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

FEDERAL ENERGY REGULATORY COMMISSION, Plaintiff, v. POWHATAN ENERGY FUND, LLC, et al., Defendants.	)	Case No.: 3:15-CV-00452-MHL

DEFENDANTS' MOTION TO DISMISS IN PART FIRST AMENDED COMPLAINT

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, defendants Powhatan Energy Fund, LLC, Houlian Chen, HEEP Fund, Inc. and CU Fund, Inc. ("defendants"), by and through undersigned counsel, hereby move this court to partially dismiss the First Amended Complaint of the Federal Energy Regulatory Commission ("FERC"). A Memorandum of Law in Support of Defendants' Motion to Dismiss in Part First Amended Complaint, and a form of order, are submitted herewith.

WHEREFORE, the defendants respectfully request that the Court enter an order partially dismissing FERC's First Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).

Respectfully submitted,

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Dated: February 28, 2018

CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2018, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which shall send notification of such filing to counsel receiving notices in this matter, including the following counsel of record:

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MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS IN PART FIRST AMENDED COMPLAINT

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INTRODUCTION

For three reasons, the Court should partially dismiss the First Amended Complaint (ECF No. 93) as to all defendants. *First*, plaintiff Federal Energy Regulatory Commission ("Plaintiff" or "FERC") filed this action too late to assert civil penalty claims for all but a handful of the days that make up the so-called "Manipulation Period." *Second*, disgorgement is, by statute, unavailable as a remedy in this civil penalty action. *And third*, assuming disgorgement is available at all in this case, the statute of limitations also precludes any disgorgement remedy for almost all of the days at issue.

1. The civil penalty statute of limitations issue turns on the meaning of two statutes: (1) 28 U.S.C. § 2462, which is the default statute of limitations applicable to federal government efforts to impose civil penalties, and (2) Federal Power Act ("FPA") § 31, codified at 16 U.S.C. § 823b. This Court recently addressed the meaning of FPA § 31 at length. *See generally* December 28, 2017 Memorandum Opinion (ECF No. 89) ("Mem. Op."). So we start with the default statute of limitations, which states as follows:

> Except as otherwise provided by Act of Congress, 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 . . . .

28 U.S.C. § 2462.

The claims at issue here "first accrued" between June 1 and August 3, 2010—a 64-day period FERC calls the "Manipulation Period." Am. Comp. ¶ 1. The filing of the instant action in this Court plainly qualifies as an "action, suit or proceeding" that satisfies § 2462. *See 3M (Minn. Mining & Mfg.) v. Browner*, 17 F.3d 1453, 1459 (D.C. Cir. 1994) ("§ 2462's application to cases in which the court first adjudicates liability and then sets the penalty or fine is unquestioned"). But because FERC did not file this action until July 31, 2015, it missed its five-

year window for the period from June 1, 2015 through July 30, 2015. That leaves only four days—July 31, 2015 through August 3, 2015—within reach of potential civil penalties.

Stretching to keep the prior sixty days within temporal grasp, FERC previously has contended that its issuance of a show cause order on December 17, 2014, commenced a "proceeding" within the meaning of § 2462. *See* Mem. of Law in Supp. of FERC's Opp'n to Mot. to Dismiss of Defs. Chen, *et al*. at 4 (ECF No. 29). The specific issue here thus is whether, in an FPA enforcement matter where the subject chooses what this Court has called the "Alternate Option," Mem. Op. at 12, FERC's issuance of a show cause order commences a "proceeding" for purposes of § 2462. The answer is no.

The plain statutory language raises the first impenetrable barrier to FERC's position. Under the plain language of § 2462, if an agency can conduct a "proceeding" that is relevant for statute of limitations purposes at all, it must be a full adjudication, including trial-type proceedings to ventilate disputed issues of material fact. We know that because when the statute was revised in 1948, the words "action, suit or proceeding" replaced the words "suit or prosecution." *See 3M*, 17 F.3d at 1456. And as the court in *Barclays* recently pointed out, the contemporaneous "Reviser's Notes" confirm that this change was not substantive. *FERC v. Barclays Bank PLC*, No. 2:13-cv-02093-TLN-DB, 2017 WL 4340258 at *8 (E.D. Cal. Sept. 29, 2017) ("*Barclays*") (citing *3M*, 17 F.3d at 1458). "Proceeding," for purposes of § 2462, therefore means something equivalent to an "action," a "suit," or a "prosecution." It cannot mean agency procedures that do not involve real adjudication.

This also follows from the purpose of § 2462, which is to require the federal government to commence civil penalty claims before evidence recedes and memory fades. *See Gabelli v. SEC*, 133 S. Ct. 1216, 1221 (2013). An agency process that is not a real adjudication would not meet that objective, and thus cannot be the type of proceeding that satisfies § 2462. Moreover,

FERC's position creates the absurd result of making any real adjudication an event distant in time, even infinitely so. FERC could issue a show cause order and then do nothing. It similarly could issue a penalty assessment order and then do nothing. There would be no outer bound on how long the agency might take to file a court action. Section § 2462 would become a statute of *no* limitations.

In addition, under the plain language of FPA § 31, as construed by both this Court and the federal district court in *FERC v. Barclays Bank PLC*, where—as here—an investigative subject elects what this Court has termed FPA § 31's Alternate Option, Mem. Op. at 12, FERC cannot rely on its extra-statutory show-cause-order process as a basis for denying the investigative subject a full adjudication in a federal district court, with the standard rights to discovery and other adjudicative tools provided for in the Federal Rules of Civil Procedure. The statute gives FERC no power to adjudicate anything under the Alternate Option. As the *Barclays* court cogently observed, FERC's extra-statutory show-cause-order process under the Alternate Option "was a decision to prosecute. It was not itself a prosecution." *Barclays*, 2017 WL 4340258 at *13. The prosecution itself occurs in this Court. *Id*.; *accord* Mem. Op. at 10-31.

Because the FERC show-cause-order process that preceded this action amounts to nothing more than a decision to prosecute this case in federal district court, nothing the agency itself did prior to commencing this action can constitute a "proceeding" under § 2462. In this case, the only "action, suit or proceeding" authorized in FPA § 31 is the filing of this civil action. And FERC filed this action too late for it to seek civil penalties for sixty of the sixty-four days at issue.

While the statutory text is sufficient alone to dictate that outcome, an overwhelming body of case law compels the same conclusion. The Supreme Court's unanimous decision in *Gabelli*, while deciding a different question, uses reasoning that broadly sweeps away FERC's position.

As the Supreme Court observed, since the beginning days of the Republic, our legal system has required the government to bring civil penalty actions within five years of the disputed conduct. *Gabelli*, 133 S. Ct. at 1221. FERC's position countermands that ruling because it would allow the government an unlimited period of time to bring a court action. That cannot be the law, particularly after *Gabelli*.

