SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.: A-0739-22

MATTHEW J. PLATKIN, ATTORNEY GENERAL OF NEW JERSEY, ON BEHALF OF AMY KOPLETON, ACTING CHIEF OF THE NEW JERSEY BUREAU OF SECURITIES,	:	CIVIL ACTION
Plaintiff-Appellant,	:	ON APPEAL FROM SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION, GENERAL EQUITY PART - UNION COUNTY
v.	:	SAT BELOW: HON. ROBERT J. MEGA, P.J.CH.
OWUSU A. KIZITO, INDIVIDUALLY AND AS MANAGING MEMBER OF INVESTIGROUP, LLC; INVESTIGROUP, LLC, A HAWAIIAN LIMITED LIABILITY COMPANY; AND INVESTIGROUP NP A NJ NONPROFIT CORPORATION, A NEW JERSEY NONPROFIT CORPORATION,	:	
Defendants-Respondents.	:	

BRIEF ON BEHALF OF PLAINTIFF-APPELLANT
Date Submitted: March 1, 2023

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PRELIMINARY STATEMENT

The undisputed proofs in the appeal establish that defendants—Owusu Kizito, Investigroup, LLC ("Investigroup LLC") and Investigroup NP, purportedly a NJ nonprofit corporation, ("Investigroup NP")—engaged in a coordinated scheme to defraud investors. Defendants' misdeeds caused investors over $15 million in losses and unjustly enriched Kizito and Investigroup NP by at least $1.5 million. Plaintiff sought disgorgement of their $1.5 million in ill-gotten gains, but the trial court declined to order it based on its view that the controlling statute precludes awarding multiple remedies in the same action. The trial court's erroneous statutory interpretation is the sole issue on appeal.

The New Jersey Uniform Securities Law (1997), N.J.S.A. 49:3-47 to –89 (the "Securities Law") and similar laws in other jurisdictions with which the Securities Law must be harmonized, are designed not only to prevent and root out fraud, but also to deter wrongdoing. Accordingly, N.J.S.A. 49:3-69(a)(2) authorizes the Chief of the New Jersey Bureau of Securities ("Bureau") to seek, and the courts to order "rescission, restitution or disgorgement or any other order within the court's power**,** directed to any person who has engaged in any act constituting a violation of any provision of this act or any rule or order hereunder."

As with all remedial statutes, the Securities Law must be broadly interpreted to prevent fraud and protect the public. Charged with enforcing the Securities Law, the Bureau and our courts have consistently interpreted N.J.S.A. 49:3-69(a)(2) to allow multiple remedies in the same action. Additionally, federal and sister state courts have interpreted similar statutes similarly. That common sense reading recognizes that those who violate the Securities Law inflict numerous harms that must be penalized, rectified and deterred.

Based on the egregiousness of defendants' conduct and the extent of their fraud, the trial court entered an order: (1) permanently enjoining and restraining Kizito, Investigroup LLC, and Investigroup NP from engaging in certain conduct defined in the Securities Law; (2) ordering Kizito and Investigroup LLC to pay $15,161,043 as restitution for investors; (3) assessing civil monetary penalties of $1,505,000 against Kizito based on his 753 combined violations of the Securities Law; and (4) assessing civil monetary penalties of $1,505,000 against Investigroup LLC based on its 753 combined violations of the Securities Law. However, it declined to order Investigroup NP to disgorge its $1,500,000 of ill-gotten gains. That error was based on the trial court's sua sponte determination that it could not grant multiple remedies under N.J.S.A. 49:3-69(a)(2) because the statute uses "or" disjunctively and thus limits remedies to

restitution or disgorgement, and does not allow for an award of both even where plainly warranted.

The trial court's reading of section 69(a)(2) results in defendants reaping the benefits of their violative acts. It means Kizito will face no consequences for siphoning at least $1,500,000 of investor funds to Investigroup NP, an entity that had no entitlement to those funds, and then subsequently misusing those funds for such things as making cash withdrawals topping $400,000, spending $250,000 at auto auctions, paying creditors at least $250,000, and giving money to his brother. The trial court's ruling sends the wrong message to the public.

To effectuate the remedial intent of Securities Law and to empower the Bureau to fully and effectively protect the investing public this court must reverse the trial court's decision and require Investigroup NP to disgorge its ill-gotten gains.

PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

Statutory Background

Nearly one hundred years ago, the Legislature recognized the importance of strong securities laws to New Jersey's economic health and well-being. With the passage of the New Jersey Securities Act (L. 1927, c. 79), the Legislature announced its purpose:

> Harm to the economic life and health of this State is brought about through the use of all sorts of deceptive schemes imposed on the public in the purchase and sale of stocks, bonds, and other papers in the form of securities. The subject is of wide importance to the community and the consequence of such schemes are generally injurious. It is within the protective power of the State and is a matter of public concern to intervene, to check, suppress, and prevent such evils, and such is the purpose of this act.

The Legislature enacted the Securities Law in 1967 to adapt to the ever-changing field of securities, make the Securities Law more uniform to our sister states, and to adequately fulfill the public policy purpose of investor protection. The 1967 version of the Securities Law authorized the Superior Court to stop "illegal practices." N.J.S.A. 49:3-69 (1967). It states:

> (a) When it shall appear to the bureau chief that a person has engaged in, is engaging in, or is about to

[1] Because the procedural and factual histories are closely related, they are combined for efficiency and the court's convenience.

> engage in, any practices declared to be illegal and prohibited by this law or when it shall appear that it will be against the public interest for any person to issue, sell, offer for sale, purchase, offer to purchase, promote, negotiate, advertise or distribute any securities from or within this State, the Attorney General on his behalf may bring an action in the Superior Court and apply therein for injunctive relief, or the appointment of a receiver, or both. The court may proceed in the action in a summary manner or otherwise[.]
>
> [N.J.S.A. 49:3-69 (1967).]

Additional Securities Law amendments in 1985 expanded the Bureau's powers to adequately protect investors. See Press Release, Office of the Governor Thomas H. Kean (Jan. 6, 1986) ("I believe these new laws, combined with the recently authorized Bureau of Securities, will substantially enhance the protection of New Jersey investors.").

The Legislature amended the Securities Law again in 1997 to further expand the Bureau's enforcement powers and to specify available enforcement remedies in subsection (a)(2):

> (a) If it appears to the bureau chief that any person has, or directly or indirectly controls another person who has engaged in, is engaging in, or is about to engage in any act or practice constituting a violation of any provision of this act or any rule or order hereunder, or if it appears that it will be against the public interest for any person to issue, sell, offer for sale, purchase, offer to purchase, promote, negotiate, advertise or distribute any securities from or within this State, the bureau chief

> may take, in addition to any other enforcement actions available under this act and in the bureau chief's discretion, either or both of the following actions:
>
> . . . .
>
> (2) Have an action brought by the Attorney General in the Superior Court on the bureau chief's behalf to enjoin the acts or practices to enforce compliance with this act or any rule or order hereunder. Upon a proper showing, a permanent or temporary injunction, restraining order, or writ of mandamus shall be granted and a receiver or conservator may be appointed for the defendant or the defendant's assets. In addition, upon a proper showing by the bureau chief, the court may enter an order of rescission, restitution or disgorgement or any other order within the court's power, directed to any person who has engaged in any act constituting a violation of any provision of this act or any rule or order hereunder. The court may not require the bureau chief to post a bond. The court may proceed in the action in a summary manner or otherwise[.]
>
> [N.J.S.A. 49:3-69 (1997).]

