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Liu v. Securities And Exchange Commission, Case No. 18–1501 (2020).
Equitable relief, including disgorgement, is permissible under the Securities Act of 1933, 15 U. S. C. §77a et seq., so long as it does not exceed a wrongdoer's net profit.

Bowling v. U.S. Bank National Association, Case No. 17-11953 (11th Cir. 2020).
Counterclaim defendants may not remove a civil action to federal court under 28 U.S.C. § 1441(a) or § 1441(c).

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Service of a suit to confirm an arbitration award under the Inter-American Convention on Letters Rogatory ("Convention on Letters Rogatory"), Jan. 30, 1975, O.A.S.T.S. No. 43, 1438 U.N.T.S. 288, is accomplished by service under the laws of the host country of the defendant, and accordingly, service on a doorman that is proper under Brazilian law is sufficient to support service in federal court.

Russell v. Wells Fargo Bank, N.A., Case No. 1D18-5128 (Fla. 1st DCA 2020).
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Allied Tube and Conduit Corporation v. Latitude on the River Condominium Association, Inc., Case Nos. 3D19-2054; 3D19-2053; 3D19-2051; 3D19-2048; 3D19-2046; 3D19-2044 (Fla. 3d DCA 2020).
Florida Rule of Civil Procedure 1.221 permits a class action by a condominium association for construction defects located physically within units, rather than in the common elements, if the defect is prevalent throughout the building.

Dawson v. Hernandez, Case No. 4D18-1588 (Fla. 4th DCA 2020).
A trial court can amend a final foreclosure judgment – even after the borrower redeems the property – to include additional attorney's fees.

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Syllabus

SUPREME COURT OF THE UNITED STATES

Syllabus

LIU ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 18–1501. Argued March 3, 2020—Decided June 22, 2020

To punish securities fraud, the Securities and Exchange Commission is authorized to seek "equitable relief" in civil proceedings, 15 U. S. C. §78u(d)(5). In *Kokesh* v. *SEC*, 581 U. S. ___, this Court held that a disgorgement order in a Securities and Exchange Commission (SEC) enforcement action constitutes a "penalty" for purposes of the applicable statute of limitations. The Court did not, however, address whether disgorgement can qualify as "equitable relief" under §78u(d)(5), given that equity historically excludes punitive sanctions.

Petitioners Charles Liu and Xin Wang solicited foreign nationals to invest in the construction of a cancer-treatment center, but, an SEC investigation revealed, misappropriated much of the funds in violation of the terms of a private offering memorandum. The SEC brought a civil action against petitioners, seeking, as relevant here, disgorgement equal to the full amount petitioners had raised from investors. Petitioners argued that the disgorgement remedy failed to account for their legitimate business expenses, but the District Court disagreed and ordered petitioners jointly and severally liable for the full amount. The Ninth Circuit affirmed.

Held: A disgorgement award that does not exceed a wrongdoer's net profits and is awarded for victims is equitable relief permissible under §78u(d)(5). Pp. 5–20.

(a) In interpreting statutes that provide for "equitable relief," this Court analyzes whether a particular remedy falls into "those categories of relief that were *typically* available in equity." *Mertens* v. *Hewitt Associates*, 508 U. S. 248, 256. Relevant here are two principles of equity jurisprudence. Equity practice has long authorized courts to strip wrongdoers of their ill-gotten gains. And to avoid transforming that

remedy into a punitive sanction, courts restricted it to an individual wrongdoer's net profits to be awarded for victims. Pp. 5–14.

(1) Whether it is called restitution, an accounting, or disgorgement, the equitable remedy that deprives wrongdoers of their net profits from unlawful activity reflects both the foundational principle that "it would be inequitable that [a wrongdoer] should make a profit out of his own wrong," *Root* v. *Railway Co.,* 105 U. S. 189, 207, and the countervailing equitable principle that the wrongdoer should not be punished by "pay[ing] more than a fair compensation to the person wronged," *Tilghman* v. *Proctor,* 125 U. S. 136, 145–146. The remedy has been a mainstay of equity courts, and is not limited to cases involving a breach of trust or fiduciary duty, see *Root,* 105 U. S., at 214. Pp. 6–9.

(2) To avoid transforming a profits award into a penalty, equity courts restricted the remedy in various ways. A constructive trust was often imposed on wrongful gains for wronged victims. See, *e.g.*, *Burdell* v. *Denig,* 92 U. S. 716, 720. Courts also generally awarded profits-based remedies against individuals or partners engaged in concerted wrongdoing, not against multiple wrongdoers under a joint-and-several liability theory. See, *e.g.*, *Ambler* v. *Whipple*, 20 Wall. 546, 559. Finally, courts limited awards to the net profits from wrongdoing after deducting legitimate expenses. See, *e.g.*, *Rubber Co.* v. *Goodyear*, 9 Wall. 788, 804. Pp. 9–12.

(3) Congress incorporated these longstanding equitable principles into §78u(d)(5), but courts have occasionally awarded disgorgement in ways that test the bounds of equity practice. Petitioners claim that disgorgement is necessarily a penalty under *Kokesh*, and thus not available at equity. But *Kokesh* expressly declined to reach that question. The Government contends that the SEC's interpretation has Congress' tacit support. But Congress does not enlarge the breadth of an equitable, profit-based remedy simply by using the term "disgorgement" in various statutes. Pp. 12–14.

(b) Petitioners briefly claim that their disgorgement award crosses the bounds of traditional equity practice by failing to return funds to victims, imposing joint-and-several liability, and declining to deduct business expenses from the award. Because the parties did not fully brief these narrower questions, the Court does not decide them here. But certain principles may guide the lower courts' assessment of these arguments on remand. Pp. 14–20.

(1) Section 78u(d)(5) provides limited guidance as to whether the practice of depositing a defendant's gains with the Treasury satisfies its command that any remedy be "appropriate or necessary for the benefit of investors," and the equitable nature of the profits remedy gen-

erally requires the SEC to return a defendant's gains to wronged investors. The parties, however, do not identify a specific order in this case directing any proceeds to the Treasury. If one is entered on remand, the lower courts may evaluate in the first instance whether that order would be for the benefit of investors and consistent with equitable principles. Pp. 14–17.

(2) Imposing disgorgement liability on a wrongdoer for benefits that accrue to his affiliates through joint-and-several liability runs against the rule in favor of holding defendants individually liable. See *Belknap* v. *Schild*, 161 U. S. 10, 25–26. The common law did, however, permit liability for partners engaged in concerted wrongdoing. See, *e.g.*, *Ambler*, 20 Wall., at 559. On remand, the Ninth Circuit may determine whether the facts are such that petitioners can, consistent with equitable principles, be found liable for profits as partners in wrongdoing or whether individual liability is required. Pp. 17–18.

(3) Courts may not enter disgorgement awards that exceed the gains "made upon any business or investment, when both the receipts and payments are taken into the account." *Goodyear*, 9 Wall., at 804. When the "entire profit of a business or undertaking" results from the wrongdoing, a defendant may be denied "inequitable deductions." *Root*, 105 U. S., at 203. Accordingly, courts must deduct legitimate expenses before awarding disgorgement under §78u(d)(5). The District Court below did not ascertain whether any of petitioners' expenses were legitimate. On remand, the lower courts should examine whether including such expenses in a profits-based remedy is consistent with the equitable principles underlying §78u(d)(5). Pp. 18–20.

754 Fed. Appx. 505, vacated and remanded.

SOTOMAYOR, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, BREYER, ALITO, KAGAN, GORSUCH, and KAVANAUGH, JJ., joined. THOMAS, J., filed a dissenting opinion.

SUPREME COURT OF THE UNITED STATES

No. 18–1501

CHARLES C. LIU, ET AL., PETITIONERS *v.* SECURITIES AND EXCHANGE COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 22, 2020]

JUSTICE SOTOMAYOR delivered the opinion of the Court.

In *Kokesh* v. *SEC*, 581 U. S. ___ (2017), this Court held that a disgorgement order in a Securities and Exchange Commission (SEC) enforcement action imposes a "penalty" for the purposes of 28 U. S. C. §2462, the applicable statute of limitations. In so deciding, the Court reserved an antecedent question: whether, and to what extent, the SEC may seek "disgorgement" in the first instance through its power to award "equitable relief" under 15 U. S. C. §78u(d)(5), a power that historically excludes punitive sanctions. The Court holds today that a disgorgement award that does not exceed a wrongdoer's net profits and is awarded for victims is equitable relief permissible under §78u(d)(5). The judgment is vacated, and the case is remanded for the courts below to ensure the award was so limited.

I

A

Congress authorized the SEC to enforce the Securities Act of 1933, 48 Stat. 74, as amended, 15 U. S. C. §77a *et seq.*, and the Securities Exchange Act of 1934, 48 Stat. 881,

as amended, 15 U. S. C. §78a *et seq*., and to punish securities fraud through administrative and civil proceedings. In administrative proceedings, the SEC can seek limited civil penalties and "disgorgement." See §77h–1(e) ("In any cease-and-desist proceeding under subsection (a), the Commission may enter an order requiring accounting and disgorgement"); see also §77h–1(g) ("Authority to impose money penalties"). In civil actions, the SEC can seek civil penalties and "equitable relief." See, *e.g.*, §78u(d)(5) ("In any action or proceeding brought or instituted by the Commission under any provision of the securities laws, . . . any Federal court may grant . . . any equitable relief that may be appropriate or necessary for the benefit of investors"); see also §78u(d)(3) ("Money penalties in civil actions" (quotation modified)).

Congress did not define what falls under the umbrella of "equitable relief." Thus, courts have had to consider which remedies the SEC may impose as part of its §78u(d)(5) powers.

Starting with *SEC* v. *Texas Gulf Sulphur Co.*, 446 F. 2d 1301 (CA2 1971), courts determined that the SEC had authority to obtain what it called "restitution," and what in substance amounted to "profits" that "merely depriv[e]" a defendant of "the gains of . . . wrongful conduct." *Id.*, at 1307–1308. Over the years, the SEC has continued to request this remedy, later referred to as "disgorgement,"[1] and

[1] Courts have noted the relatively recent vintage of the term "disgorgement." See, *e.g.*, *SEC* v. *Cavanaugh*, 445 F. 3d 105, 116, n. 24 (CA2 2006). The dissent contends that this recency in terminology alone removes disgorgement from the class of traditional equitable remedies, *post*, at 4 (opinion of THOMAS, J.), despite seeming to recognize disgorgement's parallels to restitution-based awards well within that class, *post*, at 4–5. It is no surprise that the dissent notes such parallels, given this Court's acknowledgment that "disgorgement of improper profits" is "a remedy only for restitution" that is "traditionally considered . . . equitable." *Tull* v. *United States*, 481 U. S. 412, 424 (1987); see also *infra*, at 7.

courts have continued to award it. See *SEC* v. *Commonwealth Chemical Securities, Inc.*, 574 F. 2d 90, 95 (CA2 1978) (explaining that, when a court awards "[d]isgorgement of profits in an action brought by the SEC," it is "exercising the chancellor's discretion to prevent unjust enrichment"); see also *SEC* v. *Blatt*, 583 F. 2d 1325, 1335 (CA5 1978); *SEC* v. *Washington Cty. Util. Dist.*, 676 F. 2d 218, 227 (CA6 1982).

In *Kokesh*, this Court determined that disgorgement constituted a "penalty" for the purposes of 28 U. S. C. §2462, which establishes a 5-year statute of limitations for "an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture." The Court reached this conclusion based on several considerations, namely, that disgorgement is imposed as a consequence of violating public laws, it is assessed in part for punitive purposes, and in many cases, the award is not compensatory. 581 U. S., at ___–___ (slip op., at 7–9). But the Court did not address whether a §2462 penalty can nevertheless qualify as "equitable relief" under §78u(d)(5), given that equity never "lends its aid to enforce a forfeiture or penalty." *Marshall* v. *Vicksburg*, 15 Wall. 146, 149 (1873). The Court cautioned, moreover, that its decision should not be interpreted "as an opinion on whether courts possess authority to order disgorgement in SEC enforcement proceedings." *Kokesh*, 581 U. S., at ___, n. 3 (slip op., at 5, n. 3). This question is now squarely before the Court.

The dissent also observes the solid equitable roots of an accounting for profits, *post*, at 3; accord, *infra*, at 6 (discussing the equitable origins of the accounting remedy), a remedy closely resembling disgorgement, see *infra*, at 8–9. In any event, casting aside a form of relief solely "based on the particular label affixed to [it] would 'elevate form over substance,'" *Aetna Health Inc.* v. *Davila*, 542 U. S. 200, 214 (2004), leaving unresolved the question before us: whether the underlying profits-based award conforms to equity practice.

B

The SEC action and disgorgement award at issue here arise from a scheme to defraud foreign nationals. Petitioners Charles Liu and his wife, Xin (Lisa) Wang, solicited nearly $27 million from foreign investors under the EB–5 Immigrant Investor Program (EB–5 Program). 754 Fed. Appx. 505, 506 (CA9 2018) (case below). The EB–5 Program, administered by the U. S. Citizenship and Immigration Services, permits noncitizens to apply for permanent residence in the United States by investing in approved commercial enterprises that are based on "proposals for promoting economic growth." See USCIS, EB–5 Immigrant Investor Program, https://www.uscis.gov/eb-5. Investments in EB–5 projects are subject to the federal securities laws.

Liu sent a private offering memorandum to prospective investors, pledging that the bulk of any contributions would go toward the construction costs of a cancer-treatment center. The memorandum specified that only amounts collected from a small administrative fee would fund "'legal, accounting and administration expenses.'" 754 Fed. Appx., at 507. An SEC investigation revealed, however, that Liu spent nearly $20 million of investor money on ostensible marketing expenses and salaries, an amount far more than what the offering memorandum permitted and far in excess of the administrative fees collected. 262 F. Supp. 3d 957, 960–964 (CD Cal. 2017). The investigation also revealed that Liu diverted a sizable portion of those funds to personal accounts and to a company under Wang's control. *Id.*, at 961, 964. Only a fraction of the funds were put toward a lease, property improvements, and a proton-therapy machine for cancer treatment. *Id.*, at 964–965.

The SEC brought a civil action against petitioners, alleging that they violated the terms of the offering documents by misappropriating millions of dollars. The District Court

found for the SEC, granting an injunction barring petitioners from participating in the EB–5 Program and imposing a civil penalty at the highest tier authorized. *Id.*, at 975, 976. It also ordered disgorgement equal to the full amount petitioners had raised from investors, less the $234,899 that remained in the corporate accounts for the project. *Id.*, at 975–976.

Petitioners objected that the disgorgement award failed to account for their business expenses. The District Court disagreed, concluding that the sum was a "reasonable approximation of the profits causally connected to [their] violation." *Ibid.* The court ordered petitioners jointly and severally liable for the full amount that the SEC sought. App. to Pet. for Cert. 62a.

The Ninth Circuit affirmed. It acknowledged that *Kokesh* "expressly refused to reach" the issue whether the District Court had the authority to order disgorgement. 754 Fed. Appx., at 509. The court relied on Circuit precedent to conclude that the "proper amount of disgorgement in a scheme such as this one is the entire amount raised less the money paid back to the investors." *Ibid.*; see also *SEC* v. *JT Wallenbrock & Assocs.*, 440 F. 3d 1109, 1113, 1114 (CA9 2006) (reasoning that it would be "unjust to permit the defendants to offset . . . the expenses of running the very business they created to defraud . . . investors").

We granted certiorari to determine whether §78u(d)(5) authorizes the SEC to seek disgorgement beyond a defendant's net profits from wrongdoing. 589 U. S. ___ (2019).

II

Our task is a familiar one. In interpreting statutes like §78u(d)(5) that provide for "equitable relief," this Court analyzes whether a particular remedy falls into "those categories of relief that were *typically* available in equity." *Mertens* v. *Hewitt Associates*, 508 U. S. 248, 256 (1993); see also *CIGNA Corp.* v. *Amara*, 563 U. S. 421, 439 (2011);

Montanile v. *Board of Trustees of Nat. Elevator Industry Health Benefit Plan*, 577 U. S. 136, 142 (2016). The "basic contours of the term are well known" and can be discerned by consulting works on equity jurisprudence. *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U. S. 204, 217 (2002).

These works on equity jurisprudence reveal two principles. First, equity practice long authorized courts to strip wrongdoers of their ill-gotten gains, with scholars and courts using various labels for the remedy. Second, to avoid transforming an equitable remedy into a punitive sanction, courts restricted the remedy to an individual wrongdoer's net profits to be awarded for victims.

A

Equity courts have routinely deprived wrongdoers of their net profits from unlawful activity, even though that remedy may have gone by different names. Compare, *e.g.*, 1 D. Dobbs, Law of Remedies §4.3(5), p. 611 (1993) ("Accounting holds the defendant liable for his profits"), with *id.*, §4.1(1), at 555 (referring to "restitution" as the relief that "measures the remedy by the defendant's gain and seeks to force disgorgement of that gain"); see also Restatement (Third) of Restitution and Unjust Enrichment §51, Comment *a*, p. 204 (2010) (Restatement (Third)) ("Restitution measured by the defendant's wrongful gain is frequently called 'disgorgement.' Other cases refer to an 'accounting' or an 'accounting for profits'"); 1 J. Pomeroy, Equity Jurisprudence §101, p. 112 (4th ed. 1918) (describing an accounting as an equitable remedy for the violation of strictly legal primary rights).

No matter the label, this "profit-based measure of unjust enrichment," Restatement (Third) §51, Comment *a*, at 204, reflected a foundational principle: "[I]t would be inequitable that [a wrongdoer] should make a profit out of his own wrong," *Root* v. *Railway Co.,* 105 U. S. 189, 207 (1882). At

the same time courts recognized that the wrongdoer should not profit "by his own wrong," they also recognized the countervailing equitable principle that the wrongdoer should not be punished by "pay[ing] more than a fair compensation to the person wronged." *Tilghman* v. *Proctor*, 125 U. S. 136, 145–146 (1888).

Decisions from this Court confirm that a remedy tethered to a wrongdoer's net unlawful profits, whatever the name, has been a mainstay of equity courts. In *Porter* v. *Warner Holding Co.*, 328 U. S. 395 (1946), the Court interpreted a section of the Emergency Price Control Act of 1942 that encompassed a "comprehensiv[e]" grant of "equitable jurisdiction." *Id.*, at 398. "[O]nce [a District Court's] equity jurisdiction has been invoked" under that provision, the Court concluded, "a decree compelling one to disgorge profits . . . may properly be entered." *Id.*, at 398–399.

Subsequent cases confirm the "'protean character' of the profits-recovery remedy." *Petrella* v. *Metro-Goldwyn-Mayer, Inc.*, 572 U. S. 663, 668, n. 1 (2014). In *Tull* v. *United States*, 481 U. S. 412 (1987), the Court described "disgorgement of improper profits" as "traditionally considered an equitable remedy." *Id.*, at 424. While the Court acknowledged that disgorgement was a "limited form of penalty" insofar as it takes money out of the wrongdoer's hands, it nevertheless compared disgorgement to restitution that simply "'restor[es] the status quo,'" thus situating the remedy squarely within the heartland of equity. *Ibid.*[2]

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[2] The dissent acknowledges that this Court has "referred to disgorgement as an equitable remedy in some of its prior decisions." *Post*, at 6 (citing *Feltner* v. *Columbia Pictures Television, Inc.*, 523 U. S. 340, 352 (1998)). While the dissent attempts to discount those cases for having "merely referred to the term" only "in passing," *post*, at 6, those cases expressly "characterized as equitable . . . actions for disgorgement of improper profits" in analyzing whether certain remedies were traditionally available in equity, *Feltner*, 523 U. S., at 352 (citing *Teamsters* v. *Terry*, 494 U. S. 558, 570 (1990) ("characteriz[ing] damages as equitable where they are restitutionary, such as in 'action[s] for disgorgement of improper

In *Great-West*, the Court noted that an "accounting for profits" was historically a "form of equitable restitution." 534 U. S., at 214, n. 2. And in *Kansas* v. *Nebraska*, 574 U. S. 445 (2015), a "'basically equitable'" original jurisdiction proceeding, the Court ordered disgorgement of Nebraska's gains from exceeding its allocation under an interstate water compact. *Id.*, at 453, 475.