Decisions by various United States courts of appeals also contradict FERC's position. In adopting exactly the same position we urge here, the *Barclays* court relied heavily on the D.C. Circuit's reasoning in *3M*, which later was adopted by the Fourth Circuit, albeit in a case involving substantially different facts, *Arch Mineral Corp. v. Babbitt*, 104 F.3d 660, 669-70 (4th Cir. 1997). The D.C. Circuit ruled in *3M* that, where an agency held administrative proceedings equivalent to the "Default Option" under FPA § 31—adjudicating civil penalty liability under the Administrative Procedures Act ("APA") before an administrative law judge ("ALJ"), with judicial review available in a United States court of appeals—the agency process constituted a "proceeding" under § 2462. *3M*, 17 F.3d 1453.

As this Court already has ruled, however, Congress did *not* authorize FERC to adjudicate civil penalty liability under the Alternate Option. Mem. Op. at 18 (noting, among other things, that the Alternate Option provides for "no administrative record in the ordinary sense," and that "Congress intended the district court's *de novo* review to be a plenary trial"). And in any event, agency adjudication is light years from the extra-statutory agency process FERC used here: "Respondents have had, to date, no opportunity to compel any witnesses or documents or to cross-examine any of the Commission's witnesses. Neither have they been able to test the reliability or veracity of the Commission's evidence through the evidentiary standards of either the Federal Rules of Evidence or the APA's [evidentiary requirements]." Mem. Op. at 28.

Other circuit court decisions also defeat FERC's position. The Fifth Circuit, in *United States v. Core Laboratories, Inc.*, 759 F.2d 480 (5th Cir. 1985), rejected the government's argument that § 2462's limitations period did not begin to run until the date of a final administrative penalty order—meaning that the government was required to commence an action in court within five years of the alleged violations, irrespective of any agency process. In a related line of cases, addressing a different but analogous statute of limitations, several courts, including the U.S. Supreme Court and the Fourth Circuit, have reached the same outcome reached in *Core*—holding that agency proceedings, though statutorily authorized, did not stop the statute of limitations clock. *See Unexcelled Chem. Corp. v. United States*, 345 U.S. 59 (1953); *Lance, Inc. v. United States*, 190 F.2d 204 (4th Cir. 1951).

Other circuit courts, led by *United States v. Meyer*, 808 F.2d 912 (1st Cir. 1987), have held that where "adjudicatory administrative proceedings" are a statutory precondition to filing a subsequent civil penalty collection action in federal district court, § 2642's limitations period does not begin to run until the administrative proceedings have concluded and there is a "final" agency decision. *Id.* at 921-22. FERC has previously argued, and presumably will again, that *Meyer* supports its position. But *Meyer* actually anticipated the instant case, stating that where a statute authorizes the agency only to make "prosecutorial determinations," that type of agency action does *not* satisfy § 2642. As this Court recently held, FPA § 31's Alternate Option sets the adjudication of FERC's civil penalty claims in this Court, *not* before the agency. *Meyer* therefore defeats—rather than supports—FERC's position.

2. In addition, there is no statutory basis for FERC to seek disgorgement for any time period in this civil action. FERC filed this action under FPA § 31's Alternate Option. And that provision expressly authorizes this Court to affirm, modify, or set aside FERC's penalty

assessment. It does not authorize FERC to assess disgorgement, and does not authorize this Court to take any action whatsoever regarding disgorgement.

The Supreme Court recently flagged, as an open issue, whether the Securities and Exchange Commission ("SEC") has authority to seek disgorgement in cases brought in federal district court, given the absence of any express statutory authority for judicial imposition of that remedy. *Kokesh v. SEC*, 137 S. Ct. 1635, 1642 n.3 (2017). That same question exists here. And the answer—given that § 31 grants targeted authority for this court to affirm, modify, or set aside FERC's penalty assessment, with no mention of disgorgement—is no.

While FERC has claimed the authority to impose disgorgement itself, pointing to cases relying on another provision of the FPA that grants FERC authority to implement other statutory functions, those cases do not apply here because they do not address *court* imposition of disgorgement. At the time *Kokesh* was decided, the SEC had express statutory authority to impose disgorgement administratively, but that did not prevent the Supreme Court's pointed question in *Kokesh* regarding the authority of the court in an SEC district court enforcement action.

In any event, there is no Supreme Court or Fourth Circuit precedent on FERC's authority to impose disgorgement administratively. And as we explain below, the authorities concluding that FERC has disgorgement authority by virtue of its generic FPA authority to perform "any and all acts" in furtherance of the purposes of the act are not persuasive, and should not be followed here—particularly in light of *Kokesh*.

3. Finally, even if FERC has a statutory basis for seeking disgorgement in this case, that remedy is time-barred for trades before July 31, 2010. Under *Kokesh*, the remedy of disgorgement can constitute a penalty if, among other things, it does more than return the defendant "to the place he would have occupied" absent the alleged violation. 137 S. Ct. at 644.

Because FERC's disgorgement directive here purports to make the defendants jointly and severally liable for the disgorgement of their fellow defendants, it is punitive. In addition, although not addressed in *Kokesh*, disgorgement is synonymous with "forfeiture," which is expressly referenced in § 2462 as the type of proceeding to which § 2462 applies. *See SEC v. Graham*, 823 F.3d 1357, 1363 (11th Cir. 2016).

BACKGROUND

I. FACTUAL BACKGROUND

A brief recap of the factual background is sufficient for purposes of the instant motion.[1]

In 2010, Dr. Chen was trading a particular financial electricity product offered by PJM Interconnection, L.L.C. ("PJM"). Am. Comp. ¶ 30. The product in question was called "up-to congestion" (or "UTC") trading. *Id*. ¶ 37. Dr. Chen was trading on behalf of himself, his two funds (HEEP Fund and CU Fund), and co-defendant Powhatan Energy Fund, LLC. *Id*. ¶ 1.

Up-to congestion trades have three financial components. During the relevant period, those components were as follows: First, an up-to congestion trade required payment of fixed transmission charges (and other minor transaction costs). *Id*. ¶¶ 42-43. Second, having paid those transmission charges, traders were entitled to receive an allocation of "loss credits," also known as a Marginal Loss Surplus Allocation ("MLSA"). *Id*. ¶¶ 44-46. Third, a congestion component, which FERC refers to as the "price spread" component, could be positive or negative. *Id.* ¶¶ 42-43. Taken together, the required payments, the loss credits, and a positive or negative price spread, dictated whether a given trade resulted in profit or loss.

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[1] The Court provided a succinct summary of the factual background of this case in its memorandum opinion addressing the procedures for FERC civil penalty actions pursuant to FPA § 31. *See* Mem. Op. at 2-7.

FERC claims that Dr. Chen's trades targeted the loss credit component, thus "receiv[ing] excessive amounts of [loss credit] payments," while improperly eliminating risk associated with the price spread component. According to FERC, those trades violated the FPA's prohibition on energy market manipulation. Am. Comp., Ex. 1 at PP 2-3. The trades in question took place between June 1 and August 3, 2010—the so-called "Manipulation Period." *Id*. ¶ 1.

II. PROCEDURAL BACKGROUND

On August 25, 2010, FERC began a formal investigation of up-to congestion trading, including trading by or on behalf of the defendants. *Id*. ¶ 67. On December 17, 2014, more than four years later, FERC issued an "Order to Show Cause and Notice of Proposed Penalty" ("Show Cause Order"). That order required the defendants to respond, and notified them of their statutory right, pursuant to FPA § 31(d), to choose between (1) an administrative hearing before an administrative law judge, or (2) a federal district court action. *Id.* ¶¶ 74-75

The defendants elected a federal district court action. *Id.* ¶ 80. The defendants, as well as FERC enforcement staff, filed submissions in response to the Show Cause Order. *Id.* ¶¶ 81-82.

