No. _____

IN THE

Supreme Court of the United States

SOUTHERN TRUST METALS, INC., LORELEY OVERSEAS CORP., ROBERT ESCOBIO,

Petitioners,

v.

UNITED STATES COMMODITY FUTURES TRADING COMMISSION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

PETER W. HOMER
Counsel of record
CHRISTOPHER KING
HOMER BONNER JACOBS
1200 Four Seasons Tower
1441 Brickell Avenue
Miami, Florida 33131
(305) 350-5192
phomer@homerbonner.com
cking@homerbonner.com

Attorneys for Petitioners

QUESTIONS PRESENTED

The Commodity Exchange Act ("CEA") limits restitution in enforcement actions to "losses proximately caused" by a violation of the CEA and CFTC regulations. 7 U.S.C. § 13a-1(d)(3)(A). This Court's decision in *Bank of America Corp. v. City of Miami, Florida*, 137 S. Ct. 1296, 1306 (2017) holds foreseeability is not enough to satisfy proximate cause. *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 343-44 (2005) holds that proximate cause requires a plaintiff to show loss causation, meaning "not only that had he known the truth he would not have acted [i.e., reliance, or transaction causation] but also that he suffered actual economic loss." The Eleventh Circuit below ruled, much as it did in *Bank of America*, that foreseeability and reliance are all § 13a-1(d)(3)(A) requires to satisfy proximate cause and specifically held loss causation is not required.

The Eleventh Circuit also affirmed a lifetime industry ban against Petitioners. The injunctive relief provisions of § 13a-1(a) authorize no such relief, and the circuits are split on whether an injunction may be a penalty. The questions presented are:

1. Whether foreseeability and reliance alone, without any proof of loss causation, satisfy § 13a-1(d)(3)(A)'s proximate cause requirement, in contravention of *City of Miami* and *Dura*; and

2. Whether a lifetime industry ban is a penalty and therefore beyond a district court's statutory and equity power to issue without violating separation-of-powers principles.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding below are,

United States Commodity Futures Trading Commission, Plaintiff-Appellee, Respondent on Review;

Southern Trust Metals, Inc., Defendant-Appellant, Petitioner on Review;

Loreley Overseas, Corp., Defendant-Appellant, Petitioner on Review; and

Robert Escobio, Defendant-Appellant, Petitioner on Review.

Southern Trust Metals is wholly owned by Loreley Overseas Corporation; Lorleley Overseas Corporation is wholly owned by Southern Trust Securities Holding Corporation, a publicly held company. Southern Trust Securities Holding Corporation has no parent company and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Regulations

PETITION FOR A WRIT OF CERTIORARI

Petitioners Southern Trust Metal, Inc., Loreley Overseas, Inc., and Robert Escobio ("Defendants") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The Eleventh Circuit panel opinion and order granting rehearing in part and replacing prior opinion (App. A, *infra*, 1a-35a) is reported at 894 F.3d 1313. The original Eleventh Circuit opinion (App., *infra*, 65a-94a) later vacated and replaced on rehearing is reported at 880 F.3d 1252. The Eleventh Circuit order denying panel rehearing and rehearing en banc of the replacement opinion (App., *infra*, 95a-96a) is unreported. The district court's findings of fact and conclusions of law awarding restitution and imposing a permanent industry ban (App., *infra*, 36a-64a) is unreported but available at 2016 WL 4523851. The district court's Final Judgment (App., *infra*, 97a-105a) is unreported but available at 2016 WL 4536275.

JURISDICTION

The judgment of the court of appeals was entered on July 12, 2018. The Eleventh Circuit denied rehearing and rehearing en banc on October 18, 2018. On January 9, 2019, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including February 15, 2019. *See Southern Trust Metals v. CFTC*, No. 18A703. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

7 U.S.C. § 13a-1 of the CEA provides in relevant part,

> (a) Action to enjoin or restrain violations
>
> Whenever it shall appear to the Commission that any registered entity or other person has engaged, is engaging, or is about to engage in any act or practice constituting a violation of any provision of this chapter or any rule, regulation, or order thereunder, or is restraining trading in any commodity for future delivery or any swap, the Commission may bring an action in the proper district court of the United States or the proper United States court of any territory or other place subject to the jurisdiction of the United States, to enjoin such act or practice, or to enforce compliance with this chapter, or any rule, regulation or order thereunder, and said courts shall have jurisdiction to entertain such actions:
>
> ***
>
> (d) Civil penalties
>
> ***
>
> (3)Equitable remedies.—In any action brought under this section, the Commission may seek, and the court may impose, on a proper showing, on any person found in the action to have committed any violation, equitable remedies including—

> (A) restitution to persons who have sustained losses proximately caused by such violation (in the amount of such losses);…

Section 13a-1 is reproduced in its entirety in Appendix G, *infra*.

INTRODUCTION

This Court's decision in *Bank of America* dealt a fatal blow to the restitution award in this case. The district court awarded $2.1 million in customer loss restitution, basing its proximate cause ruling entirely on the foreseeability standard the Eleventh Circuit adopted in its *Bank of America* opinion. *See* App., *infra*, 60a-61a. The CFTC urged the district court to adopt that erroneous standard and offered no other proximate cause theory at trial. *See id*. at 22a. The record would not have supported one, either. Southern Trust Metals was alleged to have misrepresented that customers were trading leveraged physical silver when, according to the CFTC, they were trading leveraged derivative silver contracts pegged to the market price of physical silver. Since there was no price difference in the two closely related investments, and no customer wanted delivery, customers would have had the same losses (or gains) had they traded leveraged physical silver rather than leveraged derivative silver contracts. *See id*. at 3a, 33a-34a. In the middle of Defendants' appeal, this Court vacated the Eleventh Circuit's *Bank of America* decision and found foreseeability alone insufficient to prove proximate cause, *see Bank of Am.*, 137 S. Ct. at 1305. As a consequence, the restitution judgment had to be reversed.

The Eleventh Circuit instead found a way to affirm, by ignoring this Court's decisions and writing

proximate cause out of the restitutionary remedy created by § 13a-1(d)(3)(A). The decision below concludes, "there is no need to ask, as we would in a fraud-on-the-market case, whether the Defendants' fraud, rather than independent market forces, *caused the victims' losses*." App., *infra*, 33a (emphasis added). Yet the statute demands an answer to exactly that question. For the Eleventh Circuit, the fraud violations were proof enough of proximate cause, and the court relied on its own judge-made "policy" of thwarting would-be fraudsters as the guiding factor. These rulings are irreconcilable with this Court's proximate cause precedent.

First, in direct conflict with *Bank of America*, the Eleventh Circuit has again made foreseeability alone sufficient to prove proximate cause.

Second, in conflict with *Dura*, the Eleventh Circuit found reliance, or transaction causation, sufficient to satisfy proximate cause. This departs from *Dura*'s main holding that proximate cause requires "actual economic loss," rather than mere proof "that had [the investor] known the truth he would not have acted." *Dura*, 544 U.S. at 343–44.

Third, the Eleventh Circuit announced loss causation has no application to § 13a-1(d)(3)(A)'s proximate cause requirement, even though *Dura* and numerous circuit courts correctly recognize that loss causation is simply common-law proximate cause.

Fourth, the Eleventh Circuit misapplied this court's decision in *Robers v. United States*, 134 S. Ct. 1854 (2014) to make Defendants responsible for market declines in silver prices. The Eleventh Circuit ignored *Robers*' acknowledged limitation that its proximate cause ruling had no application to investors, but applied only when victims of loan fraud

encountered delays in selling collateral after a default. *See id.* at 648–49 (Sotomayor, J., concurring). Using *Robers* to circumvent *Bank of America* and *Dura* further conflicted with this Court's instruction to judge "directness principles" by the "nature of the statutory cause of action," *Bank of Am*, 137 S. Ct. at 1306—in this case, CEA antifraud claims virtually indistinguishable from private securities fraud actions under § 10(b) of the Securities Exchange Act of 1934.

The Eleventh Circuit's departure from this Court's proximate cause precedent and the plain text of § 13a-1(d)(3)(A) has nationwide consequences. It ensures restitution is automatic for violations of the CEA anti-fraud provisions, notwithstanding the statute's requirement of proximate cause for all violations. It establishes an untenable precedent where lower courts may choose among this Court's proximate cause decisions to affirm monetary awards that more recent and clearly applicable decisions would destroy. And it creates a number of circuit splits with circuit courts that distinguish loss causation from transaction causation and recognize that loss causation *is* common law proximate cause. The Eleventh Circuit's decision thus calls out for this Court's review, to ensure uniformity in how proximate cause and loss causation principles are applied, and to restore clear meaning to the body of proximate cause rulings from this Court.

This case is also an ideal vehicle to resolve another important and recurring issue—the power of district courts to issue permanent industry bans in enforcement actions. The CEA injunction statute does not authorize industry bans, and the circuits are split over whether injunctive bar orders in agency enforcement actions are penalties. This Court's

analysis in *Kokesh v. Securities and Exchange Commission*, 137 S. Ct. 1635 (2017) supports those courts that hold industry bar orders are penalties. The Court should grant the petition to resolve this ongoing debate.

STATEMENT OF THE CASE

A. Legal background

In 2005, this Court in *Dura* resolved a circuit split over loss causation, the proximate cause element of private securities fraud actions under § 10(b) of the Securities Exchange Act of 1934. *See Dura*, 544 U.S. at 340-41. A section of the Private Securities Litigation Reform Act ("PSLRA") provided, "the plaintiff shall have the burden of proving that the act or omission of the defendant alleged to violate this chapter caused the loss for which the plaintiff seeks to recover damages." 15 U.S.C. § 78u-4(b)(4). The Ninth Circuit, in conflict with other circuit courts, interpreted the statute to mean that plaintiffs could "establish loss causation if they have shown that the price *on the date of purchase* was inflated because of the misrepresentation." *See Dura*, 544 U.S. at 340 (emphasis in original). This Court reversed, holding that the statute "makes clear Congress' intent to permit private securities fraud actions for recovery where, but only where, plaintiffs adequately allege and prove the traditional elements of causation and loss." *Id*. at 346.

Drawing on those "traditional elements," the Court reasoned that "the common law has long insisted that a plaintiff in such a case show not only that had he known the truth he would not have acted but also that he suffered actual economic loss." *See id*. at 343–44. And Congress, in making private actions available to deter fraud, sought "not to provide

investors with broad insurance against market losses, but to protect them against those economic losses that misrepresentations actually cause." *See id*. at 345. The statute therefore required the plaintiff to "prove that the defendant's misrepresentation (or other fraudulent conduct) proximately caused the plaintiff's economic loss." *Id*. at 346.

In 2010, Dodd-Frank incorporated a virtual mirror image of this holding and § 78u-4(b)(4) into the CEA. The amendment added authorization for the CFTC, after proving a violation of the CEA or a CFTC regulation, to recover "restitution to persons who have sustained *losses proximately caused by such violation* (in the amount of such losses)." *See* 7 U.S.C. § 13a-1(d)(3)(A) (emphasis added).

In 2017, this Court again drew on common-law proximate cause principles to resolve disagreement among circuit courts over whether foreseeability satisfies proximate cause under federal statutes. The Eleventh Circuit had found foreseeable harm sufficient to support monetary relief for discriminatory lending practices under the Fair Housing Act. *See Bank of Am.*, 137 S. Ct. at 1305–06. This Court vacated that decision, holding common-law directness principles controlled proximate cause analysis and foreseeability alone was not enough. *See id*.

This case returned the issue of foreseeability's role in proximate cause to the Eleventh Circuit, only this time with respect to restitution under the CEA. The Eleventh Circuit committed the same error.

B. Factual and procedural background

The CFTC brought this enforcement action in 2014 under § 13a-1, alleging violations of the CEA's anti-fraud statute and certain CEA and CFTC

registration requirements. App., *infra*, 7a. The fraud allegations centered around Southern Trust Metal's leveraged physical silver business. *Id.* at 1a. The Complaint alleged the transactions were actually leveraged derivative contracts "which tracked the value of the underlying commodities being sold (gold, silver, platinum or palladium.)" *See id.* at 7a. These leveraged transactions were made through highly-regulated London financial firms, Hantec and Berkley, in sub-accounts corresponding to each customer and held in the name of Southern Trust Metal's parent company, Loreley. *Id.* at 3a-4a.

The district court found Defendants liable and, after a bench trial, awarded the CFTC statutory restitution under § 13a-1(d)(3)— $1,542,892 on the leveraged derivative silver contract transactions, and $559,727 on the registration violations. App., *infra*, 36a, 37a, 97a. The district court also entered a permanent injunction barring Defendants from registered commodities trading. *Id.* at 96a.

Defendants appealed. App., *infra*, 8a. One argument asserted that the district court applied a foreseeability causation standard specifically rejected in *Bank of America*. *Id.* at 21a-22a. Another argument challenged the lifetime ban on grounds that the ban was a penalty, unsupported either by the record or the district court's statutory or equity authority. *Id.* at 19a, 105a-106a.

The Eleventh Circuit issued an opinion January 22, 2018. App., *infra*, 64a. It held the district court's foreseeability standard was wrong under *Bank of America* and vacated the restitution award on the registration violations. *Id.* at 85a-90a. However, the decision affirmed restitution on the leveraged metals transactions, though on an erroneous basis. The Eleventh Circuit found customers were buying futures

contracts, which the CFTC had never alleged. *See id.* at 90a-93a. The transactions were leveraged derivative silver contracts (not futures) specifically tied to the price of silver. *See id.* at 3a. The Opinion also affirmed the lifetime ban. *Id.* at 83a-84a.

Defendants moved for Panel rehearing, pointing out the error. App., *infra*, 1a. Additional briefing on the proximate cause issue showed there was no price difference between leveraged physical silver transactions and leveraged derivative contracts in silver. Had customers been trading leveraged physical silver as the CFTC claimed they understood, they would have had the same losses (or gains) as occurred in trading leveraged derivative silver contracts. The CFTC presented no record evidence to the contrary.

On July 12, the Eleventh Circuit vacated the first opinion and issued a new one. App., *infra*, 1a. The Eleventh Circuit again affirmed the lifetime ban and restitution award on the leveraged derivative silver contract transactions, but vacated the restitution award on futures and options transactions. *Id.*at 19a-35a.

The Eleventh Circuit found two bases for proximate cause on the leveraged derivative silver transactions. First, customers had "testified at trial that they would not have invested with Southern Trust if they had known that their money would be passed through Loreley and invested in metals derivatives rather than actual metals." App., *infra*, 28a. Second, the court below found customers had "lost substantial sums" when the National Futures Association ("NFA"), a self-regulatory organization, "forced Loreley's accounts at Berkeley and Hantec…to be liquidated." *Id.* The Eleventh Circuit found those losses a foreseeable result of the fraud. *See id.* at 28a, 34a.

The Eleventh Circuit rejected "loss causation" as the applicable standard, finding that it only applied in "fraud-on-the-market" cases. App., *infra*, 32a-33a. The Eleventh Circuit determined therefore that there was "no need to ask" whether the fraud caused the losses. *See id*. The court below instead relied on *Robers*, a loan fraud case in which defendant's fraud was found to have a sufficient proximate cause connection to market declines. *See id*. at 29a-34a. The Eleventh Circuit declared "*Robers* applicable here," as both cases involved "fraudulently obtained investments." *Id*. at 31a. Citing what it called "bedrock policy," the Eleventh Circuit concluded that Defendants' fraud must be the proximate cause of losses since it "would create perverse incentives" to hold otherwise. *See id*. 34a-35a.

The Eleventh Circuit denied Defendants' motion for rehearing and rehearing en banc. App., *infra*, 95a.

REASONS FOR GRANTING THE PETITION

I. The Eleventh Circuit's decision flouts this Court's proximate cause precedent and resurrects circuit splits.

Though *Bank of America* issued in the middle of the appeal below, the Eleventh Circuit rejected its core commands when it came to the CTFC's fraud claims. The decision below makes foreseeability alone again a valid basis for proximate cause, despite *Bank of America* vacating that very holding. The violence the Eleventh Circuit's decision does to *Dura* is even more fundamental, as the clear lines this Court has drawn between transaction causation, which is *reliance*, and loss causation, which is *proximate cause*, are distinguished away. As a result, the circuit splits *Bank of America* and *Dura* resolved are back. Worse still, the decision below uses this Court's

distinguishable analysis in *Robers* to avoid the proximate cause principles enunciated in *Bank of America* and *Dura*.

Accordingly, the decision below is an ideal vehicle for this Court to reinforce the holdings of *Bank of America* and *Dura* and to insist that lower courts uniformly adhere to this Court's proximate cause precedent.

A. The decision below is irreconcilable with *Bank of America* and *Dura*.

The Eleventh Circuit identified two grounds for proximate cause. First, "[s]everal victims of this scheme testified at trial that they would not have invested with Southern Trust if they had known that their money would be passed through Loreley and invested in metals derivatives rather than in actual metals." App., *infra*, 28a. Second, "victims of this scheme lost substantial sums when the NFA, having determined that the Defendants were violating commodities-trading laws, forced Loreley's accounts at Berkeley and Hantec (which corresponded to customer accounts at Southern Trust) to be liquidated." *Id.*

The first ground is irreconcilable with *Dura*. Testimony from a plaintiff "that had he known the truth he would not have acted" is not proximate cause. It is reliance, or what is more accurately described as "transaction causation," a different element altogether. *See Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 812 (2011) (explaining "[w]e have referred to the element of reliance in a private Rule 10b–5 action as 'transaction causation,' not loss causation") (citing *Dura*, 544 U.S. at 341–342). Where reliance focuses on "facts surrounding the investor's decision to engage in the transaction," loss

causation "requires a plaintiff to show that a misrepresentation that affected the integrity of the market price *also* caused a subsequent economic loss." *Erica P. John*, 563 U.S. at 812. Transaction causation, without more, is not proof of proximate cause under *Dura* and *Erica P. John*. However, the Eleventh Circuit has ruled to the contrary. According to the Eleventh Circuit, evidence of transaction causation is all proximate cause requires. *See* App., *infra*, 28a, 34a. Indeed, as the Eleventh Circuit openly acknowledged, whether the violation actually *caused* economic loss is irrelevant. See App., *infra*, 33a. Because this conclusion is utterly incompatible with this Court's holdings on proximate cause, review by this Court is required.

The second ground the Eleventh Circuit cited for proximate cause is irreconcilable with *Bank of America*. According to the Eleventh Circuit, Southern Trust Metals should have foreseen the losses the NFA intervention eventually caused, and should have foreseen "the market conditions that contributed to the customers' losses." *See* App., *infra*, 34a. Rather than breaking the chain of causation, as intervening third-party actions normally do, the circuit panel opinion determined the NFA's action kept the causal chain intact. *See id*. The court cited *Robers*, a distinguishable loan fraud case this Court specifically limited to non-investment situations, *see infra* Sec. I(c), to justify making Defendants responsible for market declines unconnected to the CEA violations. These rulings conflict with *Bank of America* in three ways.

First, mere foreseeability returns as a viable basis for proximate cause after *Bank of America* rejected that very argument. *See Bank of Am.*, 137 S. Ct. at 1306. Second, the causal chain can tolerate

multiple steps by multiple parties, contrary to *Bank of America*'s holding that proximate cause generally does not travel beyond the first step in the causal chain. *See id.* And third, courts can justify their conclusions by analogizing distinguishable cases, despite *Bank of America*'s instruction to base proximate cause limits on the "nature of the statutory cause of action," *see id.*—here, CEA anti-fraud statutes that are clearly modeled after § 10(b) of the Securities Exchange Act of 1934.[1]

The Eleventh Circuit takes its rulings to the ultimate conclusion—proximate cause as *Bank of America* and *Dura* defined it is not required under § 13a-1(d)(3)(a). Loss causation is specifically found inapplicable. The Eleventh Circuit distinguishes cases where fraud was "on the market," from this case, where it found the fraud to be on "individual consumers who wished to invest in metals and instead had their funds placed in metals derivatives." App., *infra*, 33a. Because no one alleged "the Defendants manipulated the price of a commodity," the Eleventh Circuit reasoned, "there is no need to ask, as we would in a fraud-on-the-market case, whether the Defendants' fraud, rather than independent market forces, caused the victims' losses." *Id.* According to

---

[1] Section 10(b) forbids the "use or employ[ment] ... of any ... deceptive device … in connection with the purchase or sale of any security," and "in contravention of" Securities and Exchange Commission "rules and regulations." 15 U.S.C. § 78j(b). The CEA anti-fraud statutes and regulation, 7 U.S.C. § 6b(a), 7 U.S.C. § 9, and 17 C.F.R. § 180.1, use virtually the same language. Section 6b(a) makes it "unlawful . . . for any person . . . in connection with . . . any contract of sale of any commodity . . . for future delivery . . . to cheat or defraud or attempt to cheat or defraud the other person . . . [or] willfully to make . . . any false report or statement . . . [or] willfully to deceive or attempt to deceive the other person by any means whatsoever." 7 U.S.C. § 6b(a).

this line of reasoning, "[t]he factual question of whether fluctuations in the value of metals derivatives mirror fluctuations in the value of the underlying commodities is therefore beside the point." So "even if the value of the metals derivatives in this case precisely tracked the value of the underlying commodities … the Defendants' fraud would still be a proximate cause of the victims' losses." *Id.* at 33a-34a. In the Eleventh Circuit's view, it is enough to satisfy proximate cause that "Southern Trust took [customer] money and, contrary to their wishes, invested it in metals derivatives. Furthermore, the Defendants' fraud is what prompted the NFA to intervene and, in an effort to prevent further losses, to require that Loreley's accounts at Berkeley and Hantec be liquidated." *Id.* at 34a.

All the Eleventh Circuit requires of proximate cause, therefore, is a violation of the CEA anti-fraud statutes and an action by regulators in response. Proximate cause is effectively written out of § 13a-1(d)(3)(a). That conflicts with *Bank of America*'s foundational assumption that federal causes of action incorporate the "'well established principle of [the common] law that in all cases of loss, we are to attribute it to the proximate cause, and not to any remote cause." *Bank of Am.*, 137 S. Ct. at 1305.

It also conflicts with § 13a-1(d)(3)(a) itself. To say "the Defendants' fraud" need not have "caused the victims' losses," App., *infra*, 33a, defies the statute's basic requirement and plain meaning. The CFTC is *only* entitled to recover "losses *proximately caused*" by a violation of the CEA and CFTC regulations. 7 U.S.C. § 13a-1(d)(3)(a).

The Eleventh Circuit explains its reasoning with what it describes as public policy. Requiring the fraud to be the direct cause of customer loss "would create

perverse incentives for commodities traders and undermine the purpose of the CEA," the Eleventh Circuit held. App., *infra*, 34a. *Dura* holds the opposite view. Private securities fraud laws seek to deter fraud as an "important securities law objective" and make actions available to accomplish this, though "not to provide investors with broad insurance against market losses, but to protect them against those economic losses that misrepresentations actually cause." *Dura*, 544 U.S. at 345. The circuit panel decision below gives customers, via a CFTC enforcement action, the "broad insurance" § 13a-1(d)(3)(a) and *Dura* clearly withheld.

The Eleventh Circuit's decision at once cites this Court's controlling proximate cause precedent and then violates it with irreconcilable foreseeability findings and policy arguments. This Court should grant the petition to restore vertical consistency to the law of proximate cause. This case is an ideal vehicle for doing so. The issue is outcome determinative—all testifying customers called by the CFTC admitted they would have traded at the same price and in the same quantities had they traded leveraged physical silver as represented. Removing foreseeable causal chains and requiring loss causation destroys the CFTC's requested restitution award.

Further, the decision below has major importance. The Eleventh Circuit has ignored precedent, eviscerated loss causation, and enabled the CFTC to claim restitution in virtually every alleged fraud case. That impacts enforcement actions nationwide.

This Court has rendered proximate cause decisions dealing with a host of federal acts. *See, e.g., Bank of Am.*, 137 S. Ct. at 1306 (Federal Housing Act); *Lexmark Intern., Inc. v. Static Control Components,*

Inc., 572 U.S. 118 (2014) (Lanham Act); *Hemi Group, LLC v. City of New York*, 559 U.S. 1 (2010) (RICO); *Dura*, 544 U.S. at 338; *Holmes v. Sec. Inv. Protection Corp.*, 503 U.S. 258 (1992) (RICO); *Associated Gen. Contractors of Calif., Inc. v. Calif. State Council of Carpenters*, 459 U.S. 519 (1983) (Clayton Act). The decision below demonstrates just how badly uniform guidance is still needed. The Court should grant review to ensure its body of decisional law on proximate cause is horizontally enforced under all federal statutory schemes.

B. The decision below resurrects circuit splits.

Both *Dura* and *Bank of America* resolved circuit splits. The decision below, by ignoring this Court's precedents, renews the splits.