The legislative history supports this reading of the amendments. See Ass. Fin. Ins. Comm. Statement to S. 2990 1 (June 12, 1997) ("[T]his Bill provides the Bureau of Securities strong enforcement powers to deal with securities firms and individuals regulated by the bureau who violate the law."); Sen. Commerce Comm. Statement to S. 2990 1 (Nov. 24, 1997) ("This bill . . . enhances the enforcement powers of the Bureau of Securities in the Division of Consumer Affairs. . . [and] provides the Bureau of Securities with strong enforcement

powers to deal with securities firms and individuals regulated by the bureau who violate the law.").

Since the 1997 amendment, the Bureau has administered the Securities Law according to the legislature's intent and pursuant to N.J.S.A. 49:3-69(a)(2) to obtain judgments and orders awarding both restitution and disgorgement in the same action. See (Pa2148-Pa2156) Order Granting Plaintiff's Motion For Entry Of Final Judgment By Default As To Defaulting Defendants Pursuant To Rule 4:43-2(b) at 6-7 in Grewal v. Masselli, Docket No. MON-C-135-18 (Monmouth Cnty., March 19, 2021) (entering final judgment for restitution and disgorgement against defendants and nominal defendants); (Pa2157-Pa2164) Amended Final Judgment by Default and Order at 5-6 in Hoffman v. Branded Marketing, LLC, Docket No. C-56-12 (Passaic Cnty., March 31, 2015) (entering final judgment for restitution and disgorgement against defendants and nominal defendants); (Pa2056-Pa2071) Final Judgment by Default and Order at 6-7 in Hoffman v. Branded Marketing, LLC, Docket No. C-56-12 (Passaic Cnty., February 23, 2015) (same); (Pa2072-Pa2084) Order at 9-11 in Hoffman v. Zuck, Docket No. C-125-12 (Hudson Cnty., May 9, 2014) (entering final judgment for restitution and disgorgement against defendants and relief defendants); (Pa2085-Pa2114) Consent Order And Final Judgment As To Defendants Brian Carr And Capital Markets Advisory Limited Liability Company at 10 in Chiesa

v. Miller, Docket No. ESX-C-288-10 (Essex Cnty., May 7, 2012) (allowing the Bureau Chief to commence an action upon the occurrence of a "Triggering Event" to collect a judgment of restitution, disgorgement, and a civil penalty); (Pa2115-Pa2139) Final Judgment and Consent Order at 16 in Dow v. Lucchetto, Jr., Docket No. UNN-C-32-09 (Union Cnty., May 4, 2011) (entering a final judgment and consent order that includes restitution to be paid for investors and disgorgement to be paid to the Bureau of Securities); (Pa2140-Pa2147) Final Judgment By Default at 6-7 in Milgram v. Hankins, Docket No. C-49-08 (Monmouth Cnty., August 25, 2009) (entering final judgment by default against defendants for restitution and disgorgement).[2]

Complaint and Hearing

After receiving complaints from investors and performing an investigation, on October 26, 2020, the Bureau filed a seven-count verified complaint against Kizito, Investigroup LLC and Investigroup NP. (Pa1-Pa37). Kizito holds himself out as a financial consultant with twenty years of experience in finance matters, including consulting, banking, financial analysis, financial planning, tax preparation, and loan modifications. (Pa5-Pa6).

[2] Copies of the cited unreported trial court orders are annexed to Plaintiff-Appellants' Appendix in Volume XIII in accordance with Rule 1:36-3.

Investigroup LLC is a limited liability company incorporated by Kizito in Hawaii in 2006, which has been registered as a New Jersey foreign limited liability company since 2007. (Pa6). Investigroup LLC describes itself as a "full-service business development group, general management and financial consulting firm," that also offers "tax and accounting services." (Pa155-Pa156). Kizito has served as Investigroup LLC's managing member and Chief Executive Officer since its incorporation. (Pa6).

Investigroup NP is purportedly a New Jersey non-profit corporation focused on sending medical supplies and equipment to health care providers in Ghana. (Pa301). Kizito has served as the Chairman of the Board and as the Chief Executive Officer of Investigroup NP since its inception. (Pa6).

The Bureau charged Kizito and Investigroup LLC with employing a device, scheme, or artifice to defraud, in violation of N.J.S.A. 49:3-52(a) (count one); Kizito and Investigroup LLC with making untrue statements of a material fact or omitting a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading, in violation of N.J.S.A. 49:3-52(b) (count two); Kizito and Investigroup LLC with engaging in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in violation of N.J.S.A. 49:3-52(c) (count three); Kizito and Investigroup LLC with selling unregistered securities

in violation of N.J.S.A. 49:3-60 (count four); Kizito with acting as an agent in this State without registration, in violation of N.J.S.A. 49:3-56(a) (count five); Investigroup LLC with employing an unregistered agent, in violation of N.J.S.A. 49:3-56(h) (count six); and Kizito and Investigroup NP with unjust enrichment (count seven).

The complaint was based on allegations that defendants misrepresented Investigroup LLC as a top global tax preparation and business consulting firm that could provide investors with substantial returns on their investment in either: 1) membership units in Investigroup LLC; or 2) promissory notes purporting to monetize standby letters of credit. (Pa2-Pa3). In connection with the offer and sale of the unregistered Investigroup LLC membership units and promissory notes, Kizito and Investigroup LLC failed to inform investors that Kizito and Investigroup LLC were subject to judgments or were named as defendants in other litigation. (Pa18-Pa20). Those judgments included a court decision that found Kizito had engaged in fraudulent conduct while working with an Investigroup LLC mortgage modification client and "impermissibly and improperly held himself out as an attorney." (Pa18-Pa20; Pa916). Additionally, Kizito and Investigroup LLC never told investors that: 1) the Internal Revenue Service ("IRS") had assessed taxes, interest, and penalties against Kizito and Investigroup LLC, and ordered them to pay unpaid taxes; and 2) Investigroup

LLC had been borrowing significant sums through factoring agreements with merchant cash advance companies, which would have access to and would withdraw a significant amount of investor funds from Investigroup LLC's and Investigroup NP's bank accounts. (Pa9-Pa10; Pa17-Pa18; Pa20).

The verified complaint also asserted Kizito and Investigroup LLC told investors their funds would be used to expand Investigroup LLC's business or to monetize standby letters of credit. (Pa8). Instead, Kizito and Investigroup LLC, through Kizito, used those funds to pay Kizito's personal expenses, make other cash withdrawals, repay merchant cash lenders' previous cash advances, and for other non-business-related purposes. (Pa2-Pa3; Pa8; Pa10-Pa20).

To facilitate these personal and other non-business-related payments, Kizito and Investigroup LLC improperly transferred funds to a separate Kizito-owned non-profit entity, Investigroup NP. (Pa3; Pa6; Pa9). Investors did not invest in Investigroup NP and were not told their funds went there. (Pa3; Pa9).

