "an agency process as defined by paragraphs (5), (7), and (9) of this section." *Id.* § 551(12). Paragraph (7), in turn, defines "adjudication" as "agency process for the formulation of an order." *Id.* § 551(7). An "order" means "the whole or part of a final disposition . . . of an agency in a matter other than rule making, but including licensing." *Id.* § 551(6). Under these principles, a proceeding or adjudication occurred here; FPA § 31(d)(3) required the Commission to formulate a penalty by order, which represented the final disposition of the agency in this matter.[7]

[7] The procedures FERC employed, *see* First Am. Pet. (ECF 93) at ¶¶ 74-83, exceeded the minimal requirements for informal agency adjudication, which need not mimic those of trial court. *See Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 655 (1990); *Kobach v. U.S. Election Assistance Comm.*, 772 F.3d 1183, 1197 n. 10 (10th Cir. 2014) ("Unless a statute requires otherwise, agencies have 'flexibility' to decide that a full evidentiary hearing is unnecessary in an informal adjudication."). These standards are consistent with the provisions of FPA § 308(b), in which Congress expressly authorized the Commission to promulgate rules of practice and procedure to govern all "hearings, investigations, and proceedings under this Act" and, in so doing, expressly stated that "the technical rules of evidence need not be applied" and "[n]o informality in any hearing, investigation, or proceeding or in any manner of taking testimony shall invalidate any order, decision, rule, or regulation issued under the authority of this Act." 16 U.S.C. § 825g (2017).

Furthermore, the Commission has concluded that FPA § 31(d)(3) requires an adjudicative paper hearing before it can apply the statutory criteria and assess a civil penalty. *Statement of Administrative Policy Regarding the Process for Assessing Civil Penalties*, 117 FERC ¶ 61,317 (2006). And, the Commission's construction of its own organic statute as requiring a proceeding as a prerequisite to imposing penalties under FPA § 31(d)(3) is entitled to deference. *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Serv.*, 545 U.S. 967, 980 (2005) ("If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation."). Thus, Defendants' claim that the procedures employed by the Commission to assess penalties under FPA § 31(d)(3) are *ultra vires* because they are "extra-statutory," Def. Mem. at 3-4, 10-13, is baseless. *Cf. TOTAL*, 859 F.3d at 338 (finding language in the NGA identical to that in FPA § 316A ("after notice and opportunity for public hearing") "affords FERC wide latitude to dictate the terms of the civil penalty process."). What controls for purposes of § 2462 is the binary question of whether a proceeding occurred, not which contours of that proceeding were or were not required under the governing statute. *3M Co.*, 17 F.3d at 1458-59 (administrative assessment proceedings that seek to impose civil penalties "are proceedings for the 'enforcement' of penalties and § 2462 thus applies."). A proceeding did occur here.

2. The Order to Show Cause Proceeding was a contested adjudication.

Several other factors weigh in favor of finding that the proceeding below was sufficient for § 2462 purposes. First, the Commission's long standing regulations define the Commission's order to show cause process as a proceeding. Specifically, an order to show cause commences a "contested" i.e., adversarial, "on-the-record proceeding." 18 C.F.R. § 385.2201(c)(1)(i). The

very first factor that the D.C. Circuit in *3M* looked to in deciding that the Environmental Protection Agency's penalty assessment process constituted an "action, suit, or proceeding" was how the agency regulations described the process. *3M*, 17 F.3d at 1456 ("In this case, EPA's regulations describe the agency's process for assessing civil penalties as a 'proceeding.'").

Second, the Natural Gas Policy Act ("NGPA")—which contains a *de novo* review provision identical to that of FPA § 31(d)(3)—is explicit in having the statutory notice (i.e., the order to show cause) satisfy the statute of limitations.[8]

Finally, a FERC order to show cause does not prejudge or adjudicate any issue, but instead frames the issues that will be decided in the contested adjudication before the Commission. 18 C.F.R. § 385.209(b) ("A notice of examination or an order to show cause will contain a statement of the matters about which the Commission is inquiring, and a statement of the authority under which the Commission is acting. The statement is tentative and sets forth issues to be considered by the Commission."); *see also*, *Hunter v. FERC*, 569 F. Supp. 2d 12, 17 (D.D.C. 2008), *aff'd*, 348 Fed. Appx. 592 (D.C. Cir. 2009) (Order to show cause does not make any findings or adjudicate anything). Participants in such proceedings contest factual and legal issues and are forbidden from *ex parte* contacts with the Commission itself, which acts as a neutral decision-maker and fact-finder. *See* 18 C.F.R. § 385.2201 (*Ex Parte*) and § 385.2002 (separation of functions); *see also Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (rejecting the "contention that the combination of investigative and adjudicative functions necessarily creates