1. The Eleventh Circuit's outright rejection of loss causation causes a circuit split.

In *Dura*, the Ninth Circuit had split with a majority of circuits by defining loss causation in private securities fraud cases under § 10(b) to require only that a misrepresentation inflate the price of a stock at the time of purchase. *See Dura*, 544 U.S. at 340 (collecting cases). Other circuits rejected that standard, mainly because what the Ninth Circuit was requiring was not loss causation, another name for ordinary common law proximate cause. *See e.g., Emergent Capital Inv. Mgmt., LLC v. Stonepath Group, Inc.*, 343 F.3d 189, 198–99 (2d Cir. 2003) (distinguishing a case where a fraudulent concealment "induced [the company's] failure" from a case where market price declines were "unrelated" to the "concealed negative history"); *Bastian v. Petren Res. Corp.*, 892 F.2d 680, 685 (7th Cir. 1990) (finding "'[l]oss causation' is an exotic name … for the standard

rule of tort law that the plaintiff must allege and prove that, but for the defendant's wrongdoing, the plaintiff would not have incurred the harm of which he complains.").

The Eleventh Circuit's view that loss causation is a limited principle inapplicable outside of fraud-on-the-market cases renews the split *Dura* effectively resolved. To break "loss causation" apart from proximate cause, and then merge both with transaction causation, departs from long-established circuit authority. *See id.* As Judge Easterbrook observed, "[e]ver since *Schlick v. Penn-Dixie Cement Corp.,* 507 F.2d 374, 380-81 (2d Cir.1974), courts have been distinguishing between 'transaction causation' and 'loss causation'." *See LHLC Corp. v. Cluett, Peabody & Co., Inc.*, 842 F.2d 928, 931 (7th Cir. 1988) (citing Thomas Lee Hazen, *The Law of Securities Regulation* § 11.5 (1985)). A plaintiff "must show both. 'Loss causation' means that the investor would not have suffered a loss if the facts were what he believed them to be; 'transaction causation' means that the investor would not have engaged in the transaction had the other party made truthful statements at the time required." *LHLC*, 842 F.2d at 931. The Eleventh Circuit disagrees, finding transaction causation to be a valid substitute for proximate cause/loss causation. *See* App., *infra*, 28a-29a. That is essentially the mistake the Ninth Circuit made in *Dura*—a misrepresentation that causes a purchase at an inflated price no more proves proximate cause than a misrepresentation that causes a purchase at a normal market price. Either way, proximate cause still requires "that the defendant's misrepresentations 'caused the loss for which the plaintiff seeks to recover.'" *Dura*, 544 U.S. at 345–46 (quoting 15 U.S.C. § 78u–4(b)(4)). Most circuits

distinguish between loss causation and transaction causation in this way. *See, e.g., LHLC*, 842 F.2d at 931. The Eleventh Circuit opinion below inexplicably does not.

The Eleventh Circuit's distinction that loss causation applies only in fraud-on-the-market cases is unprecedented. Section 10(b) and Rule 10b-5 claims require loss causation for any misrepresentation in connection with a security, whether publicly traded or not. *See Dura*, 544 U.S. at 338. Two influential loss causation decisions from the Seventh Circuit in fact had nothing to do with any claimed fraud on the market but involved privately held securities. *See Bastian*, 892 F.2d at 682 (relating to misrepresentations and omissions in offering memoranda for "oil and gas limited partnerships"); *LHLC*, 842 F.2d. at 929–30 (involving the sale of stock in a company that owned department stores to a "closely-held firm").

Circuit court decisions have required loss causation outside of private § 10(b) securities fraud actions, as well. Virtually all circuits recognize that ERISA claims must satisfy loss causation principles, though the circuits disagree on who bears the burden. *See Pioneer Centres Holding Co. Employee Stock Ownership Plan & Tr. v. Alerus Fin., N.A.*, 858 F.3d 1324, 1334 (10th Cir. 2017) (finding the "plain language of § 1109(a) establishes liability for losses 'resulting from' the breach, which we have recognized indicates that 'there must be a showing of some causal link between the alleged breach and the loss plaintiff seeks to recover.'"); *Tatum v. RJR Pension Inv. Comm.*, 761 F.3d 346, 361 (4th Cir. 2014) (addressing "the district court's holding with respect to which party bears the burden of proof as to loss causation"); *Peabody v. Davis*, 636 F.3d 368, 373 (7th Cir. 2011)

(holding that "[t]o prevail under § 502(a)(2), the plaintiff must show a breach of fiduciary duty, and its causation of an injury"); *Kuper v. Iovenko*, 66 F.3d 1447, 1459 (6th Cir. 1995) (holding that a "plaintiff must show a causal link between the failure to investigate and the harm suffered by the plan."), abrogated in part on other grounds by *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014). None of these cases involved fraud-on-the-market theories, but they all required loss causation.

The same can be said for the False Claims Act, where circuits have held that "a causal connection must be shown between loss and fraudulent conduct and that a broad 'but for' test is not in compliance with the statute." *U.S. v. Luce*, 873 F.3d 999, 1010 (7th Cir. 2017) (quoting and ultimately agreeing with *U.S. v. Hibbs*, 568 F.2d 347, 349 (3d Cir. 1977)); *U.S. v. Miller*, 645 F.2d 473, 475–76 (5th Cir. 1981) (holding "the language of the [FCA] statute clearly requires that before the United States may recover double damages, it must demonstrate the element of causation between the false statements and the loss."); *U.S. ex rel. Schwedt v. Planning Research Corp.*, 59 F.3d 196, 200 (D.C. Cir. 1995) (holding "the Act does not contemplate liability for all damages that would not have arisen 'but for' the false statement."). The Eleventh Circuit's holding that loss causation applies only when the "fraud in on the market," rather than on individual investors, App., *infra*, 33a, poses a direct conflict with these cases.

What these decisions all eventually recognize is what this Court in *Dura* held—loss causation *is* common law proximate cause. *See Dura*, 544 U.S. at 343-44*; Bastian*, 892 F.2d at 685; *see also Movitz v. First Nat. Bank of Chicago*, 148 F.3d 760, 763 (7th Cir. 1998) (Posner, J.) (explaining "[t]he distinction

between 'but for' causation and actual legal responsibility for a plaintiff's loss is particularly well developed in securities cases, where it is known as the distinction between 'transaction causation' and 'loss causation.'"). Declaring loss causation inapplicable is the same as ruling statutorily required proximate cause is unnecessary.

In sum, the Eleventh Circuit's rejection of loss causation in CEA fraud cases and embrace of transaction causation as proof of proximate cause creates and renews conflicts among the circuits. For all the reasons this Court resolved the circuit split in *Dura*, it should do so again here.

2. The Eleventh Circuit's use of foreseeable harm as a leading factor in proximate cause also renews a circuit split.

Bank of America also resolved a circuit split. The Eleventh Circuit's foreseeability standard had split with decisions by the Second, Fifth, and Ninth Circuits applying directness principles to an array of federal acts. *See* Pet. for Cert., *Bank of Am. Corp. v. City of Miami*, 2016 WL 860956 at 29-30 (March 4, 2016) (citing *Ray Charles Foundation v. Robinson,* 795 F.3d 1109, 1124 (9th Cir. 2015) (Copyright Act); *Aransas Project v. Shaw*, 115 F.3d 641, 658 (5th Cir. 2014) (Endangered Species Act); *Henrietta D. v. Bloomberg,* 331 F.3d 261, 278-79 (2d Cir. 2003) (Americans with Disabilities Act)). This Court's ruling that "a plaintiff must do more than show that its injuries foreseeably flowed" from a Federal Housing Act violation effectively resolved the question. *Bank of Am.*, 137 S. Ct. at 1301. Congress would have to depart explicitly from common law directness principles to allow findings that "any remote cause" satisfies proximate cause. *See id.* at 1305.

The Eleventh Circuit's decision brings back the split. Foreseeability returns under the CEA as a central factor, though the statute supplies no support at all for that ruling. Under the decision below, remote causes may satisfy proximate cause for CEA fraud claims, even by third-party actors. *See* App., *infra*, 34a (finding "Defendants' fraud is what prompted the NFA to intervene and, in an effort to prevent further losses, to require that Loreley's accounts at Berkeley and Hantec be liquidated… [T]he market conditions that contributed to the customers' losses were foreseeable"). This decision puts the Eleventh Circuit in the extreme minority of circuit courts that permit such elaborate causal chains. *See LHLC*, 842 F.2d at 931 (rejecting remote cause arguments under § 10(b) as "[i]t is almost always possible to show that a given disclosure or nondisclosure could have affected *some* transaction, at some level of probability.") (emphasis in original).

Bank of America consolidated proximate cause principles from decades of decisional law on a variety of federal statutes. *See Bank of Am.*, 137 S. Ct. at 1306 (collecting cases on the Lanham Act, RICO, and the Clayton Act). The idea that fraud claims under the CEA might be excluded from traditional directness principles is a radical departure from this authority. This Court should grant the petition to restore uniformity in how proximate cause is applied from statute to statute.

C. The Eleventh Circuit misapplied *Robers* to avoid directness principles.

The Eleventh Circuit's way around *Bank of America* and *Dura* was to rely on this Court's decision in *Robers*. These three decisions are not incompatible, but the Eleventh Circuit found in *Robers* a supposed alternative path to making Defendants responsible for

market losses admittedly *not* caused by the statutory anti-fraud violations.

Robers pre-dates *Bank of America*, and *Bank of America* does not restrict its directness analysis solely to the Fair Housing Act. Such a restriction would have to come from Congress, this Court reasoned. And "[n]othing in the statute suggests that Congress intended to provide a remedy wherever those ripples [of harm] travel." *Bank of Am.*, 137 S. Ct. at 1306. Similarly, nothing in the CEA suggests Congress intended multi-step causal chains, with market-specific losses and the actions of third-party intervenors making the case for proximate cause. To the contrary, the statute expressly limits restitution to "losses proximately caused" by a CEA violation, an obvious direct link. 7 U.S.C. § 13a-1(d)(3)(A).

This Court's decision in *Robers* does not suggest a different analysis. But the Eleventh Circuit used *Robers* to circumvent directness principles entirely. In the Eleventh Circuit's view, proximate cause depends on foreseeability and a policy choice about who should bear the losses—the violation itself is the proximate cause. *See* App., *infra*, 34a. As "in *Robers*," the Eleventh Circuit reasoned, "the market conditions that contributed to the customers' losses were foreseeable," leading the court "to a bedrock policy question: Who should be responsible for the customers' losses?" *Id*. at 34a-35a.

Making proximate cause solely about foreseeability and policy rather than Congress' presumed (and in this case *express*) requirement of traditional common law proximate cause openly conflicts with *Bank of America* and *Dura*. *See Bank of Am.*, 137 S. Ct. at 1305; *Dura*, 544 U.S. at 343–44. It also conflicts with the special circumstances with which *Robers* dealt.

Robers devoted two paragraphs to a proximate cause argument under the Mandatory Victims Restitution Act, a criminal statute. The statute allowed victims to recover "the value of the property" less "the value (as of the date the property is returned) of any part of the property that is returned." *See Robers*, 572 U.S. at 640. The main issue was whether "any part of the property … returned" meant the collateral itself at the time of receipt, or the proceeds from a later sale of the collateral. If the sale were delayed, especially in a down market, the difference could be substantial. This Court held it means when the collateral is sold. *See id.*

The defendant made an alternative proximate cause argument, claiming market forces and not his loan fraud caused property values to fall. This Court rejected the argument, but not based on any policy that defendants in fraud cases must always be liable for foreseeable market declines. This Court instead ruled that there was a "sufficiently close connection" between the violation and the loss. *See id.* at 645. Losses from market declines were found "directly related to an offender's having obtained collateralized property through fraud." But other than noting that "[f]luctuations in property values are common," and "[t]heir existence (though not direction or amount) is foreseeable," the Court did not probe into the details of the direct connection. *See id.* at 645–46. The direct connection is easy to see, though. One who fraudulently procures loans to buy houses is likely to default in a falling market and take profits in a rising one. In the case of a default, the banks, deprived of the principal and interest they bargained for, are left with collateral in a bad market. The market losses have a direct relationship to the fraud.

Justice Sotomayor in a concurring opinion was careful to limit *Robers* to just those facts. In the event the banks were not delayed in selling the houses and decided, instead, to hold them hoping property values rebounded, the banks could not claim market declines. *See id.* at 648–49 (Sotomayor, J., concurring). In that case they would have become investors. And "[i]f the collateral loses value after the victim chooses to hold it," she explained, "[t]he defendant cannot be regarded as the 'proximate cause' of that part of the loss." *See id.*

The Eleventh Circuit misapplied this decision to force a tortured analogy with market losses in investment fraud—the very situation Justice Sotomayor determined would distinguish the majority opinion. Every customer in this case was a willing investor, just as Justice Sotomayor described. *See* App., *infra*, 28a. The Eleventh Circuit misconstrued the key fact, finding that "[i]n *Robers*, the Supreme Court concluded that the fraudster proximately caused the banks' losses even though the banks received precisely the collateral that they had bargained for." *Id.* at 34a. Collateral (in that case, two houses) may have secured the loans, but nothing in *Robers* suggests the banks got "precisely" what they bargained for with the loan defaults. The banks primarily bargained for principal and interest. And if the banks did desire to speculate in property values after receiving the houses, the causal chain would be broken. *Robers*, 572 U.S. at 649 (Sotomayor, J., concurring).

Robers says nothing different than *Bank of America* or *Dura*. The statute, the criminal procedural aspect, and the facts were different, and *Robers* is an especially fact-bound case, as Justice Sotomayor pointed out. *See id. Bank of America* in contrast

enforced proximate cause principles from across the spectrum of federal statutes. *See Bank of Am.*, 137 S. Ct. at 1306 (stating "we have repeatedly applied directness principles to statutes with 'common-law foundations'" and citing cases). In *Robers*, proximate cause was a side-issue. For the Eleventh Circuit to misuse *Robers* to promote a policy-driven view of proximate cause, where violators of anti-fraud statutes must always be liable for foreseeable market losses, conflicts with *Robers*' own limitations.

More importantly, the Eleventh Circuit ignored this Court's primary instruction that "[p]roximate-cause analysis is controlled by the nature of the statutory cause of action." *Bank of Am.*, 137 S. Ct. at 1305. This was not a case, as in *Robers*, where victims had to take title to collateral in a down, non-liquid market and faced delays in their attempts to sell. The nature of the statutory violation here was alleged investment fraud in the deep, liquid market for silver, no different than a § 10(b) private securities fraud claim. *See* n.1 *supra*; *Dura*, 544 U.S. at 343 (finding "implied private securities fraud actions resemble in many (but not all) respects common-law deceit and misrepresentation actions."). Circuit courts have traditionally looked to securities laws for guidance in interpreting the CEA. *See Loginovskaya v. Batratchenko*, 764 F.3d 266, 272 (2d Cir. 2014). Splitting with these courts, the Eleventh Circuit reasoned that securities fraud loss causation principles have no application to the CEA. It decided instead to follow *Robers*, a criminal loan fraud case that would have reached a different result on proximate cause had the banks been investors or received liquid assets. *See Robers*, 572 U.S. at 649 (Sotomayor, J., concurring).

The Eleventh Circuit's decision creates an untenable precedent, where lower courts can deliberately avoid this Court's rulings on proximate cause by searching through the case law for supporting results and then straining to find parallels. This Court should grant the petition to prevent having its most pertinent decisions on proximate cause eclipsed by a misapplication of distinguishable cases.

D. The Eleventh Circuit's decision is wrong and violates separation-of-powers principles.

The decision below is obviously wrong. Transaction causation—customers testifying they would not have invested if they had known the truth, *see* App., *infra*, 28a-29a—is not proximate cause or a substitute for it. *See Erica P. John*, 563 U.S. at 812; *Dura*, 544 U.S. at 341–342. That leaves only foreseeability as a possible basis for proximate cause, but this Court has already reversed the Eleventh Circuit for basing proximate cause on foreseeability alone. *Bank of Am.*, 137 S. Ct. at 1306. Only Congress may prescribe more flexible causation standards, *see id.*, and Congress inarguably did not do that for restitution under the CEA.

To the contrary, it is overwhelmingly apparent that Congress intended to incorporate loss causation into § 13a-1(d)(3)(A). The statute mirrors *Dura*'s holding and the proximate cause language of the PSLRA. *Compare id.* with 15 U.S.C. § 78u-4(b)(4). Loss causation is nothing more than traditional common-law proximate cause. *See Dura*, 544 U.S. at 343–44. In finding loss causation does not apply, the Eleventh Circuit in effect holds proximate cause is not required, at least for fraud claims. The decision below even underscores the point, holding "there is no need

to ask … whether the Defendants' fraud, rather than independent market forces, caused the victims' losses." App., *infra*, 33a. That is exactly the question § 13a-1(d)(3)(A) asks.

Most egregiously, the Eleventh Circuit followed its own policy preferences rather than the plain statutory language. Congress did not make all violators of CEA anti-fraud statutes and regulations liable for market losses, no more than the PSLRA did for § 10(b). *See Dura,* 544 U.S. at 346. The CEA requires a direct proximate cause link between the loss and violation, and it does not discriminate among different kinds of violations. *See* 7 U.S.C. § 13a-1(d)(3)(A). The Eleventh Circuit nonetheless made Defendants liable for investor restitution by announcing a supposed "bedrock policy" of deterring fraud nowhere found in or suggested by the statute. App., *infra*, 34a-35a.

This Court has repeatedly emphasized that "policy arguments do not obscure what the statutory language makes clear." *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 634 (2018); *see, e.g.*, *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 531 (2019) (rejecting a policy argument that the Federal Arbitration Act should block arbitration of frivolous claims, explaining, "we may not rewrite the statute simply to accommodate that policy concern."). When a court, seeking a different result, substitutes its policy preferences for the statutory language Congress passed and the President signed into law, the court subverts basic separation-of-powers principles.

The "separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties." *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1861 (2017) (citations omitted). The "judicial task is to interpret the statute Congress has passed."

Alexander v. Sandoval, 532 U.S. 275, 286 (2001). It is not "to interfere in an intrusive way" with the functions of another branch. *See Ziglar*, 137 S. Ct. at 1861. Relaxing statutory proximate cause requirements to ensure restitution is available for fraud claims intrudes on the legislative functions of Congress. *Cf. FTC v. AMG Capital Mgmt., LLC*, 910 F.3d 417, 436–37 (9th Cir. 2018) (O'Scannlain concurring) (finding, "we have implausibly construed the word 'injunction' in § 13(b) to authorize the extensive power to order defendants to repay ill-gotten gains," resulting in "an impermissible exercise of judicial creativity, [which] contravenes the basic separation-of-powers principle that leaves to Congress the power to authorize (or to withhold) rights and remedies.").

The Eleventh Circuit might not, as a matter of judicially-created policy, want to apply loss causation or traditional proximate cause for CEA anti-fraud statute violations, but Congress required it. Accordingly, this Court should grant the petition to restore the express proximate cause Congress required for restitution under the CEA.

II. Whether district courts have authority to issue permanent industry bans is an important and recurring question splitting the circuits.

The Eleventh Circuit's affirmance furthers a circuit split over whether injunctive relief, including industry bans, may be a penalty. The Fifth Circuit has held such injunctions are penalties. *See SEC v. Bartek*, 484 Fed. Appx. 949, 956–57 (5th Cir. 2012) (permanent injunction and bar on serving as officer or director at any public company are § 2462 "penalties"). The Sixth, Eighth, and Eleventh Circuits have ruled enforcement action injunctions are not penalties.

SEC v. Collyard, 861 F.3d 760, 764 (8th Cir. 2017) (finding an injunction not to violate securities laws is not a penalty); *SEC v. Graham*, 823 F.3d 1357, 1361 (11th Cir. 2016) (same); *SEC v. Quinlan*, 373 Fed. Appx. 581, 586–88 (6th Cir. 2010) (permanent injunction and bar on serving as officer or director at any public company are not § 2462 "penalties"). This case presents an ideal opportunity for this Court to settle the conflict in the context of lifetime industry bans.

Neither the CEA nor any CFTC regulation authorizes judicially-entered bar orders.[2] The CEA allows the CFTC to bring an action against a person who "has engaged, is engaging, or is about to engage in any act or practice constituting *a violation* of any provision of" the CEA or CFTC regulations. 7 U.S.C. § 13a-1(a) (emphasis added). In that case, the district court is empowered "to enjoin *such act or practice*, or to *enforce compliance* with this chapter, or any rule, regulation or order thereunder." *Id.* (emphasis added). The statutory injunction is thus limited to stopping violations and enforcing compliance with the law. Lifetime industry bans go far beyond that, prohibiting even *lawful* acts and practices that fully comply with the law.

Courts have nonetheless claimed authority, presumably implied from statutory injunctive powers, to issue permanent industry bans in CFTC enforcement actions. The CFTC in this case sought

---

[2] This contrasts with CFTC regulations. 17 CFR §14.4 authorizes the CFTC, after notice and an administrative hearing, to enter an administrative order temporarily or permanently barring a person the privilege of appearing or practicing before it. The CFTC did not avail itself of this administrative procedure.

bans against all three Defendants, and the district court granted them. App., *infra*, 98a.

The Eleventh Circuit has adopted from SEC enforcement actions a series of factors courts are supposed to consider in deciding the severity of injunctions. *See* App., *infra*, 20a (citing *SEC v. Carriba Air, Inc.*, 681 F.2d 1318, 1322 (11th Cir. 1982)). Defendant Robert Escobio, who had a thirty-year spotless record in the commodity industry and had assisted regulators in shutting down the metals trading accounts, appealed the ban in this case as an abuse of discretion. App., *infra*, 21a.

An important decision came out during the appeal that substantially bolstered his argument. SEC industry bans had traditionally been justified as "remedial, not punitive," a distinction that found its roots in "a single, unexplained sentence in a 77-year-old Second Circuit case." *See Saad v. SEC*, 873 F.3d 297, 304 (D.C. Cir. 2017) (Kavanaugh, J., concurring) (citing *Wright v. SEC*, 112 F.2d 89, 94 (2d Cir. 1940)). But the D.C. Circuit in *Saad* remanded a lifetime ban ruling by the SEC to consider whether this Court's decision in *Kokesh v. SEC*, 137 S. Ct. 1635 (2017) had altered the longtime presumption that industry bans are remedial and not improper penalties. *See id*. at 304. This Court in *Kokesh* found equitable disgorgement remedies to be penalties, as "sanctions imposed for the purpose of deterring infractions of public laws are inherently punitive…. A civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment." *Kokesh*, 137 S. Ct. at 1645.

A concurring opinion in *Saad* by then Judge (now Justice) Kavanaugh found *Kokesh*'s penalty analysis applies to SEC bans and "was not limited to the

specific statute at issue there." *Saad*, 873 F.3d at 305 (Kavanaugh, J., concurring). Judge Kavanaugh persuasively made the case that SEC industry bans in fact meet all the characteristics of penalties *Kokesh* highlighted. Like disgorgement paid to the government, "expulsion or suspension of a securities broker does not provide anything to the victims to make them whole or to remedy their losses." *Id.* at 305. *Saad* thus joined the line of circuit decisions that have wrestled with the question of whether permanent injunctions from entire industries are punitive. *See Bartek*, 484 Fed. Appx. at 956–57; *Quinlan*, 373 Fed. Appx. at 586–88.

Escobio filed a Rule 28(j) letter noticing *Saad* and Judge Kavanaugh's concurrence to the Eleventh Circuit. App., *infra*, 106a. Using Judge Kavanaugh's argument, Escobio argued the permanent bans in this case were not remedial. They did nothing for the customers who had already lost money. The bans were pure punishment, barring even the lawful, regulated trading Escobio was licensed to do. *See id*. at 106a-07a. And if, as *Kokesh* holds, "sanctions imposed for the purpose of deterring infractions of public laws are inherently punitive," *Kokesh*, 137 S. Ct. at 1645, a lifetime industry ban is the ultimate deterrent, and thus the ultimate punishment. Such punishment could not be justified under § 13a-1(a) or a court's inherent equity powers. The Eleventh Circuit nevertheless affirmed, finding the ban was within the district court's discretion. App., *infra*, 21a.

This Court should review this supposed claim to discretion to issue industry bars nowhere authorized by the statute. It infringes the separation-of-powers for courts to claim for themselves implied power to issue industry bans well outside the boundaries of the limited injunctions Congress authorized. *See Ziglar*,

137 S. Ct. at 1857 (instructing, "when a party seeks to assert an implied cause of action under a federal statute, separation-of-powers principles are or should be central to the analysis."); *cf. Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1385 (2015) (finding "[t]he power of federal courts of equity to enjoin unlawful executive action is subject to express and implied statutory limitations.").

It is, moreover, a crucial issue dividing the circuits. Congress has not authorized lifetime judicially imposed industry bans in the CEA. And as the affirmance in this case demonstrates, few standards govern a district court's seemingly unlimited discretion to declare any CEA violation "egregious" and forever destroy a person's professional life. *See* App., *infra*, 20a-21a. Courts below have fashioned this relief in the name of equity, but it is not equitable. It is retributive and punitive, and therefore courts need Congressional authorization to impose it.