On May 29, 2015, FERC issued an order concluding that the defendants violated the FPA, and assessing (collectively) $29.8 million in civil penalties, along with $4.7 million in disgorgement ("Assessment Order"). *Id*. ¶ 83 & Ex. 1.

On July 31, 2015, FERC filed the instant action in this court. Pet. for an Order Affirming the FERC's Order Assessing Civil Penalties (ECF No. 1). After it became apparent that the parties disagreed about the nature of this action,[2] and the significance (or lack of significance)

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[2] The parties' contrary views on the nature of this federal district court action became apparent, in part, as a result of the defendants' motions to dismiss and FERC's oppositions thereto. *See, e.g.*, Mem. Op. at 6 (describing defendants' motions to dismiss and FERC's responses). The Court denied the defendants' motions to dismiss without prejudice. Jan. 8, 2016 Mem. Order (ECF No. 44).

associated with the show-cause-order process and the Assessment Order, the Court ordered briefing and heard argument.

On December 28, 2017, the Court issued a Memorandum Opinion concluding that the defendants "are entitled to a trial *de novo* governed by the Federal Rules of Civil Procedure and the Federal Rules of Evidence." Mem. Op. at 2. The Court directed FERC to "re-file the Complaint or file an Amended Complaint." Dec. 28, 2017 Order (ECF No. 92).

On January 29, 2018, FERC filed a First Amended Complaint (ECF No. 93).

ARGUMENT

I. THE STATUTE OF LIMITATIONS BARS FERC'S CIVIL PENALTY CLAIMS FOR ALL BUT THE LAST FOUR DAYS OF THE ALLEGED MANIPULATION PERIOD

A. FERC's Position Violates Plain Statutory Language

FERC's claim here—that issuance of the show cause order initiated an "adversarial administrative proceeding" that satisfies § 2462[3]—contradicts the plain words of both § 2462 and FPA § 31.

Section 2462 dates back well over a century, and, for over a century, its original wording stated that any "suit or prosecution" for civil penalties must be brought within five years. The wording was slightly changed in 1948—requiring, as it does now, any "action, suit or proceeding" for penalties to be brought within five years. *FERC v. Barclays Bank PLC*, No. 2:13-cv-02093-TLN-DB, 2017 WL 4340258 at *8 (E.D. Cal. Sept. 29, 2017). And it is beyond cavil that this slight change in wording had no substantive effect. *Id.* (citing *3M Co. (Minn. Mining & Mfg.) v. Browner*, 17 F.3d 1453, 1458 (D.C. Cir. 1994)). A "proceeding" under the current language of § 2462 therefore must equate to a "suit or prosecution" under the original

[3] Mem. of Law in Supp. of FERC's Opp. to Mot. to Dismiss of Defs. Chen, et al. at 4 (ECF No. 29).

version. Assuming *arguendo* that an agency "proceeding" can ever satisfy § 2462 (case law answering this question in the negative is discussed below), that proceeding must be a real adjudication, with mutual discovery and the opportunity for trial-type proceedings before a neutral decision-maker to ventilate any disputed issues of material fact—the agency version of an adjudication in federal district court under the Federal Rules of Civil Procedure. It cannot be whatever process an agency might from time to time invent, even one lacking the essential hallmarks of a real adjudication.

The plain language of FPA § 31 further cements this conclusion. Both this Court and the *Barclays* court have ruled that the two optional paths in FPA § 31 set forth a symmetrical structure where civil penalty liability is adjudicated either (1) at FERC, with an ALJ trial of any disputed issues of material fact before a neutral fact-finder, or (2) in federal district court, using the tools provided by the Federal Rules of Civil Procedure, with a trial of any disputed issues of material fact before a federal district judge. *See* Mem. Op. at 10-13; *FERC v. Barclays Bank PLC*, 247 F. Supp. 3d 1118 (E.D. Cal. 2017).

We need not address whether an ALJ proceeding under the Default Option is sufficient to satisfy § 2462. Where, as here, the Alternate Option is chosen, the conclusion is unmistakable that the filing of this civil action is the only "proceeding" that satisfies § 2462. FPA § 31's Alternate Option authorizes an adjudicative proceeding in federal district court that indisputably satisfies the requirements of § 2462. *See 3M*, 17 F.3d at 1459 (application of § 2462 to cases where court first adjudicates liability is "unquestioned"). The Alternate Option does *not* authorize any adjudicative proceeding at FERC. Nor did FERC actually hold one. To the contrary, once FERC issues a notice of the subject's right to elect between the two statutory paths, FPA § 31 requires FERC to "promptly" assess civil penalties, allowing FERC to file a civil action after 60 days. 16 U.S.C. § 823b(d)(3).

FERC cannot arrogate onto itself the power to hold an extra-statutory proceeding—invading the statutory province of federal district courts—and then bootstrap that unauthorized venture into a means to administratively satisfy § 2462, thus avoiding the statutory requirement that it commence a court action within five years. Accepting FERC's view would turn the statute of limitations into an ever-receding horizon. All FERC would need to do is to issue a show cause order within five years, leaving no limitation on what happens next. It then could take many years to issue a penalty assessment order. And if it ever took that step, it then could take many years to file a civil action in court. While § 31 states that FERC should issue a penalty assessment order "promptly," there are no express sanction if FERC fails to do so. And the ultimate sanction—Congress's age-old command that the federal government must commence any action for civil penalties within five years—would fall prey to the federal government's own *ad hoc* creation of an agency process that has no statutory basis and lacks the essential elements of an adjudication. The threat of court action to impose civil penalties could hang over the potential defendant forever. That cannot be the law.

The recent decisions about FPA § 31 by both this Court and the federal district court in *Barclays* reinforce that conclusion. As the *Barclays* court held:

> Defendants are requesting a contested hearing before a neutral decision-maker, with discovery. They have never had the opportunity to conduct discovery, could not compel witnesses to give testimony, had no opportunity to cross-examine witnesses, and had no opportunity to make their case before a neutral decision-maker. Defendants are asking for the opportunity to do those things for the first time here, in this Court.

Barclays, 247 F. Supp. 3d at 1126. FERC's invented "adversarial adjudicative proceeding" is not an adjudication. It is, instead, "simply a mechanism for getting the case into district court." *Barclays*, 2017 WL 4340258 at *13 (citation omitted).

This Court reached the same conclusion, holding that the:

> Respondents have had, to date, no opportunity to compel any witnesses or documents or to cross-examine any of the Commission's witnesses. Neither have they been able to test the reliability or veracity of the Commission's evidence through the evidentiary standards of either the Federal Rules of Evidence or the APA's requirement that "irrelevant, immaterial, or unduly repetitious evidence" be excluded in formal hearings, 5 U.S.C. § 556(d).

