No. 22_____

In the Supreme Court of the United States

BRIGHT HARRY and RONALD S. DRAPER,
Petitioners,

v.

KCG AMERICAS LLC, ET AL,
Respondents.

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

Appendices A, B and C

with their Sub-Appendices

APPENDIX A

(District Court Case Number 4:20-cv-07352-JST)
(District Court Case Number 4:20-cv-07352-HSG)
(9th Circuit Court Case Number 21-16258)

Appendix A Table of Contents and its sub-Appendices

APPENDIX A1

(For 9th Circuit Case Number 21-16258)

Unpublished Memorandum Decision of the U.S. Court of Appeals for the 9th Circuit, *Harry et al vs. KCG Americas LLC et al* Filed March 24, 2022

NOT FOR PUBLICATION

FILED

MAR 24 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BRIGHT HARRY; RONALD STEPHEN DRAPER Plaintiffs-Appellants, v. KCG AMERICAS LLC; et al., Defendants-Appellees.	No. 21-16258 D.C. No. 4:20-cv-07352-HSG MEMORANDUM*

Appeal from the United States District Court for
the Northern District of California
Haywood S. Gilliam, Jr., District Judge, Presiding

Submitted March 16, 2022**

Before: SILVERMAN, MILLER, and BUMATAY, Circuit Judges.

Bright Harry and Ronald Stephen Draper appeal pro se from the district court's judgment dismissing their action, declaring them vexatious litigants, and entering a pre-filing review order against them. We have jurisdiction under 28 U.S.C. § 1291. We review de novo a dismissal under Federal Rule of Civil

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Procedure 12(b)(6). *Hebbe v. Pliler*, 627 F.3d 338, 341 (9th Cir. 2010). We affirm.

The district court properly dismissed Harry's claims as barred by issue preclusion and Draper's claims as barred by claim preclusion because the issues raised by Harry and Draper were adjudicated in a previous litigation against the same parties (or those in privity to the parties). *See Janjua v. Neufeld*, 933 F.3d 1061, 1065 (9th Cir. 2019) (setting forth the elements of issue preclusion; holding that issue preclusion bars the relitigation of issues actually adjudicated in previous litigation); *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir. 2001) (setting forth elements of claim preclusion).

The district court did not abuse its discretion by declaring plaintiffs vexatious litigants and entering a pre-filing review order against them because all of the requirements were met. *See Ringgold-Lockhart v. County of Los Angeles*, 761 F.3d 1057, 1062 (9th Cir. 2014) (setting forth standard of review and requirements for pre-filing review orders).

The district court did not abuse its discretion by denying plaintiffs' motion to recuse District Judge Gilliam because plaintiffs failed to demonstrate that a reasonable person would believe Judge Gilliam's impartiality could be questioned. *See United States v. Hernandez*, 109 F.3d 1450, 1453 (9th Cir. 1997) (setting forth standard of review and discussing standard for recusal under 28 U.S.C. §§ 144 and

455).

We reject as without merit plaintiffs' contentions that Judge Gilliam and Judge Tigar behaved improperly.

We do not consider matters not specifically and distinctly raised and argued in the opening brief. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

Plaintiffs' motion to amend their excerpts of record (Docket Entry No. 34) is granted. All other pending requests are denied.

AFFIRMED.

APPENDIX A2

(For 9th Circuit Case Number 21-16258)

Judgment order and judgment of U.S. District Court for the Northern District of California, *Harry et al vs. KCG Americas LLC et al* Filed July 1, 2021

Page 8

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BRIGHT HARRY, et al.,

Plaintiffs,

v.

KCG AMERICAS LLC ("KCG"), et al.,

Defendants.

Case No. 20-cv-07352-HSG

JUDGMENT

Judgment is hereby entered consistent with the Court's Order Granting Motion to Dismiss and Granting Motion to Deem Plaintiffs Vexatious Litigants,

This document constitutes a judgment and a separate document for purposes of Federal Rule of Civil Procedure 58(a).

Dated at Oakland, California, this1st day of July, 2021.

Susan Y. Soong Clerkof Court

By: _____
Nikki D. Riley
Deputy Clerk to the Honorable
HAYWOOD S. GILLIAM, JR.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BRIGHT HARRY, et al., Plaintiffs,

v.

KCG AMERICAS LLC ("KCG"), et al.,

Defendants.

Case No. 20-cv-07352-HSG

ORDER GRANTING MOTION TO DISMISS AND GRANTING MOTION TO DEEM PLAINTIFFS VEXATIOUS LITIGANTS

Re: Dkt. Nos. 26, 28

Pending before the Court are Defendants' motion to dismiss Plaintiff Bright Harry and Ronald S. Draper's complaint and motion to deem Plaintiffs vexatious litigants. Dkt. Nos. 26, 28. The Court finds these matters appropriate for disposition without oral argument and the matters are deemed submitted. *See* Civil L.R. 7-1(b). For the reasons detailed below, the Court **GRANTS** the motions.

I. BACKGROUND

This is not the first case that Plaintiffs have brought against these Defendants.[1] Each Plaintiff filed his own separate case in 2017 and 2018 respectively. Harry filed a pro se complaint in this district on April 26, 2017. *See Harry v. KCG Americas LLC*, No. 17-cv-02385-HSG (*Harry Case*), Dkt. No. 1. Draper filed a virtually identical pro se complaint in this district approximately one year later on April 27, 2018. *See Draper v. KCG Americas LLC*, No. 18-cv-02524-HSG (*Draper Case*), Dkt. No. 1. Both cases asserted claims relating to technical difficulties that Harry allegedly experienced while using an electronic trading platform to trade

[1] Defendants in this case include KCG Americas, LLC, Daniel B. Coleman, Carl Gilmore, Greg Hostetler, Main Street Trading, Inc., Patrick J. Flynn, Wedbush Securities, Inc., Edward W. Wedbush, ION Trading, Inc., Andrea Pignataro, Robert Sylverne, Computer Voice Systems, Inc., Paul Sturm, and Scott William Benz.

commodity futures spreads in an account held by his business partner, Draper, from 2013 to 2015. These two cases were found related under Civil L.R 3-12, and assigned to this Court. *See, e.g.*, *Harry Case*, Dkt. No. 97.

In both the *Harry Case* and the *Draper Case*, Plaintiffs alleged that in 2013, Harry entered a business venture with Draper to trade electronic commodity futures spreads. *See, e.g.*, *Harry Case*, Dkt. No. 75. On November 6, 2013, Main Street Trading connected Draper and Harry with KCG, a broker with whom Plaintiffs opened a trading account. *See id.* at ¶¶ 23, 28–30, 34. The account was opened under Draper's name, and Draper "contributed the $275,000 Initial Good Faith Deposit (Investment Money) for the joint venture." *See id.* at ¶¶ 19, 30, 34. Harry, in turn, "contributed cash in form of operational expenses, hardware/software purchases and trading software payments for the Joint Venture," and was involved in the actual trading. *Id.* at ¶¶ 7, 19. Draper thus remained a "passive [i]nvestor." *See id.* at ¶19. KCG was later acquired by Wedbush, another broker. *Id.* at ¶8. At all relevant times, KCG and Wedbush outsourced the management of their trading platform to two entities: CVS and ION. *Id.* at ¶¶ 43–44.

Plaintiffs further alleged that beginning on November 15, 2013, Harry regularly experienced technical issues with the trading platform. *See id.* ¶¶ 104–144. On that day, for example, the platform failed "to route and clear" his trade orders. *Id.* at ¶104. Such issues persisted through April 28, 2015. *See id.* at ¶¶ 105–144. Plaintiffs alleged that some of these failures resulted in missed trade opportunities. *See id.* at ¶¶ 107, 115, 135–37. When Harry finally "closed out all his open trading positions" on April 28, 2015, only $6,621.49 of Draper's initial contribution of $275,000 remained in the account. *Id.* at ¶ 144.

Plaintiffs alleged that this loss was due to Defendant's fraud, which included concealing the problems with the electronic trading platform and Defendants' own "precarious financial situation." *See, e.g., id.* at ¶¶ 35–38, 73–77, 84–102. Based on these facts, Plaintiffs asserted numerous causes of action, including fraudulent concealment, fraudulent misrepresentation, breach of fiduciary duty, breach of contract, "aiding and abetting" fraud, violation of several California consumer protection statutes, and "employment of manipulative computer software programs, computer servers, electronic trading facility and manipulative scheme to defraud" them

See id. at ¶¶ 178–287. The *Draper Case* also asserted a claim for elder financial abuse. *See Draper Case*, Dkt. No. 1 at ¶¶ 220–227.

On March 7, 2018, the Court dismissed the operative complaint in the *Harry Case*, finding that Harry (1) lacked standing to seek the vast majority of his requested relief because Draper had contributed the $275,000 with which he traded, and the trading account was in Draper's name; and (2) failed to state a claim under Federal Rule of Civil Procedure 9(b) with respect to any of his personal losses. *See* Dkt. No. 74. The Court gave Harry one opportunity to amend. *See id.* at 7. Harry filed a second amended complaint on April 3, 2018. *See* Dkt. No. 75.

Defendants ultimately filed motions to dismiss in both the *Harry Case* and *Draper Case*. *See Harry Case*, Dkt. Nos. 86, 89, 90; *Draper Case*, Dkt. Nos. 13, 18, 21. On August 27, 2018, the Court granted Defendants' motions and directed the Clerk to close the cases. *See Harry Case*, Dkt No. 123; *Draper Case*, Dkt No. 66. In the *Harry Case*, the Court again found that Harry lacked standing to recover losses associated with the $275,000 that Draper had contributed, and that Harry failed to provide any factual support regarding any other losses that he may have incurred himself. *See Harry Case*, Dkt No. 123. In the *Draper Case*, the Court found that Draper's federal causes of action were barred by the two-year statute of limitations. *See Draper Case*, Dkt. No. 66. The allegations in the complaint made clear that Draper was aware of Defendants' alleged fraud by April 28, 2015, when he and Harry shut down the trading account. *See id.* at 8. However, Draper did not file his complaint until 2018, and the statute of limitations on Draper's federal claims ran almost a year before he filed the *Draper Case*. *Id.* The Court declined to exercise supplemental jurisdiction over Plaintiffs' state law claims in both the *Harry Case* and *Draper Case* and dismissed them without prejudice to refiling them in state court. *Id.* The Court dismissed the federal claims in both cases with prejudice. *Id.*

Draper asked the Court to vacate its order dismissing the complaint. *See Draper* Case, Dkt. No. 79 at 2. Plaintiffs then filed a "joint motion" to vacate the judgments in both the *Harry Case* and *Draper Case*. *See Harry Case*, Dkt. No. 134; *Draper Case*, Dkt. No. 77. Plaintiffs cited various bases for relief, including a violation of Federal Rule of Civil Procedure 12(b)(7) for failing to join parties, the Supreme Court's decision in *Lucia v. Securities and Exchange*

Commission, manifest errors of fact and law and manifest injustice, violations of their Constitutional rights, and fraud. *Id.* The Court rejected Plaintiffs' arguments and denied the motion to vacate. *See Harry Case*, Dkt. No. 147; *Draper Case*, Dkt. No. 94. Plaintiffs then filed joint "notices" to "join" each other's cases as indispensable parties. *See, e.g.*, *Harry Case*, Dkt. Nos. 138, 139; *Draper Case*, Dkt. Nos. 83, 84. Plaintiffs also filed several letters with the Court describing their "legal nightmare" with Defendants, asking the Court to reconsider the dismissals, and attempting to relitigate their cases. *See Harry Case*, Dkt. Nos 131, 132, 146, 151, 152, 154; *Draper Case*, Dkt. Nos. 85, 91, 99, 100, 102.

Plaintiffs then appealed to the Ninth Circuit. *See Harry Case*, Dkt. No. 150; *Draper Case*, Dkt. No. 98. On May 14, 2020, the Ninth Circuit affirmed the dismissals. *See Harry Case*, Dkt No. 155; *Draper Case*, Dkt No. 103. The mandates issued on September 25, 2020 (*Draper Case*) and October 5, 2020 (*Harry Case*) respectively. *See Harry Case*, Dkt No. 157; *Draper Case*, Dkt No. 104.

Two days after the mandate issued, Harry filed a motion to file a supplemental memorandum with this Court to vacate the judgment, reopen the case, and add Draper as a party to his case. *See Harry Case*, Dkt. No. 158. The Court denied the request and cautioned Harry that no further filings would be accepted in the closed case. *See Harry Case*, Dkt. No. 159. Plaintiffs nevertheless filed motions to stay the judgments in their respective cases. *See Harry Case*, Dkt. No. 160; *Draper Case*, Dkt. No. 106. The Court denied these motions. *See Harry Case*, Dkt. No. 161; *Draper Case*, Dkt. No. 107. Harry then filed another motion to reopen his case and vacate the judgment. *See Harry Case*, Dkt. No. 164. The Court denied this as well. *Harry Case*, Dkt. No.165.

At the same time, Plaintiffs jointly filed the present action on October 13, 2020. *See* Dkt. No. 1 ("Compl."). The 163-page complaint generally asserts the same causes of action against the same Defendants based on the same alleged transactions and events as those asserted in the *Harry Case* and *Draper Case*. Plaintiffs also now allege that Defendants' alleged conduct was the result of "racketeering activities," and Plaintiffs assert several new claims against Defendants under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961, *et seq.* *See id.*

at ¶¶ 270–349. Plaintiffs allege that Defendants engaged in a "fraudulent scheme to make money" by failing to test the functionality and reliability of the electronic trading platform before inducing Plaintiffs to open a trading account with them. *See, e.g., id.* at ¶277. As before, Plaintiffs allege that the platform was "dysfunctional," and this dysfunction caused them to lose thousands of dollars. *See id.* at ¶75.