Most recently, in *SCA Hygiene Products Aktiebolag* v. *First Quality Baby Products, LLC*, 580 U. S. ___ (2017), the Court canvassed pre-1938 patent cases invoking equity jurisdiction. It noted that many cases sought an "accounting," which it described as an equitable remedy requiring disgorgement of ill-gotten profits. *Id.*, at ___ (slip op., at 11). This Court's "transsubstantive guidance on broad and fundamental" equitable principles, *Romag Fasteners, Inc.* v. *Fossil Group, Inc.*, 590 U. S. ___, ___ (2020) (slip op., at 5), thus reflects the teachings of equity treatises that identify a defendant's net profits as a remedy for wrongdoing.

Contrary to petitioners' argument, equity courts did not limit this remedy to cases involving a breach of trust or of fiduciary duty. Brief for Petitioners 28–29. As petitioners acknowledge, courts authorized profits-based relief in patent-infringement actions where no such trust or special relationship existed. *Id.*, at 29; see also *Root*, 105 U. S., at 214 ("[I]t is nowhere said that the patentee's right to an account is based upon the idea that there is a fiduciary relation created between him and the wrong-doer by the fact of infringement").

Petitioners attempt to distinguish these patent cases by suggesting that an "accounting" was appropriate only because Congress explicitly conferred that remedy by statute in 1870. Brief for Petitioners 29 (citing the Act of July 8, 1870, §55, 16 Stat. 206). But patent law had not previously deviated from the general principles outlined above: This

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profits' "); *Tull*, 481 U. S., at 424).

Court had developed the rule that a plaintiff may "recover the amount of . . . profits that the defendants have made by the use of his invention" through "a series of decisions under the patent act of 1836, which simply conferred upon the courts of the United States general equity jurisdiction . . . in cases arising under the patent laws." *Tilghman*, 125 U. S., at 144. The 1836 statute, in turn, incorporated the substance of an earlier statute from 1819 which granted courts the ability to "proceed according to the course and principles of courts of equity" to "prevent the violation of patent-rights." *Root*, 105 U. S., at 193. Thus, as these cases demonstrate, equity courts habitually awarded profits-based remedies in patent cases well before Congress explicitly authorized that form of relief.

B

While equity courts did not limit profits remedies to particular types of cases, they did circumscribe the award in multiple ways to avoid transforming it into a penalty outside their equitable powers. See *Marshall*, 15 Wall., at 149.

For one, the profits remedy often imposed a constructive trust on wrongful gains for wronged victims. The remedy itself thus converted the wrongdoer, who in many cases was an infringer, "into a trustee, as to those profits, for the owner of the patent which he infringes." *Burdell* v. *Denig,* 92 U. S. 716, 720 (1876). In "converting the infringer into a trustee for the patentee as regards the profits thus made," the chancellor "estimat[es] the compensation due from the infringer to the patentee." *Packet Co.* v. *Sickles*, 19 Wall. 611, 617–618 (1874); see also *Clews* v. *Jamieson*, 182 U. S. 461, 480 (1901) (describing an accounting as involving a "'distribution of the trust moneys among all the beneficiaries who are entitled to share therein'" in an action against the governing committee of a stock exchange).

Equity courts also generally awarded profits-based remedies against individuals or partners engaged in concerted

wrongdoing, not against multiple wrongdoers under a joint-and-several liability theory. See *Ambler* v. *Whipple*, 20 Wall. 546, 559 (1874) (ordering an accounting against a partner who had "knowingly connected himself with and aided in . . . fraud"). In *Elizabeth* v. *Pavement Co.*, 97 U. S. 126 (1878), for example, a city engaged contractors to install pavement in a manner that infringed a third party's patent. The patent holder brought a suit in equity to recover profits from both the city and its contractors. The Court held that only the contractors (the only parties to make a profit) were responsible, even though the parties answered jointly. *Id.*, at 140; see also *ibid.* (rejecting liability for an individual officer who merely acted as an agent of the defendant and received a salary for his work). The rule against joint-and-several liability for profits that have accrued to another appears throughout equity cases awarding profits. See, *e.g.*, *Belknap* v. *Schild*, 161 U. S. 10, 25–26 (1896) ("The defendants, in any such suit, are therefore liable to account for such profits only as have accrued to themselves from the use of the invention, and not for those which have accrued to another, and in which they have no participation"); *Keystone Mfg. Co.* v. *Adams*, 151 U. S. 139, 148 (1894) (reversing profits award that was based not on what defendant had made from infringement but on what third persons had made from the use of the invention); *Jennings* v. *Carson*, 4 Cranch 2, 21 (1807) (holding that an order requiring restitution could not apply to "those who were not in possession of the thing to be restored" and "had no power over it") (citing *Penhallow* v. *Doane's Administrators*, 3 Dall. 54 (1795) (reversing a restitution award in admiralty that ordered joint damages in excess of what each defendant received)).

Finally, courts limited awards to the net profits from wrongdoing, that is, "the gain made upon any business or investment, when both the receipts and payments are taken into the account." *Rubber Co.* v. *Goodyear*, 9 Wall.

788, 804 (1870); see also *Livingston* v. *Woodworth*, 15 How. 546, 559–560 (1854) (restricting an accounting remedy "to the actual gains and profits . . . during the time" the infringing machine "was in operation and during no other period" to avoid "convert[ing] a court of equity into an instrument for the punishment of simple torts"); *Seymour* v. *McCormick*, 16 How. 480, 490 (1854) (rejecting a blanket rule that infringing one component of a machine warranted a remedy measured by the full amounts of the profits earned from the machine); *Mowry* v. *Whitney*, 14 Wall. 620, 649 (1872) (vacating an accounting that exceeded the profits from infringement alone); *Wooden-Ware Co.* v. *United States,* 106 U. S. 432, 434–435 (1882) (explaining that an innocent trespasser is entitled to deduct labor costs from the gains obtained by wrongfully harvesting lumber).

The Court has carved out an exception when the "entire profit of a business or undertaking" results from the wrongful activity. *Root*, 105 U. S., at 203. In such cases, the Court has explained, the defendant "will not be allowed to diminish the show of profits by putting in unconscionable claims for personal services or other inequitable deductions." *Ibid.* In *Goodyear*, for example, the Court affirmed an accounting order that refused to deduct expenses under this rule. The Court there found that materials for which expenses were claimed were bought for the purposes of the infringement and "extraordinary salaries" appeared merely to be "dividends of profit under another name." 9 Wall., at 803; see also *Callaghan* v. *Myers*, 128 U. S. 617, 663–664 (1888) (declining to deduct a defendant's personal and living expenses from his profits from copyright violations, but distinguishing the expenses from salaries of officers in a corporation).

Setting aside that circumstance, however, courts consistently restricted awards to net profits from wrongdoing after deducting legitimate expenses. Such remedies, when assessed against only culpable actors and for victims, fall

comfortably within "those categories of relief that were *typically* available in equity." *Mertens*, 508 U. S., at 256.

C

By incorporating these longstanding equitable principles into §78u(d)(5), Congress prohibited the SEC from seeking an equitable remedy in excess of a defendant's net profits from wrongdoing. To be sure, the SEC originally endeavored to conform its disgorgement remedy to the common-law limitations in §78u(d)(5). Over the years, however, courts have occasionally awarded disgorgement in three main ways that test the bounds of equity practice: by ordering the proceeds of fraud to be deposited in Treasury funds instead of disbursing them to victims, imposing joint-and-several disgorgement liability, and declining to deduct even legitimate expenses from the receipts of fraud.[3] The SEC's disgorgement remedy in such incarnations is in considerable tension with equity practices.

Petitioners go further. They claim that this Court effectively decided in *Kokesh* that disgorgement is necessarily a penalty, and thus not the kind of relief available at equity. Brief for Petitioners 19–20, 22–26. Not so. *Kokesh* expressly declined to pass on the question. 581 U. S., at ___, n. 3 (slip op., at 5, n. 3). To be sure, the *Kokesh* Court evaluated a version of the SEC's disgorgement remedy that seemed to exceed the bounds of traditional equitable principles. But that decision has no bearing on the SEC's ability

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[3] See, *e.g.*, *SEC* v. *Clark*, 915 F. 2d 439, 441, 454 (CA9 1990) (requiring defendant to disgorge the profits that his stockbroker made from unlawful trades); *SEC* v. *Brown*, 658 F. 3d 858, 860–861 (CA8 2011) (*per curiam*) (ordering joint-and-several disgorgement of funds collected from investors and concluding that "'the overwhelming weight of authority hold[s] that securities law violators may not offset their disgorgement liability with business expenses'"); *SEC* v. *Contorinis*, 743 F. 3d 296, 304–306 (CA2 2014) (requiring defendant to disgorge benefits conferred on close associates).

to conform future requests for a defendant's profits to the limits outlined in common-law cases awarding a wrongdoer's net gains.

The Government, for its part, contends that the SEC's interpretation of the equitable disgorgement remedy has Congress' tacit support, even if it exceeds the bounds of equity practice. Brief for Respondent 13–21. It points to the fact that Congress has enacted a number of other statutes referring to "disgorgement."

That argument attaches undue significance to Congress' use of the term. It is true that Congress has authorized the SEC to seek "disgorgement" in administrative actions. 15 U. S. C. §77h–1(e) ("In any cease-and-desist proceeding under subsection (a), the Commission may enter an order requiring accounting and disgorgement"). But it makes sense that Congress would expressly name the equitable powers it grants to an agency for use in administrative proceedings. After all, agencies are unlike federal courts where, "[u]nless otherwise provided by statute, all . . . inherent equitable powers . . . are available for the proper and complete exercise of that jurisdiction." *Porter*, 328 U. S., at 398.

Congress does not enlarge the breadth of an equitable, profit-based remedy simply by using the term "disgorgement" in various statutes. The Government argues that under the prior-construction principle, Congress should be presumed to have been aware of the scope of "disgorgement" as interpreted by lower courts and as having incorporated the (purportedly) prevailing meaning of the term into its subsequent enactments. Brief for Respondent 24. But "that canon has no application" where, among other things, the scope of disgorgement was "far from 'settled.'" *Armstrong* v. *Exceptional Child Center, Inc.*, 575 U. S. 320, 330 (2015).

At bottom, even if Congress employed "disgorgement" as a shorthand to cross-reference the relief permitted by §78u(d)(5), it did not silently rewrite the scope of what the

SEC could recover in a way that would contravene limitations embedded in the statute. After all, such "statutory reference[s]" to a remedy grounded in equity "must, absent other indication, be deemed to contain the limitations upon its availability that equity typically imposes." *Great-West*, 534 U. S., at 211, n. 1. Accordingly, Congress' own use of the term "disgorgement" in assorted statutes did not expand the contours of that term beyond a defendant's net profits—a limit established by longstanding principles of equity.

III

Applying the principles discussed above to the facts of this case, petitioners briefly argue that their disgorgement award is unlawful because it crosses the bounds of traditional equity practice in three ways: It fails to return funds to victims, it imposes joint-and-several liability, and it declines to deduct business expenses from the award. Because the parties focused on the broad question whether any form of disgorgement may be ordered and did not fully brief these narrower questions, we do not decide them here. We nevertheless discuss principles that may guide the lower courts' assessment of these arguments on remand.

A

Section 78u(d)(5) restricts equitable relief to that which "may be appropriate or necessary for the benefit of investors." The SEC, however, does not always return the entirety of disgorgement proceeds to investors, instead depositing a portion of its collections in a fund in the Treasury. See SEC, Division of Enforcement, 2019 Ann. Rep. 16–17, https://www.sec.gov/files/enforcement-annual-report-2019.pdf. Congress established that fund in the Dodd-Frank Wall Street Reform and Consumer Protection Act for disgorgement awards that are not deposited in "disgorgement fund[s]" or otherwise "distributed to victims." 124

Stat. 1844. The statute provides that these sums may be used to pay whistleblowers reporting securities fraud and to fund the activities of the Inspector General. *Ibid.* Here, the SEC has not returned the bulk of funds to victims, largely, it contends, because the Government has been unable to collect them.[4]

The statute provides limited guidance as to whether the practice of depositing a defendant's gains with the Treasury satisfies the statute's command that any remedy be "appropriate or necessary for the benefit of investors." The equitable nature of the profits remedy generally requires the SEC to return a defendant's gains to wronged investors for their benefit. After all, the Government has pointed to no analogous common-law remedy permitting a wrongdoer's profits to be withheld from a victim indefinitely without being disbursed to known victims. Cf. *Root*, 105 U. S., at 214–215 (comparing the accounting remedy to a breach-of-trust action, where a court would require the defendant to "refund the amount of profit which they have actually realized").

The Government maintains, however, that the primary function of depriving wrongdoers of profits is to deny them the fruits of their ill-gotten gains, not to return the funds to victims as a kind of restitution. See, *e.g.*, SEC, Report Pursuant to Section 308(C) of the Sarbanes Oxley Act of 2002, p. 3, n. 2 (2003) (taking the position that disgorgement is not intended to make investors whole, but rather to deprive wrongdoers of ill-gotten gains); see also 6 T. Hazen, Law of Securities Regulation §16.18, p. 8 (rev. 7th ed. 2016) (concluding that the remedial nature of the disgorgement remedy does not mean that it is essentially compensatory and

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[4] According to the Government, petitioners "transferred the bulk of their misappropriated funds to China, defied the district court's order to repatriate those funds, and fled the United States." Brief for Respondent 36.

concluding that the "primary function of the remedy is to deny the wrongdoer the fruits of ill-gotten gains"). Under the Government's theory, the very fact that it conducted an enforcement action satisfies the requirement that it is "appropriate or necessary for the benefit of investors."

But the SEC's equitable, profits-based remedy must do more than simply benefit the public at large by virtue of depriving a wrongdoer of ill-gotten gains. To hold otherwise would render meaningless the latter part of §78u(d)(5). Indeed, this Court concluded similarly in *Mertens* when analyzing statutory language accompanying the term "equitable remedy." 508 U. S., at 253 (interpreting the term "appropriate equitable relief"). There, the Court found that the additional statutory language must be given effect since the section "does not, after all, authorize . . . 'equitable relief' *at large*." *Ibid.* As in *Mertens*, the phrase "appropriate or necessary for the benefit of investors" must mean something more than depriving a wrongdoer of his net profits alone, else the Court would violate the "cardinal principle of interpretation that courts must give effect, if possible, to every clause and word of a statute." *Parker Drilling Management Services, Ltd.* v. *Newton*, 587 U. S. ___, ___ (2019) (slip op., at 9) (internal quotation marks omitted).

The Government additionally suggests that the SEC's practice of depositing disgorgement funds with the Treasury may be justified where it is infeasible to distribute the collected funds to investors.[5] Brief for Respondent 37. It is an open question whether, and to what extent, that practice nevertheless satisfies the SEC's obligation to award relief

[5] We express no view as to whether the SEC has offered adequate proof of failed attempts to return funds to investors here. To the extent that feasibility is relevant at all to equitable principles, we observe that lower courts are well equipped to evaluate the feasibility of returning funds to victims of fraud. See, *e.g.*, *SEC* v. *Lund*, 570 F. Supp. 1397, 1404–1405 (CD Cal. 1983) (appointing a magistrate judge to determine whether it was feasible to locate victims of financial wrongdoing).

"for the benefit of investors" and is consistent with the limitations of §78u(d)(5). The parties have not identified authorities revealing what traditional equitable principles govern when, for instance, the wrongdoer's profits cannot practically be disbursed to the victims. But we need not address the issue here. The parties do not identify a specific order in this case directing any proceeds to the Treasury. If one is entered on remand, the lower courts may evaluate in the first instance whether that order would indeed be for the benefit of investors as required by §78u(d)(5) and consistent with equitable principles.

B

The SEC additionally has sought to impose disgorgement liability on a wrongdoer for benefits that accrue to his affiliates, sometimes through joint-and-several liability, in a manner sometimes seemingly at odds with the common-law rule requiring individual liability for wrongful profits. See, *e.g.*, *SEC* v. *Contorinis*, 743 F. 3d 296, 302 (CA2 2014) (holding that a defendant could be forced to disgorge not only what he "personally enjoyed from his exploitation of inside information, but also the profits of such exploitation that he channeled to friends, family, or clients"); *SEC* v. *Clark*, 915 F. 2d 439, 454 (CA9 1990) ("It is well settled that a tipper can be required to disgorge his tippee's profits"); *SEC* v. *Whittemore*, 659 F. 3d 1, 10 (CADC 2011) (approving joint-and-several disgorgement liability where there is a close relationship between the defendants and collaboration in executing the wrongdoing).

That practice could transform any equitable profits-focused remedy into a penalty. Cf. *Marshall*, 15 Wall., at 149. And it runs against the rule to not impose joint liability in favor of holding defendants "liable to account for such profits only as have accrued to themselves . . . and not for those which have accrued to another, and in which they have no

participation." *Belknap*, 161 U. S., at 25–26; see also *Elizabeth* v. *Pavement Co.*, 97 U. S. 126 (1878).

The common law did, however, permit liability for partners engaged in concerted wrongdoing. See, *e.g.*, *Ambler*, 20 Wall., at 559. The historic profits remedy thus allows some flexibility to impose collective liability. Given the wide spectrum of relationships between participants and beneficiaries of unlawful schemes—from equally culpable codefendants to more remote, unrelated tipper-tippee arrangements—the Court need not wade into all the circumstances where an equitable profits remedy might be punitive when applied to multiple individuals.

Here, petitioners were married. 754 Fed. Appx. 505; 262 F. Supp. 3d, at 960–961. The Government introduced evidence that Liu formed business entities and solicited investments, which he misappropriated. *Id.*, at 961. It also presented evidence that Wang held herself out as the president, and a member of the management team, of an entity to which Liu directed misappropriated funds. *Id.*, at 964. Petitioners did not introduce evidence to suggest that one spouse was a mere passive recipient of profits. Nor did they suggest that their finances were not commingled, or that one spouse did not enjoy the fruits of the scheme, or that other circumstances would render a joint-and-several disgorgement order unjust. Cf. *SEC* v. *Hughes Capital Corp.*, 124 F. 3d 449, 456 (CA3 1997) (finding that codefendant spouse was liable for unlawful proceeds where they funded her "lavish lifestyle"). We leave it to the Ninth Circuit on remand to determine whether the facts are such that petitioners can, consistent with equitable principles, be found liable for profits as partners in wrongdoing or whether individual liability is required.

C

Courts may not enter disgorgement awards that exceed the gains "made upon any business or investment, when

both the receipts and payments are taken into the account." *Goodyear*, 9 Wall., at 804; see also Restatement (Third) §51, Comment *h*, at 216 (reciting the general rule that a defendant is entitled to a deduction for all marginal costs incurred in producing the revenues that are subject to disgorgement). Accordingly, courts must deduct legitimate expenses before ordering disgorgement under §78u(d)(5). A rule to the contrary that "make[s] no allowance for the cost and expense of conducting [a] business" would be "inconsistent with the ordinary principles and practice of courts of chancery." *Tilghman*, 125 U. S., at 145–146; cf. *SEC* v. *Brown*, 658 F. 3d 858, 861 (CA8 2011) (declining to deduct even legitimate expenses like payments to innocent third-party employees and vendors).