Mem. Op. at 28. In fact, as this Court stated, FERC's agency process would be an inherently unfair way to decide issues on the merits, "if only because 'the simple fact that the Commissioners perform both investigative and adjudicatory functions in the same case risks an inherent bias in the decisionmaking process.'" *Id.* at 29 n.28 (quoting *FERC v. Maxim Power Corp.*, 196 F. Supp. 3d 181, 195 (D. Mass. 2016)).

As this Court also observed, FERC itself "initiates the 'action' in the Alternate Option, which is consistent with how normal civil trials unfold in a district court: the party seeking affirmative relief institutes the action." *Id*. at 19. The agency's penalty assessment order therefore has no force and effect. It does not fix rights or obligations; in fact, it does not require the subject to do anything at all. That is because, under the Alternate Path, FERC does not actually decide anything—besides deciding to commence a civil action that asks a federal district court to decide the case.

In contrast, under the Default Option, if FERC ultimately imposes a penalty after an ALJ trial, the aggrieved party (the subject of the penalty) must petition a United States court of appeals for review of the penalty order. If the aggrieved party does not take that step, FERC's order becomes final and a penalty is owed. Under that option, FERC decides the merits.

It follows that, under both this Court's decision and the decision in *Barclays*, when the subject of an investigation chooses the Alternate Option, FERC has no authority to adjudicate anything. And it is a short step to move from that holding to the holding we seek here: that FERC's show-cause-order process does not commence a proceeding within the meaning of

§ 2642. As the *Barclays* court stated, rejecting FERC's position on the statute of limitations "is entirely consistent" with that court's prior decision on the meaning of FPA § 31, "if not *compelled by it*." *Barclays*, 2017 WL 4340258 at *13 (emphasis added). To elaborate:

> It should come as no surprise that a "proceeding" within the meaning of § 2462 must involve an "adversarial adjudication" to be tantamount to a "prosecution." The very hallmark of our system of prosecution of criminal and civil offenses is that there must be an adversarial adjudication before a neutral decision-maker. *Marshall v. Jerrico, Inc*., 446 U.S. 238, 242 (1980); *United States v. Thompson*, 827 F.2d 1254, 1258 (9th Cir. 1987).

Id. at *11.

In sum, the plain language of both § 2462 and FPA § 31 compels the conclusion that FERC's show-cause-order process does not constitute a proceeding within the meaning of § 2642. As we next show, the case law does too.[4]

B. The Case Law Leaves No Room for FERC's Effort to Evade the Statute of Limitations

1. The Supreme Court's Gabelli *Decision Forecloses FERC's Position*

The issue in *Gabelli* was whether the government could delay the date upon which its fraud claim "first accrued" based on application of the "discovery rule." *Gabelli v. SEC*, 133 S. Ct. 1216 (2013). A unanimous Supreme Court confirmed that § 2462's "five-year clock begins

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[4] We are aware of only one case supporting FERC's position on this issue. As observed in *Barclays*: "The *Silkman I* court found the Administrative Penalty Assessment Process did constitute a 'proceeding' within the meaning of § 2462. In doing so, the *Silkman I* court stated that 'FERC did more than decide to bring suit. It conducted an adjudication.'" *Barclays*, 2017 WL 4340258 at *13 n.13 (citing *FERC v. Silkman*, 177 F. Supp. 3d 683, 700 (D. Mass. 2016)). The *Barclays* court stated that it did "not find *Silkman I*'s analysis in support of the above-quoted statement persuasive," and noted that "after *Silkman I*, the case was transferred to the District of Maine. The *Silkman II* court . . . had a less rosy view of the same Administrative Penalty Assessment Process. *See* [*FERC v. Silkman*, 233 F. Supp. 3d 201, 226 (D. Me. 2017)]." *Id*. (quotation omitted). In addition, the *Barclays* court noted that *Silkman I* reached its conclusion without discussing *3M*" and another case discussed in *Barclays*. Like the court in *Barclays*, we think *Silkman I* was wrongly decided.

to tick" when a defendant's allegedly fraudulent conduct occurs, and the government may not delay accrual until it discovers the alleged fraud. *Id.* at 1220-24.

The Supreme Court emphasized the importance of time limits on civil penalty actions with quotes from cases reaching back to the early days of the Republic. *Gabelli* quotes Virginia's own Chief Justice Marshall, who wrote, over 200 years ago, that "it 'would be utterly repugnant to the genius of our laws' if actions for penalties could 'be brought at any distance of time.'" *Id*. (quoting *Adams v. Woods*, 2 Cranch 336, 342 (1805)). In addition, as Chief Justice Marshall colorfully explained, "[i]n a country where not even treason can be prosecuted after a lapse of three years, it could scarcely be supposed, that an individual would remain forever liable to a pecuniary forfeiture." *Adams*, 2 Cranch at 342. Statutes of limitations are "vital to the welfare of society," and "even wrongdoers are entitled to assume that their sins may be forgotten." *Gabelli*, 133 S. Ct. at 1221 (quoting, respectively, *Wood v. Carpenter*, 101 U.S. 135, 139 (1879), and *Wilson v. Garcia*, 471 U.S. 261, 271 (1985)). Similarly, Justice Story, sitting over 200 years ago as a Circuit Justice in a civil penalty case, observed that "it would be utterly repugnant to the genius of our laws, to allow such prosecutions a perpetuity of existence." *United States v. Mayo*, 26 F. Cas. 1230, 1231 (C.C.D. Mass. 1813) (No. 15,755), *quoted in 3M*, 17 F.3d at 1457.

Gabelli thus speaks in sweeping and unanimous terms, echoing landmark jurists from the early days of the Republic, about the importance of enforcing the five-year statute of limitations set forth in § 2462. While *Gabelli* did not address the particular issue here—whether an agency can invent an extra-statutory agency process as a means to satisfy § 2462's requirement that the government commence an action within five years—*Gabelli* cannot be squared with FERC's effort to avoid timely court adjudication. It is not clear, after *Gabelli*, that any agency proceeding can satisfy § 2462. But it is clear, after *Gabelli*, that an invented, extra-statutory

agency process that lacks the essential elements of real adjudication cannot suffice. Otherwise the five-year statute of limitations mandated by § 2462 would be replaced by a boundless clock of the government's own devising—one that continues to tick, should the government so choose, "at any distance in time." *Gabelli*, 133 S. Ct. at 1220-24 (quoting *Adams*, 2 Cranch at 342). And that *Gabelli* does not permit.

2. Decisions of Numerous Courts of Appeals Likewise Reject FERC's View

(a) FERC's Position Fails Under the D.C. Circuit's Reasoning in 3M*, Which Has Been Adopted by the Fourth Circuit and the* Barclays *Court*

The issue addressed by the D.C. Circuit in *3M* was whether an administrative proceeding under the Toxic Substances Control Act ("TSCA") was an "action, suit or proceeding" within the meaning of § 2462. After the Environmental Protection Agency ("EPA") issued an administrative complaint alleging violations, the company argued before the ALJ that § 2462 barred claims for alleged violations more than five years prior to the administrative complaint. There was no dispute that the statute authorized the administrative proceeding at issue. The ALJ ruled that § 2462 applied only in judicial proceedings—not administrative ones—and the EPA's Chief Judicial Officer upheld that ruling.