II. MOTION TO DISMISS

Defendants argue that Plaintiffs' federal causes of action are barred by res judicataand the applicable statute of limitations, and that Harry lacks standing to bring his asserted claims. *See* Dkt. No. 26. Defendants also argue that Plaintiffs have failed to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6), and urges the Court to decline supplemental jurisdiction over Plaintiffs' state law claims. *Id.* Because the Court finds that the res judicataissue isdispositive, the Court does not reach Defendants' alternative arguments.

A. Res Judicata

Res judicata, also known as claim preclusion, limits the ability of litigants to relitigate matters. The doctrine "serves to promote judicial efficiency by preventing multiple lawsuits and to enable the parties to rely on the finality of adjudications." *Dodd v. Hood River County*, 136 F.3d 1219, 1224–25 (9th Cir. 1998). Res judicataapplies where there is "(1) an identity of claims; (2) a final judgment on the merits; and (3) identity or privity between parties." *Ruiz v. Snohomish Cty. Pub. Util. Dist. No. 1*, 824 F.3d 1161, 1164 (9th Cir. 2016) (quotation omitted). Where these factors are met, res judicata not only bars claims that were actually adjudicated in the prior action, but also *all claims that could have been raised* in that action. *W. Radio Servs. Co. v. Glickman*, 123 F.3d 1189, 1192 (9th Cir. 1997). Here, the Court finds that all three requirements for res judicata are satisfied.

i. Identity of Claims

Courts determine whether there is an identity of claims by assessing four factors: "(1) whether the two suits arise out of the same transactional nucleus of facts; (2) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (3) whether the two suits involve infringement of the same right; and (4) whether

substantially the same evidence is presented in the two actions." *ProShipLine Inc. v. Aspen Infrastructures Ltd.*, 609 F.3d 960, 968 (9th Cir. 2010) (emphasis omitted) (quotation omitted). The first of these factors is the most important. *See Turtle Island Restoration Network v. U.S. Dep't of State*, 673 F.3d 914, 917–18 (9th Cir. 2012).

"Whether two suits arise out of the same transactional nucleus depends upon whether they are related to the same set of facts and whether they could conveniently be tried together." *ProShipLine*, 609 F.3d at 968 (emphasisomitted) (quotations omitted). The Ninth Circuit has explained that although "[a] plaintiff need not bring every possible claim," "where claims arise from the same factual circumstances, a plaintiff must bring all related claims together or forfeit the opportunity to bring any omitted claim in a subsequent proceeding." *Turtle Island*, 673 F.3d at 918.

Here, the present case and the *Harry Case* and *Draper Case* clearly "arise out of the same transactional nucleus of facts." In fact, a large portion of the allegations in the complaints are nearly identical. In all three cases, Plaintiffs allege that Defendants fraudulently induced Plaintiffs to move their commodity futures trading account to Defendants' platform on November 6, 2013. *See, e.g.*, *Compl.* at ¶¶ 1, 5-7, 38–40, 72, 84, 86–107, 189–93. Plaintiffs allege that they experienced myriad problems on the platform, which thwarted Harry's ability to trade on behalf of Draper. *See id.* at ¶¶ 74, 135, 141–81. As a result, on April 28, 2015, Harry closed out all open trading positions. *Id.* at ¶ 179. Plaintiffs may have included more detail about the ways in which Defendants induced them to open an account with them and the problems that Harry experienced on the trading platform, but Plaintiffs did not allege distinct and unrelated facts.

Similarly, that Plaintiffs have added new RICO claims and refer to Defendants as members of an "enterprise" does not alter the identity of claims among the cases. Plaintiffs' RICO claims are premised on the same underlying facts: Defendants withheld information about the problems with their trading platform and thus fraudulently induced Plaintiffs to open an account with them. Defendants alleged conduct also spans the same period of time, from 2013 to April 2015. There are thus no new factual developments underlying these RICO claims. In their opposition brief, Plaintiffs even acknowledge that "Defendants were given notice of the RICO claim in both the

Harry Case and *Draper Case*" *See* Dkt. No. 32 at 6–7. In any event, to the extent the RICO claims may be considered new to this case, Plaintiffs could have brought these claims in the *Harry Case* and *Draper Case*

Plaintiffs rely heavily on the Supreme Court opinion in *Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322 (1955), to suggest that the doctrine of res judicata nevertheless cannot apply. *See* Dkt. No. 32 at 5–7. Plaintiffs suggest that they have provided "new facts or a worsening of the earlier conditions" that precludes the application of the doctrine. *Id.* Plaintiffs identify three "new" facts, related to how much of the $275,000 initial deposit and software subscription Harry and Draper each provided. *See id.* at 10–11. Plaintiffs contend that, despite its prior allegations, Harry contributed some of his own money and therefore has standing. *Id.* Plaintiffs, however, misunderstand the holding in *Lawlor* In *Lawlor*, the Supreme Court merely concluded that a prior judgment "cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case." *Lawlor*, 349 U.S. at 328. But as explained above, this case does not raise new claims or present new allegations that could not have been brought in the *Harry Case* and *Draper Case* The amount of money that each Plaintiff contributed to their business venture from 2013 to 2015 was certainly knowable (if not known) when the *Harry Case* and *Draper Case* were filed.[2]

ii. Identity of Parties

The cases also involve the same parties. The *Harry Case* was filed by Harry, the *Draper Case* was filed by Draper, and both Harry and Draper are the Plaintiffs in this case. Moreover, Defendants in this case are the exact same Defendants named in both the *Harry Case* and *Draper Case Compare* Compl. *with Harry Case*, Dkt. No. 75; *Draper Case*, Dkt. No. 1.

In opposition, Plaintiffs argue that the present action involves different parties because after it filed the complaint in this action, one of Defendants—Edward W. Wedbush—died. *See* Dkt. No. 32 at 11. Mr. Wedbush was sued as the founder and CEO of Wedbush Securities, Inc.

[2] As explained in more detail below, the Court also has serious concerns about how Plaintiffs have changed their allegations over time and in response to the Court's legal findings, particularly about Harry's alleged monetary contributions.

See Compl. at ¶4. Two weeks after Plaintiffs filed the complaint in this action, they filed a document entitled "suggestion of death upon the record under Rule 25(a)(1) and motion for substitution of party." *See* Dkt. No. 5. They explained that Mr. Wedbush died in January 2020 (ten months before they filed the complaint), and requested that Gary L. Wedbush be substituted under Federal Rule of Civil Procedure 25 as "the Co-President of Wedbush Securities, Inc.". *See id.* at 2.

Plaintiffs did not file this purported request as a noticed motion, and the Court did not formally grant the substitution. It is not clear from the record whether Gary L. Wedbush would be a proper party to substitute for purposes of Rule 25. *See, e.g.*, Fed. R. Civ. P. 25(a)(1) (requiring substitution "of the proper party"); *Mallonee v. Fahey*, 200 F.2d 918, 919 (9th Cir. 1952) ("Rule 25(a)(1) applies only to the substitution of legal representatives"). But even assuming he was properly substituted into this action, "[t]he substituted party steps into the same position as [the] original party." *Hilao v. Est. of Marcos*, 103 F.3d 762, 766 (9th Cir. 1996). Thus, Gary L. Wedbush could not be substituted as a "new" Defendant, but rather as equivalent to Mr. Wedbush, sued in his role as "Co-President of Wedbush Securities, Inc." *See* Dkt. No. 5.

Moreover, res judicata may apply where there is "privity between parties." *Ruiz*, 824 F.3d at 1164. Privity is a flexible concept that "exists when a party is so identified in interest with a party to former litigation that he represents precisely the same right in respect to the subject matter involved." *See Stratosphere Litig. L.L.C. v. Grand Casinos, Inc.*, 298 F.3d 1137, 1143, n.3 (9th Cir. 2002). Plaintiffs' allegations against Gary L. Wedbush as "Co-President of Wedbush Securities, Inc." are the same as those against the now-deceased Mr. Wedbush, and their interests are thus aligned across all three cases. As noted above, Gary L. Wedbush would "step[] into the same position" as Mr. Wedbush. *Hilao*, 103 F.3d at 766. Therefore, even if Gary L. Wedbush were properly substituted into this action, there is privity between Mr. Wedbush and Gary L. Wedbush such that this factor is satisfied.

iii. Final Adjudication of Merits

As noted above, the Court dismissed the federal claims with prejudice in the *Harry Case* based on lack of standing and in the *Draper Case* based on the statute of limitations. Plaintiffs

nevertheless urge that "the Judgment on the *Harry Case* and the judgment on the *Draper Case* were not final judgments on the merits." *See* Dkt. No. 32 at 2. Plaintiffs are simply wrong as a matter of law.

"A dismissal on statute of limitations grounds is a judgment on the merits that operates as res judicata." *Ruiz*, 824 F.3d at 1164 (quotation omitted). This factor is therefore satisfied for Draper's federal claims, and Draper's claims are barred by res judicata. As for Harry's federal claims, Plaintiffs are correct that constitutional standing is generally a threshold issue that the Court must address before reaching the meritsof a case. *See, e.g.*, *Bird v. Lewis & Clark Coll.*, 303 F.3d 1015, 1019 (9th Cir. 2002). And the Ninth Circuit has cautioned that dismissing claims "with prejudice" "is not always conclusive for the purpose of res judicata and, indeed, does not equate to an adjudication on the merits when the dismissal is for lack of jurisdiction." *Ruiz*, 824 F.3d at 1168.

Nevertheless, the Court finds that the related doctrine of collateral estoppel, or issue preclusion, still prohibitsHarry from relitigating whether he has standing to bring his asserted claims. "Collateral estoppel, or issue preclusion, bars the relitigation of issues actually adjudicated in previous litigation between the same parties." *Kamilche Co v. United States*, 53 F.3d 1059, 1062 (9th Cir. 1995), *opinion amended on other point on reh'g*, 75 F.3d 1391 (9th Cir. 1996). The Court must consider the following factors:

> (1) the issue must be identical to one alleged in prior litigation; (2) the issue must have been "actually litigated" in the prior litigation; and (3) the determination of the issue in the prior litigation must have been "critical and necessary" to the judgment.

Beauchamp v. Anaheim Union High Sch. Dist., 816 F.3d 1216, 1225 (9th Cir. 2016) (quotation omitted).

The issue in the *Harry Case* is identical to the issue here—whether Harry has standing to bring his asserted claims related to the technical difficulties that he allegedly experienced while using an electronic trading platform from 2013 to 2015. The parties also fully litigated that issue in the *Harry Case*. Harry had an opportunity to fully brief and provide argument on the issue of

standing twice, in response to both of Defendants' motions to dismiss. The Court also gave Harry an opportunity to amend his complaint to address this standing issue before dismissing the federal claims with prejudice. *See Harry Case*, Dkt. No. 74 at 7. Harry filed a second amended complaint, but failed to address the deficiencies that the Court identified. *See Harry Case*, Dkt. No. 75. Standing was thus a critical and necessary part of the judgment in the *Harry Case*: the Court dismissed Harry's federal claims in the *Harry Case* with prejudice for failure to allege standing. The Court accordingly finds that the determination that Harry lacked standing in the *Harry Case* precludes relitigation of the same standing argument in this case. *See, e.g.*, *Johnson v. Chain*, 967 F.2d 587 (9th Cir. 1992) (finding doctrines of res judicata and collateral estoppel applied where plaintiff "had a full and fair opportunity to litigate the issue[] of standing" in the earlier case); *accord Perry v. Sheahan*, 222 F.3d 309, 318 (7th Cir. 2000) ("A dismissal for lack of jurisdiction precludes relitigation of the issue actually decided, namely the jurisdictional issue.").

That Plaintiffs now allege for the first time that Harry contributed $18,157.40 of the $275,000 Initial Good Faith Deposit and $6,078.60 for trading software fees does not alter the application of collateral estoppel. *See* Compl. at ¶¶ 11, 14–15. Rather, it highlights exactly why collateral estoppel should apply. The complaints in the *Harry Case* and *Draper Case* clearly indicated that Draper—and not Harry—had provided the $275,000 Initial Good Faith Deposit and that fees for software were paid from Draper's account. The Court therefore concluded that the standing defect was not amenable to remedy, and so dismissed the federal claims with prejudice. Now, years later, Plaintiffs have changed their allegations in what appears to be an attempt to manufacture standing for Harry. The Court has substantial concerns about this tactic, and questions the truthfulness of Plaintiffs' new allegations in light of this reversal. But in any event, as the Ninth Circuit has explained, "once an *issue* is raised and determined, it is the entire issue that is precluded, not just the particular arguments raised in support of it in the first case." *Kamilche*, 53 F.3d at 1063 (emphasis in original). Harry had ample opportunity to explain what personal costs he incurred as a result of Defendant's alleged misconduct, and did not do so. Application of res judicata and collateral estoppel in these circumstances thus serves the central purposes of "protect[ing] [the prevailing party] from the expense and vexation attending multiple

lawsuits, conserv[ing] judicial resources, and foster[ing] reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana v. United States*, 440 U.S. 147, 153–54 (1979).

* * *

The Court **GRANTS** the motion to dismiss the federal claims on res judicata and collateral estoppel grounds, and again declines to exercise supplemental jurisdiction over the state law claims.

III. MOTION TO DEEM VEXATIOUS LITIGANT

A. Legal Standard

"The All Writs Act, 28 U.S.C. § 1651(a), provides district courts with the inherent power to enter pre-filing orders against vexatious litigants. However, such pre-filing orders are an extreme remedy that should rarely be used. Courts should not enter pre-filing orders with undue haste because such sanctions can tread on a litigant's due process right of access to the courts." *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1057 (9th Cir. 2007). At the same time, "[f]lagrant abuse of the judicial process cannot be tolerated because it enables one person to preempt the use of judicial time that properly could be used to consider the meritorious claims of other litigants." *De Long v. Hennessey*, 912 F.2d 1144, 1148 (9th Cir. 1990).