The District Court below declined to deduct expenses on the theory that they were incurred for the purposes of furthering an entirely fraudulent scheme. It is true that when the "entire profit of a business or undertaking" results from the wrongdoing, a defendant may be denied "inequitable deductions" such as for personal services. *Root*, 105 U. S., at 203. But that exception requires ascertaining whether expenses are legitimate or whether they are merely wrongful gains "under another name." *Goodyear*, 9 Wall., at 803. Doing so will ensure that any disgorgement award falls within the limits of equity practice while preventing defendants from profiting from their own wrong. *Root*, 105 U. S., at 207.

Although it is not necessary to set forth more guidance addressing the various circumstances where a defendant's expenses might be considered wholly fraudulent, it suffices to note that some expenses from petitioners' scheme went toward lease payments and cancer-treatment equipment. Such items arguably have value independent of fueling a fraudulent scheme. We leave it to the lower court to examine whether including those expenses in a profits-based

remedy is consistent with the equitable principles underlying §78u(d)(5).

* * *

For the foregoing reasons, we vacate the judgment below and remand the case to the Ninth Circuit for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 18–1501

CHARLES C. LIU, ET AL., PETITIONERS *v.* SECURITIES AND EXCHANGE COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 22, 2020]

JUSTICE THOMAS, dissenting.

The Court correctly declines to affirm the Ninth Circuit's decision upholding the District Court's disgorgement order, but I disagree with the Court's decision to vacate and remand for the lower courts to "limi[t]" the disgorgement award. *Ante,* at 1. Disgorgement can never be awarded under 15 U. S. C. §78u(d)(5). That statute authorizes the Securities and Exchange Commission (SEC) to seek only "equitable relief that may be appropriate or necessary for the benefit of investors," and disgorgement is not a traditional equitable remedy. Thus, I would reverse the judgment of the Court of Appeals.

I

The Securities Exchange Act of 1934, as amended in 2005, allows the SEC to request "equitable relief" in federal district court against those who violate federal securities laws. §78u(d)(5). According to our usual interpretive convention, "equitable relief" refers to forms of equitable relief available in the English Court of Chancery at the time of the founding. Because disgorgement is a creation of the 20th century, it is not properly characterized as "equitable relief," and, hence, the District Court was not authorized to award it under §78u(d)(5).

A

"This Court has never treated general statutory grants of equitable authority as giving federal courts a freewheeling power to fashion new forms of equitable remedies." *Trump* v. *Hawaii*, 585 U. S. ___, ___ (2018) (THOMAS, J., concurring) (slip op., at 3). "Rather, it has read such statutes as constrained by 'the body of law which had been transplanted to this country from the English Court of Chancery' in 1789." *Ibid.* (quoting *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 105 (1945)). As Justice Story put it, "the settled doctrine of this court is, that the remedies in equity are to be administered . . . according to the practice of courts of equity in [England], as contradistinguished from that of courts of law; subject, of course to the provisions of the acts of congress." *Boyle* v. *Zacharie & Turner*, 6 Pet. 648, 654 (1832).

We have interpreted other statutes according to this "settled doctrine." For example, we have read the term "equitable relief" in the Employee Retirement Income Security Act of 1974 to refer to "those categories of relief that were typically available in equity." *Mertens* v. *Hewitt Associates*, 508 U. S. 248, 256 (1993) (emphasis deleted). We have done the same for the Judiciary Act of 1789, see, *e.g.*, *Grupo Mexicano de Desarrollo, S. A.* v. *Alliance Bond Fund*, *Inc.*, 527 U. S. 308, 318–319 (1999), and for provisions in the Bankruptcy Code, see *Taggart* v. *Lorenzen*, 587 U. S. ___, ___ (2019) (slip op., at 5). There is nothing about §78u(d)(5) that counsels departing from this approach.

B

Disgorgement is not a traditional form of equitable relief. Rather, cases, legal dictionaries, and treatises establish that it is a 20th-century invention.

As an initial matter, it is not even clear what "disgorgement" means. The majority frankly acknowledges its "'"protean character."'" *Ante*, at 7 (quoting *Petrella* v.

Metro-Goldwyn-Mayer, Inc., 572 U. S. 663, 688, n. 1 (2014)). The difficulty of defining this supposedly traditional remedy is the first sign that it is not a historically recognized equitable remedy. In contrast, an accounting for profits, or accounting—a distinct form of relief that the majority groups with disgorgement—has a well-accepted definition: It compels a defendant to account for, and repay to a plaintiff, those profits that belong to the plaintiff in equity. Bray, Fiduciary Remedies, in The Oxford Handbook of Fiduciary Law 449 (E. Criddle, P. Miller, & R. Sitkoff eds. 2019). The definition of disgorgement, after today's decision, is a remedy that compels each defendant to pay his profits (and sometimes, though it is not clear when, all of his codefendants' profits) to a third-party Government agency (which sometimes, though it is not clear when, passes the money on to victims). This remedy has no basis in historical practice.

No published case appears to have used the term "disgorgement" to refer to equitable relief until the 20th century. Even then, the earliest cases use the word in a "nontechnical" sense, Brief for Law Professors as *Amici Curiae* 22, to describe the action a defendant must take when a party is awarded a traditional equitable remedy such as an accounting for profits or an equitable lien.[1] For example, in *Byrd* v. *Mullinix*, 159 Ark. 310, 251 S. W. 871 (1923), the Supreme Court of Arkansas affirmed the imposition of an equitable lien to prevent a debtor from "put[ting] the money in property which was itself beyond the reach of creditors, and to compel its disgorgement," *id.,* at 316–317, 251 S. W., at 872. Likewise, in *Armstrong* v. *Richards*, 128 Fla. 561, 175 So. 340 (1937), the Supreme Court of Florida referred to "the right of the taxpayer to require an accounting from

[1] An equitable lien is imposed on a defendant's property "as security for a claim on the ground that otherwise the former would be unjustly enriched." Restatement of Restitution §161, p. 650 (1936).

and disgorgement by public officers and those in collusion with them," *id.*, at 564, 175 So., at 341. In these cases, the term "disgorgement" colloquially described what a defendant was ordered to do, not the remedy itself.

By the 1960s, published opinions began to use "disgorgement" to refer to a remedy in the administrative context. In *NLRB* v. *Local 176*, 276 F. 2d 583 (CA1 1960), the agency had "applied its . . . remedy of disgorgement of dues, requiring the union to refund to every member who had obtained employment on the Company project the dues which he had paid," *id.*, at 586 (footnote omitted). The court declined to enforce this part of the agency's order, but not because disgorgement was an impermissible form of relief. Instead, it found that, in the circumstances of the case, disgorgement "seem[ed] . . . to be an *ex post facto* penalty." *Ibid.*; see also *NLRB* v. *Local 111*, 278 F. 2d 823, 825 (CA1 1960) (enforcing a disgorgement order from the agency).

By the 1970s, courts started using the term "disgorgement" to describe a judicial remedy in its own right. When the SEC initially sought this kind of relief under the Securities Exchange Act in *SEC* v. *Texas Gulf Sulphur Co.*, 312 F. Supp. 77 (SDNY 1970), the District Court called it "restitution," *id.,* at 93, and the Court of Appeals called it "[r]estitution of [p]rofits," *SEC* v. *Texas Gulf Sulphur Co.*, 446 F. 2d 1301, 1307 (CA2 1971) (emphasis deleted). Courts soon substituted the label "disgorgement." *SEC* v. *Manor Nursing Centers, Inc.*, 458 F. 2d 1082, 1105 (CA2 1972); *SEC* v. *Shapiro*, 349 F. Supp. 46, 55 (SDNY 1972).

The late date of these cases is sufficient reason to reject the argument that disgorgement is a traditional equitable remedy. But it is also telling that, when the SEC began seeking this relief, it did so without any statutory authority. Prior to 2005, the SEC lacked the power even to seek "equitable relief" in cases like this one. See §305(b), 116 Stat. 779 (amending the Securities Exchange Act). The District Court in *Texas Gulf Sulphur* purported to "imply [a] new

remed[y]," based on its "inherent equity power" and a belief that "the congressional purpose is effectuated by so doing." 312 F. Supp., at 91. But the sources it cited are dubious. The court relied on *J. I. Case Co.* v. *Borak*, 377 U. S. 426 (1964), a case about implied causes of action that we have since abrogated. See *Alexander* v. *Sandoval*, 532 U. S. 275, 287 (2001). It also relied on a securities law treatise that advocated for what it called "restitution" but admitted that district courts had no express authority to grant the remedy and that the SEC had never sought this remedy in the past. 3 L. Loss, Securities Regulation 1827–1828 (1961). It is functionally this same unauthorized remedy that the SEC and courts now call "disgorgement." The details have varied over time, but the lineage is clear: Disgorgement is "a relic of the heady days" of courts inserting judicially created relief into statutes. *Correctional Services Corp.* v. *Malesko*, 534 U. S. 61, 75 (2001) (Scalia, J., concurring).

Disgorgement as a remedy in its own right is also absent from legal publications until the 20th century. Leading legal dictionaries did not define the term until the turn of the 20th century. See, *e.g.*, Merriam-Webster's Dictionary of Law 143 (1996); Black's Law Dictionary 480 (7th ed. 1999). Nor was disgorgement included in the first Restatement of Restitution, adopted in 1936. The remedy does not appear until the Third Restatement, adopted in 2010, which states that "[r]estitution remedies" that seek "to eliminate profit from wrongdoing . . . are often called 'disgorgement' or 'accounting.'" 2 Restatement (Third) of Restitution and Unjust Enrichment §51(4), p. 203. But "Restatement" is an inapt title for this edition of the treatise. Like many of the modern Restatements, its "authors have abandoned the mission of describing the law, and have chosen instead to set forth their aspirations for what the law ought to be." *Kansas* v. *Nebraska*, 574 U. S. 445, 475 (2015) (Scalia, J., concurring in part and dissenting in part). The inclusion of

"disgorgement" in the Third Restatement, which the majority cites in support of its holding, *ante*, at 6, represents a "'novel extension'" of equity. *Kansas*, *supra*, at 483 (THOMAS, J., concurring in part and dissenting in part) (quoting Roberts, Restitutionary Disgorgement for Opportunistic Breach of Contract and Mitigation of Damages, 42 Loyola (LA) L. Rev. 131, 134 (2008)).

I acknowledge that this Court has referred to disgorgement as an equitable remedy in some of its prior decisions. See, *e.g.*, *Feltner* v. *Columbia Pictures Television*, *Inc.*, 523 U. S. 340, 352 (1998). But these opinions merely referred to the term in passing without considering the question in depth. The history is clear: Disgorgement is not a form of relief that was available in the English Court of Chancery at the time of the founding.

C

The majority's treatment of disgorgement as an equitable remedy threatens great mischief. The term disgorgement itself invites abuse because it is a word with no fixed meaning. The majority sees "parallels" between accounting and disgorgement, *ante,* at 2, n. 1, but parallels are by definition not the same. Even if they were, the traditional remedy of an accounting—which compels a party to repay profits that belong to a plaintiff—has important conceptual limitations that disgorgement does not. An accounting connotes the relationship between a plaintiff and a defendant. In the words of one scholar, "it is an accounting by A to B." Bray, Fiduciary Remedies, at 454. But disgorgement connotes no relationship and so is not naturally limited to net profits and compensation of victims. It simply "is A disgorging." *Ibid.* Further, the traditional remedy of a constructive trust[2] or an equitable lien requires that the "money or prop-

[2] A constructive trust compels a defendant "holding title to property . . . to convey it to another on the ground that he would be unjustly enriched

erty identified as belonging in good conscience to the plaintiff . . . clearly be traced to particular funds or property in the defendant's possession." *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U. S. 204, 213 (2002). Disgorgement reaches further because it has no tracing requirement. By using a word with no history in equity jurisprudence, the SEC and courts have made it possible to circumvent the careful limitations imposed on other equitable remedies.

One need look no further than the SEC's use of disgorgement to see the pitfalls of the majority's acquiescence in its continued use as a remedy. The order in *Texas Gulf Sulphur* did not depart too far from equitable principles. The award was limited to the defendants' net profits and the funds were held in escrow and were at least partly available to compensate victims, 446 F. 2d, at 1307. It did not take long, however, for a district court to order a defendant to turn over both his profits and the investment "income earned on the proceeds." *Manor Nursing Centers*, 458 F. 2d, at 1105. And in the case before us today, just a half century later, disgorgement has expanded even further. The award is not limited to net profits or even money possessed by an individual defendant when it is imposed jointly and severally. See *ante*, at 5. And not only is it not guaranteed to be used to compensate victims, but the imposition of over $26 million in disgorgement and approximately $8 million in civil monetary penalties in this case seems to ensure that victims will be unable to recover anything in their own actions. As long as courts continue to award "disgorgement," both courts and the SEC will continue to have license to expand their own power.

The majority's decision to tame, rather than reject, disgorgement will also cause confusion in administrative prac-

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if he were permitted to retain it." Restatement of Restitution §160, at 640–641.

tice. As the majority explains, the SEC is expressly authorized to impose "'disgorgement'" in its in-house tribunals. *Ante*, at 13 (quoting 15 U. S. C. §77h–1(e)). It is unclear whether the majority's new restrictions on disgorgement will apply to these proceedings as well. If they do not, the result will be that disgorgement has one meaning when the SEC goes to district court and another when it proceeds in-house.

More fundamentally, by failing to recognize that the problem is disgorgement itself, the majority undermines our entire system of equity. The majority believes that insistence on the traditional rules of equity is unnecessarily formalistic, *ante,* at 3, n. 1, but the Founders accepted federal equitable powers only because those powers depended on traditional forms. The Constitution was ratified on the understanding that equity was "a precise legal system" with "specific equitable remed[ies]." *Missouri* v. *Jenkins*, 515 U. S. 70, 127 (1995) (THOMAS, J., concurring). "Although courts of equity exercised remedial 'discretion,' that discretion allowed them to deny or tailor a remedy despite a demonstrated violation of a right, not to expand a remedy beyond its traditional scope." *Trump*, 585 U. S., at ___ (THOMAS, J., concurring) (slip op., at 5). The majority, while imposing some limits, ultimately permits courts to continue expanding equitable remedies. I would simply hold that the phrase "equitable relief" in §78u(d)(5) does not authorize disgorgement.

II

After holding that disgorgement is equitable relief, the majority remands for the lower courts to reconsider the disgorgement order in this case. If the majority is going to accept "disgorgement" as an available remedy, it should at least limit the order to be consistent with the traditional rules of equity. First, the order should be limited to each

petitioner's profits. Second, the order should not be imposed jointly and severally. Third, the money paid by petitioners should be used to compensate petitioners' victims.

A

First, the disgorgement order should be limited to "the profits actually made" by each petitioner. *Mowry* v. *Whitney*, 14 Wall. 620, 649 (1872); see also *ante*, at 11, 18–20. Defendants in equity traditionally may deduct "allowances . . . for the cost and expense of the business" from the amount of the award. *Root* v. *Railway Co.*, 105 U. S. 189, 215 (1882); see also *Callaghan* v. *Myers*, 128 U. S. 617, 665 (1888); *Elizabeth* v. *Pavement Co.*, 97 U. S. 126, 139 (1878); *Rubber Co.* v. *Goodyear*, 9 Wall. 788, 804 (1870). The rationale behind this rule is that "it is not the function of courts of equity to administer punishment." *Bangor Punta Operations*, *Inc.* v. *Bangor & Aroostook R. Co.*, 417 U. S. 703, 717–718, n. 14 (1974) (internal quotation marks omitted); see also 2 J. Story, Commentaries on Equity Jurisprudence §1494, p. 819 (13th ed. 1886). Here, however, the District Court reasoned that "it would be 'unjust to permit the defendants to offset against the investor dollars they received the expenses of running the very business they created to defraud those investors into giving the defendants the money in the first place.'" 754 Fed. Appx. 505, 509 (CA9 2018) (quoting *SEC* v. *J. T. Wallenbrock & Assocs.*, 440 F. 3d 1109, 1114 (CA9 2006)). On remand, the lower courts should limit the award to each petitioner's profits.

B

Second, and relatedly, the disgorgement order should not be imposed jointly and severally. The majority analogizes disgorgement to accounting, *ante*, at 6, but this Court has rejected joint and several liability in actions for an accounting. *Elizabeth*, *supra,* at 139–140; *Keystone Mfg. Co.* v. *Adams*, 151 U. S. 139, 148 (1894); *Belknap* v. *Schild*, 161 U. S.

10, 25–26 (1896). The majority instructs the lower courts to determine whether petitioners were "partners in wrongdoing," apparently based on a case about the liability of partners. *Ante,* at 10, 18 (citing *Ambler* v. *Whipple*, 20 Wall. 546 (1874)). But the liability in that case was premised on the law of partnership, and nothing indicates that petitioners here were legal partners. The joint and several order in this case is thus at odds with traditional equitable rules.[3]

C

Finally, the award should be used to compensate victims, not to enrich the Government. Plaintiffs in equity may claim "that which, *ex aequo et bono* [according to what is equitable and good], is theirs, and nothing beyond this." *Livingston* v. *Woodworth*, 15 How. 546, 560 (1854). The money ordered to be paid as disgorgement in no sense belongs to the Government, and the majority cites no authority allowing a Government agency to keep equitable relief for a wrong done to a third party. Requiring the SEC to only "generally" compensate victims, *ante,* at 15, is inconsistent with traditional equitable principles.

Worse still from a practical standpoint, the majority provides almost no guidance to the lower courts about how to resolve this question on remand. Even assuming that disgorgement is "equitable relief" for purposes of §78u(d)(5) and that the Government may sometimes keep the money,

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[3] For its part, respondent cites the joint and several liability in *Jackson* v. *Smith,* 254 U. S. 586, 589 (1921), but the remedy in that case was a constructive trust, see *Smith* v. *Jackson*, 48 App. D. C. 565, 576 (1919). As explained above, there is no tracing requirement in the District Court's order as would be required in a case of constructive trust. *Supra*, at 6–7. The Court also allowed joint and several liability in *Belford* v. *Scribner*, 144 U. S. 488 (1892), a copyright case. But it based its holding on the fact that, under the relevant copyright statute, "both the printer and the publisher are equally liable to the owner of the copyright for an infringement." *Id.*, at 507; see also *Washingtonian Publishing Co.* v. *Pearson*, 140 F. 2d 465, 467 (CADC 1944).

the Court should at least do more to identify the circumstances in which the Government may keep the money. Instead, the Court asks lower courts to improvise a solution. If past is prologue, this uncertainty is sure to create opportunities for the SEC to continue exercising unlawful power.

* * *

I would reverse for the straightforward reason that disgorgement is not "equitable relief" within the meaning of §78u(d)(5). Because the majority acquiesces in the continued use of disgorgement under that statute, I respectfully dissent.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-11953

D.C. Docket No. 2:13-cv-01881-MHH

PHILIP BOWLING,
JENNIE M. BOWLING,

Defendants/Third-Party Counterclaim Plaintiffs-Appellants,

versus

U.S. BANK NATIONAL ASSOCIATION, As Trustee for C-Bass Mortgage Loan Asset-Backed Certificates, Series 2007-SP2,
LITTON LOAN SERVICING, LP,
OCWEN LOAN SERVICING, LLC,

Third-Party Counterclaim Defendants-Appellees

Appeal from the United States District Court
for the Northern District of Alabama

(June 23, 2020)

Before ROSENBAUM, BRANCH, and HIGGINBOTHAM,* Circuit Judges.