On judicial review, the D.C. Circuit disagreed: "What cannot be 'entertained' after § 2462's limitation period has expired is 'an action, suit or proceeding.' An agency's adjudication of a civil penalty case readily fits this description." *3M*, 17 F.3d at 1456. The court supported its conclusion by examining the nature of the penalty assessment process under the relevant statute:

> Civil penalty proceedings under TSCA emulate judicial proceedings: a complaint is brought, the defendant answers, motions and affidavits are filed, depositions are taken, other discovery pursued, a hearing is held, evidence is introduced, findings are rendered and an order assessing a civil penalty is issued. When that sequence of events takes place in a court, we have no trouble calling it a "prosecution,"

> although the modern trend is to reserve the description for criminal cases. When the same sequence of events plays out before an administrative agency, it too may be—and has been—designated a "prosecution."

Id. at 1456-57 (citation omitted).

The *3M* court also rejected the EPA's attempt to avoid § 2462's limitations bar based on a claim that its administrative proceeding was not one for "enforcement" of a civil penalty:

> [I]f "enforcement" means only the collection of a previously assessed penalty and not the *adjudication* of liability for a civil penalty, then § 2462's five-year limitations period would not apply even to federal court actions to determine penalties. In view of the history of § 2462 and reasons why we have statutes of limitations, such a result is inconceivable. Indeed, § 2462's application to cases in which the court first adjudicates liability and then sets the penalty or fine is unquestioned.

Id. at 1459 (emphasis added).

3M thus stands for the proposition that § 2462 applies to agency proceedings where the government is seeking to "impose" a civil penalty, and where that potential liability is being adjudicated pursuant to the statute's penalty scheme. And the Fourth Circuit expressly adopted *3M*'s reasoning in *Arch Mineral*, holding that "an action, suit or proceeding for the enforcement" of a penalty included an agency proceeding for the "imposition" of a penalty.[5]

As noted above, the court in *Barclays* relied on *3M*'s reasoning in rejecting FERC's argument that the agency's show-cause-order process constituted a "proceeding" within the

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[5] *Arch Mineral Corp. v. Babbitt*, 104 F.3d 660, 669-70 (4th Cir. 1997). In *Arch Mineral,* the facts, procedural posture, and legal issue were different from the instant case. The federal Office of Surface Mining Reclamation and Enforcement ("OSM") had previously prosecuted a civil penalty claim in federal district court, and obtained a judgment against a certain mining company that later filed for bankruptcy. Several years later, after adopting new ownership and control regulations, OSM made a determination to enter Arch Mineral into an administrative database as being "linked" to the bankrupt mining company. That action would have put Arch Mineral at risk for having permit applications blocked, and made it responsible for penalties against the mining company. Arch Mineral filed a federal district court action to prohibit OSM from linking it to the bankrupt company on grounds that such action was a penalty and was time-barred by § 2462. The district court agreed and the Fourth Circuit affirmed. The OSM's authority to take administrative action was expressly *not* an issue.

meaning of § 2462. *See Barclays*, 2017 WL 4340258 at *11. The court stated that "the entire thrust of *3M*'s analysis" was "contrary" to FERC's position. *Id*. "The D.C. Circuit only concluded the particular proceeding at issue there was a 'proceeding' within the meaning of § 2462 because it was tantamount to a 'prosecution.'" *Id*. (citation omitted). Because FERC's show-cause-order process "was a decision to prosecute," and "not itself a prosecution," *id.* at *13, it did not satisfy § 2462. The court in *Barclays* was correct: under *3M*, FERC's show-cause-order process does not constitute a proceeding within the meaning of § 2462.

(b) FERC's Position Likewise Fails Under Competing Lines of Precedent Addressing When a Civil Penalty Claim Accrues Under § 2462

Two competing lines of precedent address a slightly different question than the one presented in *3M*. These cases address when the § 2462 limitations period begins to run for purposes of a federal district court *collection action* that follows a mandatory administrative adjudication for imposing civil penalties.[6] They fall into two categories; each forecloses FERC's position.

First, under one line of cases, government claims for penalties or damages accrue at the time of the conduct, and administrative proceedings are irrelevant to the application of the statute of limitations. Only a court action stops the clock.

The Fifth Circuit first articulated this position in *United States v. Lovknit Mfg. Co.*, 189 F.2d 454 (5th Cir. 1951), which involved a statute of limitations that is different from—but

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[6] Before discussing that precedent, and explaining why it is fatal to FERC's position, we note that the instant action is *not* a collection action. Indeed, there is a specific subsection of FPA § 31(d) that describes an action "to recover" a civil penalty that remains unpaid *after* a district court has entered a "final judgment in favor of the [FERC] under [the Alternate Option in § 31(d)(3)]." 16 U.S.C. § 823b(d)(5). Nevertheless, the courts' analysis addressing the question set forth above strongly supports the conclusion that FERC's show-cause-order process was not a proceeding within the meaning of § 2462.

comparable to—the one at issue here. The Fourth Circuit later expressly adopted *Lovknit* in *Lance, Inc. v. United States*, 190 F.2d 204 (4th Cir. 1951). After the Third Circuit reached a contrary conclusion, a unanimous U.S. Supreme Court resolved the conflict in *Unexcelled Chemical Corp. v. United States*, 345 U.S. 59 (1953), expressly citing both *Lovknit* and *Lance* and following their approach. *Id*. at 61. Later, in *United States v. Core Laboratories, Inc.*, 759 F.2d 480 (5th Cir. 1985), the Fifth Circuit cited *Unexcelled* as persuasive authority for purposes of resolving the same question in the context of § 2462. Below, we briefly discuss *Lovknit*, *Lance*, *Unexcelled*, and *Core* in the order they were decided.

In *Lovknit*, a hearing examiner conducted a hearing, made findings, and rendered a decision against the company for liquidated damages under the Walsh-Healy Act. The Department of Labor affirmed. The government subsequently filed suit to collect, and the company argued that the collection action was barred by the applicable two-year statute of limitations. The Fifth Circuit agreed:

> Under the view of counsel for [the government], notwithstanding the strong limiting Act, there could be an indefinite postponement of final settlement of these and numberless other public contracts, till the Secretary after any lapse of time and with no speed at all should see fit to start a hearing, and his examiners to decide it, before the Attorney General in any case could sue. The [applicable 2-year limitations statute] would be entirely nullified.

189 F.2d at 458. Although the government's enforcement action to collect the damages was filed in federal district court within two years of the administrative order imposing liability, it was filed more than two years after the underlying conduct. Accordingly, the Fifth Circuit held that the government's claim was time-barred, regardless of the administrative litigation.

Like *Lovknit,* the Fourth Circuit's *Lance* decision involved a government claim for liquidated damages pursuant to the Walsh-Healy Act. When the government filed a federal district court action to recover the damages at issue after an agency process, the company argued

that the government's claim was time barred. The district court rejected that argument, holding that the cause of action did not accrue until the end of the agency process. The Fourth Circuit reversed, expressly adopting the holding in *Lovknit*. *Lance*, 190 F.2d at 204 ("We are in accord with [the "able opinion" by Judge Sibley in *Lovknit*] and think that nothing need be added to what was said by Judge Sibley.").