Following defendants' repeated discovery defaults, on October 22, 2021, the court entered an order suppressing and striking defendants' answer and affirmative defenses with prejudice, pursuant to Rule 4:23-5(a)(2). (Pa82). The clerk entered defendants' default on the docket on November 1, 2021. (Pa82). On April 27, 2022, the Bureau moved for final judgment by default. (Pa82). The trial court held a proof hearing between June 20 and July 14, 2022.

During Kizito's proof hearing testimony, he admitted committing the conduct alleged in the verified complaint and other fraudulent acts. (4T; 5T; 6T). Specifically, Kizito admitted he never informed investors of the IRS tax lien and a subsequent September 8, 2017 offer in compromise he entered into with the IRS, which would require him to file and pay required taxes for five years after entering the agreement. (4T:77:13-20; Pa1056-Pa1064). When Kizito was asked about his and Investigroup LLC's tax filings after entering the offer in compromise, Kizito admitted to selling equity ownership in Investigroup LLC to investors but filing tax returns on behalf of Investigroup LLC claiming it was a single-member LLC. (Pa78; 4T93:4-96:1; 4T116:25-118:22). However, Kizito then testified it was an error to file the LLC's tax returns as a single-member LLC and that his filings may require amendments. (Pa78; 4T93:4-96:1; 4T116:25-118:22).

Kizito further testified that he did not maintain books and records for Investigroup LLC, and that he completely relied on bank statements and his error-filled tax returns to track business expenses and the use of investor funds. (4T138:15-139:25; Pa564-Pa612).

Kizito then testified that between 2016 and 2018 he commingled investor funds with other business income, nonprofit donations, and other sources of funds in Investigroup NP's bank accounts. (5T20:4-21:9). Kizito explained that

he commingled funds in the Investigroup NP bank accounts because merchant cash advance companies were automatically withdrawing funds from defendants' bank accounts and that he needed to start using the bank accounts of Investigroup NP because merchant cash advance companies had locked him out of the Investigroup LLC bank accounts. (4T81:24-82:15). However, Kizito admitted he did not tell investors about his or Investigroup LLC's issues with merchant cash advance companies. (4T81:24-82:15; 5T22:1-20).

Kizito also admitted he never told investors about several lawsuits against him or Investigroup LLC. (5T84:7-20; 5T86:21-87:15; Pa1204-1206). However, Kizito's attempted explanations as to why he did not inform investors about the litigation was inconsistent and contradictory. For example, Kizito testified neither he nor Investigroup LLC disclosed one particular case where a trial court found Kizito fraudulently held himself out as an attorney because the case "wasn't filed" at the time he began seeking investors in 2016. (5T84:7-85:11; Pa564-Pa612; Pa914-Pa936). When Kizito was presented with his court-filed certification from the same matter which stated he had received the summons and complaint on January 18, 2014, he changed his testimony and said that the case was not disclosed because it was a "special circumstance." (5T85:15-86:18; Pa1204-Pa1206). Subsequently, Kizito testified that he did not disclose the outcome of the case because "it was appealed." (5T87:3-15).

However, even though Kizito testified he "would report it whatever the decision is" whether favorable or unfavorable, he was allegedly unaware that his appeal had already been denied. (5T98:4-100:15; Pa1282). Kizito then admitted that he never informed investors that the matter was pending as an appeal. (5T100:12-15).

With regard to specific examples of how he misused investor funds, Kizito asserted he was engaging in a "strategic partnership" when he used investor funds to do a "favor" for his brother by buying a car and shipping it to Ghana. (4T146:23-150:2). However, Kizito also admitted that he never informed investors that the same brother was arrested and charged with receiving stolen property, fencing, and conspiracy in connection with a high-end auto theft ring. (4T151:25-159:6; Pa1068-Pa1073).

In addition, Kizito admitted transferring at least $900,000 of investor funds to an entity known as Fog Logistics, owned by an individual named Fred Asante. (5T104:21-105:12; Pa1283-Pa1288; 4T108:4-111:20; Pa1289-Pa1305). Yet, Kizito never informed investors of these transfers, or that Fred Asante pled guilty and was sentenced to 108 months in prison for "his role as the top U.S.-based money launderer for a criminal enterprise based in the Republic of Ghana" which involved fraudulent schemes including "business email compromises, romance scams, targeting elderly victims, and fraud schemes related to the

COVID-19 pandemic." (5T104:21-105:12; Pa1283-Pa1288; 4T108:4-111:20; Pa1289-Pa1305).

In addition to the admissions above, Kizito also testified that he filed for and received approximately $750,000 through the Paycheck Protection Program ("PPP") and Economic Injury Disaster Loans ("EIDL") programs designed to provide relief to businesses during the COVID-19 pandemic, by submitting multiple incomplete or inaccurate applications on behalf of himself and the entities he controlled (including Investigroup LLC and Investigroup NP). (5T60:1-65:16; Pa1190-Pa1197; 5T78:2-79:24; Pa1198-Pa1203). In addition, Kizito admitted to improperly listing Investigroup LLC investors as employees on Investigroup LLC's payroll records as part of the PPP and EIDL applications. (5T60:1-65:16; Pa1190-Pa1197; 5T78:2-79:24; Pa1198-Pa1203).

Bureau Investigator Michael LaChapelle, the Bureau's expert Richard W. Barry, and defendant-respondents' expert Michael Saccomanno also testified at the proof hearing. (1T; 2T; 3T; 4T; 6T; 7T; 8T). Barry and Saccomanno's testimony focused, in part, on calculating restitution, disgorgement, and civil monetary penalties. (6T; 7T; 8T). Barry testified that defendants offered and sold a total of at least $16,187,651 in unregistered securities to sixty-nine investors. (6T132:7-20). Barry also testified that he calculated repayments to investors totaling $1,026,000; when he subtracted that from the amount raised

from investors, $15,161,043 remained outstanding and owed to investors. (5T132:21-135:2).

Barry explained, however, that investors were partially repaid with funds Kizito's entities received through PPP and EIDL loans. (6T138:18-6T148:6; Pa1899-Pa1900). Barry also testified that defendants transferred $1,500,000 of investor funds to Investigroup NP's bank accounts at Bank of America between 2016 and 2018, when the Investigroup NP bank accounts were closed, and provided examples of how some of these funds were commingled with other funds and misspent at auto actions and on transfers to Kizito's brother. (7T19:19-27:6; 7T104:24-106:15; Pa564-Pa612). For example, Barry testified that the misuse of investor funds included over $400,000 in cash withdrawals, spending approximately $250,000 at auto auctions, using at least $250,000 to pay creditors including merchant cash advance companies, and transferring money to or withdrawing money for Kizito's brother. (7T19:19-27:6; 7T104:24-106:15).

Defendant-Respondents' expert Saccomanno offered a damage calculation that matched Barry's with one exception. Saccomanno reduced investors' losses by subtracting purportedly legitimate business expenses. (Pa81; 8T94:3-94:13). Saccomanno admitted however, that since defendants' had commingled funds from investors with funds from other sources, it was

difficult, if not impossible, to verify whether the business expenses were legitimate and to identify the source of funds used to pay them. (8T106:8-107:4).