ROSENBAUM, Circuit Judge:

Perhaps some might think removal is not the most riveting topic. But it's important: the removal statutes establish the basis for federal jurisdiction in qualifying cases originally filed in state court. And every so often, a new Supreme Court case comes along that changes the removal playing field—at least in our Circuit. That's what happened here.

After the district court upheld Third-Party Counterclaim Defendants U.S. Bank National Association, Litton Loan Servicing, LP, and Ocwen Loan Servicing, LLC's removal of this case from Alabama state court, the Supreme Court issued *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743 (2019). That case had the effect of upending *Carl Heck Engineers, Inc. v. Lafourche Parish Police Jury*, 622 F.2d 133 (5th Cir. 1980), our longstanding Circuit precedent on removal by third-party counterclaim defendants.

As a result, we must reverse the district court's denial of Defendants/Third-Party Counterclaim Plaintiffs-Appellants Philip and Jennie Bowling's motion to remand, which was based in substantial part on *Carl Heck*. And since we conclude that the district court erred in denying the Bowlings' motion to remand, the district

* Honorable Patrick E. Higginbotham, United States Circuit Judge for the Fifth Circuit, sitting by designation.

court's order granting the Third-Party Counterclaim Defendants' motion for summary judgment must be vacated, and the entire case must be remanded to state court.

I.

In 1986, Defendants/Third-Party Counterclaim Plaintiffs-Appellants Philip and Jennie Bowling bought a house located in Birmingham, Alabama. To pay for the house, the Bowlings obtained a 30-year mortgage loan from First Security Mortgage Corporation. As a part of this loan, the Bowlings executed a promissory note in favor of First Security. Over the life of the loan, the note and mortgage were transferred several times. Most recently, in July 2012, Bank of America assigned the loan to Third-Party Counterclaim Defendant-Appellee U.S. Bank National Association.

For many years, the Bowlings made their loan payments. But they began missing payments in 1999, and after that, they hovered in and out of default for some time. During this period, the servicer of the loan was Third-Party Counterclaim Defendant-Appellee Litton Loan Servicing, LP. The Bowlings continued this pattern until they made their last payment (which was not the final payment required) on the loan in August 2011, just before Third-Party Counterclaim Defendant-Appellant Ocwen Loan Servicing, LLC, replaced Litton as the loan servicer on September 1, 2011.

Between September 20, 2011, and August 2012, Ocwen and the Bowlings had various communications related to foreclosure and Ocwen's responsibilities under federal law. The following month, on September 24, 2012, Ocwen accelerated the loan and provided a notice to the Bowlings that a foreclosure sale was scheduled for October 24, 2012.

WGB, LLC, purchased the Bowlings' house for $178,000.00 at the October 24, 2012, foreclosure sale. But the Bowlings refused to vacate the property.

So in Alabama state court, WGB filed a Complaint against the Bowlings for ejectment. In response to the ejectment action, the Bowlings filed what they titled an "Answer and Counterclaim." The filing added three new parties to the action—U.S. Bank, Ocwen, and Litton (the "Third-Party Counterclaim Defendants")—and it added fifteen claims that were a mix of state and federal claims. With respect to the federal claims, the Bowlings asserted violations of the Truth in Lending Act ("TILA"), the Real Estate Settlement Procedures Act ("RESPA"), the Fair Credit Reporting Act ("FCRA"), and the Fair Debt Collection Practices Act ("FDCPA"). The Bowlings directed all claims in the "Answer and Counterclaim" at the three new Third-Party Counterclaim Defendants and none against the original plaintiff WGB.

The Third-Party Counterclaim Defendants removed the entire case to federal court, asserting that removal was proper under either 28 U.S.C. § 1441(a) or 1441(c). Primarily, they argued that Section 1441(c) supported removal. The Bowlings

opposed removal and filed a motion to remand the case to state court.

After reviewing the Bowlings' motion to remand, the district court denied it. But it severed WGB's original ejectment claim and remanded that to Alabama state court. As a result, WGB was no longer a party to the federal proceedings.

Meanwhile, in the federal proceedings, the Third-Party Counterclaim Defendants moved for summary judgment on the federal claims (TILA, RESPA, FCRA, and FDCPA). The Bowlings opposed and sought to strike the declaration testimony of one of the Third-Party Counterclaim Defendants' witnesses and all exhibits that were a part of that testimony, on the grounds that the witness's testimony was not based on personal knowledge. After the issues were fully briefed, the district court denied the Bowlings' motion to strike and granted the Third-Party Counterclaim Defendants' motion for summary judgment on the federal claims. The court declined to exercise supplemental jurisdiction over the remaining state-law claims and instead remanded them to the Alabama state court.

The Bowlings timely appealed the rulings denying remand, denying the motion to strike the declaration testimony, and granting summary judgment on the claims against the Third-Party Counterclaim Defendants.

II.

We review *de novo* the denial of a motion to remand. *Blevins v. Aksut*, 849 F.3d 1016, 1018 (11th Cir. 2017). The right to removal is statutory. *Global Satellite*

Commc'n Co. v. Starmill U.K. Ltd., 378 F.3d 1269, 1271 (11th Cir. 2004) (citation omitted). But because removal jurisdiction implicates "significant federalism concerns," we construe removal statutes strictly. *Univ. of S. Ala. v. Am. Tobacco Co.*, 168 F.3d 405, 411 (11th Cir. 1999); *see also Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108 (1941). On a motion to remand, the removing party shoulders the burden of establishing federal subject-matter jurisdiction. *Conn. State Dental Ass'n v. Anthem Health Plans, Inc.*, 591 F.3d 1337, 1343 (11th Cir. 2009).

The district court denied the motion to remand because it concluded that the Third-Party Counterclaim Defendants properly removed the case from state court under 28 U.S.C. §1441(c).[1] Our predecessor Court analyzed a prior version of § 1441(c) in *Carl Heck Engineers, Inc. v. Lafourche Parish Police Jury*, 622 F.2d 133 (5th Cir. 1980).[2] The district court relied on *Carl Heck* in finding the Bowlings' federal claims against the Third-Party Counterclaim Defendants removable, and the Third-Party Counterclaim Defendants likewise invoke *Carl Heck* on appeal. For these reasons, we review *Carl Heck* in some detail.

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[1] The Third-Party Counterclaim Defendants also argued that 28 U.S.C. § 1441(a) authorized removal of the case from Alabama state court. The district court did not opine on this argument, since it found the case properly removed under § 1441(c). On appeal, while the Third-Party Counterclaim Defendants originally urged § 1441(a) as an alternative basis for affirming the district court's decision, they have since conceded that the Supreme Court's recent decision in *Home Depot U.S.A, Inc. v. Jackson*, 139 S. Ct. 1743 (2019), means that § 1441(a) does not provide a basis for removal. We agree. More on *Home Depot* later.

[2] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*), we adopted as binding precedent all Fifth Circuit decisions issued before October 1, 1981.

At the time *Carl Heck* was decided, § 1441(c) read as follows:

> Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

28 U.S.C. § 1441(c) (1976).

In *Carl Heck*, Carl Heck Engineers, Inc., the plaintiff, sued Lafourche Parish Police Jury in Louisiana state court. 622 F.2d at 134. Carl Heck sought liquidated damages on a contract Heck had with Lafourche concerning engineering services for the building and repair of public roads. *Id.* Lafourche then filed a third-party claim against Maryland Casualty Company. *Id.* at 134-35. In that third-party claim, Lafourche asserted that Maryland was required to defend Lafourche and hold it harmless from Heck's claim. *Id.* Lafourche based its claim on an agreement Lafourche and Maryland had reached for Maryland to take over the responsibilities on the road project for the general contractor (Douglas G. Lambert Contractor, Inc.), whom Lafourche had previously separately contracted with and who had abandoned the project before completion. *Id.* at 134.

Maryland removed the action to federal court. *Id.* at 135. In response, Lafourche moved to remand the entire case to state court. *Id.* The district court denied Lafourche's motion, holding that the action was properly removable to federal court under the then-existing version of § 1441(c). *Id.* It noted that diversity

of citizenship existed between Maryland and Lafourche,[3] and the third-party claim would be removable if Lafourche had separately sued Maryland on it. *Id.* Finally, the district court concluded that Lafourche's claim against Maryland, while related to the circumstances surrounding Carl Heck's claim filed in the original case, was separate and independent from the claim Carl Heck alleged. *Id.*

Our predecessor Court affirmed. *Id.* at 137. It reasoned that "the language of the statute does not require only those causes of action joined by the original plaintiff to form the basis of removal." *Id.* at 136. Rather, the Court explained, the statute allowed for the removal of third-party claims that were "not unrelated to the main claim [in the original action], but sufficiently independent of it that a judgment in an action between [the parties to the third-party claim] alone can be properly rendered." *Id.* In our predecessor Court's view, removal made sense because "[s]uch actions can be and often are brought in a separate suit from that filed by the original plaintiff in the main claim." *Id.* And since it found that Lafourche's claim against Maryland stated a "separate and independent claim which if sued upon alone could have been brought properly in federal court," the old Fifth Circuit concluded that the case was

[3] Under the then-existing version of § 1441(c), the satisfaction of diversity jurisdiction, as well as of § 1441(c)'s other requirements, sufficed to permit removal. But the current version of § 1441(c) allows for removal only when federal-question jurisdiction exists, in addition to fulfillment of the rest of § 1441(c)'s requirements. This difference between the prior and current versions of § 1441(c) makes no difference to our analysis of whether § 1441(c) authorizes removal in the Bowlings' case, since the Bowlings' claims against the Third-Party Counterclaim Defendants clearly satisfy current §1441(c)'s federal-question requirement.

properly removable. *Id*.

In light of *Carl Heck* and its post-Circuit-split Fifth Circuit progeny, the district court here understandably concluded that the Third-Party Counterclaim Defendants' claims were removable under § 1441(c). After all, the Bowlings' federal claims against the Third-Party Counterclaim Defendants, though related to WGB's ejectment action, were just as separate and distinct from that action as Lafourche's claim against Maryland was from Carl Heck's claim against Lafourche. Nothing required the Bowlings' federal claims against the Third-Party Counterclaim Defendants to be litigated with WGB's ejectment action against the Bowlings. Indeed, as was the case with Lafourche's claim against Maryland, the Bowlings could have separately filed their claims against the Third-Party Counterclaim Defendants here. And if they had done so, the Third-Party Counterclaim Defendants might have been able to remove the case to federal court under the current version of § 1441(c), since the Bowlings' would-be separate action had "claim[s] arising under the . . . laws . . . of the United States" and perhaps included claims satisfying the phrase "claim[s] not within the original or supplemental jurisdiction of the district court or . . . claim[s] that ha[d] been made nonremovable by statute."[4] 28

[4] Here, we need not decide whether the Bowlings' federal claims against the Third-Party Counterclaim Defendants qualified under § 1441(c)(1)(B)'s provision as claims "not within the original or supplemental jurisdiction of the district court or a claim that has been made non-removable by statute." As we explain later in this opinion, the Supreme Court's recent ruling in *Home Depot* abrogates *Carl Heck* and renders the Bowlings' third-party claims non-removable here, regardless of whether they would have been removable had the Bowlings filed them in a

U.S.C. § 1441(c).

But the removal playing field has dramatically changed since the district court issued its order denying remand of the entire case against the Third-Party Counterclaim Defendants. As promised, *see supra* at notes 1 & 4, we now get to the removal game-changer: *Home Depot U.S.A, Inc. v. Jackson*, 139 S. Ct. 1743 (2019).

In *Home Depot*, the Supreme Court clarified the types of defendants that qualify as "defendants" who can obtain removal under § 1441(a). And its analysis leaves no doubt about two things. First, even though *Carl Heck* involves § 1441(c), *Carl Heck* is no longer good law because it is impossible to read the statute as a whole and conclude that the same term in (a) and (c) has different meanings. And second, § 1441(c) does not provide for removal jurisdiction of the Bowlings' claims against the Third-Party Counterclaim Defendants here because (a) is the operative clause that authorizes removal, and (c) merely adds a condition for certain types of civil cases.

Because *Home Depot* abrogates our forty-year-old precedent *Carl Heck* and requires reversal of the district court's order denying remand here, we discuss it at length. In *Home Depot*, Citibank, N.A., filed a debt-collection action against Jackson in state court. *Home Depot*, 139 S. Ct. at 1747. The action contended that

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separate action. We therefore do not opine on whether, under the current language of § 1441(c), the Bowlings' federal claims would have been removable if the Bowlings had filed them as plaintiffs in a new action.

Jackson was liable for charges he made on his Home Depot credit card. *Id.* In response, Jackson filed an answer, as well as a counterclaim against Citibank and third-party class-action claims against Home Depot and Carolina Water Systems, Inc. *Id.* Essentially, the claims alleged that Home Depot and Carolina Water Systems had schemed to induce homeowners to buy water-treatment systems at inflated prices and that Citibank was jointly and severally liable for this alleged conduct. *Id.*

Citibank soon dismissed its claims against Jackson, and Home Depot removed the case, citing, among other statutes, § 1441. *Id.* Jackson moved to remand and amended his third-party class-action claims to eliminate any reference to Citibank. *Id.* The district court granted Jackson's remand motion, and the Fourth Circuit affirmed. *Id.* So did the Supreme Court. *Id.* at 1751.

As relevant here, en route to affirming, the Supreme Court considered whether § 1441(a) authorizes a third-party counterclaim defendant to remove a claim filed against it.[5] *Id.* at 1747-48. Section 1441(a) provides,

> § 1441. Removal of civil actions
>
> **(a) Generally.**—Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of

[5] The Supreme Court used the term "third-party counterclaim defendant" in referring to "a party first brought into the case as an additional defendant to a counterclaim asserted against the original plaintiff." *Home Depot*, 139 S. Ct. at 1747 n.1.

> the United States for the district and division embracing the place where such action is pending.

28 U.S.C. § 1441(a).

The Supreme Court began its analysis of the statute with a discussion of the meaning of the phrase "the defendant or the defendants." *Home Depot*, 139 S. Ct. at 1748. Noting that the phrase must be construed "in light of the structure of the statute and [Supreme Court] precedent," the Court concluded that "§ 1441(a) does not permit removal by any counterclaim defendant, including parties brought into the lawsuit for the first time by the counterclaim." *Id.*

Six things demanded this conclusion, the Court reasoned.

First, § 1441(a) refers to "civil action[s]," not "claims." *Id.* The Supreme Court's precedent has long required district courts, in evaluating whether they enjoy original jurisdiction over a given civil action a party seeks to remove, to determine whether the action could have been brought originally in federal court. *Id.* This, in turn, imposes on the district court an obligation to ascertain whether federal subject-matter jurisdiction would have extended to the plaintiff's complaint, had the plaintiff chosen to file in federal court instead of state court. *Id.* But counterclaims are "irrelevant" to determining whether a district court has "original jurisdiction" over a civil action; rather, Supreme Court precedent requires the plaintiff's complaint in the original action to establish "original jurisdiction." *Id.* And "'the defendant' to

that action is the defendant to that complaint, not a party named in a counterclaim." *Id.*

Second, the Court pointed to the meaning of the term "defendant" in "related contexts" and noted that it did not include third-party counterclaim defendants. *Id.* at 1749. For example, the Court pointed out that the Federal Rules of Civil Procedure distinguish among "third-party defendants, counterclaim defendants, and defendants." *Id.* In particular, the Court observed, Rule 14 governs "Third-Party Practice," and it distinguishes among "the plaintiff," a "defendant" who becomes the "third-party plaintiff," and "the third-party defendant" sued by the original defendant. *Id.* Similarly, Rule 12 differentiates between defendants and counterclaim defendants in independently identifying when "'[a] defendant must serve an answer' and when '[a] party must serve an answer to a counterclaim.'" *Id.* (quoting Fed. R. Civ. P. 12(a)(1)(A)-(B)).

Third, the Court compared the language of § 1441(a) to that of other removal provisions where Congress "clearly extended the reach of the statute to include parties other than the original defendant." *Id.* In this respect, it noted that 28 U.S.C. § 1452(a) authorizes "'[a] party' in a civil action to 'remove any claim or cause of action' over which a federal court would have bankruptcy jurisdiction." *Id.* Similarly, 28 U.S.C. §§ 1452(a) and (b) permit "'any party' to remove '[a] civil action in which any party asserts a claim for relief arising under any Act of Congress

relating to patents, plant variety protection, or copyrights." *Id.* But § 1441(a), the Court explained, allows removal by only "the defendant or the defendants" in a "civil action" in which the district courts enjoy original jurisdiction. *Id.* This difference is significant. *Id*.

Fourth, the Court reasoned that its decision in *Shamrock Oil* also supports the conclusion that "third-party counterclaim defendants are not 'the defendant or the defendants' who can remove under § 1441(a)." *Id.* The Court recounted that in *Shamrock Oil*, it had held that a counterclaim defendant who was the plaintiff in the original action could not remove under § 1441(a)'s predecessor statute. *Id.* Though the Court recognized in *Home Depot* that *Shamrock Oil*, unlike *Home Depot*, involved a counterclaim defendant that had chosen the original state forum when it filed the civil action, the Court nevertheless concluded that the *Shamrock Oil* rule applied equally to the counterclaim defendant in *Home Depot*. *Id.* After all, the Court explained, *Shamrock Oil* did not construe the counterclaim to constitute a different action with a new plaintiff and a new defendant. *Id.* Rather, the *Shamrock Oil* Court emphasized that the original plaintiff remained "the plaintiff," even after the original defendant brought the counterclaim. *Id.*

Fifth, the Court concluded after considering other removal statutes that "the limits Congress has imposed on removal show that it did not intend to allow all defendants an unqualified right to remove." *Id.* (citing 28 U.S.C. §§ 1441(b)(2)).

So the Court found unpersuasive Home Depot's argument that the Court's narrow reading of "the defendant" in § 1441(a) contradicted the history and purposes of removal by precluding a party involuntarily introduced into state-court proceedings from removing the claim against it. *Id.*

And sixth, the Court observed that the broader construction of "the defendant" to include a third-party counterclaim defendant would lead to absurd results in the context of other removal statutes. *Id.* The Court pointed, for example, to § 1446(b)(2)(A) and noted that, if "defendant" were given the broader meaning for which Home Depot advocated, that provision could be construed as requiring "[removal] consent from the third-party counterclaim defendant, the original plaintiff (as a counterclaim defendant), *and* the original defendant asserting claims against them"—in other words, potentially all parties. *Id.* at 1750.

For all these reasons, the Court held that "a third-party counterclaim defendant is not a 'defendant' who can remove under § 1441(a)." *Id.*

Though *Home Depot* deals with § 1441(a) and not § 1441(c), its analysis necessarily demands the same conclusion with respect to § 1441(c). Section 1441(c) provides,

> § 1441. Removal of ***civil actions***
>
> **(c) Joinder of Federal law claims and State law claims.—(1)** If a ***civil action*** includes—

> **(A)** a claim arising under the Constitution, laws, or treaties of the United States (within the meaning of section 1331 of this title), and
>
> **(B)** a claim not within the original or supplemental jurisdiction of the district court or a claim that has been made nonremovable by statute,
>
> the entire action may be removed if the action would be removable without the inclusion of the claim described in subparagraph (B).
>
> **(2)** Upon removal of an action described in paragraph (1), the district court shall sever from the action all claims described in paragraph (1)(B) and shall remand the severed claims to the State court from which the action was removed. Only ***defendants*** against whom a claim described in paragraph (1)(A) has been asserted are required to join in or consent to the removal under paragraph (1).