Subsequently, in *Unexcelled*, the U.S. Supreme Court described a conflict among the circuits on how to apply the two-year statute of limitations applicable to Walsh-Healy Act cases. Citing and following the approach in *Lovknit* and *Lance*, a unanimous Supreme Court rejected the government's argument that the statute of limitations began to run only after the conclusion of the administrative proceedings. The Supreme Court noted that the Walsh-Healy Act conferred "broad investigatory and hearing powers" on the Secretary, but found that "*irrelevant*" to when the limitations period began to run, which was the date of the alleged violation. *Unexcelled*, 345 U.S. at 65 (emphasis added).

Roughly thirty years after deciding *Lovknit*, the Fifth Circuit addressed a substantially similar question regarding the application of § 2462. In *Core*, the Commerce Department charged the company with certain violations. Following administrative proceedings, civil penalties were imposed. When the company failed to pay the penalties, the government commenced an action to enforce the penalties. The company argued that the government's claims were barred by § 2462, and the district court granted judgment on the pleadings. On appeal, the Fifth Circuit affirmed, citing *Unexcelled* as persuasive (albeit not controlling) precedent and concluding that the government's claim accrued at the time of the alleged violations, and that the enforcement action was not commenced within five years of the alleged violations.

In so holding, the *Core* court rejected the government's argument that § 2462's limitations period began to run only after the conclusion of the administrative process. The court explained that, because "[t]he progress of administrative proceedings is largely within the control of the Government," a "limitations period that began to run only after the government concluded its administrative proceedings would thus amount in practice to little or none." *Core*, 759 F.2d at 482-83. With language and reasoning that pre-saged *Gabelli*, the Fifth Circuit said that such an outcome would be a "derogation of the right to be free of stale claims, which comes in time to prevail over the right to prosecute them. *Id*. at 483 (citing *Burnett v. N.Y. Cent. R.R. Co*., 380 U.S. 424, 428 (1965) (quoting *Order of R.R. Telegraphers v. Ry. Express Agency, Inc*., 321 U.S. 342, 348-49 (1944))).

More recently, the Fifth Circuit reaffirmed *Core*'s holding and rationale in *SEC v. Bartek*, 484 F. App'x 949 (5th Cir. 2012), a decision that expressly (and presciently) declined to follow a Second Circuit opinion that was later overturned in *Gabelli,* and also held that § 2462 applies to the SEC's equitable remedies—foreshadowing *Kokesh*.

The reasoning and outcomes in *Lovknit*, *Lance*, *Unexcelled*, and *Core* are all consistent. Applying that reasoning to the present case, the claims against the defendants accrued between June 1, 2010 and August 3, 2010, and FERC was required to file this action by June 1, 2015 in order to satisfy the statute of limitations with respect to the entirety of the alleged Manipulation Period.

Second, under a competing line of cases, the First Circuit in *United States v. Meyer*, 808 F.2d 912 (1st Cir. 1987), declined to adopt *Core*'s approach. Rather than support FERC's position, however, *Meyer* eviscerates it. The *Meyer* court held that where "adjudicatory administrative proceedings" are a statutory precondition to filing a civil penalty enforcement action in federal district court, § 2642's limitations period does not begin to run until the

administrative proceedings have concluded and there is a "final" agency decision. 808 F.2d at 921-22. FERC has previously called *Meyer* "the leading case on this issue," and argued that it supports the agency's position. *See* Mem. of Law in Supp. of FERC's Opp. to Mot. to Dismiss of Defs. Chen, et al. at 8 (ECF No. 29). FERC is mistaken.

Meyer, like *Core*, involved claimed violations of the Export Administration Act ("EAA"). Following an administrative enforcement proceeding before an ALJ, the government imposed a civil penalty. After Meyer refused to pay, the government commenced an enforcement action. The district court dismissed the action as time barred, but the First Circuit reversed, holding that where "mandatory administrative adjudication" is a statutory prerequisite to a federal district court enforcement action, the limitations period under § 2462 does not begin to run until the agency adjudication is final. *Meyer*, 808 F.2d at 920-21. Thus, under *Meyer*, if the statute authorizing a penalty requires a mandatory administrative adjudication of penalty liability, followed by a federal district court action for recovery after the final administrative order, the government's claims are timely if the administrative adjudication is commenced within five years of the alleged violations. A second five-year limitations period for filing the collection action begins after the administrative proceeding has ended.

In so holding, the First Circuit drew a distinction that goes to the heart of this case. *Meyer* pointedly distinguished between: (1) statutes providing for mandatory agency adjudication and (2) statutes that provide for the agency to make prosecutorial determinations:

> Administrative determinations of [the prosecutorial] ilk, however necessary they may be to the prosecution of enforcement actions, are not in any sense adjudicative. At bottom, they comprise nothing more or less than decisions to bring suit. In significant contrast to the adjudicative administrative proceedings required before EAA penalties may be imposed and enforced, these determinations fall entirely within the suzerainty of the government. Were the statute of limitations to run against, say, an F.T.C. action, the Commission would have only its own indecision to blame. The EAA analogue to this kind of administrative prerequisite is not the imposition of a statutory penalty by an ALJ

> after notice, discovery, and hearing; rather, it is the Department's initial issuance of a charging letter. No one disputes that the limitations period on wholly administrative action runs from the time of the underlying violation rather than from the government's decision to prosecute the charge. Indeed, if statutes of limitations did not begin running until a party resolved to bring suit or otherwise take affirmative action to vindicate its rights, no statute of limitations would ever lapse; the promise of repose would be as empty as a beggar's purse. *To liken prosecutorial decisionmaking to mandatory administrative adjudication is to compare plums with pomegranates*.

Id. at 920-21 (emphasis added).[7]

Under FPA § 31's Alternate Option, and in stark contrast to *Meyer*, FERC was *not* statutorily authorized to adjudicate the defendants' liability. While that has been our position throughout this case, it was a disputed issue prior to the Court's December 2017 Memorandum Opinion. Now that this Court, like the court in *Barclays*, has defined the respective roles of the agency and the Court under the FPA's Alternate Option, *Meyer* confirms that none of FERC's actions prior to the commencement of this civil action are relevant for purposes of applying § 2642. The limitations period began to run at the time of the alleged violations, and the only "action, suit or proceeding" that satisfies § 2642 is this action, which was commenced more than five years after all but four of the 64 trading days at issue.

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[7] The Sixth, Seventh, and Eighth Circuits have similarly held that where the statute authorizing the penalty provides for administration adjudication of penalty liability, resulting in a final order, the limitations period for a subsequent enforcement or collection action begins after the administrative proceeding has concluded. *See SEC v. Mohn*, 465 F.3d 647, 654 (6th Cir. 2006) (after civil penalty was administratively imposed and affirmed in a final SEC order, and SEC sought to recover penalty in federal court, Seventh Circuit held that the SEC's case was a "collection action," and that "a claim accrues and the period of limitations begins to run on any collection proceeding to which § 2462 applies once the underlying administrative action establishing liability becomes final"); *U.S. Dep't of Labor v. Old Ben Coal Co*., 676 F.2d 259 (7th Cir. 1982) (after an administrative hearing and a "final" order assessing civil penalties, the subsequent federal district court enforcement action was timely either because § 2642 did not apply or because "the limitations period begins to run when the administrative order becomes final"); *U.S. v. Godbout-Bandal*, 232 F.3d 637, 640 (8th Cir. 2000) ("[W]here an Act which authorizes the assessment of a civil penalty also provides for an administrative procedure for assessing that penalty, the statute of limitations period set out in § 2462 will not begin to run until that administrative process has resulted in a final determination.").