This case is a good vehicle for resolving the dispute. It presents a straightforward legal question raised by this Court's decision in *Kokesh*—whether the same penalty analysis that applies to disgorgement applies to injunctions. The Eleventh Circuit's holding that the district court acted within its discretion deepens the circuit split over whether injunctions may be penalties. And the issue affects regulatory enforcement actions throughout the country. This is a prime opportunity for this Court to build on *Kokesh*'s holding, as Judge Kavanaugh did in *Saad*, and apply its penalty analysis to judicially-imposed industry bans.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

PETER W. HOMER
Counsel of record
CHRISTOPHER KING
HOMER BONNER JACOBS
1200 Four Seasons Tower
1441 Brickell Avenue
Miami, Florida 33131
(305) 350-5192
phomer@homerbonner.com
cking@homerbonner.com

Attorneys for Petitioners

February 15, 2019

Appendices

APPENDIX A—Eleventh Circuit Panel Opinion (July 12, 2018)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-16544

D.C. Docket No. 1:14-cv-22739-JLK

U.S. COMMODITY FUTURES TRADING COMMISSION,

Plaintiff - Appellee,

versus

SOUTHERN TRUST METALS, Inc., LORELEY OVERSEAS CORPORATION, ROBERT ESCOBIO,

Defendants - Appellants.

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

(July 12, 2018)

Before JORDAN, HULL, and GILMAN,* Circuit Judges.

GILMAN, Circuit Judge:

After reviewing the Defendants' Petition to Rehear, and having considered supplemental briefing by the parties, we vacate the original opinion in this case, *Commodity Futures Trading Comm'n v. Southern Trust Metals, Inc.*, 880 F.3d 1252 (11th Cir. 2018), and issue the following opinion in its place. The Petition to Rehear is otherwise denied.

* Honorable Ronald Lee Gilman, United States Circuit Judge for the Sixth Circuit, sitting by designation.

* * * *

This is a commodities-fraud case. The U.S. Commodity Futures Trading Commission (CFTC) began investigating Southern Trust Metals, Inc., Loreley Overseas Corporation, and Robert Escobio (collectively, the Defendants) in response to a customer's complaint. That complaint also prompted the National Futures Association (NFA)—a private, self-regulatory organization for the futures industry—to open an investigation, which proceeded in tandem with the CFTC's.

The NFA's investigation ended in a settlement. Afterwards, the CFTC filed this lawsuit, alleging that the Defendants violated the Commodities Exchange Act (CEA) when they failed to register as futures commission merchants, transacted the purchase and sale of contracts for the future delivery of a commodity (futures) outside of a registered exchange, and promised to invest customers' money in precious metals (metals) but instead invested the funds in so-called "off-exchange margined metals derivatives" (metals derivatives). The district court, after a bench trial, entered judgment for the CFTC on all claims.

For the reasons set forth below, we **AFFIRM** the judgment of the district court except as to the restitution award for the group of investors whose losses were associated solely with the registration violations. As to that portion of the restitution award, we **VACATE** the judgment and **REMAND** with instructions to consider other equitable remedies.

I. BACKGROUND

A. Factual background

Escobio is the Chief Executive Officer (CEO) and largest shareholder of the Southern Trust Securities

Holding Corporation (Holding Corporation). The Holding Corporation owns Loreley, a British Virgin Islands corporation, which in turn owns Southern Trust, a Florida corporation. Escobio formed Southern Trust to provide commodities investment services, and he serves as its director and CEO.

Southern Trust represented that it was able to facilitate customers' investment in precious metals. Its website and brochure stated that customers "can take physical possession of [their] metals in New York or London." The company's brokers told customers much the same story—that the customers were purchasing metals stored in places like New York, London, and Hong Kong. At least one of Southern Trust's brokers told customers that Southern Trust charged "storage fees" for the metals. To open a trading account at Southern Trust, customers completed an account-opening form containing language that "[p]hysical precious metals can either be delivered directly to the customer's designated point of delivery or to a recognized depository, which provides insured non-segregated storage." Southern Trust also represented that it could loan customers money to purchase metals.

But Southern Trust did not in fact deal in metals; it dealt in metals derivatives. Such contracts are a type of derivative investment. Southern Trust, however, was not registered with the CFTC as a futures commission merchant and thus could not trade metals derivatives on registered exchanges. So Escobio, through Loreley, engaged two foreign brokerages—Berkeley Futures Limited and Hantec Markets Limited—to handle the transactions.

Escobio opened trading accounts at Berkeley and Hantec in Loreley's name, not in the names of Southern Trust's customers. The accounts were

numbered, and Southern Trust maintained records linking its customers to the specific numbered accounts.

Opening these accounts required Escobio to review documents describing Berkeley's and Hantec's investment products. One of Hantec's account-opening documents, the "Product Disclosure Statement," explains that "bullion trading" "operates in the same manner as foreign exchange trading" in that "[w]hat you are actually buying is a [c]ontract" that "derives its value from" a "physical underlying asset" such as "Loco London Gold." That document's "Glossary" defines "Loco London Gold" to "mean[] not only that the gold is held in London but also that the price quoted is for delivery there." Elsewhere, the document explains that in "bullion trading," "[Hantec] do[es] not deliver the physical underlying assets (i.e. gold or silver) to you, and you have no legal right to it." The Berkeley documents similarly confirm that the account holder intends "to speculate in derivative products." None of the account-opening documents mention making loans for the purchase of metals.

After setting up the trading accounts at Berkeley and Hantec, Southern Trust sent its customers' money to Loreley, which in turn invested the funds, through Berkeley and Hantec, in metals derivatives. Escobio received monthly account statements showing that all investments were in metals derivatives, not metals. Those statements do not reflect any loans to Southern Trust's customers.

Southern Trust never informed its customers that their money was being transferred to Loreley, Berkeley, or Hantec. Nor did it inform customers who wished to invest in metals (the group comprising the vast majority of its customers) that their money was instead being invested in metals derivatives.

Southern Trust still charged those customers interest on fictitious loans, which it falsely told them were made in order to facilitate their investment in metals.

After receiving a complaint from one of Southern Trust's customers, the NFA opened an investigation. Around the same time, Escobio asked Berkeley and Hantec about the nature of Loreley's investments. Escobio contended at trial that he did so simply to confirm his understanding that Loreley was investing in metals. The CFTC maintained, however, and the district court ultimately concluded, that Escobio had done so in anticipation of litigation, and that he had carefully framed his inquiries to elicit responses that would support the defense he later asserted— that he did not know that his customers' money was being invested in metals derivatives.

In response to Escobio's inquiry, Hantec's CEO said: "I can confirm that you hold accounts with us that only trade Silver Bullion." Hantec's CEO clarified at his deposition, however, that "Silver Bullion" is industry lingo for derivatives and that he could not have intended any other meaning because trading in "physical metals is not something that Hantec does."

A Berkeley employee similarly responded to Escobio's inquiry, writing that "all Loreley accounts with the prefix XILOR were silver bullion accounts" that "only traded in OTC [off-exchange] silver bullion and never traded any futures contracts." But Berkeley's CEO testified at his deposition that Berkeley had never delivered metals to any of its customers, including Loreley, nor stored any metals on their behalf. He also testified that, despite Escobio's contrary assertion, he never told Escobio that the trades Berkeley handled for Loreley would lead to the storage of metals.

None of Southern Trust's investments led to the delivery of metals. Hantec's CEO testified that he told Escobio that Hantec could arrange for the delivery of metals, but that he did so only in response to a question about a hypothetical situation. According to Hantec's CEO, Escobio inquired in the abstract about Hantec's ability to arrange delivery: "It's an inquiry from a client. Robert [Escobio] did not tell me, 'I would like to deliver metal.' He asked me, 'If I wanted to deliver a metal, can you arrange it?' and I said, 'Let me go find out.'" Hantec's CEO continued: "I talked to . . . one of my contacts at Standard Chartered bank who gave me information and I went back to Robert and explained" that Hantec could arrange delivery. This response was memorialized in a letter to Escobio, stating that "any Gold or Silver you purchase from us is held for your account and upon full payment we are able to arrange delivery for you when requested." But the Defendants never asked Hantec to arrange delivery, and no delivery ever occurred.

The NFA's investigation ended in a settlement. Although the NFA's and the CFTC's investigators had cooperated with each other, their investigations were independent. The Defendants' settlement agreement with the NFA therefore does not mention the CFTC or the CFTC's investigation.

As the CFTC's investigation moved forward, the Defendants continued to produce documents in response to its requests. The Defendants' lawyers knew at the time of the NFA settlement that the CFTC might bring its own enforcement action, but they did not suggest to the CFTC or to anyone else that such an action would violate their settlement agreement with the NFA.

B. Procedural background

In July 2014, the CFTC filed its complaint, seeking equitable relief and penalties under the CEA. The complaint alleges that the Defendants engaged in two illegal schemes, which we will refer to as the "unregistered-futures scheme" and the "metals-derivatives scheme."

As to the unregistered-futures scheme, the complaint alleges that, even though the Defendants were not registered as futures commission merchants, they accepted money from customers who wished to invest in futures. Because the Defendants were unregistered, moreover, they could not trade futures on a registered exchange. They therefore sought to trade indirectly, through intermediaries. To that end, the Defendants funneled the customers' money through Loreley to foreign brokerage firms—Berkeley and Hantec—licensed to trade futures. Those brokerage firms made the actual investments.

As to the metals-derivatives scheme, the complaint alleges that the Defendants accepted money from customers who wished to invest in metals with borrowed money. But instead of issuing loans to those customers and investing their money in metals, the Defendants took the customers' money and invested it in metals derivatives. No loans existed, but the Defendants charged loan interest anyway.

At the summary-judgment stage of the case, the parties filed dueling motions. The district court granted the CFTC's motion in part, holding that the Defendants had conducted off-exchange transactions and had failed to register as futures commission merchants. It denied the Defendants' motion in full, rejecting their affirmative defenses that (1) their settlement with the FTA equitably estopped the CFTC

from bringing suit, and (2) they actually delivered metals so as to bring their transactions within an exception to the CEA's registration requirements.

The CFTC's fraud claim then proceeded to trial. After a bench trial, the district court found that the Defendants had engaged in fraud, ordered them to pay restitution in the full amount of the customers' losses, and imposed fines. The court also permanently enjoined the Defendants from employment in the commodities-trading industry. On appeal, the Defendants challenge the court's rulings both on summary judgment and at trial.

II. ANALYSIS

A. Standard of review

On an appeal from a judgment in a bench trial, we review the district court's conclusions of law de novo. *HGI Assocs., Inc. v. Wetmore Printing Co.*, 427 F.3d 867, 873 (11th Cir. 2005). We also review de novo the district court's application of the law to the facts. *United States v. Frank*, 599 F.3d 1221, 1228 (11th Cir. 2010). The district court's findings of fact, on the other hand, are evaluated under the clear-error standard. *HGI*, 427 F.3d at 873. "We will not find clear error unless our review of the record leaves us 'with the definite and firm conviction that a mistake has been committed.'" *Coggin v. Comm'r of Internal Revenue*, 71 F.3d 855, 860 (11th Cir. 1996) (quoting *United States v. Gypsum Co.*, 333 U.S. 364, 395 (1948)). Finally, when the district court has issued a permanent injunction, we review the scope of the injunction under the abuse-of-discretion standard. *Commodity Futures Trading Comm'n v. Wilshire Inv. Mgmt. Corp.*, 531 F.3d 1339, 1343 (11th Cir. 2008).

B. Equitable estoppel does not bar the CFTC's claims.

To start with, the Defendants challenge the district court's summary- judgment ruling that their settlement with the NFA does not preclude the CFTC's claims. The district court held that equitable estoppel does not apply because (1) the Defendants do not dispute that the NFA is a private, nongovernmental organization through which the commodities-trading industry regulates itself; (2) the CFTC was not a party to the settlement; and (3) settlements with private, nongovernmental organizations do not preclude subsequent claims by government regulators.

Although this circuit has not yet addressed whether a settlement between a nongovernmental regulator and a regulated company may preclude subsequent claims by the governmental regulator, the circuits that have addressed the issue have uniformly answered in the negative. *See, e.g.*, *Graham v. S.E.C.*, 222 F.3d 994, 1007 n.25 (D.C. Cir. 2000) ("Of course, even if the NASD had done something to bind itself, that would not have bound the SEC."); *Jones v. S.E.C.*, 115 F.3d 1173, 1179–81 (4th Cir. 1997) ("We have found no statutory, regulatory, or historical reference to support [the] argument that NASD discipline of its members was intended to preclude this disciplinary action by the SEC itself against a securities professional.").

In *Jones*, the Securities and Exchange Commission (SEC) brought administrative claims against a securities trader after the trader settled a claim by the National Association of Securities Dealers (NASD). 115 F.3d at 1180. The Fourth Circuit rejected the trader's argument that the settlement precluded the SEC's claims, reasoning that private

and public regulators "represent distinct interests" and "bring two separate vantage points to enforcement efforts—one from the industry itself and the other from the regulator." *Id.*

This outcome accords with the courts' general reluctance to apply principles of equitable estoppel to the government. "The Supreme Court has never established that the doctrine of equitable estoppel can be applied against the government and, in fact, has implied that it can not be." *Tovar-Alvarez v. U.S. Atty. Gen.*, 427 F.3d 1350, 1353–54 (11th Cir. 2005) (citing *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 422 (1990)). "[I]t is well settled that the [g]overnment may not be estopped on the same terms as any other litigant." *Heckler v. Cmty. Health Servs. of Crawford Cty.*, 467 U.S. 51, 60 (1984).

This circuit has repeatedly opined that, even assuming that equitable estoppel could apply against the government, "it would require a showing of affirmative misconduct on the government's part." *Tovar-Alvarez*, 427 F.3d at 1354; *see also Sanz v. U.S. Sec. Ins. Co.*, 328 F.3d 1314, 1319–20 (11th Cir. 2003) ("[E]ven if estoppel is available against the Government, it is warranted only if affirmative and egregious misconduct by government agents exists.").

The present case is analogous to *Jones*. Here, the uncontradicted evidence shows that the NFA, like the NASD, is a private, nongovernmental organization and that the CFTC was not a party to the Defendants' settlement with the NFA. The record, moreover, contains no evidence of affirmative misconduct by the government. So even if equitable estoppel theoretically could apply to the government, it does not apply here.

A second, independent ground also exists for affirming the district court's denial of summary judgment based on the Defendants' estoppel defense: the record reflects a genuine dispute of material fact regarding the element of reasonable reliance. *See Heckler*, 467 U.S. at 59 (noting that "the party claiming the estoppel must have relied on its adversary's conduct" and that the "reliance must have been reasonable"). Especially noteworthy is the fact that the settlement agreement makes no mention of the CFTC or its investigation, so the Defendants' purported reliance lacks a textual basis. The only language in the agreement that even arguably suggests reliance is a clause providing that the agreement "shall resolve and terminate all complaints, investigations and audits relating to [the Defendants]."

But interpreting this language to embrace the CFTC's investigation is unreasonable. For one thing, the notion that the NFA would agree to terminate investigations outside of its control—and that the Defendants would accept such an unfulfillable obligation as consideration for their own concessions—defies common sense. Further, a literal interpretation of "all complaints, investigations and audits relating to [the Defendants]" would impose on the Defendants obligations that they surely did not intend, such as the obligation to terminate their own routine, internal accounting audits. Such audits would, after all, be "audits relating to [the Defendants]."

The lack of textual support for the Defendants' estoppel argument creates a genuine dispute concerning the *reasonableness* of their reliance. At the same time, other evidence creates a genuine dispute about whether there was any reliance at all. First, the

Defendants continued to produce documents in response to requests from the CFTC's investigators after the settlement. This fact tends to negate any reliance because the Defendants presumably would not have continued cooperating with the CFTC if they had truly believed that their settlement with the NFA had terminated the CFTC's investigation. Second, the Defendants' lawyers, while preparing to defend against the present action, never suggested to the CFTC or anyone else that an action brought by the CFTC might violate the Defendants' settlement agreement with the NFA. For these reasons, we find no error in the district court's denial of the Defendants' motion for summary judgment based on the affirmative defense of equitable estoppel.

C. Summary judgment in favor of the CFTC on its claims for registration violations was appropriate.

We now turn to the merits of this case. The CEA imposes registration requirements on commodities traders and the exchanges where they trade. Section 6d of the CEA makes it "unlawful for any person to be a futures commission merchant unless . . . such person shall have registered [as such] . . . with the [CFTC]." 7 U.S.C. § 6d(a)(1). The statute also requires that all transactions be "conducted on or subject to the rules of a board of trade which has been designated or registered by the [CFTC]." *Id.* § 6(a). Together, these provisions require that only registered traders handle transactions and that they do so on a registered exchange.

An exception exists, however, for transactions that result in "actual delivery within 28 days." *Id.* § 2(c)(2)(D)(ii)(III)(aa). Actual delivery means "giving real and immediate possession" of the commodity "to the buyer or the buyer's agent." *U.S. Commodity*

Futures Trading Comm'n v. Hunter Wise Commodities, LLC, 749 F.3d 967, 979 (11th Cir. 2014) (internal quotation marks omitted). "'Actual' is that which 'exist[s] in fact' and is 'real,' rather than constructive." *Id.* (quoting *Black's Law Dictionary* 494 (9th ed. 2009)).

This exception is an affirmative defense on which the commodities trader bears the burden of proof. *See Schlemmer v. Buffalo, R & P R Co*, 205 U.S. 1, 10 (1907) (explaining that the "general rule of law is[] that a proviso carves special exceptions only out of the body of the act; and those who set up any such exception must establish it"); *see also Corning Glass Works v. Brennan*, 417 U.S. 188, 196–97 (1974) ("[T]he application of an exemption under the Fair Labor Standards Act is a matter of affirmative defense on which the employer has the burden of proof."); *Mulhall v. Advance Sec., Inc.*, 19 F.3d 586, 590 (11th Cir. 1994) ("[T]he exceptions granted within the EPA constitute affirmative defenses.").

The Defendants concede that they were not registered as futures commission merchants and that the trades at issue did not occur on a registered exchange. But they seek refuge in the exception for transactions resulting in actual delivery.

As set forth in the factual background of this opinion, however, there is no basis in the record for the Defendants' contention that actual delivery ever occurred. The record instead supports the holding of the district court that the Defendants failed to establish their affirmative defense of "actual delivery." *See Hunter Wise Commodities*, 749 F.3d at 979. We therefore find no error in the court's grant of summary judgment in favor of the CFTC on its claims that the Defendants engaged in off-exchange

transactions and failed to register as futures commission merchants.

D. The district court did not err in concluding that the Defendants committed fraud under 7 U.S.C. §§ 6b(a) and 9, and under 17 C.F.R. § 180.1.

We next turn to the issue of fraud. For our purposes, 7 U.S.C. § 6b(a), 7 U.S.C. § 9, and 17 C.F.R. § 180.1 are redundant. Section 6b(a) makes it "unlawful . . . for any person . . . in connection with . . . any contract of sale of any commodity . . . for future delivery . . . to cheat or defraud or attempt to cheat or defraud the other person . . . [or] willfully to make . . . any false report or statement . . . [or] willfully to deceive or attempt to deceive the other person by any means whatsoever." 7 U.S.C. §§ 6b(a). Section 9 of the same chapter is similar, providing that "[i]t shall be unlawful for any person . . . to use . . . in connection with any . . . contract of sale of any commodity . . . for future delivery . . . any manipulative or deceptive device or contrivance." *Id.* § 9(1). Finally, 17 C.F.R. § 180.1(a) declares it "unlawful for any person . . . in connection with any . . . contract of sale of any commodity . . . or contract for future delivery . . . to intentionally or recklessly . . . use . . . any manipulative device, scheme, or artifice to defraud; . . . [or] [m]ake . . . any untrue or misleading statement of a material fact or to omit to state a material fact necessary . . . to make the statements made not untrue or misleading; . . . [or] [e]ngage . . . in any act . . . which operates . . . as a fraud or deceit upon any person."

The CFTC must prove the same three elements to establish liability under each of the above provisions: "(1) the making of a misrepresentation, misleading statement, or a deceptive omission; (2) scienter; and (3) materiality." *Commodity Futures*

Trading Comm'n v. R.J. Fitzgerald & Co., Inc., 310 F.3d 1321, 1328 (11th Cir. 2002). "Unlike a cause of action for fraud under the common law of [t]orts, 'reliance' on the representations is not a requisite element…." *Id.* at n.6.

1. Misrepresentation, misleading statement, or deceptive omission

The district court's factual findings on the "misrepresentation" element reflect no clear error. With the many references to "physical metals," "physical possession," and "storage," Southern Trust's brochure, website, brokers, and account-opening documents collectively represented that the company offered investments in metals. Abundant evidence shows, however, that after accepting the customers' money, Southern Trust sent the funds to Loreley, which in turn sent them to Berkeley and Hantec for investment in metals derivatives. The Defendants do not dispute that the accounts at Berkeley and Hantec were in Loreley's name, not in the names of Southern Trust's customers. Moreover, the evidence shows that Southern Trust never informed its customers that their money was being transferred to Loreley, Berkeley, or Hantec and, consequently, that the customers did not know that those firms held their money.

The district court correctly applied the law to these facts. "Whether a misrepresentation has been made depends on the 'overall message' and the 'common understanding of the information conveyed.'" *R.J. Fitzgerald*, 310 F.3d at 1328 (quoting *Hammond v. Smith Barney Harris Upham & Co.*, Comm. Fut. L. Rep. (CCH) 36,657 & n.12 (CFTC Mar. 1, 1990)). We find the case of *U.S. Commodity Futures Trading Commission v. Hunter Wise Commodities, LLC*, 21 F. Supp. 3d 1317 (S.D. Fla. 2014), squarely on point. The

district court in *Hunter Wise* concluded, after a bench trial, that the defendant "misrepresented facts about the precious metals transactions it oversaw" and provided a deceptive "'overall message'" when it "led the retail customers to believe metals were stored on their behalf." *Id.* at 1338 (quoting *R.J. Fitzgerald*, 310 F.3d at 1328). Moreover, the court found that the defendant "failed to inform [the retail customers] that the metals it purchased were on a financed basis, it did not own the metals, and the metals, if there were any at all, were not in the retail customers' names." *Id.*; *see also U.S. Commodity Futures Trading Comm'n v. Hunter Wise Commodities, LLC*, 749 F.3d 967, 980–82 (11th Cir. 2014) (affirming the district court's issuance of a preliminary injunction because the CFTC presented a prima facie case of fraud under 7 U.S.C. § 6b).

Southern Trust orchestrated a nearly identical scheme in the present case. It misrepresented to customers the fundamental nature of their investments, telling them that they were investing in metals when in fact they were investing in metals derivatives, and charging a fictitious storage fee despite the customers having no metals to store. Finally, Southern Trust failed to tell the customers that it passed their money through Loreley to Berkeley and Hantec, with the customers having no knowledge of or relationship with these entities. The district court therefore did not err in concluding that the CFTC satisfied its burden, under the preponderance- of-the-evidence standard, to prove the first element necessary to establish fraud.

2. Scienter

Regarding the element of scienter, Escobio does not dispute that he was the CEO of both Southern Trust and the Holding Corporation, and that he had

substantial prior experience in commodities trading. He also does not dispute that he signed the account-opening documents for Loreley's trading accounts at both Berkeley and Hantec. Those documents, as well as the monthly account statements that Escobio received, make clear that Loreley was investing the customers' money in metals derivatives, not metals. Further, Escobio knew that the accounts at Hantec and Berkeley bore Loreley's name, not the names of Southern Trust's customers. Based on these facts, the district court did not clearly err in finding that Escobio knew that he was investing his customers' money in metals derivatives.

Nor did the district court clearly err in finding that Escobio knew that Berkeley and Hantec did not make any loans to Southern Trust's customers, even though Southern Trust charged its customers interest on the purported loans. Neither the account-opening documents nor the monthly statements from Berkeley or Hantec reflect any loans from those companies. Moreover, the Defendants point to no evidence—other than Escobio's uncorroborated testimony—of any loans from Berkeley or Hantec, and the district court discounted Escobio's testimony on that point, as on others, because it determined that he lacked credibility. This circuit applies a "strong rule of deference" in reviewing a district court's determination of a witness's credibility at a bench trial. *Childrey v. Bennett*, 997 F.2d 830, 834 n.5 (11th Cir. 1993). Given this standard, as well as the numerous conflicts between Escobio's testimony and the documentary evidence, the court was entitled to find that Escobio lacked credibility and to discount his testimony accordingly.