The Ninth Circuit has adopted a four-factor test to determine whether a pre-filing review order is warranted. Specifically, a pre-filing review order may be appropriateif: (1) the plaintiff was given adequate notice and an opportunity to oppose the order; (2) there isan adequate record for review; (3) the Court makes substantive findings as to the frivolous or harassing nature of the litigant's actions; and (4) the order is narrowly tailored "to closely fit the specific vice encountered." *Molski*, 500 F.3d at 1057.

B. Discussion

For the Court to declare Plaintiffs vexatious litigants, all four factors identified above must be met. And because Plaintiffs are self-represented, the Court exercises caution in considering whether and how to fashion an appropriate prefiling order. *See De Long*, 912 F.2d at 1147 (9th Cir. 1990). Nevertheless, the Court finds that all four factors are met in this case.

//

i. Notice and Opportunity to be Heard

Plaintiffs weregiven adequate notice and an opportunity to be heard because Defendants filed the motion to declare Plaintiffs vexatious litigants, and Plaintiffs filed an opposition to the motion. *See* Dkt. No. 33. The notice requirement has thus been satisfied.

ii. Adequate Record for Review

The second requirement is that the Court compile an adequate record for review. "An adequate record for review should include a listing of all the cases and motions that led the district court to conclude that a vexatious litigant order was needed." *Molski*, 500 F.3d at 1059. As detailed in Section I above, Plaintiffs have repeatedly filed cases and motions against Defendants relating to their use of—and problems with—Defendants' electronic trading platform to trade commodity futures spreads from 2013 to 2015. The Court also highlights the following:

- On October 14, 2015, Plaintiffs filed a complaint with the Commodity Futures Trading Commission ("CFTC") against many of the same Defendants named in this action and the *Harry Case* and *Draper Case*, asserting claims relating to the same purported technical difficulties that Harry had experienced while using the electronic trading platform *See Harry Case*, Dkt No. 43-5, Ex. A5. On March 8, 2016, the CFTC's Director of Office of Proceedings entered an order dismissing the complaint for lack of jurisdiction and standing. *See Harry Case*, Dkt No. 43-6. Harry appealed the order. *See Harry Case*, Dkt No. 43-8, Ex. A8 at 1. The appeal was denied four days later by the CFTC, which also issued terminating sanctions against Draper. *See id.*; *see also Harry Case*, Dkt No. 43-7, Ex. A7; Dkt. No. 43-9, Ex. A9. Plaintiffs later filed a petition for judicial review with the Ninth Circuit, which was denied. *See Draper v. CFTC*, Case No. 18-73070 (9th Cir.).

- On April 26, 2017, Harryfiled the *Harry Case*. *See Harry v. KCG Americas LLC*, No. 17-cv-02385-HSG. As has already been discussed at length, the Court dismissed the complaint with one opportunity to amend. *See* Dkt. Nos. 74, 75. Harry amended, and Defendants again moved to dismiss the complaint. *See* Dkt. No. 86. The day that Defendants' filed their second motion to dismiss in the *Harry Case*, Draper filed the *Draper Case*. *See Draper v. KCG Americas LLC*, No. 18-cv-02524-HSG. The Court granted Defendants' motions todismiss and directed the Clerk to close the cases. *See Harry Case*, Dkt No. 123; *Draper Case*, Dkt No. 66. Plaintiffs then repeatedly asked the Court to vacate its orders dismissing the complaint and attempted to relitigate the same cases. *See Harry Case*, Dkt. Nos. 131, 132, 134, 138, 139, 146, 151, 152, 154; *Draper* Case, Dkt. Nos. 77, 79, 83, 84, 85, 91, 99, 100, 102.

- The Ninth Circuit affirmed the dismissalsand issued mandates. *See Harry Case*,

Dkt Nos. 155, 157; *Draper Case*, Dkt Nos. 103, 104.

- After the Ninth Circuit affirmed the dismissals, the parties then repeatedly sought to reopen the *Harry Case* and *Draper Case* and stay the judgments. *See Harry Case*, Dkt. No. 158, 160, 164; *Draper Case*, Dkt. No. 106.

- Plaintiffs then jointly filed the present action, seeking to litigate the same issues against the same Defendants.

Accordingly, given the record compiled from Plaintiffs' prior actions against Defendants, and the record on file in the current case, the Court concludes the record is adequate for review. *Molski*, 500 F.3d at 1057.

iii. Substantive Findings as to Frivolous or Harassing Nature of Plaintiffs' Litigation

An injunction cannot issue merely upon a showing of litigiousness." *Moy v. United States*, 906 F.2d 467, 470 (9th Cir. 1990). Instead, "[t]o decide whether the litigant's actions are frivolous or harassing, the district court must look at 'both the number and content of the filings as indicia of the frivolousness of the litigant's claims." *Molski*, 500 F.3d at 1059.

Although the number of separate cases here does not necessarily establish Plaintiffs as vexatious, the meritless nature of their filings and motions does. As noted above, Plaintiffs have filed nearly identical claims against Defendants before the CFTC and this Court on three separate occasions. Even assuming the *Harry Case* and *Draper Case* were not frivolous or harassing when initially filed, Plaintiffs have failed to acknowledge the legal effect of this Court's orders dismissing these cases, let alone the Ninth Circuit's affirmance of these orders. Through serial motion and "letter" filings, Plaintiffs have repeatedly asked the Court to reconsider its past orders, reopen the cases, and reconsider the merits of Plaintiffs' claims. Even after the Ninth Circuit affirmed the dismissals, Plaintiffs continued their efforts to relitigate these cases. When this Court denied their requests to reopen the *Harry Case* and *Draper Case*, they simply refiled a new case. The Court finds such conduct frivolous and harassing. *See, e.g., Huggins v. Hynes*, 117 Fed. App'x 517, 518 (9th Cir. 2004) (affirming district court's pre-filing order in part because plaintiff "abused the courts by repeatedly relitigating the same controversy and repeatedly filing frivolous

motions and pleadings").[3] The Court is alsoconcerned with the evolving nature of Plaintiffs' allegations. Their allegations about the money Harry purportedly paid as the Initial Good Faith Deposit, for example, are undermined by their previous allegations, and appear to be simply an attempt to make an end-run around the Court's prior orders.

The Court understands that Plaintiffs feel aggrieved. But the Court has ruled on their cases, and the Ninth Circuit has affirmed those rulings. Plaintiffs have nevertheless demonstrated an intent to continue frivolously litigating against Defendants without acknowledging the myriad CFTC and judicial rulings against them. In letters filed with this Court, for example, Plaintiffs have stated that they "are not intimidated and will not allow these [Defendants] in collusion with CFTC [to] get Judgment by Deceits, Judgement by Lies, and Judgment by Fraud, either at the CFTC Tribunal, the Ninth Circuit or in this Court." *See, e.g.*, *Draper Case*, Dkt. No. 91 at 1. In opposition to the motion to deem Plaintiffs vexatious, Plaintiffs urge that they "will finally have their Day in this Court" and it is [j]ust a matter of time." *See* Dkt. No. 33 at 2. They further asserted that "Defendants and especially their Attorneys can run but they cannot hide forever from answering Plaintiffs' Complaint." *Id.* at 2, 4.

Plaintiffs have caused needless expense to Defendants, and have imposed an unnecessary burden on the courts by ignoring the legal effect of the prior dismissals. And absent a pre-filing order, there is every indication from the record—including their opposition to this motion—that Plaintiffs will continue to harass Defendants. The Court therefore finds that Plaintiffs' conduct against Defendants has been both frivolous and harassing.

iv. Narrowly Tailored Order

As to the fourth factor, Defendants request an order requiring the following:

> [A] pre-filing order prohibiting either of the Plaintiffs from filing any complaint against Defendants concerning the commodities trading account held by Draper with Defendants KCG Americas LLC and later its successor, Wedbush Securities, Inc., without first submitting the complaint for pre-filing review and receiving written authorization from a judge of this District to file it.

[3] As an unpublished Ninth Circuit decision, *Huggins* is not precedent, but may be considered for its persuasive value. *See* Fed. R. App. P. 32.1; CTA9 Rule 36-3.

See Dkt. No. 28 at 6. Given the totality of the circumstances, the Court finds that such an order is appropriate and is narrowly tailored to address Plaintiffs' repeated filings regarding the same underlying facts and theories.[4] *See Molski*, 500 F.3d at 1064.

* * *

Accordingly, the motion to declare Plaintiffs vexatious litigants is **GRANTED**Plaintiffs are adjudged vexatious litigants and ordered to obtain leave of Court before filing or causing to be filed any new action in this District against Defendants.

IV. CONCLUSION

Accordingly, the Court **GRANTS** the motions. The Clerk is directed to enter judgment in favor of Defendants and to close the case.

The Clerk of this Court may not file or accept any further complaints filed by or on behalf of Plaintiffs Bright Harry or Ronald S. Draper that name as Defendants KCG Americas, LLC, Daniel B. Coleman, Carl Gilmore, Greg Hostetler, Main Street Trading, Inc., Patrick J. Flynn, Wedbush Securities, Inc., Edward W. Wedbush, Gary L. Wedbush, ION Trading, Inc., Andrea Pignataro, Robert Sylverne, Computer Voice Systems, Inc., Paul Sturm, or Scott William Benz concerning the commodities trading account held by Draper with Defendants KCG Americas LLC and its successor, Wedbush Securities, Inc. If Plaintiffs wish to file a complaint against any of these entities and/or individuals, they shall provide a copy of any such complaint, a letter requesting that the complaint be filed, and a copy of this Order to the Clerk of this Court. The Clerk shall then forward the complaint, letter, and copy of this Order to the Duty Judge for a determination whether the complaint should be accepted for filing (*i.e.*, whether it concerns this commodities trading account).

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[4] The Court notes that nothing in this order or the Court's prior orders precludes Plaintiffs from pursuing their state law claims in state court if they have a legal basis to do so.

Plaintiffs are warned that any violation of this Order will expose them to contempt proceedings and appropriate sanctions, and any action filed in violation of this Order will be subject to dismissal.

IT IS SO ORDERED.

Dated: 7/1/2021

HAYWOOD S. GILLIAM, JR.
United States District Judge

United States District Court
Northern District of California

APPENDIX A3

(For 9th Circuit Case Number 21-16258)

Judgment order and Judgment of U.S. District Court for the Northern District of California, *Harry vs. KCG Americas LLC et al* Filed April 19, 2019

Page 26

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BRIGHT HARRY, Plaintiff,

v.

KCG AMERICAS LLC, et al.,

Defendants.

Case No. 17-cv-02385-HSG

JUDGMENT

Judgment is hereby entered consistent with the Courts Order Striking Impermissible Filing; Denying Motion to Consolidate; Denying Motion to Stay; Granting Motions to Dismiss,

This document constitutes a judgment and a separate document for purposes of Federal Rule of Civil Procedure 58(a).

Dated at Oakland, California, this 19th day of April, 2019.

Susan Y. Soong Clerk of Court

By: _____
Nikki [illegible]iley
Deput[illegible]D. Clerk to the Honorable
HAYW[illegible]D S. GILLIAM, JR.

United States District Court
Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BRIGHT HARRY, Plaintiff,

v.

KCG AMERICAS LLC, et al.,

Defendants.

Case No. 17-cv-02385-HSG

ORDER DENYING MOTION TO VACATE

Re: Dkt. No. 134

Pending before the Court is Plaintiff Bright Harry's motion to vacate the Court's August 27, 2018 order denying the motion to consolidate and dismissing his case. *See* Dkt. No. 134 ("Mot.").[1] Because Harry has not established any basis for why the judgment should be vacated, the Court **DENIES** the motion.[2]

Harry initially brought this action in April 2017, *see* Dkt. No. 1, and filed a first amended complaint in May 2017, *see* Dkt. No. 11. The Court dismissed the first amended complaint with leave to amend in March 2018. *See* Dkt. No. 74. In his second amended complaint, filed on April 3, 2018, Harrynamed 14 defendants and averred 10 causes of action across 89 pages, including fraudulent concealment, fraudulent misrepresentation, breach of fiduciary duty, breach of contract, "aiding and abetting" fraud, violation of several California consumer protection statutes, and "employment of manipulative computer software programs, computer servers, electronic trading

[1] Harry, who is proceeding pro se, styled his motion as "Plaintiffs Draper's and Harry's Joint Motion to Vacate Their Respective Judgments" and captioned the motion to include a related case, *Draper v. KCG Americas LLC, et al.*, Case No. 18-cv-2524-HSG. Draper is proceeding pro se in his own case and filed an identical motion. Because the Court previously denied Harry and Draper's motions toconsolidate their cases, *see* Dkt. No. 123 at 5, the Court will analyze each of these motions independently.

[2] The Court finds this matter appropriate for disposition without oral argument and the matter is deemed submitted. *See* Civil L.R. 7-1(b).

facility and manipulative scheme to defraud" him. *See* Dkt. No. 75 ("SAC").[3] On August 27, 2018, the Court denied Harry's motion to consolidate his case with Draper's and granted Defendants' motion to dismiss. *See* Dkt. No. 123 at 5, 8–9. The Court reviewed Harry's three theories for how he suffered an injury-in-fact and found that all of them failed, therefore concluding that Harry lacked standing to pursue his federal claims. *See id.* at 10–12.

Harry moves to vacate the Court's dismissal order, citing Federal Rules of Civil Procedure 41(b), 59(e), and 60(b) and asserting that relief is warranted because of the violation of Federal Rule of Civil Procedure 12(b)(7) for failing to join parties, the Supreme Court's decision in *Lucia v. Securities and Exchange Commission*, manifest errors of fact and law and manifest injustice, violations of his Constitutional rights, and fraud. *See* Mot. at 2–4.