[8] The NGPA is not subject to the five-year statute of limitations in § 2462; rather, it has its own, shorter statute of limitations. 15 U.S.C. § 3414(b)(6)(D). The *Barclays* court perfunctorily distinguished the NGPA on the grounds that the NGPA does not provide two alternative penalty assessment procedures, and that it contains its own statute of limitations. *Barclays*, 2017 WL 4340258 at *14-15. It did not explain why those distinctions should make a difference. They should not.

an unconstitutional risk of bias in administrative adjudication"). Additionally, the Commission does not always impose the proposed penalties following issuance of a show cause order, so its issuance cannot be said to constitute a mere "prosecutorial determination." *See, e.g.*, *In re Island Park Resorts, Inc.*, 55 FERC ¶ 61,414 (1991) (determining a proposed civil penalty should not be assessed); *In re Coaltrain Energy LP*, 155 FERC ¶ 61,204, at P 1 n.3 (2016) (dismissing proposed penalties against an individual respondent). The order to show cause proceeding was an adjudication sufficient to meet the statute of limitations set out in § 2462.

II. No Reasonable Construction of the Statutes Supports Defendants' Motion

A. The statute of limitations should be construed in favor of the Commission.

Essentially, Defendants ask the Court to construe the statute of limitations strictly against the Commission by causing its cause of action to be time-barred *less* than five years after it could have been filed in court. Defendants' construction would upend the long-enshrined rule that statutes of limitations are intended to be strictly construed in favor of the government. *See e.g.*, *Badaracco*, 464 U.S. at 391 ("This Court long ago pronounced the standard: 'Statutes of limitation sought to be applied to bar rights of the Government, must receive a strict construction in favor of the Government.'") (quoting *E.I. DuPont de Nemours & Co. v. Davis*, 264 U.S. 456, 462 (1924)). Accordingly, to the extent this court views the text of the statute of limitations or the FPA as amenable to alternative readings, the one that favors the United States must prevail. *See FDIC v. Fmr. Officers & Directors of Metropolitan Bank,* 884 F.2d 1304, 1309 (9th Cir. 1989) (*citing Badaracco & DuPont*) ("To the extent that a statute is ambiguous in assigning a limitations period for a claim, we will interpret it in a light most favorable to the government."); *see also Badaracco*, 464 U.S. at 398 ("Courts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement. This is especially so when courts construe a statute of limitations, which must receive a strict construction in favor of the Government.")

(citation omitted); *Schafer v. Astrue*, 641 F.3d 49, 62 (4th Cir. 2011); *Amoco Production Co. v. Watson*, 410 F.3d 722, 734 (D.C. Cir. 2005), *aff'd*, 549 U.S. 84 (2006) (rejecting construction of statute of limitations, 28 U.S.C. § 2415, based on an appeal to the purported underlying purpose of the statute, noting that "the Supreme Court has frequently warned that such appeals to purpose cannot override a statute's clear language") (citation omitted).

The reading of § 2462 advocated by Defendants cannot be squared with this settled rule. Under Defendants' interpretation of § 2462, they, not the government, would be granted control of key steps in the above-described sequence of events. On Defendants' proffered reading of the statute, the timeliness of an action could turn on whether or how quickly a defendant elected the district court procedures of FPA § 31(d)(3). Courts have consistently condemned construction of statutes of limitation that would allow the (alleged) wrongdoer to cause the statute of limitations to expire. *Meyer*, 808 F.2d at 920 ("Given the manifold opportunities for (arguably legitimate) delay which inhere both as a matter of trial tactics and in the innards of the administrative process, it strikes us as implausible that Congress intended to endow private litigants with so powerful an incentive for procrastination"); *Godbout-Bandal*, 232 F.3d at 640 (cautioning that "[a] violator should not be able to escape paying a penalty by dragging his feet through the administrative penalty-assessment process.").

For these reasons, even assuming *arguendo* that the only "action" that satisfies § 2462 is the one filed in this Court, the Commission should prevail because this cause of action did not "first accrue" until after the statutory prerequisites set forth in the FPA were fulfilled.

B. In the alternative, even if the Court declines to apply *Meyer*, the present action is still timely.

Even if this Court accepted Defendants' invitation to adopt the minority view of *Core* that an administrative proceeding cannot satisfy § 2462, the present cause of action would still be

timely in its entirety. The same statutory provision that grants this court jurisdiction over the cause of action sets forth two mandatory waiting periods. The cause of action cannot have accrued before those periods ended. *See Jones v. Calvert Group, Ltd.*, 551 F.3d 297, 301 (4th Cir. 2011) (citing *Vance v. Whirlpool Corp.*, 707 F.2d 483, 486-89 (4th Cir. 1983)). As a result, the earliest the claim could have accrued is 86 days after the violations, allowing the 26 days Defendants took to make their procedural election and the 60 days for them to make payment – that is, the claim could not have accrued before August 26, 2010.