The district court also correctly applied the law to these facts. "[S]cienter is established if Defendant

intended to defraud, manipulate, or deceive, or if Defendant's conduct represents an extreme departure from the standards of ordinary care." *Commodity Futures Trading Comm'n v. R.J. Fitzgerald & Co., Inc.*, 310 F.3d 1321, 1328 (11th Cir. 2002). Adapting "federal securities law" to the commodities-fraud context, this circuit has stated that scienter is shown "when Defendant's conduct involves 'highly unreasonable omissions or misrepresentations . . . that present a danger of misleading [customers] which is either known to the Defendant or so obvious that Defendant must have been aware of it.'" *Id.* (quoting *Ziemba v. Cascade Int'l, Inc.*, 256 F.3d 1194, 1202 (11th Cir. 2001)).

The evidence shows that the Defendants either intended to mislead Southern Trust's customers or made highly unreasonable misrepresentations that posed an obvious danger of misleading them. Escobio's deep involvement in managing Loreley's accounts at Berkeley and Hantec, as well as his extensive industry experience, support the inference that he knew that he was investing his customers' money in metals derivatives. Hantec's CEO, at his deposition, put it this way: "Under no circumstance is [it] plausible" that Escobio believed that he was trading in metals. Escobio also surely knew that Berkeley and Hantec had made no loans to Southern Trust's customers and, therefore, that the customers were being charged interest on loans that did not exist. The district court thus did not err in concluding that the CFTC had proved scienter.

3. Materiality

This brings us to the third and final element—materiality. "A representation or omission is 'material' if a reasonable investor would consider it important in deciding whether to make an

investment." *Fitzgerald*, 310 F.3d at 1328–29. The Defendants' briefing on this element addresses only the materiality of their omission that the customers' money would pass through Loreley to Berkeley and Hantec. If that were the only omission or misrepresentation in this case, we might need to examine the materiality element more closely. But other misrepresentations found by the district court easily qualify as material. The Defendants, for example, represented that they were investing customers' money in metals when in fact they were investing it in metals derivatives. Moreover, the Defendants represented that customers owed interest on loans used to purchase metals, but no such loans existed. A reasonable investor would consider each of these misrepresentations important in deciding whether to invest. Accordingly, the district court did not err in concluding that these misrepresentations were material. We therefore agree with the district court's overall conclusion that fraud was established under 7 U.S.C. §§ 6b(a) and 9, and under 17 C.F.R. § 180.1.

E. The district court did not err in permanently enjoining the Defendants from employment in the commodities-trading industry.

Turning now to the propriety of the injunction issued against the Defendants, we note that a district court's issuance of an injunction is reviewed under the abuse-of-discretion standard. *Commodity Futures Trading Comm'n v. Wilshire Inv. Mgmt. Corp.*, 531 F.3d 1339, 1347 (11th Cir. 2008) (applying this standard to a permanent injunction issued under the CEA). "[S]o long as [the district court's] decision does not amount to a clear error of judgment[,] we will not reverse even if we would have gone the other way had

the choice been ours to make." *S.E.C. v. ETS Payphones, Inc.*, 408 F.3d 727, 733 (11th Cir. 2005).

"[U]pon a proper showing," the CEA allows a district court to grant "a permanent or temporary injunction." 7 U.S.C. § 13a-1(b). "'[T]he ultimate test [for an injunction] is whether the defendant's past conduct indicates that there is a reasonable likelihood of further violations in the future.'" *Wilshire*, 531 F.3d at 1346 (quoting *SEC v. Caterinicchia*, 613 F.2d 102, 105 (5th Cir. 1980)). This test entails weighing the following six factors:

> the egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities for future violations.

SEC v. Carriba Air, Inc., 681 F.2d 1318, 1322 (11th Cir. 1982). A court need not make a finding on every factor. *See Wilshire*, 531 F.3d at 1346–47 (holding that a district court that considered only three of the six factors did not abuse its discretion in issuing an injunction).

Escobio argues that the injunction should be vacated because the district court, in weighing the *Carriba Air* factors, erred in not concluding that his cooperation with the NFA's investigation resolved the last three factors in his favor. But the court had discretion in how to interpret Escobio's cooperation with the NFA. This discretion would have allowed the court, for example, to interpret Escobio's cooperation

not as contrition, but as a self-interested effort to strike a favorable deal with the NFA and, perhaps, to avoid criminal prosecution. Escobio's denial of wrongdoing at his deposition, at trial, and throughout the NFA's and the CFTC's investigations further belies his acceptance of responsibility. The same is true of his attempt to deflect blame onto Berkeley and Hantec, which he claims duped him into trading metals derivatives. In sum, the court applied the correct legal standard, and its factual findings contain no clear error. We therefore find no fault in its issuance of a permanent injunction.

F. Restitution is proper only for losses sustained in the metals-derivatives scheme, not for losses sustained in the unregistered-futures scheme.

This brings us to the final issue in this case—restitution. The district court awarded restitution for losses arising from both schemes. First, it awarded $1,543,892 for losses sustained in the metals-derivatives scheme, in which the Defendants accepted customers' money for investment in metals but instead invested the funds in metals derivatives. Second, the court awarded $559,725 for losses sustained in the unregistered-futures scheme, in which the Defendants accepted customers' money for investment in futures—and actually invested the funds in futures through Loreley's accounts at Berkeley and Hantec—but failed to register as futures commission merchants or to conduct the transactions on a registered exchange. The Defendants challenge both awards, arguing that the CFTC failed to prove, as required by the CEA, that the Defendants' violations of the CEA proximately caused the customers' losses.

1. The district court relied on a definition of proximate cause subsequently rejected by the Supreme Court.

Under the CEA, a "court may impose . . . on any person found in the action to have committed any violation[] equitable remedies including . . . restitution to persons who have sustained losses proximately caused by such violation (in the amount of such losses)." 7 U.S.C. § 13a-1(d)(3). This statutory language, by its terms, permits restitution only for losses proximately caused by a violation.

In its restitution analysis, the district court concluded that the "Defendants' violations proximately caused their customers' losses" because those losses "were a reasonably foreseeable result of the Defendants' violations." The court derived this foreseeability-based formulation of proximate cause from a relatively recent decision of this court holding that, for proximate cause to exist under the Fair Housing Act (FHA), "[t]he defendant must have been reasonably able to foresee the kind of harm that was actually suffered." *See City of Miami v. Bank of Am. Corp.*, 800 F.3d 1262, 1282 (11th Cir. 2015).

That decision, however, was subsequently reversed by the Supreme Court in *Bank of America Corp. v. City of Miami*, 137 S. Ct. 1296 (2017). The Court concluded that, "[i]n the context of the FHA, foreseeability alone does not ensure the close connection that proximate cause requires" between the complained-of conduct and the alleged harm. *Id.* at 1306. As the Court explained, the FHA incorporates the concept of proximate cause developed at common law, where "directness principles" apply. *Id.* Proximate cause under the FHA thus "requires 'some direct relation between the injury asserted and the

injurious conduct alleged.'" *Id.* (quoting *Holmes v. Sec. Inv'r Protection Corp.*, 503 U.S. 258, 268 (1992)). Such a "direct relation" usually does not exist "beyond the first step" in a causal chain. *Id.* (quoting *Hemi Group, LLC v. City of New York, N.Y.*, 559 U.S. 1, 10 (2010)).

We have found no circuit court opinion examining proximate cause under the CEA, but the statute surely demands more than foreseeability alone. Section 13a-1(d)(3) of the CEA, like the FHA provision examined in *Bank of America*, "sounds basically in tort" because it defines a new legal duty and authorizes the courts to award compensation for injuries caused by a defendant's wrongful breach. *See Curtis v. Loether*, 415 U.S. 189, 195 (1974) (explaining why a damages action under the Civil Rights Act of 1964 "is analogous to a number of tort actions recognized at common law").

Congress, moreover, has given no indication, either in the CEA's text or otherwise, that it intended to depart from the common-law conception of proximate cause. *See Bank of America*, 137 S. Ct. at 1305 ("We assume Congress 'is familiar with the common-law rule and does not mean to displace it *sub silentio*' in federal causes of action." (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1390 (2014))). We thus conclude that the common-law rules governing proximate cause apply here.

Those rules begin with the notion that proximate cause necessarily encompasses *cause in fact*, requiring proof of "but-for" causation. W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 30 (5th ed. 1984). Establishing *proximate cause* requires more. *See Ray v. Spirit Airlines, Inc.*, 836 F.3d 1340, 1350 (11th Cir. 2016) ("Unable to establish even but-for causation, such a plaintiff necessarily would be unable

to meet the higher burden of showing that the racketeering activity proximately caused the plaintiff's injuries."); *Hemi Grp.*, 559 U.S. at 12 ("Our precedents make clear that in the RICO context, the focus [when assessing proximate cause] is on the directness of the relationship between the conduct and the harm.").

This does not mean, however, that the fraud must be the "sole and exclusive cause" of the loss; it means only that the fraud must be a "substantial" or "significant contributing cause." *FindWhat Inv'r Grp. v. FindWhat.com*, 658 F.3d 1282, 1309 (11th Cir. 2011) (citing *Robbins v. Koger Props., Inc.*, 116 F.3d 1441, 1447 (11th Cir. 1997)). The wrongdoer, in other words, can be held liable to the plaintiff even if the wrongful act was not the sole cause of the loss. *See, e.g.*, *Staub v. Proctor Hosp.*, 562 U.S. 411, 420 (2011) (recognizing that "it is common for injuries to have multiple proximate causes").

Concepts such as "directness" and "foreseeability," moreover, should not distract us from the fact that "[p]roximate cause is bottomed on public policy as a limitation on how far society is willing to extend liability for a defendant's actions." *See Ashley County v. Pfizer, Inc.*, 552 F.3d 659, 671 (8th Cir. 2009). As the Supreme Court has explained, "[t]he term 'proximate cause' is shorthand for a concept: Injuries have countless causes, and not all should give rise to legal liability." *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 692 (2011) (emphasis omitted). "'What we . . . mean by the word "proximate[]"' . . . is simply this: '[B]ecause of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point.'" *Id.* at 692–93 (quoting *Palsgraf v. Long Island R. Co.*, 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting)).

Accordingly, "the question whether a court will sustain a finding of proximate cause under a given set of circumstances is as much a question of public policy as it is of direct causality." *Gathercrest, Ltd. State Bank of India v. First Am. Bank & Tr.*, 805 F.2d 995, 997 (11th Cir. 1986) (citing *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982)).

2. The district court erred in finding that the registration violation alone proximately caused any loss.

With regard to the unregistered-futures scheme, the district court's finding of proximate cause rested on the premise that the Defendants' "business was illegal from the outset" and that the Defendants "never should have accepted customer funds for the purpose of trading futures transactions without first registering as a futures commission merchant with the CFTC." The court reasoned that because the transactions were illegal, the losses were foreseeable.

But such reasoning, without more, conflates correlation with causation. As a general matter, losing money is a foreseeable result of investing with an unregistered trader, but this is not because a trader's failure to register will itself inevitably cause a loss. More likely, any loss will result from some other factor, such as the trader's incompetence or dishonesty, which the failure to register might correlate with but not cause. The intrinsic qualities of the trader—not his or her failure to register—would be the likely cause of the loss, to say nothing of market fluctuations.

Consider the analogous circumstance of a client being represented by an unlicensed lawyer. The lawyer's lack of a license might indicate incompetence or a lack of integrity, but normally it will not in and of

itself cause a client's loss in court. Indeed, a client might well prevail in court despite the lawyer's unlicensed status. Or, if there is a loss, the loss might flow from factors wholly unrelated to the lawyer's status, such as an unfavorable precedent, a judicial error, or a jury's caprice.

A recent decision from this court illustrates the point that a fraudster's failure to observe registration requirements does not necessarily cause his victim's loss. In *Alvarez v. United States*, 862 F.3d 1297, 1300 (11th Cir. 2017), a group of federal employees sued the defendant for negligence per se after he sold them fraudulent, unregistered securities. The court rejected the plaintiffs' argument that the seller's failure to register the securities had caused the plaintiffs' losses, concluding instead that their losses had occurred because the securities were fraudulent. This point was made in the following passage:

> As the district court correctly explained, "had the FEBG Bond Fund been legitimate, the fact of its being unregistered would have had noeffect on plaintiffs. And conversely, if McLeod had registered the fraudulent securities (lying about them to do so since they didn't exist), plaintiffs would still have suffered the same harm. Plaintiffs' injuries flow from the securities and McLeod's representations which underlay them being fraudulent, not because they were unregistered."

Id. at 1302 (quoting the district court's opinion).

The same logic applies here. In the unregistered-futures scheme, the Defendants invested their customers' money in futures through Loreley's

accounts at Berkeley and Hantec. The customers who lost money in this scheme intended to invest in futures, and the CFTC does not dispute that the Defendants in fact facilitated the investments that those customers wished to make. According to the district court, the Defendants' only CEA violations in the unregistered-futures scheme were their failure to register as futures commission traders and their failure to disclose the roles of Berkeley, Hantec, and Loreley in making the investments.

The record contains no evidence, however, that the customers who lost money in the unregistered-futures scheme did so because of these violations. As in *Alvarez*, there has been no showing that the registration violations caused the losses. Nor has the CFTC pointed to any evidence that the losses flowed from the Defendants' omissions regarding the roles of Berkeley, Hantec, or Loreley. The CFTC has not shown, for instance, that the customers who intended to invest in futures would have refrained from doing so if they had known of Berkeley's, Hantec's, or Loreley's involvement. Nor has the CFTC shown that those entities' involvement delayed the execution of trades or otherwise caused the investors to receive anything less than what they had bargained for. Finally, the record does not show that any of the futures investors lost money as a result of the NFA requiring the Defendants to liquidate the accounts at Berkeley and Hantec.

Because the CFTC did not prove that the Defendants' violations in the unregistered-futures scheme caused any loss, we vacate the restitution award related to that scheme and remand the issue to the district court with instructions to consider whether any other equitable remedy is appropriate. We particularly note the statutory subsection under

which the court may order the disgorgement of gains, in appropriate circumstances, without regard to proximate cause. *See* 7 U.S.C. § 13a-1(d)(3) ("[T]he court may impose . . . on any person found . . . to have committed any violation[] equitable remedies including . . . disgorgement of gains received in connection with such violation."). The district court may, but need not, consider on remand whether disgorgement is appropriate in the present case.

3. Sufficient evidence supports the award of restitution for losses sustained in the metals-derivatives scheme.

The district court did not err, however, in awarding restitution for customer losses in the metals-derivatives scheme, in which the Defendants promised to invest their customers' money in metals but instead invested it in metals derivatives. Several victims of this scheme testified at trial that they would not have invested with Southern Trust if they had known that their money would be passed through Loreley and invested in metals derivatives rather than in actual metals. Moreover, victims of this scheme lost substantial sums when the NFA, having determined that the Defendants were violating commodities-trading laws, forced Loreley's accounts at Berkeley and Hantec (which corresponded to customer accounts at Southern Trust) to be liquidated.

The Defendants fault the NFA for forcing them to liquidate the accounts at an inopportune moment, when the metals markets were down. Accordingly, the Defendants argue that the NFA's action, along with market conditions, are intervening causes that broke the chain of proximate causation.

Without question, intervening causes must be considered in assessing proximate cause. The Supreme Court has recognized that "changed economic circumstances" are among the "intervening causes" that can limit a wrongdoer's responsibility. *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 812–13 (2011). Similarly, the Court has recognized that a third party's actions can "break[] the chain of causation." *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 659 (2008). This court has applied these principles as well. *See, e.g.*, *United States v. Stein*, 846 F.3d 1135, 1155–56 (11th Cir. 2017) (ordering the district court to consider, in assessing proximate cause on remand, whether widespread "short selling" of a company's stock and "the across-the-board stock market decline of 2008" "affected [the company]'s stock price during the fraudulent period and, if so, whether [those occurrences] nonetheless were reasonably foreseeable" to the defendant).

But in a relatively recent case analogous to the one before us, the Supreme Court rejected the argument that the Defendants make here. In *Robers v. United States*, 134 S. Ct. 1854 (2014), the Court considered the effect of a declining market on the proximate-cause analysis used to determine a fraudster's restitution obligation. The defendant in that case was convicted of submitting fraudulent loan applications to two banks, which extended him mortgage-backed loans based on the fraudulent applications. *Id.* at 1856. When the defendant failed to make the required mortgage payments, the banks foreclosed on the mortgages and took title to two houses, which they subsequently sold in a falling real estate market. *Id.* Both banks suffered a loss. *Id.* The district court ordered the defendant to pay restitution in the full amount of the banks' losses, even though

the value of the houses when the mortgages were created more than covered the loan balances. *Id.*

On appeal, the defendant argued that "where, as here, a victim receives less money from a later sale than the collateral was worth when received, the market and not the offender is the proximate cause of the deficiency." *Id.* at 1859. A unanimous Supreme Court was "not convinced." *Id.* It reasoned as follows:

> The basic question that a proximate cause requirement presents is "whether the harm alleged has a sufficiently close connection to the conduct" at issue. Here, it does. Fluctuations in property values are common. Their existence (though not direction or amount) is foreseeable. And losses in part incurred through a decline in the value of collateral sold are directly related to an offender's having obtained collateralized property through fraud. That is not to say that an offender is responsible for everything that reduces the amount of money a victim receives for collateral. Market fluctuations are normally unlike, say, an unexpected natural disaster that destroys collateral or a victim's donation of collateral or its sale to a friend for a nominal sum—any of which . . . could break the causal chain.

Id. (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1390 (2014)). Based on this reasoning, the Court concluded that the defendant's fraudulent loan applications proximately caused the banks' losses. *Id.* The Court therefore affirmed the judgment imposing restitution in the full amount of the deficiency. *Id.*

We find *Robers* applicable here because it involved an analogous situation: A defendant—in *Robers*, the loan applicant; here, Southern Trust—fraudulently obtained investments. (From a bank's perspective, a loan is a kind of investment. *See American Bank & Trust Co. v. Wallace*, 702 F.2d 93, 97 (6th Cir. 1983) ("In one sense every lender of money is an investor since he places his money at risk in anticipation of a profit in the form of interest." (quoting *C.N.S. Enters., Inc. v. G & G Enters., Inc.*, 508 F.2d 1354, 1359 (7th Cir. 1975))).) Upon the fraud's discovery, what remained of the investments—in *Robers*, the collateral; here, the metals derivatives—was sold. The sales took place in a declining market, so the investors lost money.

In the present case, the fraud is even more closely connected to the investors' losses than in *Robers* because the customers here had no choice, upon the fraud's discovery, about when or even whether to divest. The NFA required the metals-derivatives accounts to be liquidated, and the customers' losses were then "locked in." That the customers here were individuals, not sophisticated commercial entities as in *Robers*, makes the case for proximate cause even stronger.

We see no conflict between the Supreme Court's reasoning in *Robers* and the well-established principle in certain securities-fraud cases that market conditions must be considered in determining whether a fraudster has proximately caused a loss. Although the Defendants argue that the CFTC must show "loss causation" in this case, all of the authorities cited by the Defendants involve "fraud on the market," which is a kind of fraud that is materially different from the fraud here.

In a typical fraud-on-the-market case, the defendant is alleged to have artificially inflated the price of a security with misrepresentations or omissions that, when later revealed, caused the price of the security to drop. An important hurdle for the plaintiff in such cases is the element of loss causation, which numerous courts have likened to proximate cause. *See, e.g.*, *FindWhat Inv'r Grp. v. FindWhat.com*, 658 F.3d 1282, 1309 (11th Cir. 2011) (explaining that "loss causation" requires proof that the fraud is the "proximate cause of the plaintiff's later losses"); *Schaaf v. Residential Funding Corp.*, 517 F.3d 544, 550 (8th Cir. 2008) ("Loss causation . . . corresponds to the common law's requirement of proximate causation."); *AUSA Life Ins. Co. v. Ernst & Young*, 206 F.3d 202, 209 (2d Cir. 2000) ("Loss causation is causation in the traditional 'proximate cause' sense….").

The loss-causation concept deals with whether a security's price drop is attributable to the fraud rather than to some extraneous factor. In the fraud-on-the-market context, the Supreme Court has recognized that, rather than being the result of fraud, a security's price drop

> could instead be the result of other intervening causes, such as "changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events." If one of those factors were responsible for the loss or part of it, a plaintiff would not be able to prove loss causation to that extent. This is true even if the investor purchased the stock at a distorted price, and thereby

> presumptively relied on the misrepresentation reflected in that price.

Erica P. John Fund, Inc. v. Halliburton Co., 563 U.S. 804, 812–13 (2011) (quoting *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 342–43 (2005)).

Teasing out the effect of market conditions in fraud-on-the-market cases is essential because the fraud alleged involves a manipulation of stock price. The effect of the fraud must therefore be distinguished from the effects of independent market forces in order to determine how much of the price drop should be attributed to the defendant. Here, in contrast, the fraud at issue is not a fraud on the market, but rather a fraud on individual consumers who wished to invest in metals and instead had their funds placed in metals derivatives. The present case involves no allegation, in other words, that the Defendants manipulated the price of a commodity. So there is no need to ask, as we would in a fraud-on-the-market case, whether the Defendants' fraud, rather than independent market forces, caused the victims' losses.

The factual question of whether fluctuations in the value of metals derivatives mirror fluctuations in the value of the underlying commodities is therefore beside the point. In *Robers*, the Supreme Court concluded that the fraudster proximately caused the banks' losses even though the banks received precisely the collateral that they had bargained for. Presumably, the banks would have suffered the same losses if they had foreclosed on the loans for a reason other than the fraud. Yet this did not negate proximate cause. By the same token, even if the value of the metals derivatives in this case precisely tracked the value of the underlying commodities—a fact that, in any event, is not established by the record—the

Defendants' fraud would still be a proximate cause of the victims' losses.

Returning to the indicia of proximate cause, we conclude that the fraud here is directly related to the customers' losses because Southern Trust took their money and, contrary to their wishes, invested it in metals derivatives. Furthermore, the Defendants' fraud is what prompted the NFA to intervene and, in an effort to prevent further losses, to require that Loreley's accounts at Berkeley and Hantec be liquidated.

As in *Robers*, the market conditions that contributed to the customers' losses were foreseeable. *See Robers*, 134 S. Ct. at 1859. Those conditions, therefore, do not constitute an intervening cause. *See Staub v. Proctor Hosp.*, 562 U.S. 411, 420 (2011) ("A cause can be thought 'superseding' only if it is a 'cause of independent origin that was not foreseeable.'" (quoting *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 837 (1996))). Nor does the NFA's action constitute an intervening cause under the facts of this case. *See id.*

This brings us back to a bedrock policy question: Who should be responsible for the customers' losses? *See supra* at 28–29. The Defendants' argument that their fraud was not a proximate cause of their customers' losses is untenable not only as a matter of law and fact, but also as a matter of public policy. *See United States v. Turk*, 626 F.3d 743, 750 (2d Cir. 2010) (rejecting a similar argument because it would "encourage would-be fraudsters to roll the dice on the chips of others, assuming all of the upside benefit and little of the downside risk"). Adopting such an argument would create perverse incentives for commodities traders and undermine the purpose of the CEA. We thus find no error in the district court's

restitution award for losses sustained in the metals-derivatives scheme.

III. CONCLUSION

For all of the reasons set forth above, we **AFFIRM** the judgment of the district court except as to the restitution award for the group of investors whose losses were associated solely with the registration violations. As to that portion of the restitution award, we **VACATE** the judgment and **REMAND** with instructions to consider other equitable remedies.

APPENDIX B—District Court Findings of Fact and Conclusions of Law (August 29, 2016)

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 1:14-cv-22739-JLK

U.S. COMMODITY FUTURES TRADING COMMISSION,

Plaintiff,

v.

SOUTHERN TRUST METALS, INC., LORELEY OVERSEAS CORPORATION, and ROBERT ESCOBIO,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS CASE comes before the Court for final disposition of the issues presented during a bench trial held from July 25 through July 27, 2016. This opinion constitutes the Court's findings of fact and conclusions of Jaw pursuant to Federal Rule of Civil Procedure 52(a).

I. INTRODUCTION

Plaintiff U.S. Commodity Futures Trading Commission ("CFTC") seeks judgment against Defendant Southern Trust Metals, Inc. ("Southern Trust") for violations of the anti-fraud provisions of the Commodity Exchange Act (the "Act") and accompanying regulations, including Section 4b(a) of the Act, 7 U.S.C *§* 6b(a), Section 6(c), 7 U.S.C. *§* 9, and CFTC Regulation 180.1, 17 C.F.R. *§* 180.1. DE 1 at,, 56-74. The CFTC also seeks a permanent injunction as well as an award of restitution and imposition of

civil monetary penalties against Defendants on all charges in the Complaint.

The Complaint alleges Southern Trust held itself out to the public as a seller of physical precious metals that customers could purchase on a leveraged basis, i.e., with loans. *Id.* at 22- 25. Southern Trust represented to customers that they were purchasing actual physical metals stored in their name at a depository. *Id.* at 22-25. Southern Trust also represented to customers that they were receiving loans for the purchase of metals, for which Southern Trust charged the customers interest. *Id.* at 6.