Following that hearing, the court entered the August 16 Order in favor of the Bureau: (1) permanently enjoining and restraining Owusu A. Kizito, Investigroup LLC, and Investigroup NP from engaging in certain conduct defined in the Securities Law;[3] (2) ordering defendants Kizito and Investigroup LLC to pay $15,161,043 as restitution for investors; (3) assessing civil monetary penalties of $1,050,000 against defendant Kizito based on his 753 combined violations of the Securities Law; and (4) assessing civil monetary penalties of $1,050,000 against defendant Investigroup LLC based on its 753 combined violations of the Securities Law.[4] (Pa64-Pa66).

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[3] On January 24, 2023, the Bureau filed a motion to enforce litigant's rights against respondents' Kizito, Investigroup LLC, and Investigroup NP pursuant to Rule 1:10-3, for respondents' violations of the trial court's August 16, 2022 permanent injunction. Respondents' violations of the injunction are based on, among other things, their advertisement, marketing, promoting, and offering of a new investment opportunity in the "InvestiFund." On February 17, 2023, the trial court found respondents were violating the permanent injunction and ordered respondents to comply with the August 17, 2022 amended order within ten days. As of the time of this filing, respondents have not complied with the trial court's February 17, 2023 order.

[4] On August 17, 2022, the court entered an amended order correcting a clerical error in the civil monetary penalties, thereby assessing a corrected total of $1,505,000 against Kizito and $1,505,000 against Investigroup LLC.

The trial court found that "Investigroup LLC and Investigroup NP are two distinct entities both controlled by Kizito [and that] Investigroup LLC is a for-profit entity while Investigroup NP is a non-profit entity." (Pa83). The trial court also found defendants diverted $1,500,000 of investor funds to Investigroup NP, misused those funds for personal expenses and other non-business expenses, and never informed investors that their funds were going to Investigroup NP. (Pa84). Despite those findings of diversion and misuse of investor funds by Investigroup NP, the court denied the Bureau's request to require defendant Investigroup NP (against whom no monetary relief was awarded) to disgorge the $1,500,000 of its ill-gotten gains. (Pa91-Pa93).

The trial court issued a written statement of reasons with the August 16 Order, finding that defendants had engaged in the unlawful conduct alleged in the verified complaint. (Pa75-Pa95). With regard to registration, the court found "Kizito and Investigroup LLC . . . failed to disclose to investors that the securities sold were not registered with Plaintiff or exempt from registration." (Pa85). Furthermore, the trial court stated that "[i]n addition to the securities not being registered . . . Kizito and Investigroup LLC did not disclose to investors that Kizito was not registered . . . as an agent to sell securities." (Pa85).

As to the verified complaint's allegations of misrepresentations and omissions, the court found "Kizito failed to notify investors that Investigroup LLC was subject to multiple lawsuits." (Pa84). In addition, the court found "Kizito and Investigroup LLC also failed to disclose to investors that Investigroup LLC had been borrowing funds from certain merchant cash advance lenders and assigning rights to accounts receivable to such lenders." (Pa84). Furthermore, the court found that "Kizito and Investigroup LLC failed to disclose to investors that in 2011, the IRS assessed taxes, interest, and penalties against Kizito and Investigroup LLC and ordered them to repay same." (Pa85).

The court also found that Kizito's proof hearing testimony was not credible, and that he "testified with an intent to deceive the Court." (Pa78-Pa79).

The court declined to order disgorgement against Investigroup NP, however the extent of its reasoning was limited to a single paragraph:

> However, as to disgorgement, N.J.S.A. 49:3-69(a)(2) provides that the Court may order rescission, restitution, **or** disgorgement. N.J.S.A. 49:3-69(a)(2) (emphasis added). The Court, here, finds that Plaintiff may receive one, but not all three of the remedies set forth in N.J.S.A. 49:3-69(a)(2). Plaintiff, here, seeks both restitution in the amount of $15,161,043 and disgorgement in the amount of $1,500,000. Despite Kizito's egregious conduct, the Court finds the same to

> not be authorized by N.J.S.A. 49:3-69(a)(2). Accordingly, the request for disgorgement is **DENIED**.
>
> [Pa93.]

The trial court denied the Bureau's request for disgorgement despite its finding that Kizito improperly transferred at least $1,500,000 of investor funds to Investigroup NP and that Investigroup NP had misused at least $1,500,000 of investor funds to pay for Kizito's personal expenses, for other non-business-related expenses, and to pay prior investors. (Pa84). The funds were transferred to Investigroup NP's bank accounts, in part, because merchant cash advance companies who were factoring Investigroup LLC and Investigroup NP's receivables had closed out or otherwise prevented Investigroup LLC from maintaining operable bank accounts. (Pa89-Pa90). However, investors were never informed of the merchant cash advance activity, nor of the fact that their funds would be diverted to Investigroup NP bank accounts. (Pa84).

In addition, the trial court acknowledged the egregious nature of defendant Kizito's conduct and recognized that Investigroup NP was a key component that enabled defendants to engage in the deceptive practices that advanced the fraudulent scheme, including by submitting incomplete and falsely-certified financial disclosure statements to the Bureau, and Investigroup NP's use of PPP

and EIDL pandemic funds to repay some investors. (Pa81; Pa109; Pa1173-Pa1186).

The Bureau filed a motion for reconsideration of the trial court's decision denying disgorgement against Investigroup NP on September 1, 2022, arguing the court incorrectly interpreted N.J.S.A. 49:3-69(a)(2). (Pa134-Pa136). On October 11, 2022, the trial court denied reconsideration, finding no "clear justification to interpret the 'or' [in N.J.S.A. 49:3-69(a)(2)] conjunctively." (Pa133). The trial court reasoned that the word "or" in N.J.S.A. 49:3-69(a)(2) did not need to be read conjunctively in order to "avoid constructions that make the relevant statutory provisions redundant or meaningless." (Pa133). The trial court reasoned that because of the distinct options in N.J.S.A. 49:3-69(a)(2), there was "no risk for the 'phrases, before and after the or to mean the same thing.'" (Pa133) (quoting Wildwood Storage Ctr., Inc. v. Mayor of Wildwood, 260 N.J. Super. 464, 471 (App. Div. 1992)).

In addition, the trial court also provided the following rationale for its decision:

> [T]his Court otherwise finds no clear legislative intent for the meaning of the word "or" in this statute to depart from its normal, disjunctive interpretation. As such, this Court affirms its prior finding and holds that N.J.S.A. 49:3-69(a)(2) authorizes Plaintiff to receive one, but not all three of the remedies set forth by the statute.

[Pa133.]

For the following reasons, this court should find the trial court erred in interpreting N.J.S.A. 49:3-69(a)(2), reverse the trial court's August 16 and October 11 orders, and remand the matter to the trial court with instructions to enter a disgorgement award of $1,500,000 against Investigroup NP and in favor of the Bureau.

LEGAL ARGUMENTS

POINT I

THE TRIAL COURT'S DISJUNCTIVE READING OF N.J.S.A. 49:3-69(a)(2) FAILS TO EFFECTUATE THE LEGISLATURE'S INTENT.

The trial court's failure to award disgorgement against Investigroup NP is based on a misreading of N.J.S.A. 49:3-69(a)(2) that undermines the spirit of the Securities Law. Therefore, this court must reverse.