Moreover, even if the Court accepted Defendants' contention that the claims accrued as of the date of the violations, it should toll the statute of limitations for the mandatory waiting periods. *Cf. Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517, 1524 (9th Cir. 1987) ("[I]n citizen enforcement actions the five-year statute of limitations period [of 28 U.S.C. 2462] is tolled sixty days before the filing of the complaint, to accommodate the statutorily-mandated sixty-day notice period."); *Atl. States Legal Found. v. Al Tech Specialty Steel Corp.*, 635 F. Supp. 284, 288 (N.D.N.Y. 1986) ("[I]f prior resort to an administrative body is a prerequisite to judicial review, the running of the statute of limitations period [in 28 U.S.C. § 2462] should be tolled during the administrative proceeding") (citation omitted). The Initial Petition was filed before that and is therefore timely, even under the incorrect view urged by Defendants. To hold otherwise would be to enlarge this Court's jurisdiction beyond that granted to it by statute and to invert the rule that statutes of limitation are to be construed strictly in favor of the United States by, in effect, shortening the applicable statute of limitations from five years, to four years and 279 days. That should not be done in the absence of clearly-expressed Congressional intent.

III. The Disgorgement Sought In This Case Is Not Time-Barred

Even if the Court concludes that the statute of limitations ran with respect to civil penalties—which it did not—the disgorgement order is remedial and therefore not subject to any statute of limitations.

A. The disgorgement ordered here is remedial, not a penalty subject to § 2462.

The Commission has statutory authority to order disgorgement of money received as the result of a violation (and other equitable remedies) through the "necessary or appropriate" powers set forth in FPA § 309: "[t]he Commission shall have power to perform any and all acts, and to prescribe . . . such orders . . . as it may find necessary or appropriate to carry out the provisions of [the Act]." 16 U.S.C. § 825h (2016).[9] Disgorgement is a key tool used by the Commission to prevent unjust enrichment and remedy harms. The Commission has made clear that its use of disgorgement is a *remedial* act separate from civil penalties, which aim to "encourage compliance with the law." *See Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 114 FERC ¶ 61,165 at P 33 (2006) (distinguishing disgorgement from civil penalties and noting that "the purpose of disgorgement is to remedy unjust enrichment.").

The disgorgement ordered by the Commission in this case is purely a remedial form of equitable relief; it is not a separate penalty. One of the key hallmarks that distinguishes penal disgorgement from remedial disgorgement is whether it is restitutionary. *See Chauffers*,

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[9] Courts have long recognized that FPA § 309 authorizes disgorgement. *See, e.g., Niagara Mohawk Power Corp. v. F.P.C.*, 379 F.2d 153, 159 (D.C. Cir. 1967) (FERC has broad discretion to order disgorgement under the FPA); *Pub. Utils. Comm. of the State of Cal. v. FERC*, 462 F.3d 1027, 1048 (9th Cir. 2006) (FERC "has remedial authority to require that entities violating the [FPA] pay restitution for profits gained as a result of a statutory or tariff violation. This authority derives from [section] 309 of the [FPA] . . . .") (citations omitted); *and see Coastal Oil & Gas Corp. v. FERC*, 782 F.2d 1249, 1253 (5th Cir. 1986) (it is within FERC's remedial authority "to restore the status quo ante and prevent the unjust enrichment of the wrongdoer").

Teamsters and Helpers Local No. 391 v. Terry, 494 U.S. 558, 570 (1990) ("[W]e have characterized damages as equitable where they are restitutionary, such as in action[s] for disgorgement of improper profits."). Here, the ordered disgorgement is entirely restitutionary. Pursuant to the Commission's longstanding practice, once paid, the disgorgement amount will be returned to the victims of Defendants' fraud—that is, participants in the PJM market during the Manipulation Period—through a *pro rata* allocation administered by PJM. *See* Order Assessing Penalties at PP 188-191, and Ordering P (H). As the Commission's disgorgement is remedial and compensatory, it is not a penalty subject to the statute of limitations under § 2462.