In reality, the CFTC asserts, there were no physical precious metals, and no loans. *Id.* at 30-31. Instead, Southern Trust was transferring customer funds through Loreley Overseas Corp. ("Loreley"), a British Virgin Islands subsidiary, to London-based margin trading firms Hantec Global Markets, Ltd. ("Hantec") and Berkeley Futures, Ltd. ("Berkeley"). *Id.* at 1, 30-31. At Hantec and Berkeley, the customer funds were used to purchase derivative contracts designed to hedge Southern Trust's exposure to customer positions. *Id.* at 42. The loans extended to customers were entirely fictional, and Southern Trust and its brokers simply pocketed the interest. *Id.* at 144. None of these details were disclosed to customers, who believed they were receiving loans to purchase physical precious metals. *Id.* at 49.

II. PROCEDURAL HISTORY

The Court previously entered summary judgment for the CFTC on Counts I and IV of its Complaint. DE 122. Count I alleges Defendants Southern Trust and Loreley engaged in off- exchange retail leveraged commodity transactions in violation of Section 4(a) of the Act, 7 U.S.C. § 6(a). *Id.* at 8-9.

These leveraged commodity transactions are the same transactions that form the basis for the CFTC's fraud claims. In ruling for the CFTC on the Section 4(a) claim, the Court held that Defendants failed to adduce any evidence of actual delivery of any physical metals for their leveraged metals customers. *Id.* at 9. In ruling for the CFTC on Count IV, the Court held Southern Trust failed to register as a futures commission merchant in violation of Section 4d of the Act, 7 U.S.C. § 6d. *Id.* at 9-10.

The Court also entered summary judgment in favor of the CFTC on the issue of control person liability against Defendant Robert Escobio pursuant to Section 13(b) of the Act, 7 U.S.C. § l 3c(b). *Id.* at 10-13. In so holding, the Court found that Robert Escobio had general control over Defendants Southern Trust and Loreley. *Id.* at 10-11. The Court also held that Robert Escobio acted in bad faith by deliberately failing to act with reasonable diligence or to institute adequate internal controls. *Id.* at 11-12. Moreover, the Court found that Robert Escobio knowingly induced Southern Trust's and Loreley's violations of the Act. *Id.* at 12-13. As a result of this ruling, Mr. Escobio is jointly and severally liable for violations of the Act committed by Southern Trust or Loreley. 7 U.S.C. § 13c(b).

III. FACTUAL BACKGROUND

A. Representations to Customers

Southern Trust Metals represented to customers that they were purchasing, and indeed owned, physical metals that were held in depositories. Southern Trust Metals also represented that customers were receiving loans to purchase those metals, for which the customers were charged interest. Southern Trust perpetuated these

misrepresentations through promotional materials, account documents, and sales calls, as well as through discussions with customers about its fees and commissions.

1. Promotional Materials

Southern Trust sent its sales brochure to all prospective customers touting the benefits of Southern Trust's leveraged metals program. Transcript of Bench Trial, July 26, 2016 at 16:14- 17:1 (Testimony of Peter Rukrigl); CFTC Ex. 124 at 5-6. The brochure compared leveraged metals to a "home mortgage," and described the metals offered by Southern Trust as a "hard currency" that "derive[s] intrinsic value from [their] relative scarcity." CFTC Ex. 124 at 7, 9. The brochure said that customers "can take physical possession of [their] metals in New York or London." *Id.* at 11. The brochure encouraged customers to "keep [their] metals on deposit" so as to "enjoy instant liquidity." *Id.* at 11. Southern Trust also had a website that made similar representations about leveraged metals. CFTC Ex. 82.

Southern Trust sent prospective customers a "customer worksheet," which was available on Southern Trust's website. Transcript of Bench Trial, July 26, 2016 at 13:20-14 :3, 23:5-23:23, 56:10-56:18 (Rukrigl Testimony). Southern Trust brokers would walk prospective customers through the worksheet and explain to them how leverage could result in their ownership of more metals and greater profit. CFTC Ex. 82 at 14; Transcript of Bench Trial, July 26, 2016 at 13:20- 14:3, 56:10-56:18 (Rukrigl Testimony); Transcript of Bench Trial, July 25, 2016 at 6:6-6:12 (Testimony of Jean Jeffries).

2. Account Documents

Southern Trust required customers to fill out an account opening form which included a section called "risk factors and disclosure statement." CFTC Ex. 82 at 17; Transcript of Bench Trial, July 26, 2016 at 14:7-14:16 (Rukrigl Testimony). The disclosure statement explained that customers were investing in "physical precious metals," and advised customers that their metals could " either be delivered directly to the client ' s designated point of delivery or to a recognized depository, which provides insured non-segregated storage." CFTC Ex. 82 at 17.

Once a customer's account was open, Southern Trust generated trade confirmations and monthly account statements that it sent to customers . Transcript of Bench Trial, July 26, 2016 at 111:18-111 :20 (Testimony of Victor Casado), 67:19-67:25 (Rukrigl Testimony) . The trade confirmations purported to show purchases of physical metals by customers, setting forth the "description" (usually "silver"), and quantity in ounces of the purchase. Transcript of Bench Trial, July 26, 2016 at 112:5-112:13 (Casado Testimony); Transcript of Bench Trial, July 25, 2016 at 10:11-10:24 (Jeffries Testimony); CFTC Exs. 131, 137C. The trade confirmations state that customers should "allow up to 7 days for delivery," and that customers will be "charged for delivery." CFTCEx.131.

Customers' monthly account statements purported to show the type of physical metals owned by the customer, as well as the weight of the metal purchased in ounces. CFTC Exs. 43, 126, 136F. The account statements showed the balance of the loan (up to 70% of the value of the metal purchased), and the interest accruing on the loan. *Id.*

3. Sales Calls

In telephone conversations, Southern Trust brokers told customers they were purchasing actual physical metals, and the metals were stored in London or Hong Kong. Transcript of Bench Trial, July 25, 2016 (Jeffries Testimony), 45:19-45:24, 46:13-46:15 (Testimony of Wolfgang Helfricht), 92:12-92:18, 11 6:13-116:25, 117:17-117 :22 (Testimony of Donald Roach), 122:2-122:8 (Testimony of Michael Newquist), 149:7-149:15 (Testimony of Kelly Rogers); Transcript of Bench Trial, July 26, 2016 at 21:23-22:3, 22:14-23:3, 50:20-50:24, 51:18-51:25 (Rukrigl Testimony) , 79:2-79:4, 88:8-88:9, 89:19-89:22 (Testimony of Mariano Llosa); CFTC Ex. 40. The brokers also told customers that they could take out a loan with which to purchase additional metals. Transcript of Bench Trial, July 25, 2016 at 8:4-8:25 (Jeffries Testimony), 47:5-47:13 (Helfricht Testimony), 92:22-93:05 (Roach Testimony); Transcript of Bench Trial, July 26, 2016 at 18:10-18:23, 52:25-53:10 (Rukrigl Testimony), 79:9-80:7 (Llosa Testimony).

Southern Trust brokers told customers that the interest charge included "storage fees" and other fees associated with owning physical metals. Transcript of Bench Trial, July 26, 2016 at 60:6-60:9 (Rukrigl Testimony); Transcript of Bench Trial, July 25, 2016 at 9:5-9:18 (Jeffries Testimony); CFTC Ex. 40 (noting "storage fees").

4. Fees and Commissions

Southern Trust told its customers it would charge them a one-time fee of 1% to 3% of the account upon opening, depending on the size of the account. Transcript of Bench Trial, July 26, 2016 at 74:21-75:11 (Rukrigl Testimony), 94:7-94:12 (Llosa Testimony). Customer purchases were subject to

commissions of between 2.5% and 3%. *Id.* at 74:21-75:11 (Rukrigl Testimony), 93:21-94:1 (Llosa Testimony). For the loans, customers were charged an annual interest rate of between 6% and 7%. Transcript of Bench Trial, July 25, 2016 at 47:5-47:13 (Helfricht Testimony); Transcript of Bench Trial, July 26, 2016 at 74:21-75:11 (Rukrigl Testimony), 80:8-80:14, 94:2-94:6 (Llosa Testimony).

B. Transfer of Customer Funds to Loreley, then Hantec and Berkeley

Unbeknownst to customers, Southern Trust sent customer funds to Loreley, who in tum sent them to Hantec and Berkeley in the UK. DE 122 at 4, 9. The accounts at Hantec and Berkeley were in Loreley's name, and not in the name of Southern Trust's customers. Transcript of Bench Trial, July 26, 2016 at 199:6-199:7 (Testimony of Robert Escobio); CFTC Exs. 8, 23; CFTC Ex. 155 at 19:14-20:10, 24:8-24:14 (Deposition of Chris Thompson) [hereinafter, "Berkeley Dep."]; CFTC Ex. 156 at 39:14-40:3 (Deposition of Bashir Nurmohamed) [hereinafter, "Hantec Dep."].

When customers placed an order with Southern Trust, Southern Trust placed its own order, through Loreley, with Hantec or Berkeley in a numbered sub-account. Transcript of Bench Trial, July 26, 2016 at 113:15-113:17 (Casado Testimony). Southern Trust back-office personnel kept track of which Hantec or Berkeley sub-account corresponded with which Southern Trust customer account. *Id.* at 113:22-114:14 (Casado Testimony). Hantec and Berkeley had no knowledge of or relationship with Southern Trust's customers. Hantec Dep. at 39:14-40:3; Berkeley Dep. at 19:14-20:10, 24:8-24:14.

Southern Trust brokers did not disclose any of this to their customers, and made no mention of Hantec or Berkeley. Transcript of Bench Trial, July 26, 2016at 90:16-90:19 (Llosa Testimony), 52:8-52:10 (Rukrigl Testimony). Southern Trust's customers were unaware that their funds and their orders were being transferred to Loreley, or to Hantec or Berkeley. Transcript of Bench Trial, July 25, 2016 at 13:13-13:25 (Jeffries Testimony), 95:17-95:25 (Roach Testimony), 123:8-123:16 (Newquist Testimony), 146:3-146:9 (Rogers Testimony).

C. No Physical Metals

Southern Trust did not store metals on behalf of its customers, nor did Southern Trust have any agreements with depositories to store metals on behalf of customers. Transcript of Bench Trial, July 26, 2016 at 186:19-187:3 (Escobio Testimony). During this litigation, Southern Trust argued the trades at Hantec and Berkeley resulted in the transfer of ownership of physical metals in depositories. DE 122 at 9. In entering summary judgment on the CFTC's Section 4(a) claim, the Court rejected Defendants' contention that Hantec and Berkeley took delivery of physical precious metals on behalf of Southern Trust's customers via depositories in the UK. *Id.* at 9. That holding applies with equal force in context of the CFTC's fraud claims.

ST Metal's trading at Hantec and Berkeley was in margined derivative contracts, not physical metals. Hantec Dep. at l 0:3-10:14, 11:4-11:7; Berkeley Dep. at 16:3-16:25. Loreley held no title to any physical metals as a result of its trading, and Loreley's trading in its margin accounts did not result in the transfer or delivery of any physical metal. Hantec Dep. at 67:16-67:21; Berkeley Dep. at 78:15-78:17, 79:5-79:8, 103:18-103:21, 104:2-104:11.

This is reflected in Loreley's monthly account statements from Hantec and Berkeley, which show trading in margined derivative contracts. CFTC Exs. 128, 129. It is also reflected in Loreley's account opening documents with Hantec and Berkeley.

The Hantec account opening documents include a product disclosure statement which explains that, "we do not deliver the physical underlying assets (ie. gold or silver) to you, and you have no legal right to it." CFTC Ex. 133, at 3; *see also* CFTC Ex. 23, at 5; Hantec Dep. at 46:19-47:6.) The Hantec account opening documents also state that Loreley's business is "dealing physical metals" and its purpose in opening an account with Hantec was to " hedg[e] their exposure...." Hantec Dep., Ex. 2.

The Berkeley account opening documents state that Loreley is engaging in "over the counter & other off exchange contracts (including bullion)." CFTC Ex. 8, at 2-3. The Berkeley account opening documents also state that Loreley "wish[ed] to speculate in *derivative products* which involves a high level or risk and that your investment horizon for individual transactions is short term (less than 3 months.)" CFTC Ex. 8 at 3 (emphasis supplied).

D. No Loans

As no physical metals were ever purchased in connection with the transactions at issue, there were never any loans to purchase physical metals. Nonetheless, Defendants maintain that loans were provided to customers - not by Southern Trust, but by Hantec and Berkeley. Transcript of Bench Trial, July 27, 2016 at 9:10-9:21, 23:3-23:6.

Hantec and Berkeley have never loaned money to any customer, nor have Hantec or Berkeley charged interest to any customer. Hantec Dep. at 40:3-40:20;

Berkeley Dep. at 31:10-31:18, 59:8-59:18. Southern Trust's margin trading at Hantec and Berkeley did not involve any kind of loan, nor did it even involve an extension of credit. Hantec Dep. at 66:11-66:18; Berkeley Dep. at 129:11-130:3.

The record is bereft of any loan agreements, collateral agreements, disbursements of funds, or other evidence one would expect to see in connection with a loan for the purchase of physical assets. Transcript of Bench Trial, July 27, 2016 at 3:17-4:3, 4:14-4:21, 5:15-7:9, 10:5- 11:3, 21:25-24:1 (Escobio Testimony). Mr. Escobio claims that the loan agreements are contained in Loreley's account opening documents with Hantec and Berkeley. *Id.* at 10:18- 10:20; 23:3-23:8 (Escobio Testimony). The account opening documents, however, make no mention of any loans or interest. CFTC Exs. 8, 23. Nor does anything in Loreley's monthly statements from Hantec or Berkeley reflect any loan or interest. CFTC Exs. 128, 129.

E. Losses Suffered by Defendants' Customers

As set out in this Court's April 7, 2016 order granting partial summary judgment, Defendants engaged in two schemes: (1) the unregistered futures scheme; and (2) the leveraged precious metals scheme. DE 122. The customer losses and gains relating to both schemes are described separately below. Southern Trust failed to produce a complete set of customer account statements. Transcript of Bench Trial, July 27, 2016 at 63:6-63:7 (Testimony of Heather Johnson). Nonetheless, customer losses can be calculated via the underlying sub-account statements for the Loreley accounts at Hantec and Berkeley.

1. Customer Losses From Southern Trust's Unregistered Futures Scheme

Southern Trust used a trading account at Berkeley to execute futures trades on U.S. exchanges. Futures trading sub-accounts for the Loreley account at Berkeley were designated with a prefix of "LOF," while metals trading accounts were designated with a "LOR" prefix. Berkeley Dep. at 66:15-20, 84:17-18; CFTC Ex. 84.

Southern Trust's futures customers suffered losses totaling $559,725. Berkeley's monthly account statements show that seven of the eight futures customers collectively lost $199,388 trading futures and options through Southern Trust.[1] CFTC Exs. 128, 134. Southern Trust also charged commissions to its futures customers in the amount of $360,337. CFTC Ex. 109.

2. Customer Losses From Defendants' Leveraged Metals Scheme

During the relevant period,[2] seventy-eight leveraged metals customers suffered losses totaling $1,543,892. Of those losses, $764,759 is attributable to fees, commissions, and interest. Form W-2s for Mr.

---

1 The Loreley account at Berkeley Futures U.K. was transferred to Berkeley Bahamas in November 2012. Berkeley Dep. at 85:7-85:10. Berkeley Bahamas is an affiliate of Berkeley futures which executes all of its business through Berkeley Futures U.K. Berkeley Dep. at 55:17-56:3. They are effectively the same for purposes of the transactions at issue in this case and therefore they are collectively referred to as "Berkeley" throughout this Order.

2 The relevant time period for purposes of the leveraged metals scheme begins on July 16, 2011, the effective date of Section 2(c)(2)(0) of the Commodity Exchange Act, and ends on April 31, 2013 as Southern Trust liquidated the trading positions in its Loreley trading accounts at Hantec and Berkeley in April 2013.

Rukrigl and Mr. Llosa show that the Southern Trust brokers earned $382,379 between 2011 and 2012. CFTC Ex. 88. The brokers split the fees, commissions, and interest 50/50 with Southern Trust. Transcript of Bench Trial, July 26, 2016 at 34:22-36:2 (Rukrigl Testimony), 94:16-95:4 (Llosa Testimony). The remaining $779,133 is customer losses from derivatives trading in Loreley's account. CFTC Exs. 128, 129, 134.

IV. SOUTHERN TRUST'S LIABILITY FOR FRAUD

The CFTC has brought fraud claims against Southern Trust under Section 4b(a) of the Act, 7 U.S.C § 6b(a), as well as Section 6(c) of the Act, 7 U.S.C § 9, and its accompanying regulation, 17 C.F.R. § 180.1. A defendant is liable under Section 4b(a)[3] of the Act if the CFTC demonstrates: "(1) the making of a misrepresentation, misleading statement, or a deceptive omission; (2) scienter; and (3) materiality." *CFTC v. R.J Fitzgerald & Co.,* 310 F.3d 1321, 1328 (11th Cir. 2002). The same elements apply with respect to Regulation 180.1.[4] *Hunter Wise,* 21Supp. 3d at 1347.

---

[3] Section 4b(a) provides that "it shall be unlawful--(1) for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity in interstate commerce or for future delivery that is made, or to be made, on or subject to the rules of a designated contract market, for or on behalf of any other person; or (2) for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery, or swap, that is made, or to be made, for or on behalf of, or with, any other person, other than on or subject to the rules of a designated contract market--(A) to cheat or defraud or attempt to cheat or defraud the other person ...." 7 U.S.C. § 6b(a).

[4] Regulation 180.1 provides that "it shall be unlawful for any person, directly or indirectly, in connection with any swap, or

"In an enforcement action brought to protect the public interest, the Commission need not prove reliance to establish an antifraud violation." *CFTC v. Gutterman,* No. 12-21047-CIV, 2012 WL 2413082, at *5 (S.D. Fla. June 26, 2012) (citing *R.J Fitzgerald,* 310 F.3d at 1328 n. 6). The CFTC, like the SEC and other government enforcement agencies, does not need to prove loss causation as an element of a fraud claim. *SEC v. Goble,* 682 F.3d 934, 942-43 (11th Cir. 2012) ("Because this is a civil enforcement action ... reliance, damages, and loss causation are not required elements.").

A. Misrepresentations and Omissions

Judge Middlebrooks was confronted with misstatements in *Hunter Wise* similar to the ones at bar. Hunter Wise "prepared and distributed documents, including account statements ... and trade confirmation notices, to the retail customers confirming the existence of the metals, the loans, and the purchases." *Hunter Wise,* 21 F. Supp. 3d at 1338. However, Hunter Wise "failed to inform the parties that the metals it purchased were on a financed basis, it did not own the metals, and the metals, ifthere were any at all, were not in the retail customers' names." *Hunter Wise,* 21 F. Supp. 3d at 1338.

---

contract of sale of any commodity in interstate commerce, or contract for future delivery on or subject to the rules of any registered entity, to intentionally or recklessly:(!) Use or employ, or attempt to use or employ, any manipulative device, scheme, or artifice to defraud;(2) Make, or attempt to make, any untrue or misleading statement of a material fact or to omit to state a material fact necessary in order to make the statements made not untrue or misleading;(3) Engage, or attempt to engage, in any act, practice, or course of business, which operates or would operate as a fraud or deceit upon any person ...." 17 C.F.R. § 180.l(a).

Additionally, Hunter Wise "pocketed the interest Hunter Wise charged customers for loans it agreed to, but never did, provide, as well as the fees it charged for the storage of metals that did not exist." *Hunter Wise,* 21 F. Supp. 3d at 1338 . "Hunter Wise did not inform its clients how it was using the funds it received. Instead of applying the funds to pay off interest on real loans or buying and storing metals, Hunter Wise used the funds to offset its obligations .... Hunter Wise continued to charge interest and storage fees, even though the charges were for nonexistent services." *Hunter Wise,* 21 F. Supp. 3d at 1338. The same is true in the instant action.

The CFTC has proven by a preponderance of the evidence that Southern Trust's statements were false. There were no physical precious metals owned by customers and stored in depositories. Nor were there any loans provided to or for the benefit of Southern Trust's customers. Instead, Southern Trust transferred customer funds to Hantec and Berkeley, where Southern Trust engaged in margined derivatives trading in the name of Loreley. This margined derivatives trading was designed to hedge Southern Trust's exposure to its customers' trading positions, not to obtain physical metals as the customers were told.

The CFTC has also proven by a preponderance of the evidence that Southern Trust mislead its customers by omitting material facts in connection with the transactions at issue. Southern Trust never disclosed to customers that their funds were being sent to Loreley, Hantec, or Berkeley. Southern Trust also never disclosed that those customer funds were being used to purchase derivative contracts in the UK rather than physical metals.

B. Materiality

A representation or omission is "material" if a reasonable investor would consider it important in deciding whether to make an investment. *R.J Fitzgerald,* 310 F.3d at 1328-29. The CFTC has shown by a preponderance of the evidence that Southern Trust's misrepresentations and omissions were material.

Hunter Wise provides guidance on the materiality of Southern Trust's misrepresentations and omissions. In *Hunter Wise,* Judge Middlebrooks reasoned that, "[r]etail customers thought they were purchasing metals .... Undoubtedly, knowing that they were not buying [metals] would have been crucial information to have and to consider." *Hunter Wise,* 21 F. Supp. 3d at 1346. "Because Hunter Wise did not provide them with material information," Judge Middlebrooks held, "the retail customers entered into these investments blindly, without an accurate and complete picture of the transaction. *Hunter Wise,* 21 F. Supp. 3d at 1346. Judge Middlebrooks's reasoning applies with equal force in the instant action.

Southern Trust customers believed that they were purchasing physical metals, and that those metals were a "hard asset" with "intrinsic value." Southern Trust customers also believed they were paying interest on loans used to purchase those metals.

A reasonable customer would have found it material that no metals or loans existed, and that their money was being used to purchase derivative contracts, which were in accounts which were not in the customer's name, and held at companies located in the UK, after being passed through a BVI corporation. *See, e.g.,* Transcript of Bench Trial, July 25, 2016 at

55:22-55:25 (Helfricht Testimony), 95:14-95:16 (Roach Testimony).

C. Scienter

In its summary judgment order, this Court held that Mr. Escobio is the controlling person of Southern Trust. DE 122 at 10-13. As such, Mr. Escobio' s scienter is imputed to Southern Trust for purposes of the CFTC's fraud claims. 17 C.F.R. § 1.2.

Scienter is established if the defendant "intended to defraud, manipulate, or deceive," or if the defendant's conduct represents "an extreme departure from the standards of ordinary care," i.e., recklessness. *R.J. Fitzgerald,* 310 F.3d at 1328-29. Conduct involving "'highly unreasonable omissions or misrepresentations ... that present a danger of misleading [retail customers] which is either known to the Defendant or so obvious that [the] Defendant must have been aware of it' have been found to meet the scienter requirement." *Hunter Wise,* 21 F. Supp. 3d at 1339 (quoting *R.J. Fitzgerald,* 310 F.3d at 1328-29).

Mr. Escobio knew, or was reckless in not knowing, that Loreley was not purchasing physical metals via Hantec or Berkeley. The Hantec and Berkeley account opening documents make clear that Loreley was trading in margined derivative contracts, and had no right to any physical metals. CFTC Ex. 23, at 5; CFTC Ex. 133, at 3; CFTC Ex. 8 at 2-3. Mr. Escobio reviewed and signed these account opening documents. Transcript of Bench Trial, July 27, 2016 at 8:14-8:19, 12:18-12 :21 (Escobio Testimony). Mr. Escobio received Loreley's monthly account statements from Hantec and Berkeley at his email account. Transcript of Bench Trial, July 27, 2016 at 9:6-9:9, 14:2-14:7 (Escobio Testimony). These accounts statements show trading in margined derivative

contracts, not physical metals. CFTC Exs. 128, 129. Mr. Escobio also knew that the accounts at Hantec and Berkeley were in the name of Loreley and not in the names of Southern Trust's customers. Transcript of Bench Trial, July 26, 2016 at 198:21-199:7 (Escobio Testimony), 199:23-24; CFTC Ex. 8.

Mr. Escobio had no basis to believe that Hantec or Berkeley was providing loans. either the account opening documents nor the monthly statements from Hantec or Berkeley show the existence of any loans or the charging of any interest. CFTC Exs. 8, 23, 128, 129. Mr. Escobio understood that the interest rate was determined by the Southern Trust brokers. Transcript of Bench Trial, July 27, 2016 at 24:4-24:6 (Escobio Testimony). The "loans" were simply an artifice used by Southern Trust as a pretext for charging customers more money.