28 U.S.C. § 1441(c) (bold, italic emphases added).

Every analytical tool the Supreme Court relied on in *Home Depot* to conclude that counterclaim defendants may not remove a civil action under § 1441(a) applies with equal force to § 1441(c).

First, the text of § 1441 as a whole compels the conclusion that "defendants" means the same in (c) as in (a). As we have noted, "identical words and phrases within the same statute should normally be given the same meaning." *SEC v. Levin*, 849 F.3d 995, 1003 (11th Cir. 2017) (quoting *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007) (quotation marks omitted)); *see also* Scalia & Garner, *Reading Law* § 25, at 170 (2012) ("[a] word or phrase is presumed to bear the same meaning throughout a text" unless context requires otherwise). In

reviewing § 1441(c)'s text in the context of § 1441 as a whole, we can discern nothing that justifies a departure from this principle. Indeed, the most natural reading of the statute is that removal is generally authorized under (a), with (c) providing additional criteria for a certain subset of civil actions.

The caption of § 1441, "Removal of *civil actions*," (emphasis added), also bolsters our textual analysis. As we have noted, "civil actions" is one of the key phrases the Supreme Court relied on in *Home Depot*. *See Yates v. United States*, 135 S. Ct. 1074, 1083 (2015) ("The title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute.") (cleaned up). And when we determine whether a claim "aris[es] under" federal law in a "civil action," as § 1441(c) requires us to do, we look to the face of the original plaintiff's complaint. *Conn. State Dental Ass'n*, 591 F.3d at 1343. When we do that with cases that fall under § 1441(c), the "defendants" to that action are the "defendant[s] to that complaint, not a party named in a counterclaim." *Home Depot*, 139 S. Ct. at 1748. So just as "a counterclaim is irrelevant to whether the district court had 'original jurisdiction' over the civil action" under § 1441(a), *id.*, it is not germane to whether the district court had federal-question jurisdiction over the "civil action" under § 1441(c).

Taking the Court's remaining reasons out of order, just as *Shamrock Oil* is consistent with the conclusion that "third-party counterclaim defendants are not 'the

defendant or the defendants' who can remove under § 1441(a)," *Home Depot*, 139 S. Ct. at 1749, it equally supports the conclusion that third-party counterclaim defendants are not the "defendants" who can remove under § 1441(c). That is so because *Shamrock Oil* did not construe the counterclaim as a different action from the original action, with a new plaintiff and a new defendant. *See id.* And just as in *Home Depot*, here, we are talking about third-party counterclaim defendants who were not parties to the original action they attempted to remove.

As for the remaining points the Supreme Court cited in *Home Depot* when it concluded that a third-party counterclaim defendant is not a "defendant" who can remove under § 1441(a), they do not require additional explanation to show that the same conclusion results with respect to § 1441(c): the Federal Rules of Civil Procedure still differentiate among third-party defendants, counterclaim defendants, and defendants; other removal statutes still demonstrate that when Congress wishes to make removal available to parties other than the original defendant, it says so; "the limits Congress has imposed on removal [still] show that it did not intend to allow all defendants an unqualified right to remove," *Home Depot*, 139 S. Ct. at 1749; and the broader construction of "defendants" to include a third-party counterclaim defendant would still lead to absurd results in the context of other removal statutes.

For all these reasons, *Carl Heck* cannot govern our construction of the current version of § 1441(c). Indeed, the text of the current version of § 1441(c) differs in important ways from that of the prior version of the statute. While the current version of § 1441(c) speaks in terms of permitting removal of a case when a "civil action" contains certain types of claims, the earlier version authorized removal of a case when a "*claim* . . . which would be removable if sued upon alone, is joined with one or more otherwise non-removable *claims or* causes of action."[6] 28 U.S.C. § 1441(c) (1976) (emphasis added). So while *Carl Heck* partially justified its analysis on the basis that "the language of [the prior version of § 1441(c), which authorized removal of "claims"] does not require only those causes of action joined by the original plaintiff to form the basis of removal," 622 F.2d at 136, the language of the current version of the statute—which authorizes removal of only "civil action[s]"—does in fact demand that only the original plaintiff's claims provide a basis for removal.

In short, to the extent that *Carl Heck*'s interpretation of § 1441(c)'s predecessor statute could have been construed to govern the current iteration of § 1441(c), *Home Depot* has abrogated *Carl Heck*. Under *Home Depot*, only a

[6] Section 1441(c)(2) speaks of "defendants against whom a *claim* . . . has been asserted" rather than "a civil action." 28 U.S.C. § 1441. But by its terms, § 1441(c) allows removal of only "civil action[s]" that contain such "claims." Subsection (c)(2) therefore merely clarifies that, when there are multiple defendants in the original "civil action," which would otherwise be removable, only defendants to the claims that might otherwise pose a barrier to removal without § 1441(c) need consent to removal.

defendant to the original action may seek to remove a case under § 1441(c). For that reason, we reverse the district court's order denying remand, vacate the district court's subsequent orders denying the Bowlings' motion to strike and granting summary judgment, and remand to the district court with instructions to remand to the state court.

III.

After *Home Depot*, *Carl Heck* is no longer good law. And *Home Depot* dictates that third-party counterclaim defendants cannot remove a "civil action" under 28 U.S.C. § 1441(c). As a result, we must reverse the district court's order denying remand, vacate the orders denying the Bowlings' motion to strike and granting summary judgment, and remand to the district court with instructions to remand to the state court.

REVERSED, VACATED, and REMANDED.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-12615

D.C. Docket No. 1:15-cv-20098-RNS

EGI-VSR, LLC,

Petitioner – Appellee,

versus

JUAN CARLOS CELESTINO CODERCH MITJANS,

Respondent – Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(June 25, 2020)

Before ROSENBAUM and TJOFLAT, Circuit Judges, and PAULEY,* District Judge.

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* Honorable William H. Pauley, III, Senior United States District Judge, Southern District of New York, sitting by designation.

TJOFLAT, Circuit Judge:

Juan Carlos Celestino Coderch Mitjans ("Mr. Coderch") appeals the District Court's order confirming a $28 million international arbitration award in favor of EGI-VSR, LLC ("EGI"). In 2012, a Chilean arbitrator resolved a dispute between EGI and Mr. Coderch arising out of a Shareholders' Agreement that was designed to protect EGI's investment in a Chilean wine company. Specifically, the arbitrator enforced a provision of the Shareholders' Agreement which gave EGI the right to sell its shares back to the controlling shareholders, including Mr. Coderch, at a premium if any of the controlling shareholders breached certain promises made to EGI in the Agreement. The arbitrator found that the controlling shareholders breached the Agreement and ordered Mr. Coderch and the other controlling shareholders to pay for all of EGI's shares at the premium price specified in the Agreement.

EGI sought to enforce the Chilean award in the U.S. District Court for the Southern District of Florida by filing a petition to confirm the international arbitration award under the Federal Arbitration Act ("FAA"). Over Mr. Coderch's objections, the District Court confirmed the award as requested by EGI. Mr. Coderch raises two errors on appeal. First, he claims that he was not properly served in Brazil under Brazilian law. Second, he argues that the District Court should not have confirmed the award because (a) it was a non-final arbitration

award, and (b) EGI's requested relief substantially modified the award. We agree with the District Court that service was proper, and that this arbitration award should be confirmed. However, we vacate the District Court's order and remand with instructions to correct two errors that the Court committed in enforcing the award.

I.

On October 19, 2005, EGI purchased 4.24 million preferred shares in a Chilean wine company, Viña San Rafael S.A.[1] As part of that purchase, EGI entered into a written Shareholders' Agreement with the controlling shareholders of Viña San Rafael. Relevant here, the Shareholders' Agreement provides in Section 10 that if the controlling shareholders breach certain covenants in the Agreement, EGI would have a "put right," meaning that EGI could force the controlling shareholders to purchase from EGI all of EGI's shares of preferred stock.[2] Section 10 then fixes the price of those preferred shares at "one hundred and three percent (103%) of the per share Preferred Liquidation Preference." Shareholders' Agreement defines the "Preferred Liquidation Preference" as "a

[1] Over the next several years, EGI purchased millions of additional shares in Viña San Rafael, ultimately acquiring over 7.54 million shares—a nearly $20 million investment.

[2] EGI could "put" some or all of its shares, and retained full discretion "to revoke its exercised Put Right with respect to all or any part of the shares to be purchased anytime before such shares are effectively transferred and paid for and thereafter shall not be obligated to sell them."

liquidation preference in the amount of the Preferred Purchase Price per share, plus 4% per annum thereon (based on a 360-day year), compounded semi-annually accruing from and after the date of the Preferred Closing."[3] "Preferred Purchase Price" is in turn defined as "the purchase price per share paid by [EGI] for the shares of Preferred Stock acquired by them pursuant to the Preferred Purchase Agreement."[4] To make it simpler: the put price for EGI's preferred shares is equal to the original price EGI paid for those shares, plus an additional 4% per year (compounded semi-annually from the date that EGI purchased the shares), plus another 3% on top of that amount.

Additionally, under Section 11, Mr. Coderch agreed to "unconditionally and irrevocably guarantee[] the prompt payment when due and performance of the obligations and liabilities of" several of the controlling shareholder entities,

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[3] The "Preferred Closing" is "the date of the payment of the shares of Preferred Stock issued to [EGI]," or the "Payment Date."

[4] The Preferred Purchase Agreement is not included in the record on appeal, and the Shareholders' Agreement does not otherwise indicate the purchase price per share paid by EGI for its shares of preferred stock. But we know what EGI paid for these shares because the arbitrator listed the price in his ultimate award. According to the award, EGI purchased its initial 4.24 million shares of preferred stock at a price per share of UF 0.0782354. (UF is the Spanish acronym for *Unidad de Fomento*, an inflation-controlled unit of account used in Chile.)

Although the award does not walk through each of EGI's subsequent acquisitions of preferred stock, it does list the date and price of each of these purchases in its final calculation of the amount owed to EGI. Apparently, after this initial purchase of 4.24 million shares on October 19, 2005, EGI purchased an additional 42,768 shares of preferred stock on August 2, 2006 at a price per share of UF 0.07366925; 748,435 shares of preferred stock on January 31, 2007 at a price per share of UF 0.060019; 620,508 shares of preferred stock on October 11, 2007 at a price per share of UF 0.0600191; and 1,892,738 shares of preferred stock on August 26, 2008 at a price per share of UF 0.03892127. *See infra* p. 6.

including "the payment for shares of Preferred Stock purchased in connection with the exercise of the Put Right." The obligations and liabilities of the controlling shareholders under the Shareholders' Agreement are joint and several.

On October 13, 2009, EGI sought to exercise its put right, alleging several breaches of the Shareholders' Agreement by the controlling shareholders.[5] When the controlling shareholders—and Mr. Coderch, as guarantor for his companies—refused to pay for EGI's shares in accordance with Section 10, it triggered the arbitration clause of the Shareholders' Agreement, and a years-long arbitration ensued in Chile. Ultimately, on January 13, 2012, the Chilean arbitrator issued a 102-page Arbitration Award, finding that the controlling shareholders breached several sections of the Shareholders' Agreement, thus entitling EGI to exercise its put right. It ordered the controlling shareholders to purchase, within ten days, EGI's preferred shares at the price agreed to in Section 10 of the Shareholders' Agreement. It then laid out the method for calculating the purchase price with respect to each of EGI's separate acquisitions of preferred stock, tracking the language of Section 10 outlined above:

> This purchase transaction must be carried out at the price agreed to in Section 10 of the Shareholder's Agreement of Viña San Rafael S.A., that is to say:

[5] EGI elected to exercise its put right with respect to all of its shares, and it has never sought to revoke that put. *See supra* note 2.

a) The sum of 4,240,000 shares of preferred stock must be bought and paid for at a price equal to 103% of the Preferred Liquidation Price. The Preferred Liquidation Price corresponds to the amount of the Preferred Purchase Price per share, i.e., UF 0.0782354, plus 4% a year (based on a year of 360 days), compounded semi-annually, starting from October 19, 2005.

b) The sum of 42,768 shares of preferred stock must be bought and paid for at a price equal to 103% of the Preferred Liquidation Price. The Preferred Liquidation Price corresponds to the amount of the Preferred Purchase Price per share, i.e., UF 0.07366925, plus 4% a year (based on a year of 360 days), compounded semi-annually, starting from August 2, 2006.

c) The sum of 748,435 shares of preferred stock must be bought and paid for at a price equal to 103% of the Preferred Liquidation Price. The Preferred Liquidation Price corresponds to the amount of the Preferred Purchase Price per share, i.e., UF 0.060019, plus 4% a year (based on a year of 360 days), compounded semi-annually, starting from January 31, 2007.

d) The quantity of 620,508 shares of preferred stock must be bought and paid for at a price equal to 103% of the Preferred Liquidation Price. The Preferred Liquidation Price corresponds to the amount of the Preferred Purchase Price per share, i.e., UF 0.0600191, plus 4% a year (based on a year of 360 days), compounded semi-annually, starting from October 11, 2007.

e) The sum of 1,892,738 shares of preferred stock must be bought and paid for at a price equal to 103% of the Preferred Liquidation Price. The Preferred Liquidation Price corresponds to the amount of the Preferred Purchase Price per share, i.e., UF 0.03892127, plus 4% a year (based on a year of 360 days), compounded semi-annually, starting from August 26, 2008.

EGI filed a petition to confirm the Arbitration Award against Mr. Coderch in the U.S. District Court for the Southern District of Florida on January 12, 2015. In its petition, EGI performed the calculations laid out in the Arbitration Award and

asked the District Court to direct Mr. Coderch to pay EGI $28,700,450.07.[6] The District Court issued a summons on March 30, 2015, and on April 20, 2015, EGI filed a notice indicating that it had filed a request to serve process on Mr. Coderch at his last known residence in Brazil pursuant to the Inter-American Convention on Letters Rogatory ("Convention on Letters Rogatory"), Jan. 30, 1975, O.A.S.T.S. No. 43, 1438 U.N.T.S. 288.

The Convention on Letters Rogatory facilitates the transmission of letters rogatory[7] among its signatory countries, including for procedural acts such as service of process. Under the Convention on Letters Rogatory and the Additional Protocol to the Inter-American Convention on Letters Rogatory ("Additional Protocol"), May 8, 1979, O.A.S.T.S. No. 56, 1438 U.N.T.S. 372, the originating country's Central Authority—established to carry out the country's responsibilities under the Convention on Letters Rogatory—transmits the letters rogatory to the destination country's Central Authority. The Central Authority in the destination country then executes the letters rogatory in accordance with its own laws and

[6] Although EGI included its calculations in an appendix to the petition, it did not specify in the petition itself the final dollar amount it believed Mr. Coderch was obligated to pay. EGI later filed a more detailed calculation and a proposed judgment that listed the final purchase price when it filed its response brief in opposition to Mr. Coderch's motions to quash and to dismiss.

[7] "In its broader sense in international practice, the term letters rogatory denotes a formal request from a court in which an action is pending, to a foreign court to perform some judicial act." 22 C.F.R. § 92.54.

procedural rules. Convention on Letters Rogatory, art. 10; Additional Protocol, art. 4. Upon execution, the Central Authority of the destination country certifies that the letters rogatory were executed in accordance with local law and returns the executed letters rogatory to the Central Authority in the originating country. Both the United States and Brazil are signatories to the Convention on Letters Rogatory and its Additional Protocol.

Because this process can take at least twelve months to complete, EGI moved, on May 7, 2015, for an extension of time to effectuate foreign service of process on Mr. Coderch pursuant to the Convention on Letters Rogatory. The District Court granted EGI's request and administratively closed the case until service was carried out.

Once Brazil's Central Authority received the Letter Rogatory from the United States, it attempted, unsuccessfully, to serve Mr. Coderch multiple times at various addresses; later it dispatched a bailiff, who apparently was unable to locate Mr. Coderch at his last known address. During the bailiff's latest attempt to serve Mr. Coderch on November 1, 2016, the bailiff was informed that Mr. Coderch was living at a *finca* (a farm) in Paraguay. On December 5, 2016, a Paraguayan notary attempted to locate the *finca* but could not find any record of it. So, EGI submitted a request to the Brazilian Superior Court of Justice ("STJ") to serve Mr. Coderch via a special procedure for constructive service under Brazilian law called *citação*

por hora certa ("*hora certa*"), which translates to "service of process at a designated time."

Under Articles 252 and 253 of the Brazilian Code of Civil Procedure, a Brazilian court may authorize *hora certa* service on an individual if service was attempted twice unsuccessfully and there is reason to suspect that the individual is concealing himself from service. Aff. of Pedro Oliveira da Costa, ¶¶ 11–12, nn.1–2, ECF No. 16-7; Decl. of Keith S. Rosenn, ¶¶ 19–20, ECF No. 21-3; Decl. of José Roberto dos Santos Bedaque, ¶¶ 10–12, ECF No. 30-2.[8] To accomplish *hora certa* service, a court official must attempt to serve the summons twice at the individual's address. da Costa Aff. ¶ 12. If he is still unsuccessful, he must notify a family member, neighbor, or doorman at that address that he will return on the next day at a designated time to attempt service a third time. *Id.* If the target of service still cannot be located at the address after this third attempt at service, the official may leave a copy of the summons and complaint with a family member, neighbor, or doorman, and the target is deemed constructively served under Brazilian law. *Id.* ¶¶ 12–15.

Here, the STJ specifically authorized *hora certa* service on Mr. Coderch. The bailiff returned to Mr. Coderch's Brazilian apartment on April 6 and 11, 2017,

[8] "In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence." Fed. R. Civ. P. 44.1.

to attempt service. After both attempts were unsuccessful, he notified the doorman that he would attempt service one final time on April 12, 2017, at 2:00 p.m. The bailiff returned on April 12 but again could not find Mr. Coderch. The bailiff thus left the summons and copies of the court documents with the doorman. On May 11, 2017, the STJ confirmed that Mr. Coderch had been properly served via the *hora certa* process, and on June 8, 2017, the Brazilian Ministry of Justice and Public Security returned the Letter Rogatory to the United States, indicating that Mr. Coderch had been validly served under Brazilian law.

After the Letter Rogatory was returned and filed with the District Court, the District Court reopened the case. Mr. Coderch moved to quash the foreign service of process under Rule 12(b)(4) of the Federal Rules of Civil Procedure, claiming that service was invalid under Brazilian law. He also moved to dismiss the petition to confirm the Arbitration Award, arguing, *inter alia*, that the Award cannot be recognized because it is not a money judgment and that recognition of the Award as requested by EGI would substantially modify the Award. The District Court denied both motions. It first held that it could not review the Brazilian court's determination that service of process had been carried out in accordance with Brazilian law; but even if it could, it found that Mr. Coderch had not presented persuasive evidence that service was insufficient. The Court then held that the

Award should be confirmed, rejecting each of Mr. Coderch's arguments. Mr. Coderch now appeals.

II.

We turn first to the sufficiency of service of process in Brazil. When reviewing an order resolving a defendant's challenge to service of process, we review the district court's legal conclusions, including the district court's interpretation of foreign law in determining the sufficiency of service, *de novo* and its findings of fact for clear error. *Prewitt Enters., Inc. v. Org. of Petroleum Exp. Countries*, 353 F.3d 916, 920–21 (11th Cir. 2003).