B. *Kokesh* does not alter this result.

Contrary to Defendants' assertion, *Kokesh v. SEC*, -- U.S. --, 137 S. Ct. 1635 (2017) does not support disallowing the Commission's ordered disgorgement. The disgorgement sought by the SEC in that case is readily distinguishable from that ordered by FERC for several reasons. First, the "disgorgement" amount in *Kokesh* was paid directly to the U.S. Treasury, not the victims. Here disgorgement will be paid to PJM and refunded to victims. *Compare SEC v. Amerindo Investment Advisors Inc.*, 2017 WL 3017504, at *9 (S.D.N.Y. Jul. 14, 2017) (declining to extend *Kokesh* to interest distributions, because these are an equitable remedy that, unlike the "pecuniary sanction" in *Kokesh*, serve to compensate a victim for his loss). Second, the disgorgement amount in *Kokesh* exceeded the amounts gained as a result of the violation. Here, however, the disgorgement amount includes only the profits obtained by Defendants as a result of their fraudulent conduct trades.[10]

[10] Further, it is not clear as a matter of law whether *Kokesh* even applies outside of the context of SEC enforcement proceedings. *See*, *e.g.*, *Federal Trade Comm'n v. J. William Enterprises, LLC*, 2017 WL 4776669, at *2 (M.D. Fl. Oct. 23, 2017) (declining to extend *Kokesh* to disgorgement under § 19(b) of the FTC Act); *United States Commodity Futures Trading Comm'n v. Reisinger*, 2017 WL 4164197, at *6 (N.D. Ill. Sept. 19, 2017) (declining to extend *Kokesh* to disgorgement under the Commodity Exchange Act).

Defendants further argue that the imposition of joint and several liability for the ordered disgorgement necessitates a finding that the disgorgement is penal under *Kokesh*. Def. Mem. at 27-29. Defendants yet again attempt to stretch precedent too far. *Kokesh* does not address the issue of whether joint and several liability presupposes that disgorgement is penal and not remedial. Nor is the Commission aware of any case since that has found a similar connection and held that remedial disgorgement becomes penal if ordered jointly and severally. The facts alleged in the First Amended Complaint, as supported by the Commission's Order Assessing Penalties, indicates that such liability is appropriate. But, as Defendants readily admit, this argument "raise[s] factual issues that may benefit from further development" and is thus unripe for purposes of a pre-discovery motion to dismiss. *Id.* at 27. Because the disgorgement sought here differs fundamentally from that sought in *Kokesh*, it should not be considered a penalty under § 2462.

IV. This Court Has Inherent Equitable Power To Order Disgorgement

Defendants are wrong to imply that this Court does not have the power to order disgorgement in this case. Def. Mem. at 26. Disgorgement is a fundamental power of the Court that can only be restrained through explicit statutory language to the contrary. The FPA contains no such language.

Disgorgement is an equitable remedy, derived from the Court's inherent power to order equitable relief, the primary purpose of which is to require "a defendant to give up the amount by which he was unjustly enriched." *United States v. Keyspan Corp.*, 763 F. Supp. 2d 633, 638 (S.D.N.Y. 2011) (quoting *SEC v. Cavanagh*, 445 F.3d 105, 119 (2d Cir. 2006)).[11] Defendants,

[11] This Court's inherent power to order disgorgement traces back to the English equity courts of the eighteenth century. *See Cavanagh*, 445 F.3d at 116-20 (holding that "contemporary federal courts are vested with the same authority by the Constitution and the Judiciary Act.").

however, complain that FPA § 31(d)(3)(B) does not make specific reference to equitable relief in its grant of jurisdiction to this court. Def. Mem. at 24, 27. However, such an express grant of equitable authority is not required. The Supreme Court has made clear that "[u]nless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise" of the court's jurisdiction. *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946). And, in cases like this one where "the public interest is involved . . . those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake." *Id*. The Court continued, stating that this Court's inherent equitable powers can "not be denied or limited in the absence of a clear and valid legislative command." *Id*.

FPA § 31(d)(3)(B) does not, by its terms, or by any "necessary and inescapable inference," limit the Court's inherent authority to fashion appropriate equitable relief in this matter, and the lack of an explicit reference to "disgorgement" in the FPA is, therefore, of no import. *See Warner Holding*, 328 U.S. at 398 (non-explicit limitation of power must be by "necessary and inescapable inference").

CONCLUSION

For the foregoing reasons, the Commission met the statute of limitations set out in § 2462, both in timely beginning the order to show cause proceeding and timely filing the instant action. Moreover, this Court has authority to enforce the Commission's disgorgement order, which was also timely filed. Defendants' motion should, therefore, be denied.

Respectfully Submitted,

Dated: March 21, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2018, I filed the foregoing Reply with the Clerk's Office, using the CM/ECF system, which will send a notification of such filing to counsel of record in this matter.

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