1. Verbal Assurances from Hantec and Berkeley

Mr. Escobio's unlikely story is that he is the one who was defrauded, that he was duped by Hantec and Berkeley into believing that Loreley was buying physical metals. Mr. Escobio claims that Mr. Nurmohamed, the CEO of Hantec, showed him a "holding statement" showing physical gold owned by Hantec and stored at Standard Chartered Bank and Barclays. Transcript of Bench Trial, July 26, 2016 at 188:13-189:5, 192:2-192:9 (Escobio Testimony). However, Mr. Escobio failed to obtain a copy of this holding statement, and never followed up with Standard Chartered or Barclays to confirm that Hantec stored metals there for its customers. *Id.* at 188:13-188:19, 193:19-193:22, 194:8-194:14,194:21-194:23. Furthermore, Mr. Nurmohamed testified that he never told Mr. Escobio that Hantec stores physical metals at Standard Chartered or Barclays, and that

he never showed Mr. Escobio any "holding statement." Hantec Dep. at 58:13-58:18.

Mr. Escobio has a similar story with respect to Berkeley. Mr. Escobio claims that he met four times, once in the Bahamas and three times in London, with Berkeley personnel including Christopher Thompson, Berkeley's Managing Director. Each time, Mr. Escobio claims, they assured him that Loreley was buying physical metals. Transcript of Bench Trial, July 25, 2016 at 3:12-3:24 (Escobio Testimony); Transcript of Bench Trial, July 27, 2016 at 4:4-4:16; 5:4-5:18 (same). Once again, Mr. Escobio failed to procure any documents or written confirmation from Berkeley evidencing the ownership or storage of physical metals. Transcript of Bench Trial , July 26, 2016 at 193:19-193:22 (Escobio Testimony). Mr. Thompson testified that he met with Mr. Escobio only once, in 2011 when Mr. Escobio came to open the account. Berkeley Dep. at 10:18-10:22. Furthermore, Mr. Thompson testified that he never told Mr. Escobio that Loreley was trading physical metals. Berkeley Dep. at 80:16-81:11.

The Court does not credit Mr. Escobio's testimony. Mr. Escobio knew from the account opening documents and the monthly account statements, which he continued to receive, that Loreley was trading margined derivative contracts. Even if the Court were inclined to believe Mr. Escobio's story about the verbal assurances he claims to have received , it would be unreasonable for him to have relied on those assurances in light of the account opening statements he reviewed and signed which plainly state Loreley was trading derivative contracts with "no legal right" to the underlying asset. Moreover, it is not believable that Mr. Escobio would have sent millions of dollars in customer funds to

Hantec and Berkeley for the purchase of physical silver based on nothing more than verbal assurances from his counterparties during meetings that Mr. Escobio cannot corroborate with any documentation, and which Hantec and Berkeley both deny making.

2. The November 18, 2011 Letter from Hantec

Mr. Escobio points to a one-sentence letter he received via email from Hantec, dated November 18, 2011, as proof of his lack of scienter. The circumstances surrounding this letter support rather than rebut an inference of scienter.

The letter states only that "any Gold or Silver you purchase from us is held for your account and upon full payment we are able to arrange delivery for you when requ ested." Def. Ex. 49. It does not state that Southern Trust was trading physical metals, or that such metals are transferred or delivered with each trade.

The letter is dated almost a year after Mr. Escobio first opened the account. *Compare* Def. Ex. 49, *and* CFTC Ex. 23. Mr. Escobio asked Hantec to write this letter after Southern Trust brokers expressed concern about Dodd-Frank's requirement that leveraged metals be delivered within 28 days of purchase. Transcript of Bench Trial, July 26, 2016 at 195:9-195:14, 201:17-201:18 (Escobio Testimony); CFTC Ex. 34.

Mr. Nurmohamed testified that in 2011 Mr. Escobio asked him whether Hantec could deliver metal if it had to. Hantec Dep. at 52:19-54:10. Mr. Escobio assured Mr. Nurmohamed that it was "highly unlikely" he would ever need to take delivery. Hantec Dep. at 52:19-54:10, 71:18-71:24. Mr. Nurmohamed told Mr. Escobio that Hantec had never delivered

metal before, but that Standard Chartered Bank could arrange for delivery if Hantec opened an account there. Hantec Dep. at 52:19-54: 10, 71:7-71:17. Mr. Nurmohamed never opened an account at Standard Chartered, and Mr. Escobio never asked him to. Hantec Dep. at 54:11-54:15, 57:25-58:3.

It is clear that Mr. Escobio knew Loreley's accounts at Hantec and Berkeley did not contain physical metals. Nonetheless, Mr. Escobio used, and continues to use, Hantec's letter to try and convince regulators and the Court that Southern Trust was satisfying the delivery requirement. As this Court has already held, however, that requirement was not satisfied, and there is no evidence of any delivery of physical metals. DE 122 at 9.

3. The April 2013 Emails from Hantec and Berkeley

Mr. Escobio points to two emails from April 2013 as further proof that he believed Hantec and Berkeley were selling physical gold and silver. In the first email, dated April 15, 2013, Mr. Nurmohamed wrote: "I can confirm that you hold accounts with us that only trade Silver Bullion." CFTC Ex. 103. In the second email, dated April 22, 2014, a representative of Berkeley writes: "I can confirm that all Loreley accounts with the prefix XlLOR were silver bullion accounts. These accounts only traded in OTC silver bullion and never traded in any futures contracts." CFTC Ex. 104.

During his testimony, Mr. Escobio emphasized the word "bullion" in these emails, claiming the use of the word "bullion" is proof he was dealing in "physical gold bars or ingots or the physical silver bars or ingots." Transcript of Bench Trial, July 26, 2016 at 187:17-188:12.

However, the emails make no reference to physical metal, storage, depositories, or delivery, and *Mr.* Nurmohamed and Mr. Thompson both testified that the reference to "bullion" in the letters was shorthand for the margined derivative contracts that Loreley traded. Hantec Dep. at 77:1- 77:7; Berkeley Dep. at 98:1-98:15, 100:3-100:7. Moreover, the Hantec product disclosure statement and Berkeley account opening documents make it clear that Loreley's "bullion" trading was in derivative contracts, with "no legal right" to the underlying asset.

Mr. Escobio asked Hantec and Berkeley to write these emails after the National Futures Association-the futures industry self-regulatory organization-began investigating Southern Trust. Transcript of Bench Trial, July 26, 2016 at 209:18-210:6 (Escobio Testimony). Mr. Escobio did this "because of the questions that the NFA was asking and asking for us to provide proof that, in fact, we were doing bullion." *Id.* at 209:18-210:6 (Escobio Testimony). "[O]n that letter he specially said 'bullion," Mr. Escobio testified, "which is what I wanted to hear." *Id.* at 187:17-188:12 (Escobio Testimony).

Like the November 18, 2011 letter, the April 2013 emails were an attempt by Mr. Escobio to mislead regulators into believing that Southern Trust was not acting as an unregistered futures merchant.

V. ROBERT ESCOBIO CONTROLLING PERSON LIABILITY

Section l 3(b) of the Act provides that the controlling person of an entity is jointly and severally liable for that entity's violations of the Act. 7 U.S.C. *§* 13c(b). As set forth above, the Court ruled on summary judgment that Mr. Escobio had general control over Defendants Southern Trust and Loreley.

DE 122 at 10-11. Additionally, the Court found Mr. Escobio failed to act in good faith, and knowingly induced Southern Trust's off-exchange retail leveraged commodities transactions. *Id.* at 11-13. These are the same transactions that form the basis for the CFTC's fraud claims.

As such, Mr. Escobio is the controlling person for Southern Trust with respect to the CFTC's fraud claims. This conclusion is supported by the evidence at trial, which shows Mr. Escobio opened Loreley's accounts and Hantec and Berkeley, and was aware of Southern Trust's representations to customers. Transcript of Bench Trial, July 26, 2016 at 179:21-180:3, 180:22- 181:8, 183:22-184:13 (Escobio Testimony). Mr. Escobio is liable as the controlling person of Southern Trust and Loreley for all four counts of the CFTC's Complaint.

VI. RELIEF

The CFTC's Complaint seeks equitable relief pursuant to Section 6c of the Commodity Exchange Act, 7 U.S.C. § 13a-l, and also pursuant to this Court's own equitable powers. Section 6c of the Act authorizes the Court to order relief including an injunction, civil penalties, and restitution.

A. Permanent Injunction

Section 6c(b) of the Act provides that "upon a proper showing, a permanent ... injunction ... shall be granted without bond." 7 U.S.C. § 13a-l(b). In evaluating whether to grant an injunction, the Court may consider the following factors:

> [T]he egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's

> assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities for future violations.

Hunter Wise, 21 F. Supp. 3d at 28, quoting *SEC v. Carriba Air, Inc.,* 681 F.2d 1318, 1322 (11th Cir. 1982).

Defendants' violations of the Act were egregious. Defendants enticed customers to invest funds to purchase physical metals, and instead took the money and engaged in complex off-exchange derivatives transactions in anonymous, overseas trading accounts. The leveraged metals scheme spanned several years, and involved at least 100 customers and thousands of falsely misleading transactions. Victims of the Defendants' leveraged metals scheme lost $1.5 million dollars.

Defendants' futures scheme was no mere technical violation of the law. "Registration is the kingpin in th[e] statutory machinery [of the Commodity Exchange Act], giving the Commission the information about participants in commodity trading which it so vitally requires to carry out its other statutory functions of monitoring and enforcing the Act." *Stotler & Co. v. Commodity Futures Trading Comm'n,* 855 F.2d 1288, 1293 (7th Cir. 1988).

Mr. Escobio knew he was violating the Act when he engaged in the transactions at issue in this case. Mr. Escobio testified that he's "been in the futures industry for 35 years," and he has "handled some of the largest customers in the world," including "central banks" and " major institutions." Transcript of Bench Trial, July 26, 2016 at 195:15-195:17. He was the

Chief Executive Officer and Chief Financial Officer of a publicly traded company, Southern Trust Securities Holding Company, whose SEC filings extol the financial industry experience of its executives and employees. CFTC Ex. 63. The principal subsidiary of this holding company was Southern Trust Securities, "a registered broker-dealer with the SEC and a member of FINRA [and] the National Futures Association." CFTC Ex. 63 at 063-009. Given this experience and expertise, it was egregious to accept funds from customers to execute futures trades through Southern Trust, and it was egregious to disguise the trading of metals derivatives as the purchase and sale of physical metals on a leveraged basis.

There is a strong likelihood that unless enjoined, Mr. Escobio's occupation will present opportunities for future violations. Mr. Escobio remains an SEC and CFTC registrant. He :remains involved in the operations of Southern Trust Securities and in that capacity has clear opportunities to engage in the same type of conduct at issue in this case. Unless enjoined, he is :in a position to continue to work as he has in the past in the futures and securities markets, and to handle customer funds.

B. Restitution

Section 6c(d) of the Act provides that "the court may impose, on a proper showing, on any person found in the action to have committed any violation, equitable remedies including ... [r]estitution to persons who have sustained losses proximately caused by such violation (in the amount of such losses)." 7 U.S.C. § 13a-l(d)(3). Restitution is appropriate for both the futures scheme and the leveraged metals scheme. Defendant's business was illegal from the outset. Southern Trust never should

have accepted customer funds for the purpose of trading futures transactions without first registering as a futures commission merchant with the CFTC. Similarly, the Defendants never should have accepted funds in connection with off-exchange, leveraged retail commodity transactions. Under these circumstances Defendants' customers should be placed in the position they were in before the violations of the Act occurred. The appropriate amount of restitution is the difference between the amount of funds invested by Southern Trust's customers, and the amount of funds those customers received back.

Restitution is also appropriate because Defendants' violations of the Act proximately caused their customers' losses. The losses suffered by Defendants' customers were a reasonably foreseeable result of the Defendants' violations. *See City of Miami v. Bank of America Corp.,* 800 F.3d 1262, 1282 (11th Cir. 2015) ("The defendant must have been reasonably able to foresee the kind of harm that was actually suffered ... "). Defendants either pocketed customer funds directly, or placed their customers at the risk of losing money in illegal transactions.

Defendants argued at trial that their leveraged metals customers' losses were caused by a decline in the value of silver (the asset underlying the derivative contracts Defendants purchased) rather than the Defendants violations of the Act. However, a defendant who fraudulently induces another to participate in a transaction cannot blame market losses for his or her victims' losses. In *United States v. Turk,* 626 F.3d 743 (2d Cir.2010), for example, a defendant who fraudulently induced investors to participate in a real estate transaction tried to blame the market downturn for his investors' losses. The

court rejected this argument, holding that the rule urged by defendant would "encourage would-be fraudsters to roll the dice on the chips of others, assuming all the upside benefit and little of the downside risk." *Id.* at 750; *see also United States v. McKanry,* 628 F.3d 1010, 1019 (8th Cir. 2011) ("the appropriate test is not whether market factors impacted the amount of loss, but whether the market factors and the resulting loss were reasonably foreseeable"). Defendant's argument that he should not be held accountable for losses caused by market factors because he never intended to lose the investors' monies is not logical.

Defendants obtained customers' funds through false pretenses-by telling customers their money would be used to purchase physical metals held in depositories. The fact that Defendants' customers' positions would have declined regardless of whether Defendants purchased physical silver (as they had promised to do) or derivatives contracts (as they actually did) is of no moment.

Defendants tricked customers into investing in metals derivatives. Defendants took their customers' money in connection with illegal, off-exchange retail commodity transactions. When the scheme was discovered in April 2013, Southern Trust liquidated the trading positions in its Loreley accounts and sent back the small amount remaining to customers. Defendants' victims did not know that their funds were being funneled through a British Virgin Island corporation to derivatives trading accounts in London. They did not know that Southern Trust was not purchasing or delivering any metals. They did not know that Southern Trust was engaging in illegal, off-exchange retail commodity transactions in violation of

the Commodity Exchange Act. The appropriate restitution is the full amount of customer losses.

C. Civil Monetary Penalty

Section 6c(d)(l) of the Act provides that "the Court shall have jurisdiction to impose ... on any person found in the action to have committed any violation, a civil penalty in the amount of not more than the higher of $100,000 or triple the monetary gain to the person for each violation." 7 U.S.C. §13a-l(d)(l) (2006).[5] Factors to consider in assessing a civil monetary penalty include: the relationship of the violation at issue to the regulatory purposes of the Act and whether or not the violations involved core provisions of the Act; whether scienter was involved; the consequences flowing from the violations ; financial benefits to a defendant; and harm to customers or the market. *In re Grossfeld,* [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) 126,921 at 44,467-8 (CFTC Dec. 10, 1996), *aff'd* 137 F.3d 1300 (11th Cir. 1998). "Conduct that violates core provisions of the Act's regulatory system-such as manipulating prices or defrauding customers should be considered very serious." *JCC, Inc. v. CFTC,* 63 F.3d 1557, 1571 (11th Cir.1995) (quoting *In re Premex,* [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) 124,165 at 34,890-91 (CFTC Feb. 17, 1988)).

This case warrants the imposition of a civil monetary penalty. The violations at issue were egregious, systematic, and calculated. District courts in the Eleventh Circuit have issued civil monetary penalties representing triple the monetary gain to defendants in comparable cases. *See, e.g., Hunter Wise,* 21 F. Supp. 3d at 1353; *CFTC v. International*

---

[5] The Regulations adjust the statutory civil monetary penalty for inflation. *See* 17 C.F.R. § 143.8.

Monetary Metals, Case No. 14-cv-62244-WJZ, p. 16 (August 1, 2016, J. Zloch). Defendants' monetary gain from the transactions at issue in this matter totals $1,125,096.[6] Upon consideration, the Court finds a civil monetary penalty of triple the monetary gain to Defendants would be excessive, given the entry of a permanent injunction against Defendants and the requirement that Defendants make full restitution to their victims. Accordingly, the Court shall impose a civil monetary penalty of $375,032 (one-third the monetary gain to Defendants).

VII. CONCLUSION

The Court finds in favor of Plaintiff U.S. Commodity Futures Trading Commission and against Defendants on Counts II and III of the Complaint. Injunctive relief in the form of restitution, and a civil monetary penalty, are appropriate based on the findings and conclusions in this Order as well as those set out in this Court's April 7, 2016 Order granting the CFTC's Motion for Summary Judgment on Counts I and IV of the Complaint. *See* DE 122. Judgment, including the specific terms of the injunction and the amounts of restitution and civil monetary penalty, will be set out in a separate Final Judgment pursuant Federal Rule of Civil Procedure 58.

---

[6] The sum of the commissions charged in connection with the leveraged metals scheme and the commissions charged in connection with the unregistered futures sales. *See supra* Parts III(E)(1), (2).

DONE AND ORDERED in chambers at the James Lawrence King Federal Justice Building and United States Courthouse in Miami, Florida, this 29th day of August, 2016.

/s/ James Lawrence King

James Lawrence King
United States District Court Judge

APPENDIX C—Eleventh Circuit Panel Opinion, later vacated (January 22, 2018)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-16544

D.C. Docket No. 1:14-cv-22739-JLK

U.S. COMMODITY FUTURES TRADING COMMISSION,

Plaintiff - Appellee,

versus

SOUTHERN TRUST METALS, Inc., LORELEY OVERSEAS CORPORATION, ROBERT ESCOBIO,

Defendants - Appellants.

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

(January 22, 2018)

Before JORDAN, HULL, and GILMAN,* Circuit Judges.

GILMAN, Circuit Judge:

This is a commodities-fraud case. The U.S. Commodity Futures Trading Commission (CFTC) began investigating Southern Trust Metals, Inc., Loreley Overseas Corporation, and Robert Escobio (collectively, the Defendants) in response to an investor's complaint. That complaint also prompted the National Futures Association (NFA)—a private, self-regulatory organization for the futures industry—to open an investigation, which proceeded in tandem with the CFTC's. The NFA's investigation ended in a

* Honorable Ronald Lee Gilman, United States Circuit Judge for the Sixth Circuit, sitting by designation.

settlement. Afterwards, the CFTC filed this lawsuit, alleging that the Defendants violated the Commodities Exchange Act (CEA) when they failed to register as futures commission merchants, transacted the purchase and sale of contracts for the future delivery of a commodity (futures) outside of a registered exchange, and promised to invest customers' money in precious metals (metals) but instead invested the funds in futures. The district court, after a bench trial, entered judgment for the CFTC on all claims.

For the reasons set forth below, we **AFFIRM** the judgment of the district court except as to the restitution award for the group of investors whose losses were associated solely with the registration violations. As to that portion of the restitution award, we **VACATE** the judgment and **REMAND** with instructions to consider other equitable remedies.

I. BACKGROUND

A. Factual background

Escobio is the Chief Executive Officer (CEO) and largest shareholder of the Southern Trust Securities Holding Corporation (Holding Corporation). The Holding Corporation owns Loreley, a British Virgin Islands corporation, which in turn owns Southern Trust, a Florida corporation. Escobio formed Southern Trust to provide commodities investment services, and he serves as its director and CEO.

Southern Trust represented that it was able to facilitate customers' investment in precious metals. Its website and brochure stated that customers "can take physical possession of [their] metals in New York or London." The company's brokers told customers much the same story—that the customers were purchasing metals stored in places like New York,

London, and Hong Kong. At least one of Southern Trust's brokers told customers that Southern Trust charged "storage fees" for the metals. To open a trading account at Southern Trust, customers completed an account-opening form containing language that "[p]hysical precious metals can either be delivered directly to the customer's designated point of delivery or to a recognized depository, which provides insured non-segregated storage." Southern Trust also represented that it could loan customers money to purchase metals.

But Southern Trust did not in fact deal in metals; it dealt only in contracts for the future delivery of metals. Such contracts are a type of derivative investment. Southern Trust, however, was not registered with the CFTC as a futures commission merchant and thus could not trade futures on registered exchanges. So Escobio, through Loreley, engaged two foreign brokerages— Berkeley Futures Limited and Hantec Markets Limited—to handle the transactions.

Escobio opened trading accounts at Berkeley and Hantec in Loreley's name, not in the names of Southern Trust's customers. The accounts were numbered, and Southern Trust maintained records linking its customers to the specific numbered accounts.

Opening these accounts required Escobio to review documents describing Berkeley's and Hantec's investment products. One of Hantec's account-opening documents, the "Product Disclosure Statement," explains that "bullion trading" "operates in the same manner as foreign exchange trading" in that "[w]hat you are actually buying is a [c]ontract" that "derives its value from" a "physical underlying asset" such as "Loco London Gold." That document's

"Glossary" defines "Loco London Gold" to "mean[] not only that the gold is held in London but also that the price quoted is for delivery there." Elsewhere, the document explains that in "bullion trading," "[Hantec] do[es] not deliver the physical underlying assets (i.e. gold or silver) to you, and you have no legal right to it." The Berkeley documents similarly confirm that the account holder intends "to speculate in derivative products." None of the account-opening documents mention making loans for the purchase of metals.

After setting up the trading accounts at Berkeley and Hantec, Southern Trust sent its customers' money to Loreley, which in turn invested the funds, through Berkeley and Hantec, in futures. Escobio received monthly account statements showing that all investments were in futures, not metals. Those statements do not reflect any loans to Southern Trust's customers.

Southern Trust never informed its customers that their money was being transferred to Loreley, Berkeley, or Hantec. Nor did it inform customers who wished to invest in metals (the group comprising the vast majority of its customers) that their money was instead being invested in futures. Southern Trust still charged those customers interest on fictitious loans, which it falsely told them were made in order to facilitate their investment in metals.

After receiving a complaint from one of Southern Trust's customers, the NFA opened an investigation. Around the same time, Escobio asked Berkeley and Hantec about the nature of Loreley's investments. Escobio contended at trial that he did so simply to confirm his understanding that Loreley was investing in metals. The CFTC maintained, however, and the district court ultimately concluded, that Escobio had done so in anticipation of litigation, and that he had

carefully framed his inquiries to elicit responses that would support the defense he later asserted— that he did not know that his customers' money was being invested in futures.

In response to Escobio's inquiry, Hantec's CEO said: "I can confirm that you hold accounts with us that only trade Silver Bullion." Hantec's CEO clarified at his deposition, however, that "Silver Bullion" is industry lingo for contracts for the future delivery of silver and that he could not have intended any other meaning because trading in "physical metals is not something that Hantec does."

A Berkeley employee similarly responded to Escobio's inquiry, writing that "all Loreley accounts with the prefix XILOR were silver bullion accounts" that "only traded in OTC [off-exchange] silver bullion and never traded any futures contracts." But Berkeley's CEO testified at his deposition that Berkeley had never delivered metals to any of its customers, including Loreley, nor stored any metals on their behalf. He also testified that, despite Escobio's contrary assertion, he never told Escobio that the trades Berkeley handled for Loreley would lead to the storage of metals.

None of Southern Trust's investments led to the delivery of metals. Hantec's CEO testified that he told Escobio that Hantec could arrange for the delivery of metals, but that he did so only in response to a hypothetical question. According to Hantec's CEO, Escobio inquired in the abstract about Hantec's ability to arrange delivery: "It's an inquiry from a client. Robert [Escobio] did not tell me, 'I would like to deliver metal.' He asked me, 'If I wanted to deliver a metal, can you arrange it?' and I said, 'Let me go find out.'" Hantec's CEO continued: "I talked to . . . one of my contacts at Standard Chartered bank who gave me

information and I went back to Robert and explained" that Hantec could arrange delivery. This response was memorialized in a letter to Escobio, stating that "any Gold or Silver you purchase from us is held for your account and upon full payment we are able to arrange delivery for you when requested." But the Defendants never asked Hantec to arrange delivery, and no delivery ever occurred.

The NFA's investigation ended in a settlement. Although the NFA's and the CFTC's investigators had cooperated with each other, their investigations were independent. The Defendants' settlement agreement with the NFA therefore does not mention the CFTC or the CFTC's investigation.

As the CFTC's investigation moved forward, the Defendants continued to produce documents in response to its requests. The Defendants' lawyers knew at the time of the NFA settlement that the CFTC might bring its own enforcement action, but they did not suggest to the CFTC or to anyone else that such an action would violate their settlement agreement with the NFA.

B. Procedural background

In July 2014, the CFTC filed its complaint, seeking equitable relief and penalties under the CEA. The complaint alleges that the Defendants engaged in two illegal schemes, which we will refer to as the "unregistered-futures scheme" and the "leveraged-metals scheme."

As to the unregistered-futures scheme, the complaint alleges that, even though the Defendants were not registered as futures commission merchants, they accepted money from customers who wished to invest in futures. Because the Defendants were unregistered, moreover, they could not trade futures

on a registered exchange. They therefore sought to trade indirectly, through intermediaries. To that end, the Defendants funneled the customers' money through Loreley to foreign brokerage firms—Berkeley and Hantec—licensed to trade futures. Those brokerage firms made the actual investments.

As to the leveraged-metals scheme, the complaint alleges that the Defendants accepted money from customers who wished to invest in metals with borrowed money. But instead of issuing loans to those customers and investing their money in metals, the Defendants took the customers' money and invested it in futures. No loans existed, but the Defendants charged loan interest anyway.

