

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW HAMPSHIRE

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SECURITIES AND EXCHANGE	)	
COMMISSION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 21-cv-00260-PB
	)	
LBRY, INC.,	)	
	)	
Defendant.	)	

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**COMMISSION’S SUPPLEMENTAL BRIEF ON REMEDIES**

Plaintiff Securities and Exchange Commission submits its Supplemental Brief on Remedies, pursuant to the Court’s February 6, 2023 Order (ECF No. 104). This Supplemental Brief amends the relief requested in the Commission’s Opposition to LBRY’s Motion to Limit the Commission’s Remedies (ECF No. 94). Attached is a proposed final judgment. The Commission asks the Court to order these remedies against the Defendant:

1. A civil penalty of \$111,614;
2. An injunction restraining LBRY from violating Section 5 of the Securities Act of 1933 (“Securities Act”) and from conducting unregistered offerings of crypto asset securities, at least until the Defendant destroys its LBC holdings and dissolves, as it stated to the Court it will do.

The Commission also withdraws its prior request for disgorgement for the reasons stated below.

**I. The Court should enjoin LBRY**

The need to enjoin LBRY, and the legal argument justifying doing so, is detailed in the Commission’s December 19, 2022 brief (ECF No. 94, pp. 2-7). In sum:

1. LBRY's conduct was recurrent – its illegal unregistered offering was a continuous effort conducted over more than five years and continued well after this case was filed;
2. LBRY's conduct was egregious – its violation included offers and sales specifically intended to effect or alter the trading markets for LBC;
3. LBRY has not recognized that its conduct was unlawful;
4. LBRY remains in a position to violate Section 5 today – it has thus far retained its LBC and can offer and sell unregistered crypto asset securities, either itself or through its wholly owned subsidiary, Odysee.

The same facts remain true today. LBRY satisfies the factors for injunctive relief and there is a reasonable likelihood it will violate Section 5 again. For the same reasons, the Court should enjoin LBRY from conducting future unregistered offerings of crypto asset securities.

LBRY argues that it should not be enjoined, as it is shutting down operations and “burning” (destroying or rendering useless) its current LBC holdings. *See* ECF No. 89-1, p. 7 (LBRY, Inc.'s Memo. of Law in Support of its Motion to Limit the Commission's Remedies, stating in December 2022, “LBRY plans to dissolve as soon as possible” and “LBRY is willing to divest itself of all its remaining tokens”). But LBRY has not taken either of these actions yet.

Therefore, LBRY should be enjoined, at least until LBRY dissolves and burns its LBC. The alternative approach—not enjoining LBRY unless it fails to dissolve and burn its tokens—leaves this Court and the Commission in the difficult-to-manage position of having to monitor LBRY's activities, and requires a then-dissolved LBRY to prove to the Court it has destroyed its LBC holdings and that it no longer exists. *Cf. SEC v. Culpepper*, 270 F.2d 241, 250 (1st Cir. 1959) (affirming injunction where defendants' sales of securities was difficult to police). In addition, the time before LBRY dissolves may prove to be the time of greatest risk of further violation—a cash-strapped defendant who knows that it will cease to exist as a legal entity may have a sense of impunity and be more likely to violate the securities laws during that time.

Efficiency and efficacy both point to enjoining LBRY now, with a provision, if necessary, that lifts the injunction after LBRY dissolves and burns its LBC.

## **II. The Court Should Impose a Penalty of \$111,614**

Companies should not be permitted to profit from their breaches of the securities laws. LBRY has. The penalty set by this Court should ensure that LBRY and other potential Section 5 violators cannot expect an “efficient breach” through an unregistered securities offering. Even so, the Commission acknowledges LBRY’s representations that it is defunct, ceasing operations, and without the funds to pay a larger fine, and recognizes that a defendant’s ability to pay is a factor when imposing a civil penalty.

As the Commission has previously argued (ECF No. 94, pp. 12-15), LBRY is eligible for a second- or third-tier penalty under Section 20(d) of the Securities Act (15 U.S.C. § 77t(d)(2)) because it acted in reckless disregard of a regulatory requirement and continued to offer and sell LBC for at least ten months after this case was filed (*see* Kauffman Decl., ECF 100-2, ¶5, admitting LBRY continued to sell LBC through January 2022). That said, because of the need to balance the deterrence from a penalty with LBRY’s inability to pay, the Commission requests a penalty at the upper limit of a Tier 1 statutory penalty.<sup>1</sup> The Commission thus asks the Court to impose a penalty of \$111,614.