A. The Trial Court Erred In Interpreting N.J.S.A. 49:3-69(a)(2) Disjunctively To Prohibit An Award Of Restitution And Disgorgement In The Same Action.

Appellate courts "review matters of statutory interpretation de novo." Grillo v. State, 469 N.J. Super. 267, 274 (App. Div. 2021). See also D'Agostino v. Maldonado, 216 N.J. 168, 182-83 (2013) (quoting Manalapan Realty, L.P. v. Twp. Comm., 140 N.J. 366, 378 (1995) ("A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference"). "The Legislature's intent is the paramount goal when interpreting a statute and, generally, the best indicator of that intent is the statutory language." Shaw v. Shand, 460 N.J. Super. 592, 606 (App. Div. 2019) (quoting DiProspero v. Penn, 187 N.J. 477, 492 (2005)).

However, an appellate court's review "is not limited to the words in a challenged provision." Grillo, 469 N.J. Super. at 275 (quoting State v. Twiggs,

233 N.J. 513, 532 (2018)). "A court 'can also draw inferences based on the statute's overall structure and composition,' and may consider 'the legislative scheme of which [the statute] is a part.'" Id. at 275 (alterations in original) (quoting Twiggs, 233 N.J. at 532). An appellate court does "not view [statutory] words and phrases in isolation but rather in their proper context and in relationship to other parts of [the] statute, so that meaning can be given to the whole of [the] enactment." Id. at 275 (alterations in original) (quoting Twiggs, 233 N.J. at 533). See also D'Agostino, 216 N.J. at 183 (quoting DiProspero, 183 N.J. at 492) ("We review the Legislature's language in light of 'related provisions so as to give sense to the legislation as a whole'").

A court's "responsibility in interpreting [a] statute 'is to give effect to the legislature's intent.'" In re Raymour and Flanigan Furniture, 405 N.J. Super. 367, 383 (App. Div. 2009) (quoting Wildwood Storage Center, 260 N.J. Super. at 470). "In doing so, '[w]e must consider the language of the statute, the nature of the subject matter, the contextual setting, the policy behind the statute, statutes *in pari*[] *materia*, and concepts of reasonableness.'" Id. (quoting Wildwood Storage Center, 260 N.J. Super. at 470-71).

Courts also "give substantial deference to the interpretation of the agency charged with enforcing an act. The agency's interpretation will prevail provided it is not plainly unreasonable." Merin v. Maglaki, 126 N.J. 430, 436-37 (1992);

Bowser v. Bd. of Trs., 455 N.J. Super. 165, 171 (App. Div. 2018) ("We may give substantial deference to an agency's interpretation of a statute that the agency is charged with enforcing, particularly when its interpretation involves a permissible construction of an ambiguous provision . . . or the exercise of expertise"); Richardson v. Board of Trs., 192 N.J. 189, 196 (2007) ("Generally, courts afford substantial deference to an agency's interpretation of a statute that the agency is charged with enforcing").

Deference to an "agency's expertise and discretion in administering a subject matter area committed to its supervision" is particularly appropriate when, as here, the subject matter involves a "highly sensitive" area. Matter of Fleming, 290 N.J. Super. 195, 202 (App. Div. 1996); see Mayflower Sec. Co. v. Bureau of Sec., 64 N.J. 85, 93 (1973) (characterizing the securities area as a "sensitive one, open to great abuses" and "subject to careful governmental regulation to assure . . . protection of the public").

Similarly, although a court is not bound by the Attorney General's interpretation, "it is nonetheless entitled to a degree of deference, in recognition of the Attorney General's special role as the sole legal adviser to most agencies of State Government," including the Division of Consumer Affairs. Shaw, 460 N.J. Super. at 617 (citing Quarto v. Adams, 395 N.J. Super. 502, 513 (App. Div. 2007)).

The court's hyper-technical reading of the statute was erroneous and must be reversed because it ignores the actual text of the Securities Law in two respects.

First, as a practical matter the trial court declined to order any remedy against Investigroup NP, despite finding that Investigroup NP engaged in its own pattern of fraudulent conduct. The trial court correctly found Investigroup LLC and Investigroup NP were separate and distinct legal entities, but failed to treat them as such while interpreting N.J.S.A. 49:3-69(a)(2). Nevertheless, even if the trial court were to enter an order of disgorgement against Investigroup NP because it was a separate legal entity, that order would be still be based on an incorrect interpretation of N.J.S.A. 49:3-69(a)(2) and could hinder the Bureau from fully enforcing the Securities Law in future actions.

Second, as to the text of the Securities Law, in statutes, "the words 'or' and 'and' are [ofttimes] used interchangeably, and the determination of whether the word 'and' as used in the statute should be read in the conjunctive or disjunctive depends primarily upon the legislative intent." In re Raymour and Flanigan Furniture, 405 N.J. Super. at 384 (quoting Grant v. Thomas, 307 N.J. Super. 252, 256 (App. Div. 1997)). "The word 'or,' while normally used to indicate disjunctive clauses, has often been interpreted to mean the conjunctive if this is more consistent with legislative intent." Id. (quoting Wildwood Storage

Center, 260 N.J. Super. at 470). See also State v. Carreon, 437 N.J. Super. 81, 87 (App. Div. 2014) (quoting Pine Belt Chevrolet v. Jersey Cent. Power & Light Co., 132 N.J. 564, 578 (1993) ("Although the Legislature oftentimes uses 'or' and 'and' interchangeably whether they are conjunctive or disjunctive 'depends primarily upon the legislative intent.'").[5]

Here, the trial court found that the word "or" in N.J.S.A. 49:3-69(a)(2) did not need to be read conjunctively in order to "avoid constructions that make the relevant statutory provisions redundant or meaningless." (Pa133). That reasoning is flawed because as a preliminary matter, the Legislature repeatedly used "or" in place of "and" throughout N.J.S.A. 49:3-69(a)(2).

For example, the sentence that immediately precedes the provision that is the focus of this appeal reads: "[u]pon a proper showing, a permanent or temporary injunction, restraining order, or writ of mandamus shall be granted and a receiver or conservator may be appointed for the defendant or the

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[5] For illustrative purposes, see Bryan A. Garner, The Elements of Legal Style, p. 103 (2d ed., 2002).

"The word or usually includes the sense of and:

No food or drink allowed.

That sentence does not suggest that food or drink by itself is disallowed while food and drink together are OK." Ibid.

defendant's assets." N.J.S.A. 49:3-69(a)(2). If the trial court applied a strict, disjunctive interpretation of "or" throughout N.J.S.A. 49:3-69(a)(2), then the trial court would have had to choose whether it was going to enter a temporary or permanent injunction against the defendants in this case. However, contrary to the trial court's own disjunctive interpretation of "or", the trial court elected to order both a temporary at the inception of the case and permanent injunction following the proof hearing. Additional support for a conjunctive interpretation of "or" can be found in other nearby provisions, such as N.J.S.A. 49:3-69(b) which allows a court to "enjoin the issuance, sale, offer for sale, purchase, offer to purchase, promotion, negotiations, advertisement or distribution from or within this State of any securities . . . ." No court, including the trial court in this matter, has interpreted the "or" in the injunctive provision disjunctively because it would lead to absurd results. For example, if the trial court's disjunctive interpretation applied to the injunctive provision of the statute, the Bureau would need to choose whether to seek an injunction to stop a fraudulent actor from advertising their securities or selling their securities – but the injunction could not seek both. This result is plainly not what the Legislature intended.