At the summary-judgment stage of the case, the parties filed dueling motions. The district court granted the CFTC's motion in part, holding that the Defendants had conducted off-exchange transactions and had failed to register as futures commission merchants. It denied the Defendants' motion in full, rejecting their affirmative defenses that (1) their settlement with the FTA equitably estopped the CFTC from bringing suit, and (2) they actually delivered metals so as to bring their transactions within an exception to the CEA's registration requirements.

The CFTC's fraud claim then proceeded to trial. After a bench trial, the district court found that the Defendants had engaged in fraud, ordered them to pay restitution in the full amount of the customers' losses, and imposed fines. The court also permanently enjoined the Defendants from employment in the commodities-trading industry. On appeal, the Defendants challenge the court's rulings both on summary judgment and at trial.

II. ANALYSIS

A. Standard of review

On an appeal from a judgment in a bench trial, we review the district court's conclusions of law de novo. *HGI Assocs., Inc. v. Wetmore Printing Co.*, 427 F.3d 867, 873 (11th Cir. 2005). We also review de novo the district court's application of law to facts. *United States v. Frank*, 599 F.3d 1221, 1228 (11th Cir. 2010). The district court's findings of fact, on the other hand, are evaluated under the clear-error standard. *HGI*, 427 F.3d at 873. "We will not find clear error unless our review of the record leaves us 'with the definite and firm conviction that a mistake has been committed.'" *Coggin v. Comm'r of Internal Revenue*, 71 F.3d 855, 860 (11th Cir. 1996) (quoting *United States v. Gypsum Co.*, 333 U.S. 364, 395 (1948)). Finally, when the district court has issued a permanent injunction, we review the scope of the injunction under the abuse-of-discretion standard. *Commodity Futures Trading Comm'n v. Wilshire Inv. Mgmt. Corp.*, 531 F.3d 1339, 1343 (11th Cir. 2008).

B. Equitable estoppel does not bar the CFTC's claims.

To start with, the Defendants challenge the district court's summary- judgment ruling that their settlement with the NFA does not preclude the CFTC's claims. The district court held that equitable estoppel does not apply because (1) the Defendants do not dispute that the NFA is a private, nongovernmental organization through which the commodities-trading industry regulates itself; (2) the CFTC was not a party to the settlement; and (3) settlements with private, nongovernmental organizations do not preclude subsequent claims by government regulators.

Although this circuit has not yet addressed whether a settlement between a nongovernmental regulator and a regulated company may preclude subsequent claims by a governmental regulator, the circuits that have addressed the issue have uniformly answered in the negative. *See, e.g.*, *Graham v. S.E.C.*, 222 F.3d 994, 1007 n.25 (D.C. Cir. 2000) ("Of course, even if the NASD had done something to bind itself, that would not have bound the SEC."); *Jones v. S.E.C.*, 115 F.3d 1173, 1179–81 (4th Cir. 1997) ("We have found no statutory, regulatory, or historical reference to support [the] argument that NASD discipline of its members was intended to preclude this disciplinary action by the SEC itself against a securities professional.").

In *Jones*, the Securities and Exchange Commission (SEC) brought administrative claims against a securities trader after the trader settled a claim by the National Association of Securities Dealers (NASD). 115 F.3d at 1180. The Fourth Circuit rejected the trader's argument that the settlement precluded the SEC's claims, reasoning that private and public regulators "represent distinct interests" and "bring two separate vantage points to enforcement efforts—one from the industry itself and the other from the regulator." *Id.*

This outcome accords with the courts' general reluctance to apply principles of equitable estoppel to the government. "The Supreme Court has never established that the doctrine of equitable estoppel can be applied against the government and, in fact, has implied that it can not be." *Tovar-Alvarez v. U.S. Atty. Gen.*, 427 F.3d 1350, 1353–54 (11th Cir. 2005) (citing *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 422 (1990)). "[I]t is well settled that the [g]overnment may not be estopped on the same terms as any other

litigant." *Heckler v. Cmty. Health Servs. of Crawford Cty.*, 467 U.S. 51, 60 (1984).

This circuit has repeatedly opined that, even assuming that equitable estoppel could apply against the government, "it would require a showing of affirmative misconduct on the government's part." *Tovar-Alvarez*, 427 F.3d at 1354; *see also Sanz v. U.S. Sec. Ins. Co.*, 328 F.3d 1314, 1319–20 (11th Cir. 2003) ("[E]ven if estoppel is available against the Government, it is warranted only if affirmative and egregious misconduct by government agents exists.").

The present case is analogous to *Jones*. Here, the uncontradicted evidence shows that the NFA, like the NASD, is a private, nongovernmental organization and that the CFTC was not a party to the Defendants' settlement with the NFA. The record, moreover, contains no evidence of affirmative misconduct by the government. So even if equitable estoppel theoretically could apply to the government, it does not apply here.

A second, independent ground also exists for affirming the district court's denial of summary judgment based on the Defendants' estoppel defense: the record reflects a genuine dispute of material fact regarding the element of reasonable reliance. *See Heckler*, 467 U.S. at 59 (noting that "the party claiming the estoppel must have relied on its adversary's conduct" and that the "reliance must have been reasonable"). Especially noteworthy is the fact that the settlement agreement makes no mention of the CFTC or its investigation, so the Defendants' purported reliance lacks a textual basis. The only language in the agreement that even arguably suggests reliance is a clause providing that the agreement "shall resolve and terminate all

complaints, investigations and audits relating to [the Defendants]."

But interpreting this language to embrace the CFTC's investigation is unreasonable. For one thing, the notion that the NFA would agree to terminate investigations outside its control—and that the Defendants would accept such an unfulfillable obligation as consideration for their own concessions—defies common sense. Further, a literal interpretation of "all complaints, investigations and audits relating to [the Defendants]" would impose on the Defendants obligations that they surely did not intend, such as the obligation to terminate their own routine, internal accounting audits. Such audits would, after all, be "audits relating to [the Defendants]."

The lack of textual support for the Defendants' estoppel argument creates a genuine dispute concerning the *reasonableness* of their reliance. At the same time, other evidence creates a genuine dispute about whether there was any reliance at all. First, the Defendants continued to produce documents in response to requests from the CFTC's investigators after the settlement. This fact tends to negate any reliance because the Defendants presumably would not have continued cooperating with the CFTC if they had truly believed that their settlement with the NFA had terminated the CFTC's investigation. Second, the Defendants' lawyers, while preparing to defend against that action, never suggested to the CFTC or anyone else that such an action might violate the settlement agreement with the NFA. For these reasons, we find no error in the district court's denial of the Defendants' motion for summary judgment based on the affirmative defense of equitable estoppel.

C. Summary judgment in favor of the CFTC on its claims for registration violations was appropriate.

We now turn to the merits of this case. The CEA imposes registration requirements on commodities traders and the exchanges where they trade. Section 6d of the CEA makes it "unlawful for any person to be a futures commission merchant unless . . . such person shall have registered [as such] . . . with the [CFTC]." 7 U.S.C. § 6d(a)(1). The statute also requires that all transactions be "conducted on or subject to the rules of a board of trade which has been designated or registered by the [CFTC]." *Id.* § 6(a). Together, these provisions require that only registered traders handle transactions and that they do so on a registered exchange.

An exception exists, however, for transactions that result in "actual delivery within 28 days." *Id.* § 2(c)(2)(D)(ii)(III)(aa). Actual delivery means "giving real and immediate possession" of the commodity "to the buyer or the buyer's agent." *U.S. Commodity Futures Trading Comm'n v. Hunter Wise Commodities, LLC*, 749 F.3d 967, 979 (11th Cir. 2014) (internal quotation marks omitted). "'Actual' is that which 'exist[s] in fact' and is 'real,' rather than constructive." *Id.* (quoting *Black's Law Dictionary* 494 (9th ed. 2009)).

This exception is an affirmative defense on which the commodities trader bears the burden of proof. *See Schlemmer v. Buffalo, R & P R Co*, 205 U.S. 1, 10 (1907) (explaining that the "general rule of law is[] that a proviso carves special exceptions only out of the body of the act; and those who set up any such exception must establish it"); *see also Corning Glass Works v. Brennan*, 417 U.S. 188, 196–97 (1974) ("[T]he application of an exemption under the Fair Labor

Standards Act is a matter of affirmative defense on which the employer has the burden of proof."); *Mulhall v. Advance Sec., Inc.*, 19 F.3d 586, 590 (11th Cir. 1994) ("[T]he exceptions granted within the EPA constitute affirmative defenses.").

The Defendants concede that they were not registered as futures commission merchants and that the trades at issue did not occur on a registered exchange. But they seek refuge in the exception for transactions resulting in actual delivery.

As set forth in the factual background of this opinion, however, there is no basis in the record for the Defendants' contention that actual delivery ever occurred. The record instead supports the holding of the district court that the Defendants failed to establish their affirmative defense of "actual delivery." *See Hunter Wise Commodities*, 749 F.3d at 979. We therefore find no error in the court's grant of summary judgment in favor of the CFTC on its claims that the Defendants engaged in off-exchange transactions and failed to register as futures commission merchants.

D. The district court did not err in concluding that the Defendants committed fraud under 7 U.S.C. §§ 6b(a) and 9, and under 17 C.F.R. § 180.1.

We next turn to the issue of fraud. For our purposes, 7 U.S.C. § 6b(a), 7 U.S.C. § 9, and 17 C.F.R. § 180.1 are redundant. Section 6b(a) makes it "unlawful . . . for any person . . . in connection with . . . any contract of sale of any commodity . . . for future delivery . . . to cheat or defraud or attempt to cheat or defraud the other person . . . [or] willfully to make . . . any false report or statement . . . [or] willfully to deceive or attempt to deceive the other person by any

means whatsoever." 7 U.S.C. §§ 6b(a). Section 9 of the same chapter is similar, providing that "[i]t shall be unlawful for any person . . . to use . . . in connection with any . . . contract of sale of any commodity . . . for future delivery . . . any manipulative or deceptive device or contrivance." *Id.* § 9(1). Finally, 17 C.F.R. § 180.1(a) declares it "unlawful for any person . . . in connection with any . . . contract of sale of any commodity . . . or contract for future delivery . . . to intentionally or recklessly . . . use . . . any manipulative device, scheme, or artifice to defraud; . . . [or] [m]ake . . . any untrue or misleading statement of a material fact or to omit to state a material fact necessary . . . to make the statements made not untrue or misleading; . . . [or] [e]ngage . . . in any act . . . which operates . . . as a fraud or deceit upon any person."

The CFTC must prove the same three elements to establish liability under each of the above provisions: "(1) the making of a misrepresentation, misleading statement, or a deceptive omission; (2) scienter; and (3) materiality." *Commodity Futures Trading Comm'n v. R.J. Fitzgerald & Co., Inc.*, 310 F.3d 1321, 1328 (11th Cir. 2002). "Unlike a cause of action for fraud under the common law of [t]orts, 'reliance' on the representations is not a requisite element . . . ." *Id.* at n.6.

1. Misrepresentation, misleading statement, or deceptive omission

The district court's factual findings on the "misrepresentation" element reflect no clear error. With the many references to "physical metals," "physical possession," and "storage," Southern Trust's brochure, website, brokers, and account-opening documents collectively represented that the company offered investments in metals. Abundant evidence shows, however, that after accepting the customers'

money, Southern Trust sent the funds to Loreley, which in turn sent them to Berkeley and Hantec for investment in futures. The Defendants do not dispute that the accounts at Berkeley and Hantec were in Loreley's name, not in the names of Southern Trust's customers. Moreover, the evidence shows that Southern Trust never informed its customers that their money was being transferred to Loreley, Berkeley, or Hantec and, consequently, that the customers did not know that those firms held their money.

The district court correctly applied the law to these facts. "Whether a misrepresentation has been made depends on the 'overall message' and the 'common understanding of the information conveyed.'" *R.J. Fitzgerald*, 310 F.3d at 1328 (quoting *Hammond v. Smith Barney Harris Upham & Co.*, Comm. Fut. L. Rep. (CCH) 36,657 & n.12 (CFTC Mar. 1, 1990)). We find the case of *U.S. Commodity Futures Trading Commission v. Hunter Wise Commodities, LLC*, 21 F. Supp. 3d 1317 (S.D. Fla. 2014), squarely on point. The district court in *Hunter Wise* concluded, after a bench trial, that the defendant "misrepresented facts about the precious metals transactions it oversaw" and provided a deceptive "'overall message'" when it "led the retail customers to believe metals were stored on their behalf." *Id.* at 1338 (quoting *R.J. Fitzgerald*, 310 F.3d at 1328). Moreover, the court found that the defendant "failed to inform [the retail customers] that the metals it purchased were on a financed basis, it did not own the metals, and the metals, if there were any at all, were not in the retail customers' names." *Id.*; *see also U.S. Commodity Futures Trading Comm'n v. Hunter Wise Commodities, LLC*, 749 F.3d 967, 980–82 (11th Cir. 2014) (affirming the district court's issuance of a preliminary injunction because the

CFTC presented a prima facie case of fraud under 7 U.S.C. § 6b).

Southern Trust orchestrated a nearly identical scheme in the present case. It misrepresented to customers the fundamental nature of their investments, telling them that they were investing in metals when in fact they were investing in futures, and charging a fictitious storage fee despite the customers having no metals to store. Finally, Southern Trust failed to tell the customers that it passed their money through Loreley to Berkeley and Hantec, with the customers having no knowledge of or relationship with these entities. The district court therefore did not err in concluding that the CFTC satisfied its burden, under the preponderance-of-the-evidence standard, to prove the first element necessary to establish fraud.

2. Scienter

Regarding the element of scienter, Escobio does not dispute that he was the CEO of both Southern Trust and the Holding Corporation, and that he had substantial prior experience in commodities trading. He also does not dispute that he signed the account-opening documents for Loreley's trading accounts at both Berkeley and Hantec. Those documents, as well as the monthly account statements that Escobio received, make clear that Loreley was investing the customers' money in futures, not metals. Further, Escobio knew that the accounts at Hantec and Berkeley bore Loreley's name, not the names of Southern Trust's customers. Based on these facts, the district court did not clearly err in finding that Escobio knew that he was investing his customers' money in futures.

Nor did the district court clearly err in finding that Escobio knew that Berkeley and Hantec did not make any loans to Southern Trust's customers, even though Southern Trust charged its customers interest on the purported loans. Neither the account-opening documents nor the monthly statements from Berkeley or Hantec reflect any loans from those companies. Moreover, the Defendants point to no evidence—other than Escobio's uncorroborated testimony—of any loans from Berkeley or Hantec, and the district court discounted Escobio's testimony on that point, as on others, because it determined that he lacked credibility. This circuit applies a "strong rule of deference" in reviewing a district court's determination of a witness's credibility at a bench trial. *Childrey v. Bennett*, 997 F.2d 830, 834 n.5 (11th Cir. 1993). Given this standard, as well as the numerous conflicts between Escobio's testimony and the documentary evidence, the court was entitled to find that Escobio lacked credibility and to discount his testimony accordingly.

The district court also correctly applied the law to these facts. "[S]cienter is established if Defendant intended to defraud, manipulate, or deceive, or if Defendant's conduct represents an extreme departure from the standards of ordinary care." *Commodity Futures Trading Comm'n v. R.J. Fitzgerald & Co., Inc.*, 310 F.3d 1321, 1328 (11th Cir. 2002). Adapting "federal securities law" to the commodities-fraud context, this circuit has stated that scienter is shown "when Defendant's conduct involves 'highly unreasonable omissions or misrepresentations . . . that present a danger of misleading [customers] which is either known to the Defendant or so obvious that Defendant must have been aware of it.'" *Id.* (quoting

Ziemba v. Cascade Int'l, Inc., 256 F.3d 1194, 1202 (11th Cir. 2001)).

The evidence shows that the Defendants either intended to mislead Southern Trust's customers or made highly unreasonable misrepresentations that posed an obvious danger of misleading them. Escobio's deep involvement in managing the futures-trading accounts at Berkeley and Hantec, as well as his extensive industry experience, support the inference that he knew that he was investing his customers' money in futures. Hantec's CEO, at his deposition, put it this way: "Under no circumstance is [it] plausible" that Escobio believed that he was trading in metals. Escobio also surely knew that Berkeley and Hantec had made no loans to Southern Trust's customers and, therefore, that the customers were being charged interest on loans that did not exist. The district court thus did not err in concluding that the CFTC had proved scienter.

3. Materiality

This brings us to the third and final element—materiality. "A representation or omission is 'material' if a reasonable investor would consider it important in deciding whether to make an investment." *Fitzgerald*, 310 F.3d at 1328–29. The Defendants' briefing on this element addresses only the materiality of their omission that the customers' money would pass through Loreley to Berkeley and Hantec. If that were the only omission or misrepresentation in this case, we might need to examine the materiality element more closely. But other misrepresentations found by the district court easily qualify as material. The Defendants, for example, represented that they were investing customers' money in metals when in fact they were investing it in futures. Moreover, the Defendants

represented that customers owed interest on loans used to purchase metals, but the loans did not exist. A reasonable investor would consider each of these misrepresentations important in deciding whether to invest. Accordingly, the district court did not err in concluding that these misrepresentations were material. We therefore agree with the district court's overall conclusion that fraud was established under 7 U.S.C. §§ 6b(a) and 9, and under 17 C.F.R. § 180.1.

E. The district court did not err in permanently enjoining the Defendants from employment in the commodities-trading industry.

Turning now to the propriety of the injunction issued against the Defendants, we note that a district court's issuance of an injunction is reviewed under the abuse-of-discretion standard. *Commodity Futures Trading Comm'n v. Wilshire Inv. Mgmt. Corp.*, 531 F.3d 1339, 1347 (11th Cir. 2008) (applying this standard to a permanent injunction issued under the CEA). "[S]o long as [the district court's] decision does not amount to a clear error of judgment[,] we will not reverse even if we would have gone the other way had the choice been ours to make." *S.E.C. v. ETS Payphones, Inc.*, 408 F.3d 727, 733 (11th Cir. 2005).

"[U]pon a proper showing," the CEA allows a district court to grant "a permanent or temporary injunction." 7 U.S.C. § 13a-1(b). "'[T]he ultimate test [for an injunction] is whether the defendant's past conduct indicates that there is a reasonable likelihood of further violations in the future.'" *Wilshire*, 531 F.3d at 1346 (quoting *SEC v. Caterinicchia*, 613 F.2d 102, 105 (5th Cir. 1980)). This test entails weighing the following six factors:

> the egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities for future violations.

SEC v. Carriba Air, Inc., 681 F.2d 1318, 1322 (11th Cir. 1982). A court need not make a finding on every factor. *See Wilshire*, 531 F.3d at 1346–47 (holding that a district court that considered only three of the six factors did not abuse its discretion in issuing an injunction).

Escobio argues that the injunction should be vacated because the district court, in weighing the *Carriba Air* factors, erred in not concluding that his cooperation with the NFA's investigation resolved the last three factors in his favor. But the court had discretion in how to interpret Escobio's cooperation with the NFA. This discretion would have allowed the court, for example, to interpret Escobio's cooperation not as contrition, but as a self-interested effort to strike a favorable deal with the NFA and, perhaps, to avoid criminal prosecution. Escobio's denial of wrongdoing at his deposition, at trial, and throughout the NFA's and the CFTC's investigations further belies his acceptance of responsibility. The same is true of his attempt to deflect blame onto Berkeley and Hantec, which he claims duped him into trading futures. In sum, the court applied the correct legal standard, and its factual findings contain no clear error. We therefore find no fault in its issuance of a permanent injunction.

F. Restitution is proper only for losses sustained in the leveraged-metals scheme, not for losses sustained in the unregistered-futures scheme.

This brings us to the final issue in this case—restitution. The district court awarded restitution for losses arising from both schemes. First, it awarded $1,543,892 for losses sustained in the leveraged-metals scheme, in which the Defendants accepted customers' money for investment in metals but instead invested the funds in futures. Second, the court awarded $559,725 for losses sustained in the unregistered-futures scheme, in which the Defendants accepted customers' money for investment in futures—and actually invested the funds in futures through Loreley's accounts at Berkeley and Hantec—but failed to register as futures commission merchants or to conduct the transactions on a registered exchange. The Defendants challenge both awards, arguing that the CFTC failed to prove, as required by the CEA, that the Defendants' violations of the CEA proximately caused their customers' losses.

1. The district court relied on a definition of proximate cause subsequently rejected by the Supreme Court.

Under the CEA, a "court may impose . . . on any person found in the action to have committed any violation[] equitable remedies including . . . restitution to persons who have sustained losses proximately caused by such violation (in the amount of such losses)." 7 U.S.C. § 13a-1(d)(3). This statutory language, by its terms, permits restitution only for losses proximately caused by a violation.

In its restitution analysis, the district court concluded that the "Defendants' violations proximately caused their customers' losses" because those losses "were a reasonably foreseeable result of the Defendants' violations." The court derived this foreseeability-based formulation of proximate cause from a recent decision of this court holding that, for proximate cause to exist under the Fair Housing Act (FHA), "[t]he defendant must have been reasonably able to foresee the kind of harm that was actually suffered." *See City of Miami v. Bank of Am. Corp.*, 800 F.3d 1262, 1282 (11th Cir. 2015).

That decision, however, was subsequently reversed by the Supreme Court in *Bank of America Corp. v. City of Miami*, 137 S. Ct. 1296 (2017). The Court concluded that, "[i]n the context of the FHA, foreseeability alone does not ensure the close connection that proximate cause requires" between the complained-of conduct and the alleged harm. *Id.* at 1306. As the Court explained, the FHA incorporates the concept of proximate cause developed at common law, where "directness principles" apply. *Id.* Proximate cause under the FHA thus "requires 'some direct relation between the injury asserted and the injurious conduct alleged.'" *Id.* (quoting *Holmes v. Sec. Inv'r Protection Corp.*, 503 U.S. 258, 268 (1992)). Such a "direct relation" usually does not exist "beyond the first step" in a causal chain. *Id.* (quoting *Hemi Group, LLC v. City of New York, N.Y.*, 559 U.S. 1, 10 (2010)).

We have found no circuit court opinion examining proximate cause under the CEA, but the statute surely demands more than foreseeability alone. Section 13a-1(d)(3) of the CEA, like the FHA provision examined in *Bank of America*, "sounds basically in tort" because it defines a new legal duty and authorizes the courts to award compensation for

injuries caused by a defendant's wrongful breach. *See Curtis v. Loether*, 415 U.S. 189, 195 (1974) (explaining why a damages action under the Civil Rights Act of 1964 "is analogous to a number of tort actions recognized at common law").

Congress, moreover, has given no indication, either in the CEA's text or otherwise, that it intended to depart from the common-law conception of proximate cause. *See Bank of America*, 137 S. Ct. at 1305 ("We assume Congress 'is familiar with the common-law rule and does not mean to displace it *sub silentio*' in federal causes of action." (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1390 (2014))). We thus conclude that the common-law rules governing proximate cause apply here. Those rules include the notion that proximate cause encompasses cause in fact, requiring proof of "but-for" causation. W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 30 (5th ed. 1984).

2. The district court erred in finding that the registration violation alone proximately caused any loss.

With regard to the unregistered-futures scheme, the district court's finding of proximate cause rested on the premise that the Defendants' "business was illegal from the outset" and that the Defendants "never should have accepted customer funds for the purpose of trading futures transactions without first registering as a futures commission merchant with the CFTC." The court reasoned that because the transactions were illegal, the losses were foreseeable. But such reasoning mistakes correlation for causation. As a general matter, losing money is a foreseeable result of investing with an unregistered trader, but this is not because a trader's failure to register will itself cause any loss. More likely, any loss

will result from some other factor, such as the trader's incompetence or dishonesty, which the failure to register correlates with but does not cause. The intrinsic qualities of the trader—not his or her failure to register—would be the likely cause of the loss, to say nothing of market fluctuations.

Consider the analogous circumstance of a client being represented by an unlicensed lawyer. The lawyer's lack of licensure might indicate incompetence or a lack of integrity, but normally it will not in and of itself cause a client's loss in court. Indeed, a client might well prevail in court despite the lawyer's status. Or, if there is a loss, the loss could flow from factors wholly unrelated to the lawyer's status, such as an unfavorable precedent, a judicial error, or a jury's caprice.

A recent decision from this court illustrates the point that a fraudster's failure to observe registration requirements does not necessarily cause his victim's loss. In *Alvarez v. United States*, 862 F.3d 1297, 1300 (11th Cir. 2017), a group of federal employees sued the defendant for negligence per se after he sold them fraudulent, unregistered securities. The court rejected the plaintiffs' argument that the seller's failure to register the securities had caused the losses, concluding instead that the losses had occurred because the securities were fraudulent. This point was made by the *Alvarez* court in the following passage:

> As the district court correctly explained, "had the FEBG Bond Fund been legitimate, the fact of its being unregistered would have had no effect on plaintiffs. And conversely, if McLeod had registered the fraudulent securities (lying about them to do so since they didn't exist), plaintiffs would still have

> suffered the same harm. Plaintiffs' injuries flow from the securities and McLeod's representations which underlay them being fraudulent, not because they were unregistered."