Federal Rule of Civil Procedure 41(b) governs involuntary dismissals and does not provide a basis for relief here. Rule 59(e) allows a party to move to alter or amend a judgment. "There are four grounds upon which a Rule 59(e) motion may be granted: 1) the motion is necessary to correct manifest errors of law or fact upon which the judgment is based; 2) the moving party presents newly discovered or previously unavailable evidence; 3) the motion is necessary to prevent manifest injustice; or 4) there is an intervening change in controlling law." *Turner v. Burlington N. Santa Fe R. Co.*, 338 F.3d 1058, 1063 (9th Cir. 2003) (internal quotations and emphasis omitted). Rule 60(b) allows a party to move for relief from a judgment for specified reasons, including if the judgment was obtained due to the fraud, misrepresentation, or misconduct of an opposing party. "To prevail, the moving party must prove by clear and convincing evidence that the verdict was obtained through fraud, misrepresentation, or other misconduct and the conduct complained of prevented the losing party from fully and fairly presenting the defense." *De Saracho v. Custom Food Mach., Inc.*, 206 F.3d 874, 880 (9th Cir. 2000).

The Court finds that altering or vacating the order is unwarranted because Harrystill has not demonstrated that he has standing to pursue his federal claims. Harry appears to contend in his motion that he generated trading profits which were commingled with Draper's $275,000

[3] This document is erroneously titled "First Amended Complaint."

deposit and used to pay a monthly software usage fee. *See* Mot. at 15–16. But, just as the Court found in its prior order, this contention is directly beled by an allegation in Harry's second amended complaint: "Draper's Good Faith Deposit of $275,000 . . . is a negative investment in that, *every month at least $300 will be taken out of the Deposit* for Trading Platform and Exchange Fees, whether Draper traded or not." *See* SAC ¶ 69 (emphasis added). Further, Harry seems to continue to argue that his lack of trading incomdespite his "24/6" efforts was an injury, *see* Mot. at 17–18; but, just as before, that theory is entirely speculative and insufficiently concrete to establish standing.

Because the prior dismissal order finding no standing was not premised on any manifest error of law or fact, relief is not necessary to prevent a manifest injustice, and the ruling was not obtained due to fraud, the Court **DENIES** the motion to vacate. The Clerk is **DIRECTED** to enter judgment in favor of Defendants, consistent with the Court's August 27, 2018 order, Dkt. No. 123.

IT IS SO ORDERED.

Dated: 4/19/2019

Haywood S. Gilliam, Jr.

HAYWOOD S. GILLIAM, JR.
United States District Judge

United States District Court
Northern District of California

APPENDIX A4

(For 9th Circuit Case Number 21-16258)

Judgment Order of U.S. District Court for the Northern District of California, *Harry vs. KCG Americas LLC et al* Filed August 28, 2018

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BRIGHT HARRY, Plaintiff,

v.

KCG AMERICAS LLC, et al.,

Defendants.

Case No.17-cv-02385-HSG

ORDER STRIKING IMPERMISSIBLE FILINGS; DENYING MOTION TO CONSOLIDATE; DENYING MOTION TO STAY; DENYING MOTION FOR JUDICIAL REVIEW; GRANTING MOTIONS TO DISMISS

Re: Dkt. Nos. 76, 86, 89, 90, 102, 103

Pending before the Court are a motion to consolidate, a motion to stay, a motion for judicial review, and three motions to dismiss. For the reasons set forth below, the Court **DENIES** the motion to consolidate, **DENIES** the motion to stay, **DENIES** the motion for judicial review, and **GRANTS** the motions to dismiss. The Court also **STRIKES** several impermissible filings by Plaintiff Bright Harry.[1]

I. BACKGROUND

Plaintiff has named 14 defendants in this action:

- KCG Americas, LLC ("KCG"), Main Street Trading, Inc., and Wedbush Securities, Inc. ("Wedbush"), as well as several of the companies' individual officers (collectively referred to as "the Wedbush Defendants");
- ION Trading, Inc. ("ION") and several of the company's individual officers (collectively referred to as "the ION Defendants"); and
- Computer Voice Systems, Inc. ("CVS") and several of the company's individual officers (collectively referred to as "the CVS Defendants").

[1] The Court finds this matter appropriate for disposition without oral argument and the matter is deemed submitted. *See* Civil L.R. 7-1(b).

The Court will collectively refer to the Wedbush Defendants, the Ion Defendants, and the CVS Defendants as "Defendants."

A. Factual Allegations

In 2013, Plaintiff entered a business venture with his business partner, Ronald Draper[2], to trade electronic commodity futures spreads. *See* Dkt. No. 75 (Second Amended Complaint, or "SAC") ¶¶ 1, 28. Draper contributed the initial capital in the amount of $275,000, while Plaintiff "provided the operational expenses, skills, knowledge, technology, and carried out the actual trading." *Id.* ¶ 29. On November 6, 2013, Main Street Trading, an introducing broker, connected Draper and Plaintiff with KCG, a broker with whom they opened a trading account. *See id.* ¶¶ 23, 34. The account "was opened under Draper's name only for easier tax filing with the IRS." *Id.* ¶ 34. Plaintiff alleges he was the sole actor involved in actual trading. *See id.* ¶ 19(c). Later, KCG would be acquired by Wedbush, another broker. *Id.* ¶ 38. At all relevant times, KCG and Wedbush outsourced the management of their trading platform to two entities: CVS, which handled the front-end, and ION, which ran the back-end. *See id.* ¶¶ 43-44.

Beginning on November 15, 2013, Plaintiff regularly experienced technical issues with the trading platform. *See id.* ¶ 104. On that dayfor example, the platform failed "to route and clear" his trade orders. *Id.* Issues persisted through April 28, 2015. *See id.* ¶¶ 105-44.[3] Plaintiff alleges that some of these failures resulted in missed trade opportunities. *See id.* ¶¶ 107 (alleging a "total loss of . . . missed trade opportunities" amounting to $394,400); 115 ($127,600); 135 37 ($5,000). When Plaintiff "closed out all his open trading positions" on April 28, 2015, $6,621.49 of Draper's initial contribution of $275,000 remained in the account. *Id.* ¶ 144.

Plaintiff avers a total of 10 causes of action in the SAC, including fraudulent concealment, fraudulent misrepresentation, breach of fiduciary duty, breach of contract, "aiding and abetting" fraud, violation of several California consumer protection statutes, and "employment of

[2] Draper is the plaintiff in a separate, related action before this Court. *See Draper v. KCG Americas LLC*, No. 18-cv-2425-HSG.

[3] As he did in his First Amended Complaint, Plaintiff cites—often in conclusory fashion—to exhibits in a "Comprehensive Exhibits File Folder." He indicates these are on file with the Court. They are not, and so the Court disregards these references.

manipulative computer software programs, computer servers, electronic trading facility and manipulative scheme to defraud" him.

B. Procedural Posture

1. Prior to the Filing of the Second Amended Complaint

Plaintiff filed the First Amended Complaint on May 16, 2017. Dkt. No. 11 ("FAC"). The causes of action, as well as the named Defendants, were identical to those in the SAC. On March 7, 2018, the Court dismissed Plaintiffs FAC because he lacked standing to seek the vast majority of his requested relief, as the capital with which he had traded belonged to Draper. *See* Dkt. No. 74 at 5-6. Additionally, the Court found that with respect to the relief for which he *might* have standing, Plaintiff had failed to state a claim under Federal Rule of Civil Procedure 9(b). *See id*at 6-7. The Court gave him one opportunity to amend. *Id*at 7.

2. After the Filing of the Second Amended Complaint

Plaintiff filed the operative SAC on April 3, 2018. Dkt. No. 75.

On April 4, 2018, Plaintiff filed a motion challenging a decision by the Commodity Futures Trading Commission ("CFTC"). Dkt. No. 76 (Motion for Judicial Review, or "MJR"). On April 27, 2018, Defendants filed a joint opposition to Plaintiff's moton. Dkt. No. 91 ("MJR Opp."). Plaintiff replied on May 11, 2018. Dkt. No. 96 ("MJR Reply"). For reasons that are not clear, Plaintiff—who is not an attorney—purported to file his reply on behalf of both himself and Draper, whose separate lawsuit would soon be related. On July 5, 2018, the Court requested supplemental briefing in light of the Supreme Court's recent decision in *Lucia v. Securities & Exchange Commission*, 138 S. Ct. 2044 (2018). Dkt. No. 114. The parties submitted the requested briefing on July 26, 2018. Dkt. Nos. 117, 118.

On April 27, 2018, Defendants filed three motions seeking dismissal of the SAC. *See* Dkt. Nos. 86, 89, 90. Plaintiff filed a global opposition brief on May 11, 2018. Dkt. No. 95 ("MTD Opp."). Defendants replied on May 18, 2018. Dkt. Nos. 98, 99, 100.

On May 8, 2018, the ION Defendants filed a motion to relate Draper's case to Plaintiff's Dkt. No. 94. The Court granted the motion on May 15, 2018, Dkt. No. 97, and did not consider Plaintiff's belatedly-filed opposition, *see* Dkt. No. 101.

On June 18, 2018, Plaintiff—again purporting to file on behalf of both himself and Draper—moved to consolidate the two cases, Dkt. No. 102 ("Consolidation Mot."), and to stay certain proceedings, Dkt. No. 103 ("Stay Mot."). On July 2, 2018, Defendants filed oppositions to both motions. Dkt. Nos. 108, 109, 110, 113. Plaintiff replied on July 9, 2018. Dkt. Nos. 115, 116.

Also on June 18, Plaintiff—again purporting to file on behalf of both himself and Draper—filed a second opposition to Defendants' motions to dismiss his SAC. Dkt. No. 104. The motion, which styled Draper as a "specially-appearing plaintiff," also purports to oppose Defendants' motions to dismiss Draper's complaint. *See id.* at 5. The ION Defendants accordingly filed an objection, Dkt. No. 106, to which Plaintiff replied (again, purportedly on his and Draper's behalf), Dkt. No. 112.

II. DISCUSSION

A. The Court Strikes Plaintiff's Impermissible Filings.

As a preliminary matter, Plaintiff filed a second opposition brief in response to Defendants' motion to dismiss. Dkt. No. 104. When the ION Defendants objected, Dkt. No. 106, Plaintiff filed another reply, Dkt. No. 112. Even setting aside the impropriety of Plaintiff, a non-attorney, purporting to represent Draper, both filings violate the local rules because Plaintiff did not seek or obtain the Court's leave to file them. *See* Civ. L.R. 7-3(d) (stating that "[o]nce a reply is filed, no additional memoranda, papers or letters may be filed without Court approval," subject to exceptions not relevant here). Accordingly, the Court strikes Docket Numbers 104 and 112.

B. The Court Denies the Motions to Stay and Consolidate.

Plaintiff seeks (1) consolidation of his action with Draper's, and (2) a stay pending resolution of certain underlying administrative proceedings, Plaintiff's motion for judicial review, and consolidation of his and Draper's actions. The Court denies both motions.

1. Motion to Consolidate

Plaintiff contends that absent consolidation of his action with Draper's the cases will be "unadjudicatable" because they are so complex. *See* Consolidation Mot. at 4. Plaintiff further argues that the actions "seek to represent substantially the same Plaintiffs Harry and Draper, for

essentially the same claims based on similar allegations," against the same Defendants. *Id*at 5. Upon consolidation, Plaintiff seeks permission to file a consolidated complaint. *See id.* Defendants uniformly oppose the motion.

Under Federal Rule of Civil Procedure 42(a), a court may consolidate actions if they "involve a common question of law or fact." The district court enjoys "broad discretion under this rule to consolidate cases pending in the same district." *Investors Research Co. v. U.S. Dist. Court for Cent. Dist. of Cal.*, 877 F.2d 777, 777 (9th Cir. 1989); *see also Snyder v. Nationstar Mortg. LLC*, No. 15-cv-03049-JSC, 2016 WL 3519181, at *2 (N.D. Cal. June 28, 2016) (same). In exercising this "broad discretion," the district court "weighs the saving of time and effort consolidation would produce against any inconvenience, delay, or expense that it would cause." *Huene v. U.S.*, 743 F.2d 703, 704 (9th Cir. 1984), *on reh'g*, 753 F.2d 1081 (9th Cir. 1984); *see also Snyder*, 2016 WL 3519181, at *2 (same).

While these cases are largely identical with respect to the relevant questions of law and fact, the conduct of Plaintiff and Draper thus far demonstrates that consolidation would likely result in further inconvenience to the Court and Defendants, not to mention additional expense to the latter. There are strong indications that Plaintiff, who is not an attorney, has improperly been acting in a representative capacity on behalf of Draper, given the joint filings submitted by both and the similar language of their complaints. *See Johns v. Cnty. of San Diego*, 114 F.3d 874, 877 (9th Cir. 1997) ("[A] non-lawyer has no authority to appear as an attorney for others than himself.") (citation and internal quotation marks omitted). Consolidating the cases, particularly given the pro se status of the plaintiffs in both, would only blur the lines even more and make it more difficult to ensure that Plaintiff and Draper are representing only themselves. Moreover, the Court has already related the cases, which suffices in terms of preserving judicial economy under these circumstances.

Accordingly, the Court exercises its broad discretion and denies Plaintiff's motion to consolidate.

2. Motion to Stay

Next, Plaintiff seeks a stay of this action pending the resolution of certain underlying administrative proceedings before the CFTC, his MJR, and the consolidation of the two actions. Stay Mot. at 3. As noted in this order, the Court denies the motions to consolidate and for judicial review, so the only remaining argument is that the Court should stay this action pending the CFTC proceedings. Defendants uniformly oppose the motion.