* * * * *

In sum, FERC's argument fails under the plain meaning of 28 U.S.C. § 2462 and FPA § 31. It fails under *Gabelli*. It fails under *3M*. It fails under *Core*—and, by analogy, under *Lovknit*, *Lance*, and *Unexcelled*. And it fails under *Meyer* and similar cases. The passage of five years bars FERC's claim for penalties for alleged violations prior to July 31, 2010, regardless of FERC's extra-statutory show-cause-order process.

II. THERE IS NO STATUTORY BASIS FOR IMPOSING DISGORGEMENT IN THIS FPA § 31 ACTION

In its Assessment Order, FERC purported to order the defendants (collectively) to pay disgorgement of $4,718,784. Assessment Order at P 1. In the First Amended Complaint, FERC requested that this Court enter an order and judgment requiring the defendants to pay that disgorgement amount. Am. Comp. ¶¶ 11, 112. FERC's disgorgement claims should be dismissed because FERC has no authority to order disgorgement itself, and no authority to seek disgorgement in this FPA § 31 civil penalty action, where the Court's jurisdiction is expressly limited by FPA § 31.

This argument follows a provocative footnote in the Supreme Court's recent *Kokesh* decision that calls into question agency efforts to obtain disgorgement remedies in federal district court enforcement actions. In *Kokesh*, the Supreme Court *sua sponte* raised, but did not resolve, the issue of federal district court authority to order disgorgement in SEC cases: "Nothing in this opinion should be interpreted as an opinion on whether courts possess authority to order disgorgement in SEC enforcement proceedings or on whether courts have properly applied disgorgement principles in this context." *Kokesh*, 137 S. Ct. at 1642 n.3. The question raised in *Kokesh* bears on this case because FPA § 31 dictates the jurisdictional scope of this action for civil penalties, but makes no mention of disgorgement.

Under FPA § 31, this is "an action . . . for an order affirming the *assessment of the civil penalty*." FPA § 31(d)(3)(B) (emphasis added). In this action, the Court "shall have jurisdiction to enter a judgment enforcing, modifying, and enforcing as so modified, or setting aside in whole or in Part, such *assessment*." *Id.* (emphasis added); *see also* FPA section 316A, 16 U.S.C. § 825o-1 ("Any person who violates any provision of [FPA part II] or any provision of any rule or order thereunder shall be subject to a *civil penalty* . . . ."). And FPA § 31 says nothing whatsoever about disgorgement.

By way of contrast, the Commodity Futures Trading Commission ("CFTC") gained express statutory authority to seek equitable remedies in federal district court actions when Congress passed the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) ("Dodd-Frank"). Among other things, Dodd-Frank amended the Commodity Exchange Act and added the following provision:

> (3) Equitable remedies. In any action brought under this section, the Commission may seek, and the court may impose, on a proper showing, on any person found in the action to have committed any violation, equitable remedies including:
>
> (A) restitution to persons who have sustained losses proximately caused by such violation (in the amount of such losses); and
>
> (B) disgorgement of gains received in connection with such violation.

7 U.S.C. § 13a-1(d)(3). FERC can point to no statutory grant that is comparable to the CFTC's express authority to seek a federal district court order requiring disgorgement or restitution.[8]

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[8] Congress also has granted express statutory disgorgement powers to the SEC, but only in cases prosecuted administratively. Historically, the SEC had limited remedial authority and relied on the equity power of district courts to pursue claims for disgorgement in federal court actions. *See Kokesh*, 137 S. Ct. at 1640. Over the years, circuit courts addressing this issue have held that federal district courts possess the authority to impose disgorgement remedies in SEC enforcement cases. *See, e.g.*, *SEC v. Tex. Gulf Sulphur Co.*, 446 F.2d 1301, 1308 (2d Cir. 1971) ("SEC may seek other than injunctive relief in order to effectuate the purposes of the [Securities *(cont'd)*

Unable to identify any express statutory grant of authority to order disgorgement, FERC has claimed that it possesses this authority pursuant to FPA § 309, 16 U.S.C § 825h. Am. Comp. ¶ 11. Under that provision, "[t]he Commission shall have power to perform any and all acts . . . as it may find necessary or appropriate to carry out the provisions of [the FPA]." *Id.* We acknowledge that several courts over the years have endorsed that view. *See generally Pub. Util. Comm'n of the State of Cal. v. FERC*, 462 F.3d 1027 (9th Cir. 2006); *Coastal Oil & Gas Corp. v. FERC*, 782 F.2d 1249, 1253 (5th Cir. 1986) (construing comparable Natural Gas Act provision granting FERC "any and all acts" authority comparable to FPA § 309). But they do not, and should not, apply here.

First, FERC has various forms of statutory authority under the FPA. But it cannot use § 31 to invoke this Court's jurisdiction to impose those other forms of authority. It can use § 31 only to seek imposition of civil penalties, because that is all § 31 authorizes this court to decide. So even assuming, for the sake of argument, that FERC does possess authority to impose disgorgement administratively (which it does not), that does not affect the analysis here.

Any contrary argument would prove too much. If FERC could use § 31 as an empty vessel into which it may pour various forms of requested relief—beyond civil penalties—there

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Exchange Act of 1934], so long as such relief is remedial relief and is not a penalty assessment."). *Kokesh* calls that view sharply into question.

In 1990, Congress amended the SEC's governing statutes and, among other things, expressly granted the SEC authority to order disgorgement in *administrative* proceedings:

> In any proceeding in which the Commission or the appropriate regulatory agency may impose a penalty under this section, the Commission or the appropriate regulatory agency may enter an order requiring accounting and disgorgement, including reasonable interest.

15 U.S.C. § 78u–2(e); *see also id.* § 78u–3(e) ("In any cease-and-desist proceeding . . . the Commission may enter an order requiring accounting and disgorgement, including reasonable interest."). FERC has no comparable express statutory authority.

would be no limiting principle defining this Court's jurisdiction. FERC could just add whatever remedy it might want into a penalty assessment order and ask a federal district court to affirm that remedy. That cannot be the law.