The legislative intent favors a broader reading of N.J.S.A. 49:3-69(a)(2), than that originally afforded by the trial court. The remedial nature of the statute favors interpreting "or" in N.J.S.A. 49:3-69(a)(2) conjunctively.

Specifically, the trial court's interpretation of "or" effectively grants a windfall to Investigroup NP, a separate legal entity that benefited from the fraudulent conduct at the expense of investors and the investing public and, contrary to the intended purpose of the statute, unduly restricts the Bureau's ability to take action against this fraudulent enterprise. Rather, N.J.S.A. 49:3-69(a)(2) should be read expansively and conjunctively, consistent with legislative intent, as offering a non-exhaustive and non-exclusive list of possible enforcement remedies under that provision of the Securities Law.

Furthermore, if the Legislature had used "and" instead of "or," the clause would require the court to either enter an order awarding all three remedies, or an order awarding none, *i.e.*, it would provide that "the court may enter ***an order*** of rescission, restitution ***and*** disgorgement." Because many cases do not call for granting all three remedies – for example, rescission is not possible when all defrauded investors have already sold the subject securities – the Legislature used "or" instead of "and." This ensures that the court may order one, two, or

three of these remedies depending on the circumstances.[6] "[A]n interpretation of a statute should not lead to an absurd result." In re Young, 202 N.J. 50, 69 (2010) (citing Pennsauken v. Schad, 160 N.J. 156, 170 (1999)). See also Schad, 160 N.J. at 170 (quoting State v. Provenzano, 34 N.J. 318, 322 (1961)) ("[i]t is axiomatic that a statute will not be construed to lead to absurd results."). (Alterations in original).

B. The Trial Court Erroneously Failed To Afford The Bureau's Interpretation Of N.J.S.A. 49:3-69(a)(2) The Substantial Deference To Which It Is Entitled.

"The Bureau has broad powers in order to fulfill 'its responsibility to protect the investing public against fraud or misrepresentation.'" Greer v. New Jersey Bureau of Sec., 288 N.J. Super. 69, 77 (App. Div. 1996) (quoting Data Access Sys., Inc. v. New Jersey Bureau of Sec., 63 N.J. 158, 168 (1973)). Similarly, the Third Circuit held in A.S. Goldmen & Co. v. New Jersey Bureau of Sec., 163 F.3d 780 (3d Cir. 1999), that the Bureau has "broad powers" to enforce the Securities Law "when it is deemed in the public interest."

[6] For example, restoring the status quo in cases where some investors sold their securities and some retained them requires awarding both restitution and rescission. See SEC v. McNamee, 481 F.3d 451, 457 (7th Cir. 2007) (explaining rescission refers to process by which an "investor returns the security and receives the purchase price in return.").

Because the Securities Law is a remedial statute intended and designed to protect the investing public, the trial court should have interpreted it in a similarly flexible manner in this case so as to further its remedial purposes. Instead, it adopted a reading of N.J.S.A. 49:3-69(a)(2) that limits available remedies and substantially diminishes the broad powers with which the Legislature invested the Bureau to enforce the Securities Law and protect the investing public.

Because the Bureau is charged with enforcing the Securities Law, the court should have afforded deference to its interpretation of N.J.S.A. 49:3-69(a)(2). See Shaw, 460 N.J. Super. 592, 617 (App. Div. 2019) (quoting Univ. Cottage Club v. Dep't of Envtl. Prot., 191 N.J. 38, 48 (2007) ("[g]enerally, courts afford substantial deference to an agency's interpretation of a statute that it is charged with enforcing.")).

The reason for granting broad enforcement powers to the Bureau is, in part, because the Securities Law is a remedial statute. In New Jersey, as in the federal courts, remedial statutes are "liberally construed" to "accomplish [their] broad purpose of safeguarding the public." Lemelledo v. Beneficial Mgmt. Corp. of Am., 150 N.J. 255, 264 (1997) ("[T]he language of the [New Jersey Consumer Fraud Act] evinces a clear legislative intent that its provisions be applied broadly in order to accomplish its remedial purpose, namely, to root out

consumer fraud."); Smith v. Millville Rescue Squad, 225 N.J. 373, 391 (2016) (explaining that the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 to -42, is a remedial statute subject to broad interpretation); Lippman v. Ethicon, Inc., 222 N.J. 362, 381 (2015) ("Another principle requires that, as remedial legislation, [the Conscientious Employee Protection Act, N.J.S.A. 34:19-1 to -14] should be liberally construed."); Lourdes Med. Ctr. v. Bd. of Rev., 197 N.J. 339 (2009) (to further remedial and beneficial purposes of New Jersey Unemployment Compensation Law, the statute should be liberally construed to allow benefits); N.J. Mfrs. Ins. Co. v. Hardy, 178 N.J. 327 (2004)(New Jersey No Fault Act liberally construed favoring intended remedial purpose of broadly protecting accident victims).[7]

[7] Other courts are in accord. See Jost v. Locke, 673 P.2d 545, 552 (Or. Ct. App. 1983) ("In order to further the remedial purposes of Oregon's Blue Sky laws, we liberally construe them to afford the greatest possible protection to the public"); Gordon v. Drews, 595 S.E.2d 864, 868 (S.C. Ct. App. 2004) (The South Carolina Uniform Securities Act is "remedial in nature and, therefore, should be liberally construed to protect investors"); Jaciewicki v. Gordarl Assocs., Inc., 298 S.E.2d 693, 696 (Ga. Ct. App. 1974) ("The Georgia securities laws are an expression by the General Assembly of a statutory policy affording broad protection to investors . . . . [t]hey are remedial in nature and thus should be liberally construed"); Payable Accounting Corp. v. McKinley, 667 P.2d 15, 17 (Utah 1983) ("[S]ecurities laws are remedial in nature and should be broadly and liberally construed to give effect to the legislative purpose"); Cromeans v. Morgan Keegan & Co., 303 F.R.D. 543, 557 (W.D. Mo. Sept. 23, 2014) ("The Court liberally and broadly construes Missouri's Blue Sky law, to effect its intended remedial purposes of protecting investors in securities transactions and

It is a "familiar canon of statutory construction" that "remedial legislation should be construed broadly to effectuate its purposes." Tcherepnin v. Knight, 389 U.S. 332, 336 (1967) (finding that the Securities Exchange Act is remedial and should be construed broadly). Specifically, the United States Supreme Court has consistently found that "federal securities laws, 'enacted for the purpose of avoiding frauds' must be construed 'not technically and restrictively, but flexibly to effectuate remedial purposes.'" SEC v. R. J. Allen & Assocs., Inc., 386 F. Supp. 866, 875 (S.D. Fla. 1974)(citations omitted); see also SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 195 (1963) (finding that the Investment Advisers Act of 1940, like other securities legislation, was "'enacted for the purpose of avoiding frauds,' [and thus should be construed] not technically and restrictively, but flexibly to effectuate its remedial purposes.") (citation omitted).