"[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). In order to issue a stay, courts consider: (1) "the possible damage which may result from the granting of a stay," (2) "the hardship or inequity which a party may suffer in being required to go forward," and (3) "the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay." *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962) (citing *Landis*, 299 U.S. at 254-55). Whether to stay an action is a matter entrusted to the discretion of the district court. *See Landis*, 299 U.S. at 254 ("How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance."). "A trial court may, with propriety, find it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case." *Leyva v. Certified Grocers of Cal., Ltd.*, 593 F.2d 857, 863 (9th Cir. 1979). But *Landis* also "cautions that if there is even a fair possibility that the stay . . . will work damage to [someone] else, the stay may be inappropriate absent a showing by the moving party of hardship or inequity." *Dependable Highway Express, Inc. v. Navigators Ins. Co*, 498 F.3d 1059, 1066 (9th Cir. 2007) (citing *Landis*, 299 U.S. at 255) (internal quotation marks omitted).

Based on Plaintiff's litigation conduct thus far, the Court finds that a stay would "work damage" to Defendants, rendering it inappropriate. It may be true that Draper's proceedings before the CFTC are ongoing—but since Plaintiff by his own admission does not have standing to participate in those proceedings, *see* Stay Mot. at 4, it is unclear how they would affect his case.

Critically, there is more than a "fair possibility" that a stay would prolong Defendants' litigation with Plaintiff—a litigant who has demonstrated an unwillingness to, for example, abide by the local rules—and further complicate this action. Given the insufficiency of Plaintiff's showing of "hardship or inequity," a stay is not warranted.

Accordingly, the Court exercises its discretion and denies Plaintiff's motion to stay.

C. The Court Denies Plaintiff's Motion for Judicial Review.

Upon filing his SAC, Plaintiff filed a motion for judicial review ("MJR") challenging the appointment of the judgment officer who heard his case at the CFTC. He purports to file the motion on behalf of Draper as well, which he cannot do as a non-attorney. Accordingly, the Court considers the motion only as it pertains to Plaintiff, and denies the motion.

In sum, Plaintiff seeks vacatur of the underlying CFTC decision on the ground that the judgment officer who presided over the agency proceeding was improperly appointed under Article II, section 2, clause 2 of the Constitution ("the Appointments Clause"). *See* MJR at 5, 11. Although the Court subsequently directed supplemental briefing on whether the recent Supreme Court decision in *Lucia v. Securities Exchange Commission* affects the analysis of Plaintiff's Appointments Clause argument, *see* Dkt. No. 114, the Court has determined that it need not reach that issue in order to deny the motion for lack of jurisdiction.

Under the Commodity Exchange Act, 7 U.S.C. §§ 1 *et seq*("CEA"), a "person complaining of a violation" of the statute may file a petition for a "reparation proceeding" before a CFTC judgment officer. 7 U.S.C. § 18(a)(1); *see also* 17 C.F.R. § 12.26. That person may then appeal that "initial decision" to the CFTC itself. *See* 17 C.F.R. § 12.401(a). Following issuance of the CFTC's "final decision," *see* 17 C.F.R. § 12.406(a), that order "shall be reviewable on petition of any party aggrieved thereby, by the United States Court of Appeals for any circuit in which a hearing was held, or if no hearing was held, any circuit in which the appellee is located," 7 U.S.C. § 18(e); *see also* 17 C.F.R. § 12.406(c). "Such appeal shall not be effective unless within 30 days from and after the date of the reparation order the appellant also files with the clerk of the court a bond[.]" 7 U.S.C. § 18(e).

The CEA, in other words, is unambiguous: any challenge to a final order of the CFTC

must be brought in the appropriate Circuit Court of Appeals, in accordance with section 18(e)—not the district court. Plaintiff provides no meaningful basis for his decision to file the MJR in this Court, contending only that he is "under no legal obligation to [a]ppeal to any CFTC Tribunal or the Ninth Circuit because CFTC never sued any of the 14 Defendants in this Court, at the CFTC Tribunal, on behalf of [Plaintiff]" MJR Reply at 11. But Plaintiff misapprehends the import of the agency's determination that he had no standing to participate in the underlying reparation proceeding. *See* Dkt. No. 92 (Wedbush Defendants' Request for Judicial Notice), Exs. 3, 7. That determination *in itself* is the decision for which he would have sought review as described in the CEA—first by the CFTC, then by the appropriate Court of Appeals.

Accordingly, the Court denies Plaintiff's MJR. The CEA makes plain that the appropriate venue for judicial review of final decisions by the CFTC is the Court of Appeal, not the district court.[4]

D. The Court Grants Defendants' Motion to Dismiss.

In its order dismissing the FAC, the Court found that Plaintiff lacked standing to recover any alleged losses stemming from Draper's $275,000 investment in their joint venture. *See* Dkt. No. 74 at 5-6. The Court did, however, grant Plaintiff one opportunity to amend the FAC to allege additional facts regarding his alleged loss of $4,527.25, which he claimed to have paid to Defendants for the trading platform. *See id.* at 6-7. The Court further noted that Plaintiff would be required to plead in accordance with the heightened pleading requirements of Federal Rule of Civil Procedure 9(b). *Id.* Plaintiff represents that the only amendments he made to the FAC are his arguments on standing on pages 4 to 13 of the SAC. *See* MTD Opp. at 14.

Defendants renew their arguments from the previous round of litigation and claim that Plaintiff has again failed to allege facts showing that he has standing to sue. *See* Dkt. No. 86 at 6-9; Dkt. No. 89 at 3; Dkt. No. 90 at 6-9. The Court limits its standing analysis to Plaintiff's federal claims under the CEA, considers the additional allegations in the SAC, and grants Defendants'

[4] Furthermore, Plaintiff appears to concede in his supplemental briefing regarding *Lucia* that his MJR is moot. *See* Dkt. No. 118 at 2 ("Thus, the methodology of appointing [the judgment officer] through the Appointments Clause is no longer relevant."). In the alternative, the Court therefore also denies the MJR on the ground that it is moot.

motions with prejudice.

1. Legal Standard

Under Federal Rule of Civil Procedure 12(b)(1), a party may move to dismiss based on the court's lack of subject matter jurisdiction. "A Rule 12(b)(1) jurisdictional attack may be facial or factual." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) (citing *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000)). A facial attack "asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction." *Id.* A factual attack "disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." *Id.*

"A suit brought by a plaintiff without Article III standing is not a 'case or controversy,' and an Article III federal court therefore lacks subject matter jurisdiction over the suit." *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1174 (9th Cir. 2004). Because a plaintiff's standing is a prerequisite to a federal court's exercising subject matter jurisdiction over his cause of action, a defendant may challenge standing via a Rule 12(b)(1) motion. *See, e.g.*, *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1123 (9th Cir. 2010) (affirming district court's grant of Rule 12(b)(1) motion asserting that plaintiff lacked standing).[5] Consistent with Article III, "the 'irreducible constitutional minimum' of standing consists of three elements." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). "The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id.* (citing *Lujan*, 504 U.S. at 560-61). Injury in fact is "the first and foremost of standing's three elements," and requires a showing that a plaintiff "suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical." *Id.* at 1547-48 (citations, internal quotation marks, and brackets omitted). To be concrete, an injury "must actually exist." *Id.* at 1548. To be particularized, "the injury must affect

[5] Although only one of the three motions before the Court expressly raises and applies the standard under Rule 12(b)(1), the Court is nonetheless "obligated to consider sua sponte whether [it has] subject matter jurisdiction." *Jasper v. Maxim Integrated Prods., Inc.*, 108 F. Supp. 3d 757, 764 (N.D. Cal. 2015) (quoting *Valdez v. Allstate Ins. Co.*, 372 F.3d 1115, 1116 (9th Cir. 2004)).

the plaintiff in a personal and individual way." *Lujan*, 504 U.S. at 560 n.1.

"Pleadings must be construed so as to do justice." Fed. R. Civ. P. 8(e). For that reason, "a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (citations and internal quotations marks omitted). If dismissal is still apropriate, a court "should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (citation and internal quotation marks omitted).

2. Discussion

The allegations in the SAC regarding Plaintiff's injury-in-fact for purposes of standing go to one of three theories. The Court has already rejected two of these theories, and all of them fail.

a. Plaintiff's Standing Arguments Repeated from the FAC

First, Plaintiff repeats his allegations from the FAC that he suffered a direct loss of $287,462.50 and "consequential" losses of $45 million. *See, e.g.*, SAC ¶ 6. As the Court found in its previous order, this amounts to an attempt "to recover losses to the initial $275,000 contributed to the trading account by Draper"—*i.e.*, "to vindicate the invasion of a legally protected interest . . . that is indisputably not his." Dkt. No. 74 at 5.

Second, Plaintiff again asserts standing based on the "time, energy, resources and money" required "to analyze and monitor Draper and [Plaintiff's] electronic trades 24/6 . . . during the 17 month Trading Period." *See* SAC ¶ 7. He contends that "[i]t costs at least $10,000 per month to trade a $275,000 Commodity Futures Trading Account," and accordingly seeks $170,000 (*i.e.*, $10,000 per month for the relevant 17-month period). *Id.* But Plaintiff provides no basis for the $10,000 figure, except to claim that he "could have taken a job as a Commodity Futures Trader and made more than $10,000 per month." *Id.* As the Court found in its order dismissing the FAC, such an injury is improperly conjectural and speculative. *See* Dkt. No. 74 at 5 n.5 (also stating that "the physical or mental toll of trading, generally alleged, is not sufficiently concrete")

(citations and internal quotation marks omitted).[6]

Plaintiff therefore cannot assert standing on either of these grounds.

b. Plaintiff's Standing Arguments Regarding His Alleged Actual Losses

The third standing theory posited by Plaintiff is the one the Court asked him to elaborate upon in its order dismissing the FAC, and is based on certain operational expenses he allegedly incurred in the course of trading. *See* SAC ¶¶ 4 (alleging that Plaintiff "lost money" due in part to "operational expenses" and the "cost of trading equipment"), 7 (noting that Plaintiff "spent between $299.95 and $315 per month of his own money for the Trading Software, [CVS], to Place the Electronic Trade Orders for Draper and Harry's . . . Joint Venture Trading Account, under Ronald Draper's name . . . for about 15 to 17 months," and that he "spent a few thousand dollars of his own money for Software and Hardware (including a 3-Monitor Hardware System) to carry out the electronic Trades"), 225 (alleging that Plaintiff paid the CVS Defendants $299.95 per month to use their trading platform). In his prayer for relief, Plaintiff states that he is seeking $4,527.25 for the CVS Defendants' "dysfunctional" trading platform. SAC at 88(A). He provides no indication as to how he arrived at that figure. Moreover, a paragraph from the FAC that remained in the SAC contains an allegation that directly contradicts Plaintiff's contention that he paid the platform fees: "Furthermore, Draper's Good Faith Deposit of $275,000 . . . is a negative investment in that, *every month at least $300 will be taken out of the Deposit for Trading Platform and Exchange Fees* whether Draper traded or not." *See* SAC ¶ 69 (emphasis added); *see also* FAC ¶ 39 (same).

As the Court found in dismissing the FAC, the only injury in fact which Plaintiff could allege is the money he spent on the trading platform. Plaintiff has not sufficiently alleged standing in this regard. His allegation that he "spent a few thousand dollars" on software and hardware is not sufficiently concrete, nor does he allege any facts that demonstrate the required nexus—*e.g.*, that Defendants fraudulently induced him to buy this hardware and software in order to trade on

[6] Plaintiff's claim to $45 million in consequential damages (*i.e.*, "lost profits"), *see* SAC at 88-89, is also facially speculative and thus insufficient for purposes of alleging an injury-in-fact.

their system. *See* SAC ¶ 7. As for the $4,527.25 he purports to seek in his prayer for relief, Plaintiff alleges no facts in support of that figure, leaving it entirely up to the Court to guess how he arrived at it. Most saliently, Plaintiff's allegations that he paid a monthly fee for use of the trading platform is undercut by his allegation that "at least $300" was withdrawn out of Draper's $275,000 deposit every month for platform fees. *See* SAC ¶ 69. These contradictory allegations do not plausibly allege an injury in fact for purposes of establishing Plaintiff's standing, especially given the heightened pleading requirement under Federal Rule of Civil Procedure 9(b). *See Kakogui v. Am. Brokers Conduit*, No. 09-CV-4841-LHK, 2010 WL 3629825, at *2 (N.D. Cal. Sept. 14, 2010) (dismissing Truth in Lending Act claim with prejudice as futile where plaintiff set forth "vague, conclusory, and internally contradictory allegations"); *Coppes v. Wachovia Mortg. Corp.*, No. 2:10-cv-01689-GEB-DAD, 2011 WL 1402878, at *7 (E.D. Cal. Apr. 13, 2011) (finding that internally contradictory allegations failed to plausibly allege a duty of care); *Gross v. Symantec Corp.*, No. C 12-00154 CRB, 2012 WL 3116158, at *6 (N.D. Cal. July 21, 2012) (suggesting that internally contradictory allegations would "defeat plausibility").

Accordingly, the Court finds that Plaintiff lacks standing to bring his federal CEA claims, and grants Defendants' motions as to those claims with prejudice. While the Court is mindful of Plaintiff's pro se status, this is the third iteration of his complaint, and he has now twice failed to allege sufficient facts showing that he meets the threshold standing requirements. The Court reads this failure to establish that he cannot truthfully do so, such that granting leave to amend would be futile. *See Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 1007 (9th Cir. 2009) ("[W]here the plaintiff has previously been granted leave to amend and has subsequently failed to add the requisite particularity to its claims, [t]he district court's discretion to deny leave to amend is particularly broad.") (citation, internal quotations, and original brackets omitted); *Lopez*, 203 F.3d at 1130.