Id. at 1302 (quoting the district court's opinion).

The same logic applies here. In the unregistered-futures scheme, the Defendants invested their customers' money in futures through Loreley's accounts at Berkeley and Hantec. The customers who lost money in this scheme intended to invest in futures, and the CFTC does not dispute that the Defendants in fact facilitated the investments that those customers wished to make. According to the district court, the Defendants' only CEA violations in the unregistered-futures scheme were their failure to register as futures commission traders and their failure to disclose the roles of Berkeley, Hantec, and Loreley in making the investments.

But the record contains no evidence that the customers who lost money in the unregistered-futures scheme did so because of these violations. As in *Alvarez*, there has been no showing that the registration violations caused the losses. Nor has the CFTC pointed to any evidence that the losses flowed from the Defendants' omissions regarding the roles of Loreley, Berkeley, or Hantec. The CFTC has not shown, for instance, that the customers who intended to invest in futures would have refrained from doing so if they had known of Loreley's, Berkeley's, or Hantec's involvement. Nor has the CFTC shown that those entities' involvement delayed the execution of the trades or otherwise caused the investors to receive anything less than what they had bargained for.

Because the CFTC did not prove that the Defendants' violations in the unregistered-futures scheme caused any loss, we vacate the restitution award related to that scheme and remand the issue to the district court with instructions to consider whether any other equitable remedy is appropriate. We particularly note the statutory subsection under which the court may order the disgorgement of gains, in appropriate circumstances, without regard to proximate cause. *See* 7 U.S.C. § 13a-1(d)(3) ("[T]he court may impose . . . on any person found . . . to have committed any violation[] equitable remedies including . . . disgorgement of gains received *in connection with* such violation." (emphasis added)). The district court may, but need not, consider on remand whether disgorgement is appropriate in the present case.

3. Sufficient evidence supports the award of restitution for losses sustained in the leveraged-metals scheme.

The district court did not err, however, in awarding restitution for losses in the leveraged-metals scheme, in which the Defendants promised to invest the customers' money in metals but instead invested the funds in futures. To constitute a proximate cause, the fraud must stand in "direct relation" to the loss. *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1306 (2017). This does not mean that the fraud must be the "sole and exclusive cause" of the loss; it means only that the fraud must be a "substantial" or "significant contributing cause." *FindWhat Investor Group v. FindWhat.com*, 658 F.3d 1282, 1309 (11th Cir. 2011) (citing *Robbins v. Koger Properties, Inc.*, 116 F.3d 1441, 1447 (11th Cir. 1997)). The courts' "'general tendency'" when considering

whether a but-for cause qualifies as a proximate cause is "'not to go beyond the first step'" in the causal chain. *Bank of Am. Corp.*, 137 S. Ct. at 1306 (quoting *Hemi Group, LLC v. City of New York, N.Y.*, 559 U.S. 1, 10 (2010)).

In the present case, the fraud is directly related to the losses because the Defendants took their customers' money and, contrary to the customers' instructions, invested the funds in futures. But the customers wished to invest in metals, not futures, so there is no question that the Defendants' unilateral act of investing the funds in futures was a "substantial" or "significant contributing" cause of the loss. Whether additional causes exist is irrelevant. Moreover, the Defendants' act of investing the customers' funds in futures is inextricable from the fraud because that act rendered false the Defendants' representations about the nature of the investments being made and directly led to the investors' losses when market conditions deteriorated.

The Defendants argue, however, that market conditions should be viewed as the sole proximate cause of the losses on the theory that the drop in metals prices would have caused the same losses even if their customers' money had been invested in metals. But this argument ignores crucial differences between metals and futures. For one thing, futures involve an element of leverage, which magnifies gains and losses:

> When you speculate in the futures markets, you have the ability to purchase contracts on margin. This means you can control a large amount of metal at a fraction of its value. Leverage can amplify returns and risk. Small price swings in either direction could mean significant gains, or you could lose

> significantly more than you initially invested.

U.S. Commodity Futures Trading Comm'n, *The Risks of Buying Gold, Silver & Platinum*, http://www.cftc.gov/idc/groups/public/@cpfraudawarenessandprotection/documents/file/cppreciousmetalsfraudbrochure.pdf; *see also* Thomas A. Russo & Marlisa Vinciguerra, *Financial Innovation and Uncertain Regulation: Selected Issues Regarding New Product Development*, 69 Tex. L. Rev. 1431, 1488 (1991) (explaining that "futures trading is inherently risky and involves the possibility of losses greater than a customer's investments of funds"). Accordingly, the argument that the Defendants' customers would have experienced losses of the same magnitude if their money had been invested in metals is flawed.

Another crucial difference between metals and futures is that metals can be held indefinitely, whereas futures almost always have expiration dates. *See Commodity Futures Trading Comm'n v. Zelener*, 373 F.3d 861, 867 (7th Cir. 2004) (noting that "normal futures contracts have defined expiration or delivery dates"); *see also* Patricia A. O'Hara, *The Elusive Concept of Control in Churning Claims Under Federal Securities and Commodities Law*, 75 Geo. L.J. 1875, 1894 n.55 (1987) ("[C]ommodity futures are by definition a short-term investment with a specified delivery date, generally not too removed in time. The trader must either close his position prior to the delivery date or perform the contract.").

When metals prices fall, a metals investor can avoid losses by not selling the metals until prices (hopefully) recover. But a futures investor makes or loses money immediately when prices change. *See* Roberta Romano, *A Thumbnail Sketch of Derivative Securities and Their Regulation*, 55 Md. L. Rev. 1, 18

(1996) (explaining that "holders of futures contracts recognize gains and losses immediately because of the daily settlement process"); *see also id.* ("Margin accounts are adjusted daily in response to changes in the value of positions, a process that is called 'marking to market.' If a customer's position experiences a gain, his account balance is increased and he may withdraw the profit from the account. If he experiences a loss, his account balance is reduced."). This means that a futures investor cannot "ride out" unfavorable market movements in the same way as a metals investor.

Given the inherent differences between metals and futures, the Defendants' argument that conditions in the metals market were the sole proximate cause of their customers' losses is untenable. If the Defendants had placed their customers' money in a slot machine instead of in the metals market, surely they could not escape liability by pointing to the unpredictable odds in a casino as the sole proximate cause for the losses. Crediting the Defendants' argument would create perverse incentives for commodities traders. *See United States v. Turk*, 626 F.3d 743, 750 (2d Cir. 2010) (rejecting a similar argument because it would "encourage would-be fraudsters to roll the dice on the chips of others, assuming all of the upside benefit and little of the downside risk"). We therefore find no error in the district court's restitution award for losses sustained in the leveraged-metals scheme.

III. CONCLUSION

For all of the reasons set forth above, we **AFFIRM** the judgment of the district court except as to the restitution award for the group of investors whose losses were associated solely with the registration violations. As to that portion of the restitution award, we **VACATE** the judgment and

REMAND with instructions to consider other equitable remedies.

APPENDIX D—Eleventh Circuit Order Denying Petition for Rehearing and Rehearing En Banc (October 18, 2018)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-16544

D.C. Docket No. 1:14-cv-22739-JLK

U.S. COMMODITY FUTURES TRADING COMMISSION,

Plaintiff - Appellee,

versus

SOUTHERN TRUST METALS, Inc., LORELEY OVERSEAS CORPORATION, ROBERT ESCOBIO,

Defendants - Appellants.

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

ON PETITION(S) FOR REHEARING AND PETITIONS FOR REHEARING EN BANC

BEFORE: JORDAN, HULL, and GILMAN,* Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Adalberto Jordan

UNITED STATES CIRCUIT JUDGE

*Honorable Ronald Lee Gilman, United States Circuit Judge for the Sixth Circuit, sitting by designation.

APPENDIX E—District Court Final Judgment (August 29, 2016)

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 1:14-cv-22739-JLK

U.S. COMMODITY FUTURES TRADING COMMISSION,

Plaintiff,

v.

SOUTHERN TRUST METALS, INC., LORELEY OVERSEAS CORPORATION, and ROBERT ESCOBIO,

Defendants.

FINAL JUDGMENT

Final judgment is hereby **ENTERED** in favor of Plaintiff United States Commodity Futures Trading Commission ("CFTC") and against Defendants Southern Trust Metals, Inc., Loreley Overseas Corporation, and Robert Escobio (collectively "Defendants") on Counts 2 and 3 of the Complaint. Judgment as to liability against these Defendants on Counts 1 and 4 of the Complaint was previously entered by this Court on April 7, 2016. *See* DE 122.

It is hereby **ORDERED AND ADJUDGED** as follows:

I. PERMANENT INJUNCTION

Based on and in connection with this Court's Findings of Fact and Conclusions of Law (DE I 66), the Court's April 7, 2016 Order Granting Summary Judgment to Plaintiff on Counts I and 4 of the Complaint (DE 122), and pursuant to Section 6c of the Commodity Exchange Act, as amended, 7 U.S.C. §

13a-l, Defendants are permanently enjoined and prohibited from directly or indirectly:

a. trading on or subject to the rules of any registered entity, as that term is defined in Section la of the Act, 7 U.S.C. § la;

b. controlling or directing the trading for or on behalf of any other person or entity, whether by power of attorney or otherwise, in any account involving commodity interests;

c. soliciting, receiving, or accepting any funds from any person for the purpose of purchasing or selling any commodity interests;

d. applying for registration or claiming exemption from registration with the Commission in any capacity, and engaging in any activity requiring such registration or exemption from registration with the Commission, except as provided for in Regulation 4.14(a)(9), 17 C.F.R. § 4.14(a)(9); and

e. acting as a principal (as that term is defined in Regulation 3.1(a), 17 C.F.R. § 3.1(a), agent or any other officer or employee of any person (as that term is defined in Section la of the Act, 7 U.S.C. § la), or entity registered, exempted from registration or required to be registered with the Commission, except as provided for in Regulation 4.14(a)(9), 17 C.F.R. § 4.14(a)(9).

II. RESTITUTION AND CIVIL MONETARY PENALTY

A. Restitution

1. Defendants shall pay restitution in the total amount of $1,543,892 in connection with the leveraged precious metals transactions that are the subject of Counts 1, 2 and 3 of the CFTC's Complaint. Defendants are jointly and severally liable for restitution to any person who engaged in and lost money in connection with leveraged precious metals transactions with Southern Trust Metals, Inc. between July 16, 2011 and April 31, 2013, in the amount of that person's Joss.

2. Defendants Southern Trust Metals, Inc. and Robert Escobio shall pay restitution in the amount of $559,725 in connection with the futures and options transactions that are the subject of Count 4 of the CFTC's Complaint. Defendants Southern Trust Metals, Inc. and Robert Escobio are jointly and severally liable for restitution to any person who engaged in and lost money in connection with futures and options transactions conducted through Southern Trust Metals, Inc. The restitution amounts described in this Section are referred to in the remainder of this Order as the " Restitution Obligation."

3. Defendants shall pay the Restitution Obligation, plus post-judgment interest, within ten (10) days of the date of the entry of this Order. If the Restitution Obligation is not paid in full within ten (10) days of the date of entry of this Order, then post-judgment interest shall accrue on the Restitution Obligation beginning on the date of entry of this Order and shall be determined by using the Treasury Bill rate prevailing on the date of entry of this Order pursuant to 28 U.S.C. § 1961 (2006).

4. To effect payment of the Restitution Obligation and the distribution of any restitution payments to Defendants' customers, the Court appoints the National Futures Association ("NFA") as Monitor ("Monitor"). The Monitor shall collect restitution payments from Defendants and make distributions as set forth below. Because the Monitor is acting as an officer of this Court in performing these services, the NFA shall not be liable for any action or inaction arising from NFA's appointment as Monitor, other than actions involving fraud.

5. Defendants shall make Restitution Obligation payments under this Order to the Monitor in the name "Southern Trust Metals Restitution Fund" and shall send such Restitution Obligation payments by electronic funds transfer, or by U.S. postal money order, certified check, bank cashier's, or bank money order, to the Monitor at the Office of Administration, National Futures Association, 300 South Riverside Plaza, Suite 1800, Chicago, Illinois 60606 under cover letter that identifies the paying Defendants and the name and docket number of this proceeding. The paying Defendants shall simultaneously transmit copies of the cover letter and the form of payment to the Chief Financial Officer, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, D.C. 20581.

6. The Monitor shall oversee the Restitution Obligation and shall have the discretion to determine the manner of distribution of such funds in an equitable fashion to the Defendants' customers identified by the Commission or may defer distribution until such time as the Monitor deems appropriate. In the event that the amount of Restitution Obligation payments to the Monitor are of

a *de minimis* nature such that the Monitor determines that the administrative cost of making a distribution to eligible customers is impractical, the Monitor may, in its discretion, treat such restitution payments as civil monetary penalty payments, which the Monitor shall forward to the Commission following the instructions for civil monetary penalty payments set forth in Part B. below.

7. Defendants shall cooperate with the Monitor as appropriate to provide such information as the Monitor deems necessary and appropriate to identify the customers to whom the Monitor, in its sole discretion, may determine to include in any plan for distribution of any Restitution Obligation payments. Defendants shall execute any documents necessary to release funds that they have in any repository, bank, investment or other financial institution, wherever located, in order to make partial or total payment toward the Restitution Obligation.

8. Until discharged by the Court, the Monitor shall provide the Commission at the beginning of each calendar year with a report detailing the disbursement of funds to Defendants' customers during the previous year. The Monitor shall transmit this report under a cover letter that identifies the name and docket number of this proceeding to the Chief Financial Officer, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, D.C. 20581.

9. The amounts payable to each customer shall not limit the ability of any customer to prove that a greater amount is owed by Defendants or any other person or entity, and nothing herein shall be construed in any way to limit or abridge the rights of any customer that exist under state or common law.

10. Pursuant to Rule 71 of the Federal Rules of Civil Procedure, each customer of Defendants who suffered a loss is explicitly made an intended third-party beneficiary of this Order and may seek to enforce obedience of this Order to obtain satisfaction of any portion of the restitution that has not been paid by Defendants to ensure continued compliance with any provision of this Order and to hold Defendants in contempt for any violations of any provision of this Order.

11. To the extent that any funds accrue to the U.S. Treasury for satisfaction of Defendants' Restitution Obligation, such funds shall be transferred to the Monitor for disbursement in accordance with the procedures set forth above.

B. Civil Monetary Penalty

1. Defendants Southern Trust Metals, Inc., Loreley Overseas Corporation, and Robert Escobio are jointly and severally liable for and shall pay a civil monetary penalty of $254,919.66 (one-third of the total monetary gain to Defendants of$764,759) in connection with their violations of the Commodity Exchange Act described in Counts 1, 2 and 3 of the Complaint, and as further described in this Court's Order of Summary Judgment, and this Court's Findings of Fact and Conclusions of Law.

2. Defendants Southern Trust Metals, Inc. and Robert Escobio are jointly and severally liable for and shall pay a civil monetary penalty of $120,112.33 (one-third of the total monetary gain to Defendants of $360,337) Defendant Southern Trust Metals, Inc. charged its' futures customers) in connection with the violations of the Commodity Exchange Act described in Count 4 of the Complaint and as further described in this Court's Order of Summary Judgment, and this

Court's Findings of Fact and Conclusions of Law. The civil monetary penalty obligations described in this section B. are referred to in this Order as the "CMP Obligation."

3. Defendants shall pay their CMP Obligation, plus post-judgment interest, within ten (10) days of the date of the entry of this Order. If the CMP Obligation is not paid in full within ten (10) days of the date of entry of this Order, then post-judgment interest shall accrue on the CMP Obligation beginning on the date of entry of this Order and shall be determined by using the Treasury Bill rate prevailing on the date of entry of this Order pursuant to 28 U.S.C. § 1961 (2006).

4. Defendants shall pay their CMP Obligation by electronic funds transfer, U.S. postal money order, certified check, bank cashier's check, or bank money order. If payment is to be made other than by electronic funds transfer, then the payment shall be made payable to the Commodity Futures Trading Commission and sent to the address below:

> Commodity Futures Trading Commission
> Division of Enforcement
> ATTN: Accounts Receivables-AMZ 340 E-mail Box: 9-AMC-AMZ-AR-CFTC DOTIF AA/MMAC
> 6500 S. MacArthur Blvd. Oklahoma City, OK 73169
> Telephone: (405) 954-5644

If payment by electronic funds transfer is chosen, the paying Defendant shall contact Nikki Gibson or her successor at the address above to receive payment instructions and shall fully comply with those instructions. Defendants shall accompany payment of the CMP Obligation with a cover letter that identifies

Defendants and the name and docket number of this proceeding. Defendants shall simultaneously transmit copies of the cover letter and the form of payment to the Chief Financial Officer, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, D.C. 20581.

5. Partial Satisfaction: Any acceptance by the Commission or the Monitor of any partial payment of Defendants' Restitution Obligation or CMP Obligation shall not be deemed a waiver of Defendants' obligations to make further payments pursuant to this Order, or a waiver of the Commission's right to seek to compel payment of any remaining balance.

III. MISCELLANEOUS PROVISIONS

1. Notice: All notices required to be given by any provision in this Order shall be sent email and by certified mail, return receipt requested, as follows:

Notice to Commission:

Rosemary Hollinger (RHollinger@cftc.gov)
Deputy Director
U.S. Commodity Futures Trading Commission
525 W. Monroe, Suite 1100
Chicago, Illinois 60661

Notice to Defendant Robert Escobio:

Peter Homer (PHomer@homerbonner.com)
Homer Bonner
1200 Four Seasons Tower
1441 Brickell Avenue
Miami, FL 33131

Notice to Defendants Southern Trust Metals, Inc. and Loreley Overseas Corp.:

Jose Ortiz (jortiz@herronortiz.com)
Heron Ortiz
255 Alhambra Circle, Suite 1060
Coral Gables, FL 33134

Notice to the Monitor:

Daniel Driscoll
Executive Vice President, COO National Futures Association
300 South Riverside Plaza, Suite 1800
Chicago, Illinois 60606-3447

All such notices to the Commission shall reference the name and docket number of this action.

2. Continuing Jurisdiction of this Court: This Court shall retain jurisdiction of this action to ensure compliance with this Order and for all other purposes related to this action.

IV. CONCLUSION

There being no just reason for delay, the Clerk of the Court is hereby directed to enter this Order of Permanent Injunction, Civil Monetary Penalty, and Other Equitable Relief against Defendants as set forth in this Order.

DONE AND ORDERED in chambers at the James Lawrence King Federal Justice Building and United States Courthouse in Miami, Florida, this 29th day of August 2016.

/s/ James Lawrence King
James Lawrence King
United States District Court Judge

APPENDIX F—Defendants' Rule 28(j) notice of supplemental authority

HOMER BONNER JACOBS
1200 Four Seasons Tower
1441 Brickell Avenue
Miami Florida 33131

October 27, 2017

VIA CM/ECF DOCUMENT FILING SYSTEM
David J. Smith, Clerk of Court
United States Court of Appeals
for the Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Re: *U.S. Commodity Futures Trading v. Robert Escobio, et al*; Appeal No. 16-16544-DD; FRAP 28(j) Notice of Supplemental Authority

Dear Clerk of Court:

Saad v. SEC, 15-1430, 2017 WL 4557511 (D.C. Cir. Oct. 13, 2017), supports Robert Escobio's lifetime ban arguments at Replacement Brief 30-34 and Reply Brief 18-20. Mr. Escobio asserts the district court failed to consider controlling factors in permanently banning him from the commodities industry. This Court established those factors in SEC actions. See Briefs. *Saad* raises a new legal argument in connection with SEC reviews of industry bans stemming from *Kokesh v. SEC*, 137 S. Ct. 1635 (2017).

Kokesh holds equitable disgorgement remedies are penalties because "sanctions imposed for the purpose of deterring infractions of public laws are

inherently punitive…. A civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment." *Id*. at 1645. *Saad* remands a lifetime ban ruling to the SEC to consider *Kokesh*, and a concurring opinion persuasively explains why. Security industry injunctions can only be remedial and not punitive. *Saad*, 2017 WL 4557511 at *6 (Kavanaugh, J., concurring) (citing Wright v. SEC, 112 F.2d 89, 94 (2d Cir. 1940)). Judge Kavanaugh reasons that, like disgorgement paid to the government in *Kokesh*, "expulsion or suspension of a securities broker does not provide anything to the victims to make them whole or to remedy their losses." *Id*. at *7.

The same logic applies to CFTC injunctions. Like those in the securities industry, injunctions serve "not as a penalty but as a means of protecting investors." *Compare Wright*, 112 F.2d at 94 (stating the purpose of expulsion orders under §19(a)(3) of the Securities Exchange Act) *with* 7 U.S.C. § 13a-1(a) (allowing the CFTC to enjoin "any act or practice constituting a violation of any provision of this chapter or any rule, regulation") (emphasis added). The permanent expulsion of Mr. Escobio does nothing for ST Metals' customers but is pure punishment. It is not even limited to a "violation," as § 13a-1(a) requires, but bars legal trading in registered commodities. Such a ban is not authorized. For this additional reason, the Court should reverse the permanent ban.

Very truly yours,

/s/ Christopher J. King

APPENDIX G—7 U.S.C. § 13a-1

§ 13a-1. Enjoining or restraining violations

(a) Action to enjoin or restrain violations

Whenever it shall appear to the Commission that any registered entity or other person has engaged, is engaging, or is about to engage in any act or practice constituting a violation of any provision of this chapter or any rule, regulation, or order thereunder, or is restraining trading in any commodity for future delivery or any swap, the Commission may bring an action in the proper district court of the United States or the proper United States court of any territory or other place subject to the jurisdiction of the United States, to enjoin such act or practice, or to enforce compliance with this chapter, or any rule, regulation or order thereunder, and said courts shall have jurisdiction to entertain such actions: *Provided*, That no restraining order (other than a restraining order which prohibits any person from destroying, altering or disposing of, or refusing to permit authorized representatives of the Commission to inspect, when and as requested, any books and records or other documents or which prohibits any person from withdrawing, transferring, removing, dissipating, or disposing of any funds, assets, or other property, and other than an order appointing a temporary receiver to administer such restraining order and to perform such other duties as the court may consider appropriate) or injunction for violation of the provisions of this chapter shall be issued ex parte by said court.

(b) Injunction or restraining order

Upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond.

(c) Writs or other orders

Upon application of the Commission, the district courts of the United States and the United States courts of any territory or other place subject to the jurisdiction of the United States shall also have jurisdiction to issue writs of mandamus, or orders affording like relief, commanding any person to comply with the provisions of this chapter or any rule, regulation, or order of the Commission thereunder, including the requirement that such person take such action as is necessary to remove the danger of violation of this chapter or any such rule, regulation, or order: *Provided*, That no such writ of mandamus, or order affording like relief, shall be issued ex parte.

(d) Civil penalties

(1) In general

In any action brought under this section, the Commission may seek and the court shall have jurisdiction to impose, on a proper showing, on any person found in the action to have committed any violation--

(A) a civil penalty in the amount of not more than the greater of $100,000 or triple the monetary gain to the person for each violation; or

(B) in any case of manipulation or attempted manipulation in violation of section 9, 15, 13b, or 13(a)(2) of this title, a civil penalty in the amount of not more than the greater of $1,000,000 or triple the monetary gain to the person for each violation.

(2) If a person on whom such a penalty is imposed fails to pay the penalty within the time prescribed in the court's order, the Commission may refer the matter to the Attorney General who shall recover the penalty by action in the appropriate United States district court.

(3) Equitable remedies

In any action brought under this section, the Commission may seek, and the court may impose, on a proper showing, on any person found in the action to have committed any violation, equitable remedies including--

(A) restitution to persons who have sustained losses proximately caused by such violation (in the amount of such losses); and

(B) disgorgement of gains received in connection with such violation.

(e) Venue and process

Any action under this section may be brought in the district wherein the defendant is found or is an inhabitant or transacts business or in the district where the act or practice occurred, is occurring, or is about to occur, and process in such cases may be served in any district in which the defendant is an inhabitant or wherever the defendant may be found.

(f) Action by Attorney General

In lieu of bringing actions itself pursuant to this section, the Commission may request the Attorney General to bring the action.

(g) Notice to Attorney General of action brought by Commission

Where the Commission elects to bring the action, it shall inform the Attorney General of such suit and advise him of subsequent developments.

(h) Notice of investigations and enforcement actions

The Commission shall provide the Securities and Exchange Commission with notice of the commencement of any proceeding and a copy of any order entered by the Commission against any futures commission merchant or introducing broker registered pursuant to section 6f(a)(2) of this title, any floor broker or floor trader exempt from registration pursuant to section 6f(a)(3) of this title, any associated person exempt from registration pursuant to section 6k(6) of this title, or any board of trade designated as a contract market pursuant to section 7b-1 of this title.