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ensuring that the state's territory is not used as a basis of operation for purveyors of fraudulent securities"); Holderman v. Columbus Skyline Sec., 660 N.E.2d 427, 429 (1996) (The Ohio Securities Act is remedial in nature, "drafted broadly to protect the investing public from its own imprudence as well as the chicanery of unscrupulous securities dealers," and "in order to further the intended purpose of the Act, its securities antifraud provisions must be liberally construed"); Schultz v. Rector-Phillips-Morse, Inc., 552 S.W.2d 4, 9 (1977) ("The Arkansas Securities Act . . . is remedial, and remedial legislation should be liberally construed.").

Indeed, the legislative history reflects a clear intent to strengthen the Bureau's authority to protect the investing public in their statements accompanying amendments to the Securities Law. See, e.g., Press Release, Office of the Governor Thomas H. Kean (Jan. 6, 1986) ("[I] believe these new laws, combined with the recently authorized Bureau of Securities, will substantially enhance the protection of New Jersey investors"); Ass. Fin. Ins. Comm. Statement to S. 2990 1 (June 12, 1997) ("[t]his Bill provides the Bureau of Securities strong enforcement powers to deal with securities firms and individuals regulated by the bureau who violate the law.").

The trial court's restrictive interpretation of N.J.S.A. 49:3-69(a)(2) limiting the Bureau Chief's remedies not only contradicts how the Bureau has interpreted and applied the Securities Law, it creates an outlier among the numerous orders and judgments of courts that have allowed both restitution and disgorgement in the same action. As noted above, courts routinely ordered both restitution and disgorgement in Bureau enforcement actions. No court – until now – has ever concluded that it lacked the statutory and equitable power to award both remedies in the same action.

Furthermore, the New Jersey Securities Law expressly provides in N.J.S.A. 49:3-75 that "[t]his Act shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact similar laws and to

coordinate the interpretation and administration of this act with related federal regulations." The Legislature also explicitly stated its intention to achieve uniformity between New Jersey's Securities Law and our sister states in other provisions. See, e.g., N.J.S.A. 49:3-50(a)(12)(a) (stating the Bureau Chief by rule or order . . . "may adopt a securities exemption (i) that will further the objectives of compatibility with . . . the 'Securities Act of 1933' and uniformity among the states."); N.J.S.A. 49:3-53 (allowing the Bureau Chief to define dishonest or unethical practices "in a manner consistent with and compatible with the laws and regulations of the Securities and Exchange Commission . . ., and uniformity with other states"); N.J.S.A. 49:3-67 ("In prescribing rules and forms the bureau chief may co-operate with the securities administrators of the other states and the Securities and Exchange Commission with a view to effectuating the policy of this statute to achieve maximum uniformity in the form and content of applications and reports wherever practicable.").

Additional support for the Bureau's interpretation of N.J.S.A. 49:3-69(a)(2) resides in the civil enforcement and remedy provisions adopted by New Jersey's sister states and jurisdictions with the Legislature's goal of uniformity in mind. See, e.g., Md. Code Ann., Corps. & Ass'ns § 11-702 (LexisNexis 2023) (authorizing the commissioner to bring an action "to obtain 1 or more of the following remedies," including "(7) [r]escission; (8) [r]estitution; (9)

[d]isgorgement; . . . [and] (11) [a]ny other relief as the court deems just"); D.C. Code § 31-5606.03 (2023) (stating the commissioner may bring an action "to obtain one or more of the following remedies," including "(7) [a]ny relief as the court deems just, such as rescission, restitution, or disgorgement"); Mass. Ann. Laws ch. 110A, § 408 (LexisNexis 2023) (authorizing the secretary to bring an action in superior court, and stating the court "may order an accounting, disgorgement, rescission and such other relief as may be in the public interest"); Neb. Rev. Stat. Ann § 8-1116 (LexisNexis 2023) (stating "upon a proper showing by the director, the court may invoke its equitable powers under the law and issue an order of rescission, restitution, or disgorgement, an order freezing assets, an order requiring an accounting, or a writ of attachment or writ of general or specific execution"); 70 Pa. Cons. Stat. § 1-509 (2023) (stating that when the department brings an action, "the court upon a proper showing shall grant such other ancillary and equitable relief as the facts warrant, including without limitation . . . orders of rescission, orders of restitution, orders of disgorgement or other relief as may be appropriate in the public interest").

Federal courts have simultaneously ordered both restitution and disgorgement in the same order or judgment for securities law violations. See SEC v. Better Life Club of Am., Inc., 995 F. Supp. 167, 179 (D.D.C. 1998), aff'd sub nom., United States SEC v. Better Life Club of Am., Inc., 203 F.3d 54 (D.C.

Cir. 1999) (finding restitution and disgorgement were appropriate remedies). In addition, sister state courts have interpreted statutes worded similarly to N.J.S.A. 49:3-69(a)(2) conjunctively. See Okla. Dep't of Sec. ex rel. Faught v. Blair, 231 P.3d 645, 656 (Okla. 2010) (interpreting that Okla. Stat. tit. 71, § 1-603, "Administrator – Maintain an Action to Enjoin and Force Compliance" – which allows a court to enter "an order of rescission, restitution, or disgorgement," "expressly authorizes both disgorgement and restitution involving a person who has violated the securities laws."); State ex rel. Goettsch v. Diacide Distribs., Inc., 596 N.W.2d 532, 535 (Iowa 1999) (interpreting Iowa Code § 502.604, which states a court "may enter an order of rescission, restitution, or disgorgement" to authorize "various forms of relief, including restitution and disgorgement of profits."). As a result, the Bureau's interpretation of N.J.S.A. 49:3-69(a)(2) is not "plainly unreasonable." Indeed, it is correct. Accordingly, the trial court erred by failing to afford it substantial deference and award disgorgement against Investigroup NP. Merin, 126 N.J. at 436-37.

POINT II

THE TRIAL COURT'S ERRONEOUS INTERPRETATION OF N.J.S.A. 49:3-69(a)(2) THWARTS THE PUBLIC POLICY PURPOSES OF THE UNIFORM SECURITIES LAW: PROTECTING INVESTORS AND ROOTING OUT FRAUD.

The full error of the court's failure to award both restitution and disgorgement is self-evident when the outcome in this case is contrasted with the breathtaking scope of defendants' misdeeds. Both remedies were appropriate and should have been awarded given that they serve different purposes.

Restitution is a remedy that is used to restore the status quo. See Porter v. Warner Holding Co., 328 U.S. 395, 402 (1946) (in enforcement action seeking restitution, regulator "asks the court to act in the public interest by restoring the status quo"); Kugler v. Banner Pontiac-Buick, Opel, Inc., 120 N.J. Super. 572, 578 (Ch. Div. 1972) (finding in Attorney-General enforcement action under New Jersey Consumer Fraud Act, that restitution restores "status quo"). Applying that formulation, the court properly awarded the Bureau restitution of $15,161,043, representing the amount that investors paid to purchase the unregistered securities, minus what had "already been repaid." (Pa92-Pa93; August 16 Order 29-30).