3. Remaining Jurisdictional Issues

Without Plaintiff's CEA claims, this Court lacks federal question jurisdiction, as Plaintiff's remaining causes of action arise under California law. Moreover, there is no basis for exercising diversity jurisdiction, as there is not complete diversity between Plaintiff and Defendants.

Compare SAC ¶ 52 (alleging that Plaintiff is a resident of Fremont, California), *with id.* ¶ 88 (alleging that Defendant Main Street Trading, Inc. is a California corporation); *see Lee v. Am. Nat'l Ins. Co.*, 260 F.3d 997, 1004 (9th Cir. 2001) (holding that "to bring a diversity case in federal court against multiple defendants, each plaintiff must be diverse from each defendant").[7] And, while the Court may in its discretion exercise supplemental jurisdiction over Plaintiff's remaining state-law claims, *see* 28 U.S.C. § 1367(a), it may decline to do so if, as here, it has dismissed all claims over which it has original jurisdiction, *see Sanford v. MemberWorks, Inc.*, 625 F.3d 550, 561 (9th Cir. 2010) (citing 28 U.S.C. § 1367(c)(3)). "[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine—judicial economy, convenience, fairness, and comity—will point toward declining to exercise jurisdiction over the remaining state-law claims." *Id.* (citation omitted) (original brackets). The Court finds this to be "the usual case," and accordingly declines to exercise supplemental jurisdiction and dismisses Plaintiff's state-law claims without prejudice, for lack of jurisdiction.

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[7] As support for his claims, Plaintiff attached to the SAC copies of two checks he apparently made out to one of the Wedbush Defendants—one for $599.90, and the other for $627.90. *See* Dkt. No. 75-1. Plaintiff pleads insufficient facts regarding the circumstances surrounding those payments, however, and in any event, the sum of the checks does not approach the $75,000 amount-in-controversy threshold required for diversity jurisdiction, even had there been complete diversity here. *See* 28 U.S.C. § 1332(a).

III. CONCLUSION

For the foregoing reasons, the Court **STRIKES** Docket Numbers 104 and 112; **DENIES** Plaintiff's motion to consolidate; **DENIES** Plaintiff's motion to stay; and **DENIES** Plaintiffs motion for judicial review. Further, the Court **GRANTS** Defendants' motions to dismiss as follows: Plaintiff's federal claims are **DISMISSED WITH PREJUDICE** and his state-law claims are **DISMISSED WITHOUT LEAVE TO AMEND, BUT WITHOUT PREJUDICE** to refiling in state court. The Clerk is directed to close the case.

IT IS SO ORDERED.

Dated: 8/27/2018

Haywood S. Gilliam, Jr.
HAYWOOD S. GILLIAM, JR.
United States District Judge

United States District Court
Northern District of California

APPENDIX A5

(For 9th Circuit Case Number 21-16258)

Rehearing en banc Order of the U.S. Court of Appeals for the 9th Circuit, *Harry et al vs. KCG Americas LLC et al* Filed July 7, 2022

FILED

JUL 7 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BRIGHT HARRY; RONALD STEPHEN DRAPER,

Plaintiffs-Appellants,

v.

KCG AMERICAS LLC; et al.,

Defendants-Appellees.

No. 21-16258

D.C. No. 4:20-cv-07352-HSG
Northern District of California, Oakland

ORDER

Before: SILVERMAN, MILLER, and BUMATAY, Circuit Judges.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

Appellants' petition for rehearing en banc (Docket Entry No. 55) is denied.

Harry and Draper's pending motions (Docket Entry Nos. 49, 50, 51, 53, 56) are denied.

No further filings will be entertained in this closed case.

APPENDIX A6

(For 9th Circuit Case Number 21-16258)

Petitioners'/Appellants' March 28, 2022 Letter to the Chief Judge of the 9th Circuit, about the Gross ILLEGALITY in the 9th Ciruit for the Case of *Harry et al vs. KCG Americas LLC et al*

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The Hon. Chief Judge Mary Murguia
James R. Browning Courthouse
U.S. Court of Appeals for the 9th Circuit
95 Seventh Street
San Francisco, CA 94103-1526

March 28, 2022

Reference: 9th Circuit Case Number 21-16258 for Harry et al vs. KCG Americas LLC et al

Dear Hon. Chief Judge:

Why has the 9th Circuit Court of Appeals failed to provide us a Hearing Schedule encompassing the Hearing Date, Time, and Place for Oral Argument of the above-referenced Case, as required by Ninth Circuit General Orders 3.4 and 3.5, and FRAP 34-a(2)?

Why has the 9th Circuit failed to respond to our Motion, DktEntry #15-1, filed on 11/09/2021?

Why has the 9th Circuit failed to respond to our Motion, DktEntry #39-1, filed on 02/09/2022?

Why is the 9th Circuit Violating our 1st, 5th and 7th Amendment Constitutional Rights with **Judicial Impunity**?

Why did the 9th Circuit create a Secret Panel, then select Judges in Secret who then allegedly reviewed our Appeal in Secret, and then secretly promulgated an **ILLEGAL** Memorandum, DktEntry 48-1, all done, without providing us a Hearing Schedule encompassing a Hearing Date, Time and Place for Oral Argument, as required by 9th Circuit General Orders 3.4 and 3.5, and FRAP 34-a(2), for such an extremely Complex Commodity Futures Case as ours?

Even assuming *arguendo* that the Secret Panel is not Secret and we were provided a timely Hearing Schedule including Date, Time and Place, and the Hearing took place, albeit, without oral arguments, why did the Non-Secret Panel base its Memorandum on profoundly **erroneous STANDARDS OF APPELLATE REVIEW**, and not backed by facts or Law?

We await your prompt answers to this Gross **ILLEGALITY** of the 9th Circuit Court of Appeals against two elderly American Citizens.

We are two elderly American-Citizens in our seventies and non-lawyer *Pro Se* Plaintiffs/Appellants of the above referenced Case. We are *Pro Ses* not by choice but by circumstances. Despite having the financial resources to hire a law firm or lawyers to represent us, we've been unable to find any competent law firm or lawyers to represent us. We've contacted more than 60 law firms and lawyers and all have declined, most telling us that our Commodity Futures Case is extremely Complex technologically and legally, and has further been made more complicated by the opposing Attorneys. As a result, we've been forced to study the laws to represent ourselves, at a great cost, time and resources.

We are writing you this letter with extreme frustration and anger and as a last resort because of the unconscionable **ILLEGALITY** in the 9th Circuit Court of Appeals. This **ILLEGALITY MUST STOP** because this is not a game. Lives are being ruined because of this **ILLEGALITY** in the 9th Circuit Court of Appeals.

No Judge, not even the Chief Justice of the Supreme Court of the United States, and no Court, not even the Supreme Court of the United States, has any Statutory Authority to knowingly and willfully violate the 1st, 5th and 7th Amendment Constitutional Rights of any American Citizen. That's against the Law. Thus, neither the 9th Circuit Court of Appeals nor any Judge of the 9th Circuit Court of Appeals has any Statutory Authority to knowingly and willfully violate our 1st, 5th and 7th Amendment Constitutional Rights. That's pure **ILLEGALITY**, and it **MUST STOP**.

Moreover, the 9th Circuit Court of Appeals has no Statutory Authority to create a Secret Panel, then select Judges in Secret who then allegedly reviewed our Appeal in Secret, and then secretly promulgated a Memorandum, DktEntry 48-1, premised on profoundly **erroneous Standard of Appellate Review**, all done, without providing us a Hearing Schedule encompassing a Hearing Date, Time, and Place for Oral Argument, as required by 9th Circuit General Orders 3.4 and 3.5, and FRAP 34-a(2). This is an **Unconscionable ILLEGALITY** that it **MUST STOP**. Here are the General Orders and FRAP 34-a(2) for your convenience.

9th Circuit General Orders

G.O. 3.4. Notification of Calendaring of Cases

G.O. 3.4.1
About fourteen weeks before oral argument, parties are notified of the month that their cases are being considered for oral argument.

G.O. 3.4.2
About ten weeks before oral argument, parties shall be notified of the time and place of the hearing of their cases.

G.O. 3.4.3
If a panel decides not to hear oral argument, the parties should be notified at least 14 days before the scheduled hearing date. However, such notices may by necessity be issued any time before the scheduled hearing. *(Rev 1/11/16; 1/13/20)*

Rule 34. Oral Argument

(a) In General.

(1) *Party's Statement.* Any party may file, or a court may require by local rule, a statement explaining why oral argument should, or need not, be permitted.

(2) *Standards.* Oral argument must be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary for any of the following reasons:

(A) the appeal is frivolous;

(B) the dispositive issue or issues have been authoritatively decided; or

(C) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.

(b) Notice of Argument; Postponement. The clerk must advise all parties whether oral argument will be scheduled, and, if so, the date, time, and place for it, and the time allowed for each side. A motion to postpone the argument or to allow longer argument must be filed reasonably in advance of the hearing date.

(c) Order and Contents of Argument. The appellant opens and concludes the argument. Counsel must not read at length from briefs, records, or authorities.

First, our Appeal is **NOT** frivolous and "the dispositive issue", the woeful failure of the Defendants/Appellees, the illegal **closed** *Harry* Court and the **illegitimate** *Harry-Draper/Judge Gilliam, Jr.* Court to establish that subject matter jurisdictions exist, "ha[s] **[NOT]** been authoritatively decided." Hence, pursuant to FRAP 34-a(2), this Appeal demands Oral Argument. Subsequently, pursuant to G.O.3.4., "[a]bout fourteen weeks before oral argument, [we should have been] notified of the month that [ou]r case[ ] [is] being considered for oral argument, or '[a]bout ten weeks before oral argument, [we should have been] notified of the time and place of the hearing of [ou]r case[ ]". Neither of these was done by the 9th circuit. We were never notified, and we have still not been notified.

Second, assuming *arguendo* that the Secret 9th Circuit "panel decide[d] not to hear oral argument, [we should have] be[en] notified at least 14 days before the scheduled hearing date" in accordance with G.O.3.4. We have still not received a hearing date, and we were never notified that there is a Secret Panel that has decided not to hear oral argument, until 03/24/2022 when we received the **ILLEGAL** Memorandum, DktEntry #48-1, premised on profoundly erroneous **STANDARDS OF APPELLATE REVIEW**, and not backed by facts or Law We are still waiting for notification of the scheduled hearing date, time and place for Oral Argument.

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Third, by the Secret Panel affirming the Lower Courts' violation of our 1st, 5th and 7th Amendment Constitutional Rights, through the deployment of profoundly erroneous **STANDARDS OF APPELLATE REVIEW** to promulgate the **ILLEGAL** Memorandum, DktEntry #48-1, the 9th Circuit is itself violating our 1st, 5th and 7th Amendment Constitutional Rights, with **Judicial Impunity**.

Finally, for the sake of **Justice**, we request that you use your good offices to ensure that the 9th Circuit promptly (i) provide us a Schedule of the Hearing of our Appeal, encompassing the Date, Time and Place for Oral Argument, (ii) respond to our Motions, DktEntry #15-1 and DktEntry #39-1 and, (iii) constitute a new and proper 3-Judge Panel **without Bias** to proceed with the Review of our Appeal.

The Purpose of Law is to prevent Injustice, and Courts are created to prevent Injustice, not to aid and abet, or perpetuate Injustice.

Sincerely

Bright Harry

Ronald S. Draper

APPENDIX A7

(For 9th Circuit Case Number 21-16258)

Harry's $1,227.80 economic-injury-in-fact (software subscription check payment to Respondents who defrauded him of it), distinct from the $275,000 Good Faith Deposit, satisfies *Lujan*, affirming his Article III Standing in both the *Harry* case and the *Harry-Draper* case.

EXHIBIT B16

Bright Harry's Checks For Trading Software Payment For the Draper/Harry California Commodity Futures Trading Account # TSMPF148 at KCG et al, and later Wedbush

BRIGHT HARRY
37421 GILLETT ROAD
FREMONT, CA 94536

Fidelity® Cash Management Account 1001

80-568/1012

10/6/2014
Date

Pay to the Order of Main Street Trading | $ 599.90

Five hundred & ninety-nine 90/100 Dollars

Fidelity INVESTMENTS

For TEMPK148 QST /pmts

⑈101205681⑈100⑈771058352063 5⑈

Main Street Trading
G018191194

221638536

BRIGHT HARRY
37421 GILLETT ROAD
FREMONT, CA 94536

Fidelity® Cash Management Account

1002

80-568/1012

2/9/2015
Date

Pay to the Order of Main Street Trading $ 627.90

Six hundred & twenty-seven, 90/100 Dollars

Fidelity INVESTMENTS

UMB Bank, N.A.
Wanaw, MO

For TMPF148 (QST Pmt)
Q4 Jan/Feb 2015

⑆101205681⑆1002⑈7710583520635⑈

Fabiano Clarke

2041947418

Main Street Trading Inc
601819 1194

APPENDIX B

(District Court Case Number 4:20-cv-07352-JST)
(District Court Case Number 4:20-cv-07352-HSG)
(9th Circuit Court Case Number 21-16258)

Appendix B Table of Contents and its sub-Appendices

APPENDIX B1

(For 9th Circuit Case Number 21-16258)

Petitioners'/Appellants' Summary of the Harry-Draper Complaint Showing Magistrate Judge Sallie Kim as the Original Assigned Judge for the *Harry-Draper* Case, Filed on October 13, 2021

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Pro Se

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Bright Harry
and
Ronald S. Draper

Plaintiffs,

vs.