In this case, EGI chose to serve Mr. Coderch pursuant to the Convention on Letters Rogatory and its Additional Protocol. Under the Convention on Letters Rogatory, "[l]etters rogatory shall be executed in accordance with the laws and procedural rules of the State of destination," here, Brazil. Convention on Letters Rogatory, art. 10. The Convention on Letters Rogatory further provides that "the State of destination shall have jurisdiction to determine any issue arising as a result of the execution of the measure requested in the letter rogatory." Convention on Letters Rogatory, art. 11. Here, a Brazilian court determined both that service via the *hora certa* procedure was warranted and that *hora certa* service had been carried out in accordance with Brazilian law. The District Court determined that it would be improper for the Court to review a decision by the Brazilian court that

service of process was carried out in accordance with Brazilian law. We also see no reason to disturb the Brazilian court's rulings. Principles of comity[9] counsel against reviewing a foreign court's determination regarding the interpretation and application of the foreign country's own laws—especially here, where the operative treaty confers jurisdiction over the issue to the foreign court.

In evaluating whether comity is appropriate, we consider "(1) whether the judgment was rendered via fraud; (2) whether the judgment was rendered by a competent court utilizing proceedings consistent with civilized jurisprudence; and (3) whether the foreign judgment is prejudicial, in the sense of violating American public policy because it is repugnant to fundamental principles of what is decent and just." *Turner Entm't Co. v. Degeto Film GmbH*, 25 F.3d 1512, 1519 (11th Cir. 1994) (internal citations omitted). We also consider "whether 'the central issue in

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[9] International comity refers to "[t]he extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation." *Hilton v. Guyot*, 159 U.S. 113, 163, 16 S. Ct. 139, 143 (1895); *GDG Acquisitions, LLC v. Gov't of Belize*, 749 F.3d 1024, 1030 (11th Cir. 2014). As the Supreme Court has explained:

> When . . . [a] foreign judgment appears to have been rendered by a competent court, having jurisdiction of the cause and of the parties, and upon due allegations and proofs, and opportunity to defend against them, and its proceedings are according to the course of a civilized jurisprudence, and are stated in a clear and formal record, the judgment is prima facie evidence, at least, of the truth of the matter adjudged; and it should be held conclusive upon the merits tried in the foreign court, unless some special ground is shown for impeaching the judgment, as by showing that it was affected by fraud or prejudice, or that by the principles of international law, and by the comity of our own country, it should not be given full credit and effect.

Hilton, 159 U.S. at 205–06, 16 S. Ct. at 159–60.

dispute is a matter of foreign law and whether there is a prospect of conflicting judgments.'" *Daewoo Motor Am., Inc. v. Gen. Motors Corp.*, 459 F.3d 1249, 1258 (11th Cir. 2006) (quoting *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1238 (11th Cir. 2004)).

Mr. Coderch argues that the Brazilian STJ's decision to authorize *hora certa* service is not entitled to comity because (1) it was the product of an ex parte proceeding in which he had no opportunity to defend himself, and (2) it was procured by fraud. As to his first argument, Mr. Coderch claims that he lacked any fair opportunity to defend himself in the Brazilian court because, if he had appeared to challenge service or the *hora certa* procedure, he would have been automatically deemed served under Brazilian law. Thus, he could not have challenged service in the Brazilian courts, like the District Court suggested, because to challenge service in Brazil would have been to waive service.

It is true that if Mr. Coderch had attempted to challenge service in Brazil, he would be deemed served under Brazilian law upon appearing in court. But that is why, in cases dealing with constructive service such as the *hora certa* service at issue here, Brazilian law provides for the appointment of a lawyer from the Public Defender's Office to represent the interests of the individual who has not yet appeared before the Brazilian court. da Costa Aff. ¶ 11, n.4, ECF No. 30-1. In this case, a Special Guardian from the Public Defender's Office represented Mr.

Coderch in defending against service in the Brazilian tribunal. That Public Defender apparently made multiple challenges to the validity of service in the Brazilian court on Mr. Coderch's behalf, a fact Mr. Coderch does not dispute. As such, we cannot say that the Brazilian tribunal failed to offer Mr. Coderch a fair opportunity to defend against service in Brazil.

With respect to his second argument, Mr. Coderch contends that the evidence submitted to the STJ, which the STJ relied on in finding that Mr. Coderch was concealing himself from service and authorizing *hora certa* service, was false. Specifically, Mr. Coderch claims that the declaration presented to the STJ that stated that his *finca* in Paraguay did not exist was false and misled the STJ, and thus that the STJ's factual determination that Mr. Coderch was attempting to evade service was erroneous and, as a matter of Brazilian law, it should not have authorized *hora certa* service. The District Court, however, found no evidence of fraud, instead concluding that "ample evidence" substantiated the STJ's finding that Mr. Coderch was evading service of process. The District Court did not clearly err in so finding, and we are not convinced that EGI's (and the Paraguayan notary's) apparent inability to locate Mr. Coderch's *finca* in Paraguay rises to the level of fraud.

Accordingly, we hold that the District Court did not err in finding that considerations of international comity counseled against reviewing the Brazilian

court's determination that Mr. Coderch had been properly served in accordance with Brazilian law, especially since the Convention on Letters Rogatory commits jurisdiction of this issue to the courts of Brazil. Therefore, the District Court properly denied Mr. Coderch's motion to quash service under Rule 12.

III.

We turn next to Mr. Coderch's argument that the District Court erred in confirming the Arbitration Award. "On an appeal of a district court's decision to confirm or vacate an arbitration award, we review the district court's resolution of questions of law de novo and its findings of fact for clear error." *Rintin Corp., S.A. v. Domar, Ltd.*, 476 F.3d 1254, 1258 (11th Cir. 2007).

Both parties agree that this Arbitration Award is governed by the Inter-American Convention on International Commercial Arbitration (the "Panama Convention"), Jan. 30, 1975, O.A.S.T.S. No. 42, 1438 U.N.T.S. 245. Chapter 3 of the FAA, 9 U.S.C. §§ 301–307, implements the Panama Convention. Relevant here, § 302 incorporates by reference § 207 of the FAA, which provides that a federal court *must* confirm an arbitration award "unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention."[10] 9 U.S.C. § 207. Article 5 of the Panama Convention lists

[10] The "said Convention" referred to in § 207 is the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3, the predecessor to the Panama Convention. There is

seven grounds for refusing to recognize an arbitration award: (1) incapacity or invalidity of the agreement, (2) lack of notice, (3) that the decision concerns a non-arbitrable dispute, (4) violation of the arbitration agreement or relevant law in carrying out the arbitration, (5) "[t]hat the decision is not yet binding on the parties or has been annulled or suspended," (6) "[t]hat the subject of the dispute cannot be settled by arbitration under the law of [the State of recognition]," and (7) "[t]hat the recognition or execution of the decision would be contrary to the public policy (*ordre public*) of [the State of recognition]." Panama Convention, art. 5. Mr. Coderch does not claim to be invoking one of these exceptions as a basis for refusing to confirm the Arbitration Award.

Instead, Mr. Coderch argues that the Award was not confirmable for two reasons. First, he argues that the Award left undecided several issues relating to the purchase price that render the Award non-final. And, he says, although the Panama Convention is silent on whether non-final awards may be confirmed, as a general matter we lack jurisdiction to confirm a non-final arbitration award. *See Savers Prop. & Cas. Ins. Co. v. Nat'l Union Fire Ins. Co. of Pittsburg*, 748 F.3d 708, 717–19 (6th Cir. 2014) (holding that the court lacked jurisdiction to review an interim award that resolved only issues of liability and reserved for a later date the

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no substantive difference between the two as relevant here. Moreover, in incorporating § 207 into Chapter 3 of the FAA, § 302 specifies that "the Convention" shall mean the Panama Convention for purposes of Chapter 3.

question of computing damages). He asks us to send the dispute back to the arbitrator to decide these issues in the first instance. Second, he argues that confirming the Award as requested by EGI improperly modifies the Award from an order of specific performance to an award for money damages. We review each argument in turn.

A.

Coderch first argues that the Award cannot be confirmed because it did not fully resolve the parties' disputes regarding the purchase price. As explained above, the Arbitration Award provides a detailed formula, tracking precisely the language of Section 10 of the Shareholders' Agreement, for calculating the price of the shares that EGI was entitled to sell pursuant to its put right, based on the initial Preferred Purchase Price per share identified in the Award. The only thing the Arbitration Award does not do is perform the calculations. Despite this, Mr. Coderch claims that the Award is non-final because the formula fails to specify the currency in which the purchase is to be made—it provides as a starting point for the calculation a sum in UF, which is not a currency but an inflation index, and fails to specify a conversion date for purposes of converting the UF figures into an appropriate currency. He argues that EGI improperly calculated the amount owed to it under the Award by converting the UF amount listed in the Award to U.S. dollars, as opposed to Chilean pesos as the Shareholders' Agreement contemplates.

He claims that we must remand this dispute so that the arbitrator can decide the appropriate currency.

As an initial matter, we can find nothing in the Shareholders' Agreement that requires the shares purchased pursuant to the put right to be paid for only in Chilean pesos, as Mr. Coderch claims. The Arbitration Award certainly does not require as much, given that it directs the purchase price to be calculated in terms of UF. But regardless, EGI *did* initially convert the UF figure listed in the Award to Chilean pesos, before eventually converting it into U.S. dollars for purposes of confirmation in the District Court.

Moreover, the currency in which the Award is ultimately paid does not matter so much—as far as value goes—as long as the appropriate conversion date is used. That brings us to the parties' next disagreement. EGI converted the Award amount from UF to pesos to U.S. dollars using the exchange rate on the date that payment was due under the Award: January 23, 2012.[11] EGI argues this was appropriate because, according to the "breach day" rule, foreign arbitration awards should be converted to U.S. dollars on the date of the award. Mr. Coderch

[11] The arbitrator rendered a decision on January 13, 2012, requiring Mr. Coderch to purchase all of EGI's shares within ten *business days* from the date of the Award. That means that performance under the Award was due on January 27, 2012. In arriving at the January 23 date, EGI apparently counted ten total days, including Saturdays and Sundays, from the date of the Award. Nonetheless, this mistake does not affect our conclusion because, as explained below, we find that the proper conversion date is in fact January 13, 2012.

argues that this gives EGI an inflated award, and that the appropriate conversion date is the date of the "Preferred Closing" in the Shareholders' Agreement. He also argues that because the Award itself does not provide the conversion date, the Award is non-final, and we should send the matter back to the arbitrator to decide in the first instance.

While the Arbitration Award does not specify a conversion date, that omission alone does not render the Award non-final if the conversion date is established as a matter of law. The Supreme Court has laid out two options for determining the proper date on which to convert foreign currency into U.S. dollars. The first, established in *Hicks v. Guinness*, 269 U.S. 71, 46 S. Ct. 46 (1925), and known as the "breach day" rule, applies when the plaintiff's cause of action arises under U.S. law. *See Jamaica Nutrition Holdings, Ltd. v. United Shipping Co.*, 643 F.2d 376, 380 (5th Cir. April 24, 1981).[12] In that case, the applicable exchange rate is the rate that was in effect on the date that the plaintiff's cause of action arose. *Id.* In *Hicks*, a breach-of-contract case, that meant that German marks should be converted into U.S. dollars on the date the contract was breached. *See* 269 U.S. at 80, 46 S. Ct. at 47. The Supreme Court reasoned that at the time of breach the plaintiff had a claim under U.S. law for damages in U.S. dollars.

[12] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), we adopted as binding all Fifth Circuit precedent prior to October 1, 1981.

Jamaica Nutrition Holdings, 643 F.2d at 380 (quoting *Hicks*, 269 U.S. at 80, 46 S. Ct. at 47).

The second method, based on the Supreme Court's decision in *Die Deutsche Bank Filiale Nurnberg v. Humphrey*, 272 U.S. 517, 47 S. Ct. 166 (1926), applies when the suit is based entirely on an obligation existing under a foreign country's laws and the debt is payable in that country's currency. *Jamaica Nutrition Holdings*, 643 F.2d at 380. In that case, the parties assume the risk of currency fluctuations and the applicable exchange rate is the rate in effect on the date of the final decree or judgment. *Humphrey*, 272 U.S. at 518–19, 47 S. Ct. at 166–67; *Jamaica Nutrition Holdings*, 643 F.2d at 380. This is known as the "judgment day" rule.

To determine which rule is applicable, we look to the jurisdiction in which the plaintiff's cause of action arose. *See In re Good Hope Chem. Corp.*, 747 F.2d 806, 811 (1st Cir. 1984). This is a suit under the FAA to confirm an international arbitration award. Thus, the FAA, which implements the Panama Convention, is the source of EGI's cause of action. While the underlying dispute between EGI and Mr. Coderch in arbitration regarding the breach of the Shareholders' Agreement was governed by Chilean law, EGI's cause of action here derives entirely from U.S. law, namely the right under the FAA to have an international arbitration award confirmed by a U.S. court. Therefore, because EGI's cause of

action arises under U.S. law, the District Court properly understood that the purchase price owed to EGI under the Award should be converted to U.S. dollars according to the breach day rule.

However, the District Court clearly erred in accepting the date suggested by EGI—January 23, 2012—as the appropriate date for conversion under the breach day rule. The breach day rule requires conversion using the exchange rate on the date that the cause of action arose. A cause of action arises under § 207 of the FAA as soon as an arbitration award "is made." *See* 9 U.S.C. § 207 ("Within three years after an arbitral award falling under the Convention *is made*, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration." (emphasis added)); *see also Seetransport Wiking Trader Schiffarhtsgesellschaft MBH & Co., Kommanditgesellschaft v. Navimpex Centrala Navala*, 989 F.2d 572, 581 (2d Cir. 1993), *as amended* (May 25, 1993) (interpreting "made" in § 207 as referring to when the award is actually decided by the arbitrator, and thus finding that the three-year statute of limitations begins to run once the arbitration award is issued). In other words, an arbitration award becomes confirmable under the Panama Convention and the FAA as soon as it is issued. EGI thus had a cause of action under the FAA as soon as the Arbitration Award issued in Chile on January 13, 2012. As such, the proper conversion date under the breach day rule is January 13,

2012. The District Court therefore clearly erred in accepting EGI's calculations, which converted UF to pesos to U.S. dollars on January 23, 2012.

B.

Lastly, Mr. Coderch contends that the District Court should not have confirmed the Arbitration Award as requested by EGI because the Award was really an order of specific performance, forcing the controlling shareholders' compliance with Section 10 of the Shareholders' Agreement, and not an award of a sum of money. He argues that enforcing the Arbitration Award as a money judgment gives EGI a windfall, allowing EGI to collect an inflated purchase price without any obligation to turn over the shares.[13]

Mr. Coderch is correct that the Arbitration Award is properly understood as ordering specific performance of the parties' obligations under Section 10—namely, the purchase by Mr. Coderch and the sale by EGI of EGI's shares of preferred stock. As the arbitrator noted throughout the Award, EGI had sought forcible compliance with the terms of the Shareholders' Agreement. And Section 10 of the Shareholders' Agreement makes clear that the parties contemplated the simultaneous transfer of stock for cash by providing that "*[a]t the time of each one*

[13] Despite having exercised its put right, EGI continues to hold onto the shares. It represents here, as it did in the District Court, that it is willing and prepared to transfer the shares once Mr. Coderch makes the requisite payment. EGI has chosen not to transfer the shares yet because EGI fears that it would substantially weaken its economic position if it had neither the shares nor the money to which it is entitled.

of such purchases [of preferred stock made pursuant to the put right], the respective number of relevant shares of Preferred Stock *shall be transferred* to the Put Buyer against full payment in cash for such shares" (emphases added). That simultaneous exchange of shares for money is what the arbitrator ordered. To the extent that the District Court enforced the Arbitration Award as a money judgment, the District Court erred.

That said, Mr. Coderch offers no reason why an arbitration award ordering specific performance, as opposed to money damages, is not confirmable under the Panama Convention. The Panama Convention makes no exception for the recognition of arbitration awards ordering specific performance. *See generally* Panama Convention, art. 5. And, as explained above, a district court can refuse to confirm an arbitration award only if one of the enumerated exceptions in the Panama Convention applies. Accordingly, we find that the Award was confirmable under the Panama Convention and the FAA.

The fact that the Award is an order of specific performance, as opposed to a money judgment, might be irrelevant for purposes of determining whether the Award is confirmable, but it *is* relevant to crafting the appropriate remedy. Because the District Court viewed the Award as a money judgment as opposed to an order of specific performance, it enforced only half of the Award: it ordered Mr. Coderch to pay the put price for EGI's shares but neglected to enforce the

corresponding requirement that EGI tender those shares upon payment. Instead of enforcing the Arbitration Award as requested by EGI, the District Court's order should have required Mr. Coderch to pay the purchase price set out in the Shareholders' Agreement and the Award *and* in exchange required EGI to tender its shares.[14] Because the District Court did not do this, it erred.

IV.

In conclusion, we hold that while the District Court properly found that the Arbitration Award should be confirmed under the Panama Convention, the Court committed two errors in enforcing that award. First, it clearly erred by accepting EGI's calculation of the purchase price due under the award, which used the wrong conversion date. Second, it failed to fully enforce the Award by neglecting to order EGI to tender its shares upon payment, as EGI is required to do under

[14] To facilitate the transfer, the District Court could have then required both parties to tender their performance to the Clerk of Court, as is customary in cases of forced sales, rather than directly to each other. That way, once the Clerk receives the shares from EGI and the payment from Mr. Coderch, he or she could effectuate the simultaneous transfer of shares for money that the Shareholders' Agreement and the Arbitration Award contemplate. Such an approach would also ensure that neither party ends up with a windfall if the other reneges (as each party here worries the other will do) and would put to rest this never-ending game of chicken concerning who will perform first and risk ending up with nothing at all.

Of course, this still begs the question of how to enforce an order of specific performance if one of the parties still refuses to perform. Fortunately, the District Court has plenty of tools in its chest to deal with a party's failure to comply with the Court's own orders. For example, the District Court might set a specific date on which performance under its order is due, and provide that for every day after the deadline that the party refuses to comply, the District Court will impose a hefty monetary fine on the offending party. Those accumulating fines would then be enforceable as money judgments against the offending party.

Section 10 of the Shareholders' Agreement. We therefore **VACATE** the District Court's order and **REMAND** with the following instructions: (1) to recalculate the purchase price of the shares using the January 13, 2012, conversion date; and (2) to enter an order requiring both Mr. Coderch and EGI to perform their obligations under Section 10 of the Shareholders' Agreement by paying the purchase price for the relevant shares, after proper calculation and conversion, and tendering those shares, respectively.

SO ORDERED.

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D18-5128

LYNDA A. RUSSELL,

Appellant,

v.

WELLS FARGO BANK, N.A.,

Appellee.

On appeal from the Circuit Court for Duval County.
A.C. Soud, Jr., Judge.

June 22, 2020

PER CURIAM.

Appellant, Lynda A. Russell, appeals a foreclosure judgment, arguing that Appellee, Wells Fargo Bank, N.A., failed to prove that it satisfied conditions precedent to bringing the foreclosure action and that the trial court erred in allowing into evidence an email describing an attempt to make contact with her on the mortgaged property. We reject the latter argument without further comment.