The Court need not reach the question whether FERC has authority under existing case law to *administratively* impose disgorgement in order to conclude there is no authority for imposing disgorgement in this civil penalty action. This case concerns judicial, not agency, authority. In any event, however, there is no controlling Supreme Court or Fourth Circuit precedent on whether FERC can order disgorgement pursuant to FPA § 309. And we contend that the decisions from other circuits on that issue were wrongly decided—particularly after *Kokesh*'s footnote flagging the question whether the SEC could seek disgorgement in court to begin with. Notably, a number of courts have recognized that the character of FPA § 309, and similar statutory provisions, is "implementary" rather than "substantive." *New England Power Co. v. FPC*, 467 F.2d 425, 430 (D.C. Cir. 1972), *aff'd*, 415 U.S. 345 (1974); *see also Boston Ed. Co. v. FERC*, 856 F.2d 361 (1st Cir. 1988). "[FPA § 309, and a similar Natural Gas Act provision] merely augment existing powers conferred upon the agency by Congress, they do not confer independent authority to act." *New England Power*, 467 F.2d at 430-31. Section 309 lists a number of "acts" that might be considered "necessary or appropriate," but they all are ministerial in nature; examples include defining terms and creating templates for forms. 16 U.S.C § 825h.

In stark contrast, imposing disgorgement administratively—not to mention asking a federal district court to do so—is a substantive power, not a mere detail of implementation. Otherwise Congress would not have expressly granted other agencies authority to administratively impose the remedy of disgorgement or to seek that remedy in court.

We expect that FERC may argue that, even if the agency does not possess express authority to order or seek disgorgement, this court has inherent authority to order disgorgement. But FPA § 31 limits the Court's jurisdiction to the civil penalty assessment. The limited scope of § 31, the lack of any express statutory grant of authority for FERC to seek disgorgement in this action, and the lack of any express statutory authority even for FERC to administratively order disgorgement, together all compel the conclusion that FERC's disgorgement claims must be dismissed.

III. ALTERNATIVELY, FERC'S DISGORGEMENT CLAIMS ARE TIME-BARRED TO THE SAME EXTENT AS THE CIVIL PENALTY CLAIMS

The Supreme Court ruled in *Kokesh* that "SEC disgorgement constitutes a penalty," and that it therefore is subject to the § 2462's five-year limitations period. 137 S. Ct. 1635, 1642, 1643-44. To the extent that disgorgement remains at issue, FERC's disgorgement claims here are likewise subject to § 2462.

We expect FERC to argue that the disgorgement the agency purported to order in this case was remedial (not punitive) because FERC directed that the disgorgement be "distribute[d]" to PJM. Am. Comp. ¶ 11 (citing Assessment Order). There are several fatal flaws with that position. Because some of those flaws may raise factual issues that may benefit from further development, we leave them for a later point in time, if they remain relevant. Here we address certain threshold issues raised by *Kokesh*, as applied to the disgorgement directive set forth in the Assessment Order.

In *Kokesh*, the Court analyzed the nature of a penalty subject to § 2462: "'Penalties,' in the context of 2462 'go beyond compensation, are intended to punish, and label defendants as wrongdoers.'" *Id*. at 1643 (citing *Gabelli*, 568 U.S. at 451-52). The Court also noted that

"sanctions frequently serve more than one purpose," and concluded that even though SEC sanctions may sometimes serve a compensatory goal, they nevertheless are punitive:

> A civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.

Id. at 1645 (quoting *Austin v. United States*, 509 U.S. 602, 610 (1993)).

FERC's disgorgement directive, by its own terms, demonstrates that it is a punishment within the *Kokesh* Court's analysis because (among other things) FERC purports to hold the defendants jointly and severally liable for the disgorgement ordered against other defendants:

> [W]e agree with OE Staff's recommendation to hold HEEP, CU Fund and Dr. Chen jointly and severally liable for HEEP's and CU Fund's required disgorgement payments, and to hold Powhatan, HEEP, and Dr. Chen jointly and severally liable for Powhatan's required disgorgement payment. We find that applying joint and several liability is appropriate where, as occurred here, multiple respondents collaborate or have a close relationship in executing the fraud.

Assessment Order at P 191.

FERC expressly seeks to hold the various defendants responsible for disgorgement ordered against *other defendants*. This is not simply remedial because, in the words of *Kokesh*, it does not "simply return[] the defendant to the place he would have occupied had he not broken the law." 137 S. Ct. at 1644. It is, instead, a *punishment*, because it "exceeds the profits [allegedly] gained as a result of the [alleged] violation." *Id.* In *Kokesh* itself, disgorgement was punitive in part because the defendant was being required to disgorge funds he had paid out to other people. *Id.* at 1641. *Kokesh* also cited another example where disgorgement was not simply remedial—where, in an insider trading case, "a tipper" is required "to disgorge his tippees' profits." *Id.* at 1644-45. These circumstances are indistinguishable from making the various defendants jointly and severally liable for one another's disgorgement. Each would be responsible for disgorging funds allocated to another.

The disgorgement sought here therefore is punitive in nature, and is subject to § 2462. FERC itself has confirmed this, stating that "[t]he purpose of disgorgement is to nullify the value of gains acquired through misconduct"—meaning to punish a wrongdoer rather than make whole any third party. *Enforcement of Statutes, Orders, Rules, and Regulations; Policy Statement on Enforcement*, 113 FERC ¶ 61,068 at P 19 (2005).[9]

Finally, FERC's disgorgement claim also is subject to § 2462 because, by its plain terms, the limitations bar applies to actions for "enforcement of any civil fine, penalty, or *forfeiture*, pecuniary or otherwise." 28 U.S.C. § 2462. As the Eleventh Circuit held in *SEC v. Graham*, 823 F.3d 1357 (11th Cir. 2016), "for the purposes of § 2462 forfeiture and disgorgement are *effectively synonyms*." *Id*. at 1363 (emphasis added).[10]

CONCLUSION

For these reasons, the defendants respectfully submit that the Court should partially dismiss FERC's First Amended Complaint, with prejudice, as to: (1) civil penalty claims for conduct prior to July 31, 2010; (2) all disgorgement claims; and (alternatively) (3) disgorgement claims for conduct prior to July 31, 2010.

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[9] In 2008, FERC issued a Revised Policy Statement on Enforcement *Enforcement of Statutes, Regulations and Orders*, 123 FERC ¶ 61,156 (2008), but stated that its policy on disgorgement had "not altered" in the intervening period. *See id.* at P 43.

[10] The Supreme Court in *Kokesh* cited *Graham* as representing one side of the circuit split over whether disgorgement is subject to § 2462. 137 S. Ct. at 1641 n.2. However, *Kokesh* did not analyze whether disgorgement is a forfeiture. Rather, as discussed above, it held that disgorgement is covered by § 2462 because it is a "penalty." We think it is both a penalty and a forfeiture.

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2018, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which shall send notification of such filing to counsel receiving notices in this matter, including the following counsel of record:

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

FEDERAL ENERGY REGULATORY COMMISSION, Plaintiff, v. POWHATAN ENERGY FUND, LLC, et al., Defendants.	)	Case No.: 3:15-CV-00452-MHL

PROPOSED ORDER

AND NOW, this ____ day of _____, 201__, upon consideration of the Defendants' Motion to Dismiss in Part First Amended Complaint, the opposition thereto of plaintiff Federal Energy Regulatory Commission, and the defendants' reply, it is hereby ORDERED that the First Amended Complaint shall be and hereby is PARTIALLY DISMISSED with prejudice, as described in the Court's accompanying Memorandum Opinion.

_____
Honorable M. Hannah Lauck
United States District Court Judge