_____,
KCG Americas LLC ("KCG"),
Daniel B. Coleman, CEO of KCG
Carl Gilmore, Director of KCG Futures
Greg Hostetler, KCG Compliance Officer
Main Street Trading, Inc. ("MST"),
Patrick J. Flynn, President of MST
Wedbush Securities Inc. ("Wedbush")
Edward W. Wedbush, President of Wedbush
ION Trading, Inc. ("ION")
Andrea Pignataro, CEO of ION, Global
Robert Sylverne, CEO of ION, USA
Computer Voice Systems, Inc. ("QST")
Paul Sturm, CEO of QST and
Scott William Benz, VP of QST

Defendants

Case Number: CV20 7352 SK

HARRY'S AND DRAPER'S COMPLAINT FOR:

1. VIOLATIONS OF 18 U.S.C. § 1962(C)–(D): THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT ("RICO")
2. FINANCIAL ABUSE OF ELDER DRAPER
3. FRAUDULENT CONCEALMENT UNDER CALIFORNIA LAW
4. FRAUDULENT MISREPRESENTATIONS UNDER CALIFORNIA LAW
5. VIOLATIONS OF THE CALIFORNIA FALSE ADVERTISING LAW
6. FRAUD IN VIOLATION OF 7 U.S.C. § 6b
7. FRAUD IN VIOLATION OF CEA § 6(c)(1)
8. VIOLATIONS OF CALIFORNIA UNLAWFUL ACTIVITY & FRAUDULENT CONDUCT LAW
9. VIOLATIONS OF THE CALIFORNIA UNFAIR COMPETITION LAW
10. VIOLATIONS OF THE CALIFORNIA CONSUMER LEGAL REMEDIES ACT
11. BREACH OF OBLIGATION WITHOUT, AND WITH CONTRACT UNDER CALIFORNIA LAW
12. BREACH OF FIDUCIARY DUTY UNDER CALIFORNIA LAW

Federal Statutes:
7 U.S.C. § 6b, 7 U.S.C. §2(a)(1)(B), 7 U.S.C. § 25, CEA § 6(c)(1) and 18 U.S.C. § 1962(C)–(D)
California Statutes:
CCC §1572, CCC §1573, CCC §1709, CCC §1710, CCC §3294, CCC §3333 and Corp. 29536
NFA Rules:
Rules 2-2, 2-4, 2-9, 2-26, 2-29, 2-30, 2-38

JURY TRIAL DEMANDED

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Plaintiffs Bright Harry ("Harry") and Ronald S. Draper ("Draper"), or Harry-Draper Trading Partners ("HDTP") by their own experiences, investigations, and information and belief, allege with particularity pursuant to Fed. R. Civ. P. 9(b), as follows:

SUMMARY OF THE COMPLAINT

1. This action is about the Electronic Trade Manipulation Fraud (ETMF) Enterprise Defendants' Intentional Fraudulent Concealment of their defective and dysfunctional Electronic Trading Facility they fraudulently touted or represented to Plaintiffs as superior, fully functional, tightly integrated and seamlessly connected to the Commodity Futures Exchanges like CME/Globex, CBOT and ICE, to deceive and induce, and deceived and induced Plaintiffs Draper and Harry to move their successful Futures Trading Account from OEC/Daniels Trading (Plaintiffs' Former Broker) to the ETMF Enterprise Defendant KCG and later, ETMF Enterprise Defendant Wedbush, both Clearing FCMs, to defraud Plaintiffs, and defrauded Plaintiffs. The Fraudulent Concealment, Fraudulent Misrepresentations, Fraudulent Deceits and Fraudulent Inducement by the two ETMF Enterprise snake-oil Salesmen-Defendants, Scott William Benz ("Benz") of QST and Patrick J. Flynn ("Flynn") of MST were very effective and successful against Plaintiffs because their representations were corroborated by the phenomenal performance of the ETMF Enterprise Defendants' Demo Trading Platform ("DEMO"). The ease and simplicity of creating exchange-traded Futures Spreads and Futures

Spread Charts, and the speed of execution of Plaintiffs' electronic trade orders through the Simulated or Virtual Futures Exchanges was lightning fast in the DEMO. Benz and Flynn used this phenomenal performance of the DEMO to finally induce Plaintiffs to move their Futures Trading Account to the ETMF Enterprise Defendants, and the following are the ETMF Enterprise Defendants.

The Five Corporate Defendants are all Jointly and Severally Liable as a Joint Enterprise, the "ETMF Enterprise", through which the Nine Individual Defendants Carried Out their Misconducts to Defraud Plaintiffs Draper and Harry

2. The ETMF Enterprise Defendants include the 5 (five) Corporate Defendants Wedbush Securities Inc. ("Wedbush"), ION Trading, Inc. ("ION"), Main Street Trading, Inc. ("MST"), Computer Voice Systems, Inc. ("QST") and KCG Americas LLC ("KCG"), and 9 (nine) Individual Defendants (Daniel B. Coleman, Carl Gilmore, Greg Hostetler, Edward W. Wedbush, Andrea Pignataro, Robert Sylverne, Paul Sturm, Scott William Benz and Patrick J. Flynn. The 5 Corporate Defendants operated as MICK Joint Enterprise and CWIM Joint Enterprise, within the Umbrella RICO Enterprise, the Electronic Trade Manipulation Fraud ("ETMF") Enterprise, and thus, are jointly and severally liable for the misconducts alleged in Plaintiffs' Complaint.

3. Defendants Daniel B. Coleman, Carl Gilmore, Greg Hostetler, Edward W. Wedbush, Andrea Pignataro, Robert Sylverne, Paul Sturm, Scott William Benz and Patrick J. Flynn, as executives of their respective Corporations, formulated, directed, controlled, had the authority to control, or participated in the acts and practices of the corporate Defendants that constitute the "ETMF Enterprise". Thus, Defendants Daniel B. Coleman, Carl Gilmore, Greg Hostetler, Edward W. Wedbush, Andrea Pignataro, Robert Sylverne, Paul Sturm, Scott William Benz and Patrick J. Flynn are jointly and severally liable with the Corporate Defendants for the acts and practices alleged in Plaintiffs' Complaint. In short, these nine Individual Defendants who were all Officers of their respective Corporations within the ETMF Enterprise, and who controlled it and/or participated in its activities, used the ETMF Enterprise to operate their fraudulent scheme, and acted in **bad faith** pursuant to 7 U.S. C. §25(b)(4), and violated the CEA pursuant to 7 U.S. C. § 25(b)(3). **As such, they have no privity preclusion**. The corporate Defendants and the individual Defendants of the ETMF Enterprise are collectively the "Defendants".

4. Each of these "**Defendants**" in the ETMF Enterprise was the agent, partner, servant,

employee, alter ego, aider and abettor, co-conspirator and/or joint venturer of each of the remaining Defendants herein, and were all times acting within the scope and purpose of said agency, partnership, service, conspiracy, and/or joint venture through the ETMF Enterprise, and each Defendant has ratified and approved the acts of each of the remaining Defendants.

5. In July/August 2013 Defendant Scott William Benz ("Benz") of the ETMF Enterprise Defendant QST informed Harry that the Defendants' Electronic Trading Facility was the best and that Harry could easily create Commodity Futures Spread Charts and electronically trade the Commodity Futures Spreads flawlessly through the commodity futures Exchanges like CME-Globex, CBOT and ICE. He assured Harry that he will not have any problem trading right inside the Spread Charts and that Defendants' electronic Trading Facility was seamlessly and tightly integrated with the Commodity Futures Exchanges. Benz's assurance or promise later turned out to be a blatant lie and deceit, because the ETMF Enterprise Defendants' Electronic Trading Facility did not match Benz's promise or assurance. In fact, Benz's Promise and the assurances of the Software Engineers of the ETMF Enterprise Defendant QST, to Harry, turned out to be a total fraud.

6. Furthermore, in September/October 2013, Defendant Patrick Joseph Flynn ("Flynn") of ETMF Enterprise Defendant MST, also assured Harry, before opening the Harry-Draper Trading Account through the **Clearing** FCM-Defendant KCG on November 6, 2013, that Defendants' Electronic Trading Facility was tightly integrated and seamlessly connected to the Commodity Futures Exchanges, and that Harry would have no problems trading electronically. Defendants Benz and Flynn knowingly and wilfully made these promises and assurances to deceive to induce and keep, and deceived and induced Harry and Draper to move their Profitable Commodity Futures Trading Account from OEC/Daniels Trading (former Broker) to ETMF Enterprise Defendant KCG, and deceptively kept Plaintiffs as Defendants' Futures Customers. Harry and Draper justifiably relied on the representations of both Defendants Benz and Flynn since they (Benz and Flynn) had superior knowledge of their Electronic Trading Facility. But for the wilful, malicious and Fraudulent Concealment, and Fraudulent Misrepresentations of Defendants Benz and Flynn to Fraudulently Deceive and Induce Draper and Harry, Plaintiffs would never have moved their profitable Commodity Futures Trading Account from OEC/Daniels Trading to Defendants, for Defendants to defraud Plaintiffs. In

other words, Plaintiffs would have continued trading at OEC/Daniels Trading, and would have made a profit of at least **$208,278.86** instead of **$36,314.80** as of November 30, 2013, as shown in Table 4 below. With this additional profit of **$208,278.86** added to the original Good Faith Deposit of **$275,000**, making a total of **$483,278.86**, Plaintiff Harry would have turned this amount into tens of millions of Dollars, with his proprietary and robust Commodity Futures Spread Trading System, in the six years (July 2013 to July 2019) Defendants have wasted Plaintiffs' time, energy and financial resources.

Damage Loss From Fraudulent Deceits, Fraudulent Concealment and Fraudulent Misrepresentations by Benz of QST, from August 12, 2013 to November 14, 2013

Table 4

Comparing Actual and Expected Profits for the first 5 months of trading at OEC/Daniels Trading (Previous Broker) had QST not distracted Plaintiff Harry by its Fraudulent Deceits, Fraudulent Concealment and Fraudulent Misrepresentations about its QST Platform, especially during the QST-Demo Testing Period.

Actual Monthly Profits at OEC/Daniels Trading, from July 2013 to November 2013 Due to the Fraud of CVS/QST

Month	Profit/(Loss)
July	$33,000.00
August	$39,500.00
September	$9,425.00
October	-$53,375.00
November	$11,250.00
Semi-Total	**$39,800.00**
Commissions/Fees	-$3,485.20
Total	**$36,314.80**

Expected Monthly Profits at OEC/Daniels Trading, from July 2013 to November 2013 Without the Fraud of CVS/QST

Month	Profit/(Loss)
July	$33,000.00
August	$39,500.00
September	$48,000.00
October	$60,000.00
November	$72,000.00
Semi-Total	**$219,500.00**
Commissions/Fees	-$19,221.14
Total	**$208,278.86**

7. Besides, in violation of NFA Rule 2-26 and 17 CFR § 1.55, ETMF Enterprise Defendants MST and its President, Flynn, and KCG and its officers and employees including Daniel B. Coleman ("Coleman"), the CEO, Carl Gilmore ("Gilmore"), Head of KCG Futures (the Futures Division of KCG), and Greg Hostetler ("Hostetler"), Chief Compliance Officer of KCG Futures, knowingly and willfully concealed from Harry and Draper, the Financial Malfeasances of Clearing FCM Defendant KCG, especially its near bankruptcy on August 1, 2012, the numerous litigations against KCG, and several of KCG's Unlawful Conducts that violated Regulations, and opened Draper's and Harry's Account on November 6, 2013. Had Flynn, Coleman, Gilmore and Hostetler not breached their Legal

Duty to Disclose (Fraudulent Concealment) to Plaintiffs Harry and Draper, the precarious financial situation of KCG and its numerous unlawful Acts, as required by NFA Rule 2-26 and 17 CFR § 1.55, Harry and Draper would never have opened their Trading Account with Clearing FCM-Defendant KCG, and hence, would not have suffered the subsequent financial losses, as shown in table 2 below.

Table 2

Comparing Profits for the first 5 months of trading at OEC/Daniels Trading (Previous Brokers) and ETMF Enterprise Defendants

Monthly Profits at OEC/Daniels Trading Platform, from July 2013 to November 2013

Month	Profit/(Loss)
July	$33,000.00
August	$39,500.00
September	$9,425.00
October	-$53,375.00
November	$11,250.00
Semi-Total	**$39,800.00**
Commissions/Fees	-$3,485.20
Total	**$36,314.80**

Monthly Profits at ETMF Enterprise Defendants' Platform, from November 2013 to March 2014

Month	Profit/(Loss)
November 2013	$4,498.70
December 2013	-$12,050.90
January 2014	-$27,724.06
February 2014	-$131,825.00
March 2014	-$46,340.55
Semi-Total	**-$213,441.81**
Commissions/Fees	-$4,060.00
Total	**-$217,501.81**

8. Overall, the ETMF Enterprise Defendants defrauded Plaintiffs Draper and Harry to the tune of about **$125,012,445.73**, as at **June 30, 2019**, in Direct Damage Losses, Lost Profits, and Lost Opportunities pursuant to California Civil Code ("CCC") §§ 1709, 1710, 3294, and 3333, as shown partially in the attached Exhibit T15(a). Draper and Harry are seeking their original **$275,000 ($256,842.60 for Draper and $18,157.40 for Harry)** Good Faith Deposit openly stolen from them (Plaintiffs) by the ETMF Enterprise Defendants, Harry's **$6,078.60** total monthly trading software fee for 17 months stolen from him by the same ETMF Enterprise Defendants, and the actual **$287,462.50** Direct Damage Loss (see table 3 on Page 69 below) by the unlawful acts of the Defendants, during the relevant period. The sum of **$275,000** + **$6,078.60** + **$287,462.50** + **$208,278.86** = **$764,357.46** is the total Direct Damage Loss, from November 15, 2013 to April 28, 2015, when Harry closed out all Plaintiffs' open trade positions, due to Defendants' immense Fraud. Adding the Lost Profits or Consequential Damages of **$124.248 Million** as at June 30, 2019, pursuant to CCC §§1709, 1710, 3294, and 3333, brings the total Damage Loss to more than **$125 Million** all the ETMF Enterprise

Defendants jointly and severally owe Plaintiffs Draper and Harry for their unlawful acts. RICO Violation, Elder Financial Abuse and Punitive Damages Costs which are based on the Base Amount of **$125,012,445.73**, will also be included during the time of discovery. Such explicit details are not needed at this pre-discovery stage of the trial. **Ultimately, the Jury will decide the Final Total Damage Cost, and not this Court or Plaintiffs or Defendants.** This is a Jury Trial.