As for Appellant's first argument, we find no merit in her position that Appellee bore the burden to prove that it satisfied the conditions precedent. Because Appellant raised Appellee's alleged failure to satisfy the conditions as an affirmative defense rather than denying Appellee's allegation that it satisfied all conditions in her answer, it was Appellant's burden to prove that Appellee

failed to satisfy such. *See Chrzuszcz v. Wells Fargo Bank, N.A.*, 250 So. 3d 766, 770 (Fla. 1st DCA 2018) (noting that a defendant who raises an affirmative defense bears the burden of proving that affirmative defense and holding that where the appellee bank asserted in the complaint that all conditions precedent had been satisfied, but the appellant borrower denied that assertion with the specific claim that the bank failed to meet the face-to-face counseling requirement rather than raising the issue as an affirmative defense, the burden of proving the condition precedent was shifted back to the bank); *McIntosh v. Wells Fargo Bank, N.A.*, 226 So. 3d 377, 379 (Fla. 5th DCA 2017) (explaining that the burden to prove compliance with conditions precedent rests with the plaintiff if asserted in the complaint and denied in the answer but with the defendant if raised instead as an affirmative defense in the answer); *see also Harris v. U.S. Bank Nat'l Ass'n*, 223 So. 3d 1030, 1031–32 (Fla. 1st DCA 2017) (explaining that a defending party's assertion that a plaintiff has failed to satisfy conditions precedent necessary to trigger contractual duties is generally viewed as an affirmative defense for which the defensive pleader has the burden of pleading and persuasion and noting that the appellants did not raise the appellee's noncompliance "in their answer, affirmative defenses, or at any time prior to closing argument, which amounts to a waiver and failure to preserve the issue"). Given that Appellant did not meet her burden, affirmance of the foreclosure judgment is warranted.

AFFIRMED.

LEWIS, WINOKUR, and M.K. THOMAS, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Malcolm E. Harrison and Michelle Moore, Wellington, for Appellant.

Sara F. Holladay-Tobias, Emily Y. Rottmann, and C.H. Houston III, of McGuire Woods LLP, Jacksonville, for Appellee.

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D18-5328

YASHAR KORKMAS,

Appellant/Cross-Appellee,

v.

ONYX CREATIVE GROUP & NADIA KAMAL,

Appellees/Cross-Appellants.

On appeal from the Circuit Court for Leon County.
Karen Gievers, Judge.

June 22, 2020

WINOKUR, J.

Yashar Korkmas appeals the trial court's judgment entered in his suit against Onyx Creative Group and Nadia Kamal. Korkmas argues that the court erred when it ruled that he violated the Florida Consumer Collection Practices Act (FCCPA) when he attempted to collect a debt from Kamal.[1] Korkmas also contends that the trial court erred when it determined that he was not entitled to late fees or interest on the debt.

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[1] Sections 559.55–559.785 constitute the "Florida Consumer Collection Practices Act." § 559.551, Fla. Stat.

We reverse the trial court's ruling that the agreement was a "debt" under FCCPA and that FCCPA remedies apply. We affirm the court's decision that Korkmas is not entitled to interest on the loan; however, we reverse the ruling that he was not entitled to late fees.[2]

I.

Korkmas agreed to loan Kamal $25,000 for Kamal's business venture, Onyx Creative Group. Korkmas and Kamal entered into a written agreement, the Note, which attempted to set forth the parameters of the loan. Kamal drafted the Note. Following non-payment of the loan, Korkmas filed suit, seeking the principal of $25,000, interest, and late fees. Kamal counterclaimed, arguing that Korkmas violated FCCPA because he harassed her in his attempt to collect the debt.

The trial court found that Kamal did borrow $25,000 from Korkmas and had not repaid any of the principal. However, the court also ruled that Korkmas violated FCCPA in his attempts to collect the debt, thereby "entitling [Kamal] to relief pursuant to the civil remedies provision of [FCCPA], including the $1,000 statutory damages, plus [Kamal's] attorney's fees and costs . . . ." Additionally, the court held that Korkmas could not collect any interest on the loan, nor was Korkmas entitled to any late fees.

II.

A. Applicability of the FCCPA

The FCCPA prohibits certain actions in collecting debts and permits a debtor to collect certain penalties against a person engaging in these prohibited practices. *See* § 559.72 & 559.77, Fla. Stat. The trial court found that Korkmas engaged in these practices.

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[2] We reject Korkmas' claim that the court erred in denying his motion for continuance. We also reject Kamal's cross-appeal. The rulings on which those issues are based are affirmed without further comment.

For FCCPA to apply to a transaction, the obligation must meet the definition of "debt" under section 559.55(6), which states:

> "Debt" or "consumer debt" means any obligation or alleged obligation of a consumer to pay money *arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes*, whether or not such obligation has been reduced to judgment.

(Emphasis added.) Whether a transaction is a "debt" under section 559.55(6) depends on what gave rise to the obligation. In addition, the "subject of the transaction" must be "primarily for personal, family, or household purposes." § 559.55(6), Fla. Stat.

This Court considers questions of statutory interpretation de novo. *State, Dep't of Health v. Bayfront HMA Med. Ctr., LLC*, 236 So. 3d 466, 471 (Fla. 1st DCA 2018). The trial court determined that FCCPA applied to the transaction between Korkmas and Kamal because "the funds *were used* primarily for . . . Kamal's personal use." (Emphasis added.) The trial court's focus was misplaced. Again, the FCCPA applies to an obligation based on what gave rise to the obligation, not what the debtor eventually used the loan for.

It is undisputed that Korkmas provided the loan to Kamal for her *business venture*—Onyx Creative Group—as opposed to some "personal, family, or household purpose[]." Accordingly, "the subject of the transaction" was not for "personal, family, or household purposes." Instead, the "subject of the transaction" was to fund Onyx Creative Group—a business. Consequently, applying FCCPA to the current cause of action—including any of FCCPA's fines or penalties—was erroneous.

B. Interest and Late Fees

"A trial court's interpretation of a contract is a matter of law and is thus subject to *de novo* review." *Rose v. Steigleman*, 32 So. 3d 644, 645 (Fla. 1st DCA 2010). "Contracts are to be construed in

accordance with the plain meaning of the words contained therein." *Ferreira v. Home Depot/Sedgwick CMS*, 12 So. 3d 866, 868 (Fla. 1st DCA 2009). "The parties are bound by the unambiguous terms of their contract." *Chrysler Realty Corp. v. Davis*, 877 So. 2d 903, 906 (Fla. 4th DCA 2004).

We affirm the trial court's finding regarding Korkmas' entitlement to interest. However, the lower court erred by determining that Korkmas was not entitled to late fees because no due date could be determined for them to apply. "[W]hen an ambiguity [in a contract] exists and the parties' intent can be resolved only by resort to conflicting extrinsic evidence, a question of fact is presented, which must be resolved by the trier of fact." *Wagner v. Wagner*, 885 So. 2d 488, 492 (Fla. 1st DCA 2004). Moreover, "[i]nsofar as contract language may be deemed ambiguous, Florida law dictates that any ambiguity will be interpreted against the party who selected the language." *First Texas Sav. Ass'n v. Comprop Inv. Properties Ltd.*, 752 F. Supp. 1568, 1571 (M.D. Fla. 1990) (citing *Consol. Dev. & Eng'g Corp. v. Ortega Co.*, 158 So. 94, 96 (Fla. 1933)).

The Note between Korkmas and Kamal references two different due dates, after which a 5% late fee would be added to the principal. Because the Note lists two different due dates, we agree with the trial court that the due date for repayment of the loan is ambiguous and cannot be resolved on the face of the Note. However, even after hearing extrinsic evidence in an attempt to resolve the ambiguity, the trial court simply held that the ambiguity could not be resolved, and therefore, that Korkmas was not entitled to a late fee. We disagree.

As stated, we interpret ambiguities in a contract against the party who selected the language. Kamal, as the drafter of the Note, bears the burden of the ambiguity. As such, the fact that the agreement is ambiguous regarding Korkmas' entitlement to late fees is not a sufficient reason to deny late fees to him.[3]

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[3] We express no final opinion on whether Korkmas is otherwise entitled to late fees, or on the amount of fees owed. We

III.

It was error to define the obligation under the loan as "debt" under FCCPA. Therefore, because FCCPA is inapplicable, we reverse all penalties, fines, and fees associated with Korkmas' purported violation of FCCPA. In addition, it was error to determine that the Note's ambiguous due date prevented the lower court from selecting a due date altogether. Therefore, upon remand, the lower court must determine Korkmas' entitlement to late fees.[4]

AFFIRMED in part, REVERSED in part and REMANDED.

B.L. THOMAS and OSTERHAUS, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Ronald Newlin of The Newlin Law Firm, LLC, Tallahassee, for Appellant/Cross-Appellee.

Daniel W. Hartman of Hartman Law Firm, P.A., Tallahassee, for Appellees/Cross-Appellants.

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find only that the trial court's reason for denying late fees was erroneous.

[4] We note that Korkmas' entitlement to late fees is separate from his entitlement to interest, which the trial court correctly denied.

Third District Court of Appeal

State of Florida

Opinion filed June 24, 2020.
Not final until disposition of timely filed motion for rehearing.

Nos. 3D19-375 & 3D18-2407
Lower Tribunal No. 09-69166

Kelly Phillips, et al.,
Appellants/Cross-Appellees,

vs.

Mitchell's Lawn Maintenance Corp.,
Appellee/Cross-Appellant.

Appeals from the Circuit Court for Miami-Dade County, Abby Cynamon, Judge.

Weinstein Law, P.A., and Morgan L. Weinstein (Fort Lauderdale), for appellants/cross-appellees.

Espinosa Law Group, and Daniel A. Espinosa; Hazel Law, P.A., and Robin F. Hazel (Hollywood), for appellee/cross-appellant.

Before SALTER, LOGUE and HENDON, JJ.

PER CURIAM.

The appellants, two defendants below, Kelly Phillips and Edel Leon, were sued by Mitchell's Lawn Maintenance Corp. ("Mitchell's") in 2010 in an amended complaint alleging counts for civil theft, unjust enrichment, conversion, fraud, and civil conspiracy. The amended complaint also included claims against Miranda's Lawn Maintenance Corp. and Hary de la Cruz.

The amended complaint alleged that Phillips and Leon had intentionally misapplied funds of Mitchell's and diverted checks payable to Mitchell's, converting and stealing all such funds and checks for their own benefit. The pleadings of these two defendants were stricken after numerous instances of "willful and contumacious violation" of the trial court's orders. Before the pleadings were stricken, Phillips and Leon were given notice of an evidentiary hearing for their appearance and were ordered to show cause why such an order should not be entered.

Following the hearing, the order was entered striking the pleadings of Phillips and Leon. The order also entered a final default judgment against them. In July 2018, the trial court conducted a bench trial on damages, ultimately entering an amended final judgment for $871,552.82 in favor of Mitchell's and against Phillips and Leon. These appeals followed.[1]

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[1] Our Case No. 3D18-2407 was Phillips' and Leon's appeal from the amended final judgment and 13 prior orders pertaining to Phillips' and Leon's (a) non-compliance with discovery orders and (b) misrepresentations to the trial court. Mitchell's cross-appealed the final judgment, contending that the trial court erred in awarding conversion damages, but not civil theft damages as well. In our Case No. 3D19-375,

Analysis

We review a trial court's order striking pleadings for a party's misconduct for an abuse of discretion. Ham v. Dunmire, 891 So. 2d 492, 495 (Fla. 2004). This record amply supports the order striking Phillips' and Leon's pleadings, demonstrating repeated, flagrant, and intentional failures to respond to discovery and appear for deposition (including a court order requiring Phillips to appear for deposition), and other dilatory and sanctionable misconduct.

Importantly, and addressing a contention of Phillips and Leon on appeal, it was unnecessary for the trial court to provide written findings pursuant to Kozel v. Ostendorf, 629 So. 2d 817 (Fla. 1993), before striking pleadings as a sanction. Kozel is applicable to misconduct by counsel for a party, not (as here) where the entirety of the misconduct is attributable to the party. Ledo v. Seavie Res., LLC, 149 So. 3d 707, 710 (Fla. 3d DCA 2014) ("Since Ledo was sanctioned for his own failures to comply with court orders while he was acting *pro se*, Kozel has no application here.").

As to Mitchell's cross-appeal, we find no reversible error. Whether concerned by duplicative damages or a technical deficiency in the pre-suit civil theft notice, the trial court considered the evidence and rendered the amended final judgment

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Kelly and Phillips appealed the denial of their claim for attorney's fees under section 772.104(3), Florida Statutes (2019), of the civil theft statute.

accordingly. Finally, in Case No. 3D19-375, we find no reversible error in the trial court's conclusion that Phillips and Leon should not be awarded attorney's fees under section 772.104(3) of the civil theft law. Such an award would require the trial court to find that Mitchell's "raised a claim which was without substantial fact or legal support." Our review of this record demonstrates that Phillips and Leon made no such showing.

Based on the foregoing analysis, we affirm the amended final judgment and the order on attorney's fees in all respects.

Affirmed.

Third District Court of Appeal

State of Florida

Opinion filed June 24, 2020.
Not final until disposition of timely filed motion for rehearing.

Nos. 3D18-2466 & 3D19-0612
Lower Tribunal No. 16-9220

Alf J. Aanonsen,
Appellant,

vs.

Michael A. Suarez, etc.,
Appellee.

Appeals from the Circuit Court for Miami-Dade County, Beatrice Butchko, Judge.

Haber Law, P.A., and Roger Slade, and Rebecca N. Casamayor, for appellant.

Amethyst Law Group, and Amir Ghaeenzadeh, for appellee.

Before EMAS, C.J., and SCALES, and MILLER, JJ.

MILLER, J.

Appellant, Alf Aanonsen, challenges a final judgment awarding appellee, Michael A. Suarez, as Trustee of the Mas Family Trust, a substantial sum of punitive damages following a non-jury trial. Reaffirming the principle that, absent proof of a separate and independent tort, damages arising out of breach of contract are generally limited to the pecuniary loss sustained, or those which are the natural and proximate result of the breach, we reverse. See Lewis v. Guthartz, 428 So. 2d 222, 223 (Fla. 1982) (citing Griffith v. Shamrock Vill., Inc., 94 So. 2d 854, 858 (Fla. 1957)).

Here, the joint and several compensatory judgment, relied upon by Suarez as a basis for punitive damages, merely awarded the liquidated balance of the amount due and owing under a breached agreement. No further competent evidence of damages was forthcoming. Consequently, Suarez failed to adequately allege and prove both "a tort independent from the acts that breach[ed] the contract" and non-duplicative damages grounded in tort.[1] Ferguson Transp. Inc. v. N. Am. Van Lines, Inc., 687 So. 2d 821, 822 (Fla. 1996); see Ghodrati v. Miami Paneling Corp., 770 So. 2d 181, 183 (Fla. 3d DCA 2000) ("A plaintiff, however, may not recover damages for fraud that duplicate damages awarded for breach of contract.") (citing Williams v. Peak Resorts Int'l, Inc., 676 So. 2d 513, 517 (Fla. 5th DCA 1996); Fla.

[1] Nor was there evidence of "wrongful conduct . . . [that] was motivated solely by unreasonable financial gain." § 768.73(1)(b), Fla. Stat.

Temps, Inc. v. Shannon Props., Inc., 645 So. 2d 102 (Fla. 2d DCA 1994); Green Mountain Corp., Inc. v. Frink, 604 So. 2d 579 (Fla. 4th DCA 1992); Rosen v. Marlin, 486 So. 2d 623 (Fla. 3d DCA 1986)); see also Lewis, 428 So. 2d at 223 ("We reaffirm the rule and its underlying policy: an unwillingness to introduce uncertainty and confusion into business transactions as well as the feeling that compensatory damages as substituted performance are an adequate remedy for an aggrieved party to a breached contract.") (citing Simpson, Punitive Damages for Breach of Contract, 20 Ohio St. L.J. 284 (1959)).

Thus, we reverse the final judgment under review and remand with instructions to enter judgment for Aanonsen on Suarez's second amended complaint for punitive damages.

Reversed and remanded.

Third District Court of Appeal

State of Florida

Opinion filed June 24, 2020.
Not final until disposition of timely filed motion for rehearing.

No. 3D19-1595
Lower Tribunal No. 17-20456

Robenson Dumerlus and Eudine R. Dumerlus,
Appellants,

vs.

Wilmington Trust National Association, etc.,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Michael A. Hanzman, Judge.

Jonathan Kline, P.A., and Jonathan Kline (Weston), for appellants.

Greenberg Traurig, P.A., and Vitaliy Kats (Tampa), and Kimberly S. Mello and Arda Goker (Orlando), for appellee.

Before SALTER, SCALES and GORDO, JJ.

SCALES, J.

In this foreclosure case we address the question of whether the trial court committed "fundamental error" – that is, error so egregious that no contemporaneous objection is required to preserve it – by dispensing with closing arguments. Defendants below, Robenson and Eudine R. Dumerlus ("Appellants") appeal a July 17, 2019 Final Judgment of Foreclosure in favor of Wilmington Trust National Association ("Appellee"). Appellants argue that the trial court violated their due process rights by dispensing with closing arguments.[1] Concluding that the trial court did not commit fundamental error, we affirm the Final Judgment of Foreclosure.

I. Relevant Background

In 2007, Appellants executed a mortgage securing payment for Appellants' purchase of a residential property in Miami, Florida. After Appellants defaulted on their mortgage obligations, Appellee, a successor mortgagee, instituted this foreclosure action against Appellants in 2017. At the May 30, 2019 foreclosure trial, Appellee put on one witness, a loan analyst for the mortgage servicer. The loan analyst authenticated the note, the mortgage, the payment history, the demand letter and the business records associated with the loan, confirming that Appellee was the

[1] Appellants also argue the trial court erred by finding that Appellee had complied with the trial court's pre-trial order regarding exhibits and witnesses. Without further discussion, we reject Appellants' contention on this issue and affirm on this basis as well.

party entitled to foreclose and that Appellants had not made a mortgage payment since 2012.

Appellants rested their case without presenting any evidence and renewed their procedural objections in a motion for involuntary dismissal. The trial court denied this motion. As the trial court was issuing its oral ruling on the merits of the case, the following exchange took place:

> [Counsel for Appellants]: What about closing arguments?
>
> The Court: I don't need any closing arguments. You are not going to add anything to this case.

Appellants did not object to the trial court dispensing with closing arguments. The trial court completed its oral ruling and entered the Final Judgment of Foreclosure on July 17, 2019.

II. Appellants' Argument/Standard of Review

Appellants argue that they are entitled to a new trial because the trial court's decision to forego closing arguments constituted a due process violation. Because the alleged error was not met with a contemporaneous objection, we review the trial court's decision for fundamental error. Millen v. Millen, 122 So. 3d 496, 498 (Fla. 3d DCA 2013) ("[I]n the absence of an objection below, this Court will not consider issues for the first time on appeal except in cases of fundamental error."). The Florida Supreme Court has defined "fundamental error" as "error which goes to the foundation of the case or goes to the merits of the cause of action." Sanford v. Rubin,

237 So. 2d 134, 137 (Fla. 1970). For fundamental error to occur, the error must "reach down into the validity of the trial itself." Universal Ins. Co. of N. A. v. Warfel, 82 So. 3d 47, 64 (Fla. 2012) (quoting State v. Delva, 575 So. 2d 643, 644-45 (Fla. 1991)).

III. Analysis

This case involved a civil bench trial. Appellants' trial strategy was to assert procedural objections to Appellee's case-in-chief, without offering testimony or other evidence of their own. Appellants' repeated objections to Appellee's witness's testimony – based upon assertions that Appellee did not comply with the pre-trial order's requirements for document and witness disclosure – were ruled upon methodically by the trial court as having no merit. Appellants did not attack or rebut the sufficiency of Appellee's evidence. Nor did Appellants attempt to disprove any portion of Appellee's case. At the close of Appellants' case-in-chief, the trial court stated, without contemporaneous objection, that it did not need closing arguments from the parties.