Disgorgement, in contrast, "'seeks to deprive the defendants of their ill-gotten gains to effectuate the deterrence objectives of the securities laws,'" regardless of restoring the status quo. Cnty. of Essex v. First Union Nat'l Bank, 373 N.J. Super. 543, 553 (App. Div. 2004) (citing SEC v. Wang 944 F.2d 80, 85 (2d Cir. 1991)). See id. (citing Warren v. Century Bankcorporation, Inc., 741 P.2d 846, 852 (Okla. 1987)) ("In modern legal usage the term [disgorgement] has frequently been extended to include a dimension of deterrence. Disgorgement is said to occur when a 'defendant is made to cough up what he got, neither more nor less.' From centuries back equity has compelled a disloyal fiduciary to 'disgorge' his profits."); Kaye v. Rosefielde, 223 N.J. 218, 236 (2015) (quoting Restatement (Third) of Agency § 8.01 cmt. d(2) (2005)) (noting in the context of a claim of a breach of the duty of loyalty, that disgorgement "may also have a valuable deterrent effect because its availability signals agents that some adverse consequences will follow a breach of fiduciary duty."); Johnson v. McClellan, 468 N.J. Super. 562, 577 (App. Div. 2021) (quoting SEC v. Hughes Cap. Corp., 124 F.3d 449, 455 (3d Cir. 1997) and Cnty. of Essex v. First Union Nat'l Bank, 186 N.J. 46, 58 (2006) (stating "disgorgement is . . . designed to deprive a wrongdoer of his unjust enrichment and to deter others" from engaging in unlawful activity.). See also McClellan, 468 N.J. Super. at 577-78 (quoting Restatement (Third) of Restitution and Unjust Enrichment § 51

cmt. A (Am. L. Inst. 2011) ("The Restatement indicates disgorgement is a form of restitution, stating '[r]estitution measured by the defendant's wrong gain is frequently called disgorgement.'"). Thus, disgorgement targets profits made from the proceeds a defendant gains in an unlawful transaction, including profits from a defendants' subsequent use of the proceeds it receives.

Even prior to the 1997 amendment of the Securities Law, this court has recognized the inherent authority of the Chancery Division to disgorge unlawful gains in actions involving securities fraud. State v. Darby, 246 N.J. Super. 432, 447 (App. Div. 1991) ("The authority to order disgorgement of unlawful gains is inherent in the historic equity jurisdiction of the Superior Court, Chancery Division."). Subsequently, the Legislature included disgorgement as one of the non-exclusive remedies that a court could award in an action brought for a violation of the Securities Law. N.J.S.A. 49:3-69(a)(2).

Here, the trial court ordered restitution against defendants Kizito and Investigroup LLC, but declined to order any remedy against Investigroup NP – a separate entity controlled by defendant Kizito. See (Pa83) ("Investigroup LLC and Investigroup NP are two distinct entities both controlled by Kizito. Investigroup LLC is a for-profit entity while Investigroup NP is a non-profit entity."). Investigroup NP was a necessary cog in Investigroup LLC and Kizito's fraudulent securities machinery. Kizito improperly transferred at least

$1,500,000 of investor funds to Investigroup NP. (Pa84). Investigroup NP, through Kizito, then misused at least $1,500,000 of investor funds to which it had no right. (Pa84). Although the trial court found that Investigroup NP had no entitlement to those funds, it nevertheless determined it was not authorized to grant multiple remedies, thereby permitting Investigroup NP to be enriched by the fraud. Allowing Investigroup NP to retain its ill-gotten gains would be contrary to the legislative intent of the Securities Law and to New Jersey's strong public policy of rooting out fraudulent activity. See Jurista v. Amerinox Processing, Inc. 492 B.R. 707, 783 (D.N.J. 2013) (citing A.S. Goldmen & Co. v. New Jersey Bureau of Sec., 163 F.3d at 788) ("It is true that New Jersey has a legitimate interest in preventing fraud and ethically questionable conduct by its businesses."); A.S. Goldmen, 163 F.3d at 788 (citations omitted) (recognizing Blue Sky Laws were designed to prevent fraud and protect the public at large); Cola v. Terzano, 129 N.J. Super. 47, 53 (N.J. Super. Ct. Law Div. 1974) ("The Securities Laws were intended to protect the uninitiated and to prevent fraud on the public at large"), aff'd sub nom. Cola v. Packer, 156 N.J. Super. 77 (App. Div. 1974). In addition, allowing Investigroup NP to retain its ill-gotten gains is contrary to the general principles of equity, which "mandate that the wrongdoer be relieved of any profits." Cnty. of Essex v. First Union Nat'l Bank, 186 N.J. 46, 56 (2006). The Bureau is following these guiding

equitable principles by seeking to recover the $1,500,000 of ill-gotten gains that were unlawfully and unjustly acquired by Investigroup NP.

Furthermore, in this case, there is no danger of a disgorgement award against Investigroup NP resulting in a double recovery for the Bureau because the court did not order Investigroup NP to pay any restitution. Moreover, restitution is payable to investors, whereas an award of disgorgement would go to the Bureau.

POINT III

THE CATCH-ALL PROVISION OF N.J.S.A. 49:3-69(a)(2) AUTHORIZING MULTIPLE REMEDIES FURTHER ILLUSTRATES THAT THE TRIAL COURT MISCONSTRUED THAT STATUTE.

The trial court also erred by ignoring the catch-all provision in N.J.S.A. 49:3-69(a)(2) that permits "an order of rescission, restitution or disgorgement or any other order within the court's power," to effectuate the broad remedial purposes of the Securities Law. (emphasis added). Catch-all provisions have previously been read expansively to effectuate a statute's legislative purpose. See, e.g., Banco Popular N. Am. v. Gandi, 184 N.J. 161, 176-77 (2005) (finding, in part, that N.J.S.A. 25:2-29(a)(3)(c) ("Remedies of a creditor") includes "a catch-all provision, affording a creditor '[a]ny other relief the circumstances may require,'" that enables a creditor to bring other causes of action alongside

their Uniform Voidable Transactions Act claim); Wilson ex rel. Manzano v. City of Jersey City, 209 N.J. 558, 584-89 (2012) (reading a catchall provision under N.J.S.A. 52:17C-10 ("Forwarding subscriber information") expansively based on the court's "understanding of the statute's language and history and the objectives that the Legislature intended to achieve.").

Here, the catch-all provision in N.J.S.A.49:3-69(a)(2), "or any other order within the court's power," includes all of the statutorily-enumerated remedies and any other remedies the court deems necessary. The court's August 16 Order reads the second part of that provision – allowing the court to enter "any other order within [its] power" – out of the statute. And, that provision unambiguously authorizes the court to craft an order combining any remedies within its powers – including both restitution and disgorgement – as appropriate to the facts of a particular case. The Legislature's objective in codifying this sweeping language was to give both the court and the Bureau all of the available remedial measures to deter wrongdoing and protect investors. Impeding essential remedies by restricting the Bureau to choosing just one of the available remedies would frustrate that purpose and disserve the public interest.

CONCLUSION

For the foregoing reasons, the court should reverse the trial court's August 16 and October 11 Orders and remand this case to the trial court. In addition, because the trial court already made the necessary factual findings to support a disgorgement award in a specific amount, this court should instruct the trial court to enter an order against Investigroup NP to disgorge all of its ill-gotten gains in the amount of $1,500,000.

Respectfully submitted,

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