## **III. The Commission Withdraws Its Request for Disgorgement**

Notwithstanding the availability of disgorgement as a remedy in this case, the Commission, considering the information and sworn testimony received during the supplemental

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<sup>1</sup> *See* 15 U.S.C. § 77t(d)(2)(a), adjusted for inflation, per the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Sec. 701 of Pub. L. 114-74); Release Nos. 33-11143; 34-96605; IA-6212; IC-24797 (setting penalties for offenses after November 2, 2015).

discovery period, withdraws its request for disgorgement because of LBRY's (including its wholly owned subsidiary's) lack of funds and near-defunct status.

### **CONCLUSION**

For these reasons, and those stated in the its prior remedies brief, the Commission asks the Court to order a civil penalty of \$111,614 and enjoin LBRY from violating Section 5 of the Securities Act and from conducting unregistered offerings of crypto asset securities, at least until LBRY destroys its holdings of LBC and dissolves, as it stated to the Court it will do.

Dated: May 12, 2023

Respectfully submitted,

### **SECURITIES AND EXCHANGE COMMISSION**

By its Attorneys,

/s/ Marc Jones  
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### **CERTIFICATE OF SERVICE**

I hereby certify that, on May 12, 2023, I caused true and correct copies of the foregoing to be served on counsel of record for all parties that have appeared to date through the Court's CM/ECF system.

/s/ Marc Jones  
Marc Jones

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**FINAL JUDGMENT AS TO DEFENDANT LBRY, INC.**

On November 7, 2022, the Court granted Plaintiff Securities and Exchange Commission’s Motion for Summary Judgment (ECF No., 55), and found Defendant LBRY, Inc. liable for violating Section 5 of the Securities Act of 1933. The Commission has moved this Court for entry of Final Judgment. Accordingly, the Court enters judgment as follows:

**I.**

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that LBRY, Inc. is permanently restrained and enjoined from violating Section 5 of the Securities Act [15 U.S.C. § 77e] by, directly or indirectly, in the absence of any applicable exemption:

- (a) Unless a registration statement is in effect as to a security, making use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise;
- (b) Unless a registration statement is in effect as to a security, carrying or causing to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale; or

- (c) Making use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed with the Commission as to such security, or while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under Section 8 of the Securities Act [15 U.S.C. § 77h].

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Final Judgment by personal service or otherwise: (a) Defendant's officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Defendant or with anyone described in (a).

## II.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to Section 21(d)(5) of the Exchange Act [15 U.S.C. § 78u(d)(5)] LBRY, Inc. is permanently restrained and enjoined from participating, directly or indirectly, in any unregistered crypto asset securities offering.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Final Judgment by personal service or otherwise: (a) Defendant's officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Defendant or with anyone described in (a).

**III.**

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant shall pay a civil penalty in the amount of \$111,614 to the Securities and Exchange Commission pursuant to Section 20(d)(1) of the Securities Act [15 U.S.C. § 77t(d)(1)]. Defendant shall make this payment within 30 days after entry of this Final Judgment.

Defendant may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request. Payment may also be made directly from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>. Defendant may also pay by certified check, bank cashier's check, or United States postal money order payable to the Securities and Exchange Commission, which shall be delivered or mailed to

Enterprise Services Center  
Accounts Receivable Branch  
6500 South MacArthur Boulevard  
Oklahoma City, OK 73169

and shall be accompanied by a letter identifying the case title, civil action number, and name of this Court; LBRY, Inc. as a defendant in this action; and specifying that payment is made pursuant to this Final Judgment.

Defendant shall simultaneously transmit photocopies of evidence of payment and case identifying information to the Commission's counsel in this action. By making this payment, Defendant relinquishes all legal and equitable right, title, and interest in such funds and no part of the funds shall be returned to Defendant. The Commission shall send the funds paid pursuant to this Final Judgment to the United States Treasury.

The Commission may enforce the Court's judgment for penalties by the use of all collection procedures authorized by law, including the Federal Debt Collection Procedures Act,

28 U.S.C. § 3001 *et seq.*, and moving for civil contempt for the violation of any Court orders issued in this action. Defendant shall pay post-judgment interest on any amounts due after 30 days of the entry of this Final Judgment pursuant to 28 USC § 1961.

**IV.**

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that this Court shall retain jurisdiction of this matter for the purposes of enforcing the terms of this Final Judgment.

Dated: \_\_\_\_\_, \_\_\_\_\_

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UNITED STATES DISTRICT JUDGE