As stated, Appellants assert that they were denied due process because their attorney was deprived of the opportunity to present a closing argument to the trial court after the close of evidence. We have held that a clear denial of due process – such as a failure to conduct *any* hearing prior to ruling – does constitute fundamental error. Chiu v. Wells Fargo Bank, N.A., 242 So. 3d 461, 464 (Fla. 3d DCA 2018). A

court's denial of a closing argument also violates due process when a liberty interest is at stake, such as in a criminal or involuntary commitment case. Chalk v. State, 443 So. 2d 421, 423 (Fla. 2d DCA 1989) ("[A] defendant has a right to a closing argument regardless of the length of the hearing or the apparent simplicity of the issues presented.").

Appellants, though, have not cited – and we have not uncovered – authority for the proposition that a trial court's dispensing with closing arguments in a civil foreclosure case *per se* constitutes a due process violation. Indeed, "[i]n Florida, there is no constitutional or statutory provision deeming the right to be heard at the close of a non-jury civil trial an absolute right." Pan Am. Eng'g Co. v. Poncho's Constr. Co., 387 So. 2d 1052, 1054 (Fla. 5th DCA 1980). Appellants rely on cases where a due process violation occurred because the trial court prevented a party from presenting *both* evidence and a closing argument. See e.g., Dobson v. U.S. Bank Nat'l Ass'n, 217 So. 3d 1173, 1174 (Fla. 5th DCA 1998); Julia v. Julia, 146 So. 3d 516, 520-21 (Fla. 4th DCA 2014) (holding that due process was violated when the trial court imposed a time limitation that deprived a party from presenting a full case-in-chief, including closing argument). But these cases are distinguishable, as the record in the instant case plainly shows that Appellants were given the opportunity to present their full case-in-chief.

We employ the fundamental error doctrine "very guardedly," Sanford, 237 So. 2d at 137. We are unable to conclude in this case that the trial court's decision to forego closing arguments "reached down into the validity of the trial itself" or went to the "foundation of the case or . . . to the merits of the cause of action" or otherwise contaminated the proceedings at their core. Therefore, the decision of the trial court to dispense with closing arguments was not fundamental error.

Affirmed.

Third District Court of Appeal

State of Florida

Opinion filed June 24, 2020.
Not final until disposition of timely filed motion for rehearing.

Nos. 3D19-2054; 3D19-2053;
3D19-2051; 3D19-2048;
3D19-2046; 3D19-2044
Lower Tribunal No. 16-18468

Allied Tube and Conduit Corporation, et al.,
Appellants,

vs.

Latitude on the River Condominium Association, Inc.,
Appellee.

Appeals from a Non-Final Order from the Circuit Court for Miami-Dade County, Jennifer D. Bailey, Judge.

Shook, Hardy & Bacon LLP, Daniel B. Rogers and Eric S. Boos, for appellants Allied Tube & Conduit Corporation; Atkore International, Inc.; and Tyco Fire Products, L.P.; Bilzin Sumberg Baena Price & Axelrod, LLP, and Kelly R. Melchiondo; Jeffrey J. Lauderdale (Wickliffe, OH), for appellants The Lubrizol Corporation and Lubrizol Advanced Materials, Inc.; Lee, Hernandez, Landrum & Carlson, APC, Robert A. Carlson and Courtney Willoughby, for appellant Suffolk Construction Company, Inc.; Rennert Vogel Mandler & Rodriguez, P.A., and Jill Nexon Berman, for appellant Miami Riverfront Partners, LLC; Rumberger, Kirk & Caldwell, P.A., and Scott M. Sarason, for appellant Georg Fischer Harvel, LLC; Cole, Scott & Kissane, P.A., and Therese A. Savona (Orlando), for appellant Summers Fire Sprinklers, Inc.

Colson Hicks Eidson, P.A., Wm. Allen Bonner and Patrick S. Montoya, for appellee.

Before SALTER, LOGUE and GORDO, JJ.

GORDO, J.

Allied Tube and Conduit Corporation, Atkore International, Inc., Tyco Fire Products, L.P., Miami Riverfront Partners, LLC, Suffolk Construction Company, Inc., Summers Fire Sprinklers, Inc., Georg Fischer Harvel, LLC, The Lubrizol Corporation and Lubrizol Advanced Materials, Inc., appeal the trial court's non-final order on class certification permitting Latitude on the River Condominium Association to bring claims on behalf of the association members for damages related to the removal and replacement of the building's defective fire-sprinkler system.

Latitude sought to certify a class pursuant to Florida Rule of Civil Procedure 1.221. The trial court held a certification hearing, reviewed the parties' submissions and heard argument regarding the appropriateness of certification. Based on the evidence, affidavits and proffers presented, the court found that Latitude met its threshold burden for class certification under Rule 1.221 because the claims related to matters of common interest affecting the association members in a similar way.

We review the trial court's grant of class certification for an abuse of discretion. Sosa v. Safeway Premium Fin. Co., 73 So. 3d 91, 102 (Fla. 2011). See Biza, Corp. v. Galway Bay Mobile Homeowners Ass'n, Inc., No. 3D18-0631, 2019 WL 6884518, at *3 (Fla. 3d DCA Dec. 18, 2019).

Rule 1.221 expressly authorizes condominium associations to "institute, maintain, settle, or appeal actions or hearings in its name on behalf of all association members concerning matters of common interest to the members." Fla. R. Civ. P. 1.221. "[A]s to controversies affecting the matters of common interest . . ., the condominium association, without more, should be construed to represent the class composed of its members as a matter of law." Biza, 2019 WL 6884518, at *4 (quoting The Florida Bar, 353 So. 2d 95, 97 (Fla. 1977)). "[T]he common interest provision of the rule has been interpreted to permit a class action by the association for a construction defect located physically within a unit, rather than in the common elements, if the defect is prevalent throughout the building." Seawatch at Marathon Condo. Ass'n, Inc. v. Charley Toppino & Sons, Inc., 610 So. 2d 470, 473 (Fla. 3d DCA 1992) (citing Alan Becker & Robert Manne, Construction Litigation, in Florida Condominium Law & Practice § 15.3, at 715–16 (The Florida Bar CLE 1987)). We, therefore, cannot say the trial court abused its discretion in finding that damages resulting from the replacement of the fire-sprinkler system throughout the building were a matter of common interest for purposes of certification at this stage of the litigation.

Affirmed.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

ANGELA L. DAWSON and **ANGELA L. DAWSON, P.A.,**
Appellants,

v.

ANTONIO HERNANDEZ,
Appellee.

No. 4D18-1588

[June 24, 2020]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Michael L. Gates and Mily Rodriguez-Powell, Judges; L.T. Case No. CACE 14-024425 (21).

Michael Hursey of Michael Hursey, P.A., Fort Lauderdale, for appellants.

Kenzie N. Sadlak of Kenzie N. Sadlak, PA, Miami, for appellee.

On Motion for Rehearing

MAY, J.

We grant the appellee's motion for rehearing, withdraw our previously issued opinion, and substitute the following in its place.

The borrower appeals a second amended final judgment in a foreclosure action. The underlying issue is whether the trial court could twice amend the final foreclosure judgment to include appellate and post-judgment attorney's fees and costs ***after*** the borrower redeemed the property.[1] The answer is "yes." However, the process by which the amended judgments were entered here causes us to reverse.

The lender filed an action to foreclose a mortgage on commercial property and a lis pendens. It then moved for summary judgment, which

[1] There are two appellants. The P.A. is the borrower; the individual personally guaranteed the loan. We refer to them as the borrower for ease of reference.

the trial court granted. The court entered a final judgment.

The borrower appealed. We dismissed the appeal as untimely, but conditionally granted attorney's fees to the lender. After the dismissal, but before the sale date, the borrower paid the total amount reflected in the original final judgment to the Clerk of Court, which included attorney's fees and costs to date. The clerk then issued a satisfaction of judgment. It did not issue a certificate of redemption.

Later that same day, the lender moved for post-judgment and appellate attorney's fees. He also moved to vacate the satisfaction of judgment, disburse the court funds, and amend the original final judgment to increase the redemption amount to include the appellate attorney's fees, pursuant to Florida Rule of Civil Procedure 1.525. The lender argued the satisfaction was issued in error, pursuant to section 55.141, Florida Statutes.

The trial court granted the lender's motions, vacated the satisfaction of judgment, and disbursed the court registry funds. The court then entered an amended final judgment, which included the amount of the original judgment and the subsequently awarded appellate attorney's fees, giving the borrower credit for the amount paid to the Clerk of Court.

Among other motions, the borrower moved for reconsideration and/or rehearing of the amended final judgment and an order vacating the satisfaction of judgment. The trial court denied the borrower's motions on July 7, 2016. Instead of filing a notice of appeal, the borrower then moved to set aside the order denying her motions for reconsideration and/or rehearing. The trial court denied that motion on April 11, 2017. In the interim, the borrower filed several motions and requests for hearing, including a motion to cancel the foreclosure sale because the judge presiding over the case resigned.[2] The court canceled the foreclosure sale.

The lender petitioned this Court for a writ of certiorari and prohibition, seeking to quash the trial court's order canceling the sale and prohibit the trial court from considering the borrower's motion to set aside. We denied the petition without prejudice to the lender's ability to seek an increase of the redemption amount, based on the "properly entered amended final

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[2] To provide some context, the original judge resigned. The newly assigned judge recused herself, leaving the case in the hands of a third trial court judge, who ultimately recused herself as well. The borrower represented herself during much of the proceedings. She was represented by counsel for part of the proceedings, but he eventually moved to withdraw.

judgment," citing *Verneret v. Foreclosure Advisors, LLC*, 45 So. 3d 889 (Fla. 3d DCA 2010), and *Parsons v. Whitaker Plumbing of Boca Raton, Inc.*, 751 So. 2d 655 (Fla. 4th DCA 1999). The trial court denied the borrower's motion to set aside the order and amended final judgment.

The lender then moved for additional post-judgment attorney's fees and costs. It argued that it incurred attorney's fees and costs because of the borrower's multiple post-judgment motions and hearings. The lender argued it was entitled to a second amended final judgment with an increased redemption amount that included the additional attorney's fees, plus interest, pursuant to our order dismissing the lender's petition.

The trial court entered a second amended final judgment and again increased the redemption amount to include the lender's additional attorney's fees, interest, and costs, giving credit for the amount paid by the borrower to the Clerk of Court. It did so without a hearing on the amount of attorney's fees.

The borrower filed a renewed motion for reconsideration and/or rehearing of the amended final judgment, the order vacating the satisfaction of judgment, and the second amended final judgment. The trial court denied the renewed motion. The borrower now appeals.

Jurisdiction

The lender argues we lack subject matter jurisdiction to review the borrower's challenges to the first amended final judgment because the appeal was untimely. We agree.

"An order is rendered when a signed, written order is filed with the clerk of the lower tribunal." Fla. R. App. P. 9.020(h). However, a timely and authorized motion for rehearing tolls rendition of a final order "until the filing with the clerk of a signed, written order disposing of the last of such motions." Fla. R. App. P. 9.020(h)(1)(B), (h)(2)(A). An order is final and ripe for appeal when it completes the judicial labor of the lower tribunal. *Caufield v. Cantele*, 837 So. 2d 371, 375 (Fla. 2002).

Here, the amended final judgment materially changed the original final judgment by changing the redemption amount. The borrower moved for rehearing, which was denied in July 2016. The borrower did not appeal from that order, but filed yet another motion to set the order aside. In doing so, the borrower missed the opportunity for us to review the amended final judgment. *Remington v. Remington*, 705 So. 2d 920, 922 (Fla. 4th DCA 1997) ("Only a motion for rehearing authorized by the Rules

of Civil Procedure will suspend rendition of an order under the appellate rules.”).

The second amended final judgment once again changed the redemption amount. The borrower’s motions for reconsideration and rehearing were authorized under the Florida Rules of Civil Procedure. The appeal from that order is timely. We have jurisdiction.[3] *See Caldwell v. Wal-Mart Stores, Inc.*, 980 So. 2d 1226, 1229 (Fla. 1st DCA 2008) (“[A] party may appeal an amended judgment that makes a material change in the original judgment, [although] the appeal is limited to the amended portions of the judgment and does not call up for review errors in the original.”).

On the Merits

The borrower argues the trial court erred when it vacated the satisfaction of judgment. The borrower contends that because it complied with the statutory requirements for redemption, *Sedra Family Ltd. Partnership v. 4750, LLC*, 124 So. 3d 935 (Fla. 4th DCA 2012), is controlling.

The lender responds that: 1) Florida law provides for attorney’s fees to be included in a judgment for purposes of redemption; 2) the satisfaction of judgment was erroneous because it was entered pursuant to the wrong Florida Statute—section 55.141 instead of section 45.0315; 3) the trial court had discretion to enter amended final judgments for additional attorney’s fees; and 4) the borrower’s argument is moot because we previously deemed the amended final judgment “to be proper.”

We review a trial court’s amendment of a final judgment for an abuse of discretion. *See Baker v. Courts at Bayshore I Condo. Ass’n*, 279 So. 3d 799, 801 (Fla. 3d DCA 2019).

- *Redemption*

> “The right of redemption is the mortgagor’s valued and protected equitable right to reclaim [his or] her estate in foreclosed property.” *Sudhoff v. Fed. Nat’l Mortg. Ass’n.*, 942 So. 2d 425, 428 (Fla. 5th DCA 2006) (citations

[3] The borrower argues the trial court erred in granting the lender’s original motion for summary judgment without a hearing. We are without jurisdiction to review issues related to the original final judgment because that appeal was dismissed as untimely. *See Denny v. Denny*, 334 So. 2d 300, 302 (Fla. 1st DCA 1976).

> omitted). It is considered "an innate feature of every mortgage." *VOSR Indus., Inc. v. Martin Props., Inc.,* 919 So. 2d 554, 556 (Fla. 4th DCA 2005). The right "belongs to the mortgagor and those claiming under or through him [or her]." *Indian River Farms v. YBF Partners,* 777 So. 2d 1096, 1099 (Fla. 4th DCA 2001) (quoting *John Stepp, Inc. v. First Fed. Sav. & Loan Ass'n of Miami,* 379 So. 2d 384, 385 (Fla. 4th DCA 1980)).
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> The right of redemption does not require court approval prior to exercising it, and the right continues until it has been waived or extinguished. *See Indian River Farms,* 777 So. 2d at 1099; *Metroplex Invs., Inc. v. Precision Equity Invs., Inc.,* 647 So. 2d 304, 305 (Fla. 5th DCA 1994); *Kane,* 582 So. 2d at 162. "In order to exercise the right of redemption, the mortgagor or its assignee should pay the amount due by tendering it to the mortgagee or to the clerk of court." *Indian River Farms,* 777 So. 2d at 1099; *see also Kane,* 582 So. 2d at 161.

Popescu v. Laguna Master Ass'n., Inc., 184 So. 3d 1196, 1199–200 (Fla. 4th DCA 2016).

Here, the borrower redeemed the property under Florida law. Section 45.0315 (2015), Florida Statutes, provides:

> **Right of redemption**. At any time before the later of the filing of a certificate of sale by the clerk of the court or the time specified in the judgment, order, or decree of foreclosure, the mortgagor or the holder of any subordinate interest may cure the mortgagor's indebtedness and prevent a foreclosure sale by paying the amount of moneys specified in the judgment, order, or decree of foreclosure, or if no judgment, order, or decree of foreclosure has been rendered, by tendering the performance due under the security agreement, including any amounts due because of the exercise of a right to accelerate, plus the reasonable expenses of proceeding to foreclosure incurred to the time of tender, including reasonable attorney's fees of the creditor. Otherwise, there is no right of redemption.

The original foreclosure judgment included attorney's fees and costs to date. The borrower tendered the full amount of the original judgment, including some attorney's fees, costs, and post-judgment interest, and did so before the lender asked for additional attorney's fees. Neither the

statute, nor our precedent *requires* attorney's fees be paid to redeem the property. *See Sedra Family Ltd. P'ship*, 124 So. 3d at 936 (holding that redemption rights are not thwarted by failure to pay attorney's fees, because "[r]egardless of any demands . . . for attorney's fees or other amounts, appellants could have redeemed by paying the amount of the final judgment.").

While the goal of foreclosure is to ensure that the mortgage holder's lien is repaid, including attorney's fees, no case prevents the borrower from redeeming its property prior to an award of attorney's fees.[4] The borrower is however still liable for attorney's fees and costs awarded subsequent to the redemption of the property.

Equally true is that the trial court had the authority to amend the final judgment or enter a new judgment for attorney's fees and costs after the borrower redeemed the property. *See, e.g., Parsons*, 751 So. 2d 655 (borrower's exercise of redemption rights on the first foreclosure judgment "did not preclude the court from entering the second judgment.").

However, the trial court should have conducted an evidentiary hearing before amending the amended judgment to include additional attorney's fees and costs. *Geraci v. Kozloski*, 377 So. 2d 811, 812 (Fla 4th DCA 1979) ("[F]ee was assessed . . . based solely upon the affidavit of a lawyer" and over the borrower's objection. "In an adversary proceeding such as this the determination of an attorney's fee for the mortgagee based upon affidavits over objection of the mortgagor is improper. Evidence should be adduced so that the full range of cross examination will be afforded both parties."); *see also Petrovsky v. HSBC Bank*, 185 So. 3d 700, 701 (Fla. 4th DCA 2016) ("'Reasonable attorney's fees' generally are not liquidated damages and require a hearing. Absent an evidentiary hearing, the fee award will be reversed for a hearing unless there is an indication that the right to a hearing was waived.").

Here, the trial court increased the redemption amount without a hearing on the amount of fees. The borrower immediately objected by filing various post judgment motions to reconsider, rehear, set aside, and vacate the judgments. Because the trial court failed to hold an evidentiary

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[4] The lender also argues the borrower is barred from challenging the amended and second amended final judgment based on the law of the case doctrine. But, that doctrine does not apply to arguments that were not at issue in the prior proceeding. *See McKenzie Check Advance of Fla., LLC v. Betts*, 191 So. 3d 530, 534 (Fla. 4th DCA 2016).

hearing on the amount of fees and costs before it increased the redemption amount in the second amended final judgment, we reverse and remand the case for an evidentiary hearing.

- *Satisfaction of Judgment*

The last issue we address is the satisfaction of judgment. The borrower argues the trial court erred in vacating the satisfaction of judgment. The lender responds the trial court correctly vacated the satisfaction of judgment because the clerk erred in issuing the satisfaction under section 55.141, Florida Statutes, instead of issuing a certificate of redemption under section 45.0315. On this issue, we agree with the lender.

Section 55.141, which allows for satisfaction of final judgments for the payment of money "by payment of the full amount of [the] judgment . . . plus interest and costs," is inapplicable to "foreclosure judgments." *Mortg. Elec. Registration Sys. v. Mahler*, 928 So. 2d 470, 472 (Fla. 4th DCA 2006) (quoting § 55.141, Fla. Stat.). The more specific statute governing the cancellation of mortgages, liens, and judgments controls. *Id.* The court did not err in setting aside the satisfaction.

We reverse the second amended final judgment. We remand the case to the trial court for an evidentiary hearing to determine the amount of attorney's fees and costs in either an amended, new, or supplemental judgment.

Reversed in part and remanded for proceedings consistent with this opinion.

LEVINE, C.J., and GERBER, J., concur.

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