JURISDICTION

A. Subject Matter Jurisdiction

9. This action arises under the laws of the United States, and in particular, the Commodity Exchange Act, 7 U.S.C. § 1 et seq. (the "CEA"), and Racketeer Influenced and Corrupt Organization ("RICO") Act (18 U.S.C. §1962 (C) - (D)). Accordingly, this Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331, 7 U.S.C. §2(a)(1)(B), 7 U.S.C. §6b, 7 U.S.C. §7a-1, 7 U.S.C. §7a-2, 7 U.S.C. §13c(a), CEA §6(c)(1), 18 U.S.C. §1962 (C) - (D), and especially 7 **U.S.C. § 25(c).**

10. This Court also has supplemental jurisdiction over the State law claims pursuant to 28 U.S.C. § 1367(a), because these claims are so related to the Federal claims in this action that they form part of the same case or controversy.

B. Constitutional Standing

11. Both Plaintiffs Draper and Harry have Constitutional Standing. Although Draper deposited the initial **$275,000** Good Faith Deposit in the Harry-Draper Trading Account under Draper's name, Draper actually contributed **$256,842.60** and Harry contributed **$18,157.40** of this Good Faith Deposit. Furthermore, Harry contributed **$6,078.60** trading software fee for the 17 months of trading. These Financial Contributions of both Draper and Harry that were openly stolen by the ETMF Enterprise Defendants are "concrete, particularized, and actual; fairly traceable to the challenged action of Defendants; and redressable by a favorable ruling from this Court. As such, both Draper and Harry met the Supreme Court Requirement for Constitutional Standing under Article III, Section 2 of the United States Constitution, and also satisfied the heightened Pleading of FRCP 9(b), although not necessary. Besides being the Joint co-venturer of Draper in their California joint venture for Trading Commodity Futures Spreads and hence a Co-owner of their Commodity Futures Trading Account,

Harry was the sole Trader of the Account who placed the electronic buy and sell orders of the Commodity Futures for their Trading Account, and lost money (at least **$18,157.40** + **$6,078.60** or **$24,236.00**) as shown above, due to Defendants' Immense FRAUD. Hence, pursuant to **7 U.S.C. § 25(a)** and specifically **7 U.S.C. § 25(a)(1)(C)(ii)**, Harry as a Co-owner and Sole Trader of the trading account who also lost money, has private right of action, and thus, standing to sue the 14 Defendant-Fraudsters in any Court of his choice including this Court. The Seventh Circuit has held that CEA Section 22 or 7 U.S. Code § 25 by its terms "creates the exclusive remedies available to those injured by violations of the CEA, and makes those remedies available only to persons injured in the course of trading on a contract market. It therefore forecloses all other remedies, including any on behalf of non-traders." *American Agric. Movement v. Board of Trade*, 977 F.2d 1147, 1153 (7th Cir. 1992. Thus, Harry, the Co-owner of the Harry-Draper Commodity Futures Joint Venture Trading Account, and the sole Trader of the Account, has Constitutional Standing to sue the 14 Defendant-Fraudsters in this Court.

VENUE

12. Venue is proper pursuant to Judicial Code, 28 U.S.C. § 1391(a) and 7 U.S.C. § 25(c), because the events giving rise to the claims asserted herein occurred in this judicial district.

INTRADISCTRICT ASSIGNMENT

13. This Lawsuit should be assigned to the San Francisco/Oakland Division of this Court because the Account Opening Agreement was signed in Fremont, Alameda County, California, and the Events giving rise to the Claims asserted in this Complaint occurred in this Judicial District.

PARTIES

A. PLAINTIFF

14. **Plaintiff Bright Harry** who is Draper's Partner in their HDTP California Joint Venture for trading Commodity Futures Spreads, was the Executor of the contract between Draper and the FCM-Defendants, KCG and later Wedbush, suffered staggering financial losses including **$18,157.40,** his portion of the **$275,000** Initial Good Faith Deposit, and **$6,078.60** trading software usage fee for the 17 months of trading. At all times herein mentioned, Harry is a natural person resident in Fremont, located in Alameda County in the State of California. Harry is the Plaintiff who actually traded the

APPENDIX B2

(For 9th Circuit Case Number 21-16258)

Petitioners'/Appellants' 10/27/2020 Declination of Magistrate Judge Jurisdiction, ECF #7, of the *Harry-Draper*

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BRIGHT HARRY,

Plaintiff,

v.

KCG AMERICAS LLC,

Defendant.

Case No. 20-cv-07352-SK

CONSENT OR DECLINATION TO MAGISTRATE JUDGE JURISDICTION

INSTRUCTIONS: Please indicate below by checking one of the two boxes whether you (if you are the party) or the party you represent (if you are an attorney in the case) choose(s) to consent or decline magistrate judge jurisdiction in this matter. Sign this form below your selection.

( ) **Consent** to Magistrate Judge Jurisdiction

In accordance with the provisions of 28 U.S.C. § 636(c), I voluntarily **consent** to have a United States magistrate judge conduct all further proceedings in this case, including trial and entry of final judgment. I understand that appeal from the judgment shall be taken directly to the United States Court of Appeals for the Ninth Circuit.

OR

(X) **Decline** Magistrate Judge Jurisdiction

In accordance with the provisions of 28 U.S.C. § 636(c), I **decline** to have a United States magistrate judge conduct all further proceedings in this case and I hereby request that this case be reassigned to a United States district judge.

DATE: 10/23/2020

NAME: BRIGHT HARRY
COUNSEL FOR:
(OR "PRO SE:)

Signature

United States District Court
Northern District of California

APPENDIX B3

(For 9th Circuit Case Number 21-16258)

The District Court Clerk's 10/27/2020 Notice of Impending Random Reassignment of the *Harry-Drapeau* Case From the Magistrate Judge to a District Judge

Activity in Case 3:20-cv-07352-SK Harry et al v. KCG Americas LLC ("KCG") et al Clerk's Notice of Impending Reassignment - Text Only

ECF-CAND@cand.uscourts.gov

Tue 10/27/2020 4:11 PM

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.
*****NOTE TO PUBLIC ACCESS USERS*** Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.**

U.S. District Court

California Northern District

Notice of Electronic Filing

The following transaction was entered on 10/27/2020 at 4:10 PM and filed on 10/27/2020
Case Name: Harry et al v. KCG Americas LLC ("KCG") et al
Case Number: 3:20-cv-07352-SK
Filer:
Document Number: 8(No document attached)

Docket Text:
CLERK'S NOTICE OF IMPENDING REASSIGNMENT TO A U.S. DISTRICT COURT JUDGE: The Clerk of this Court will now randomly reassign this case to a District Judge because either (1) a party has not consented to the jurisdiction of a Magistrate Judge, or (2) time is of the essence in deciding a pending judicial action for which the necessary consents to Magistrate Judge jurisdiction have not been secured. You will be informed by separate notice of the district judge to whom this case is reassigned.

ALL HEARING DATES PRESENTLY SCHEDULED BEFORE THE CURRENT MAGISTRATE JUDGE ARE VACATED AND SHOULD BE RE-NOTICED FOR HEARING BEFORE THE JUDGE TO WHOM THIS CASE IS REASSIGNED.

This is a text only docket entry; there is no document associated with this notice.
(ejkS, COURT STAFF) (Filed on 10/27/2020)

Any non-CM/ECF Participants have been served by First Class Mail to the addresses of record listed on the Notice of Electronic Filing (NEF)

3:20-cv-07352-SK Notice has been electronically mailed to:

Bright Harry bharry77@hotmail.com

Ronald S. Draper ronsdraper@att.net

3:20-cv-07352-SK Please see Local Rule 5-5; Notice has NOT been electronically mailed to:

https://outlook.live.com/mail/0/inbox/id/AQQkADAwATE0OTcwLTVhYjItMTNhYy0wMAItMDAKABAAxpTaz8g3qEe%2FOvdL2dYWyw%3D%3D

APPENDIX B4

(For 9th Circuit Case Number 21-16258)

The District Courts' 10/28/2020 Order, ECF #9, Reassigning the *Harry-Draper* Case from Magistrate Judge Sallie Kim to Judge Jon S. Tigar by "a proportionate, random and blind system pursuant to General Order No. 44".

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BRIGHT HARRY, et al.,

Plaintiffs,

v.

KCG AMERICAS LLC ("KCG"), et al.,

Defendants.

Case No. 20-cv-07352-SK (INT)

ORDER REASSIGNING CASE

IT IS ORDERED that this case has been reassigned using a proportionate, random and blind system pursuant to General Order No. 44 to the Honorable Jon S. Tigar in the Oakland division for all further proceedings. Counsel are instructed that all future filings shall bear the initials JST immediately after the case number.

All hearing and trial dates presently scheduled are vacated. However, existing briefing schedules for motions remain unchanged. Motions must be renoticed for hearing before the judge to whom the case has been reassigned, but the renoticing of the hearing does not affect the prior briefing schedule. Other deadlines such as those for ADR compliance and discovery cutoff also remain unchanged.

Dated: October 28, 2020

Susan Y. Soong

Susan Y. Soong
Clerk, United States District Court

A true and correct copy of this order has been served by mail upon any pro se parties.

APPENDIX B5

(For 9th Circuit Case Number 21-16258)

The Judge Jon S. Tigar District Court's 10/28/2020 Notice of Eligibility for a Pilot Project Video Recording of the *Harry-Draper* Case, pursuant to General Order 65.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

NOTICE OF ELIGIBILITY FORIDEO RECORDING

This case is assigned to a judge who participates in the Cameras in the Courtroom Pilot Project. See General Order 65 and cand.uscourts.gov/cameras The partiesconsent is required before any proceedings in this case may be recorded. If a party, the presiding judge, or a member of the media requests that a proceeding be recorded, consent of the parties will be presumed unless a party submits an Objection to Request for Video Recording form as directed by the Cameras in the Courtroom Procedures.

Parties objecting to video recording are asked, for research purposes, to communicate to the Court the reasons for declining to participate. If you decline to participate, you should candidly convey the reasons for your decision. Whether you agree to participate or decline to participate will have no effect on your case whatsoever.

Susan Y. Soong

Susan Y. Soong, Clerk of Court

APPENDIX B6

(For 9th Circuit Case Number 21-16258)

The District Court Clerk's 10/28/2020 Notice Setting Case Management Conference, ECF #10, for the *Harry-Drapel* Case under Judge Jon S. Tigar.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BRIGHT HARRY, et al.,

Plaintiffs,

v.

KCG AMERICAS LLC, et al.,

Defendants.

Case No.20-cv-07352-JST

CLERK'S NOTICE SETTING CASE MANAGEMENT CONFERENCE

Re: Dkt. No. 9

YOU ARE NOTIFIED THAT a Case Management Conference is set for February 2, 2021 at 2:00 P.M. before the Honorable JON S. TIGAR. The Joint Case Management Conference Statement is due January 26, 2021 by 5:00 P.M.

Please report to Courtroom 6, 2nd Floor, Ronald Dellums Federal Building, 1301 Clay Street, Oakland, CA 94612.

Dated: October 28, 2020

Susan Y. Soong
Clerk, United States District Court

By: _____
Mauriona Lee, Deputy Clerk to the
Honorable JON S. TIGAR
510-637-3530

APPENDIX B7

(For 9th Circuit Case Number 21-16258)

Respondents'/Appellees' Fraudulent, Frivolous and Illegal Administrative Motion To Consider Whether Cases Should Be Related, ECF #162, Filed in the illegal closed *Harry* Court on 12/03/2020.

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Carl Gilmore, Greg Hostetler, Main Street Trading, Inc.,
Patrick J. Flynn, Wedbush Securities Inc. and Edward W. Wedbush

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIGHT HARRY, Plaintiff, v. KCG AMERICAS LLC, DANIEL B. COLEMAN, CARL GILMORE, GREG HOSTETLER, MAIN STREET TRADING, INC., PATRICK J. FLYNN, WEDBUSH SECURITIES INC., EDWARD W. WEDBUSH, ION TRADING, INC, ANDREA PIGNATARO, ROBERT SYLVERNE, COMPUTER VOICE SYSTEMS, INC., PAUL STURM, and SCOTT WILLIAM BENZ, Defendants.	Case No. 4:17-cv-2385-HSG **ADMINISTRATIVE MOTION TO CONSIDER WHETHER CASES SHOULD BE RELATED**
RONALD DRAPER, Plaintiff, v. KCG AMERICAS LLC, DANIEL B. COLEMAN, CARL GILMORE, GREG HOSTETLER, MAIN STREET TRADING, INC., PATRICK J. FLYNN, WEDBUSH SECURITIES INC., EDWARD W. WEDBUSH, ION TRADING, INC,	Case No. 3:18-cv-02524-HSG

ANDREA PIGNATARO, ROBERT SYLVERNE, COMPUTER VOICE SYSTEMS, INC., PAUL STURM, and SCOTT WILLIAM BENZ,

Defendants.

BRIGHT HARRY and RONALD S. DRAPER,

Plaintiffs,

v.

KCG AMERICAS LLC, DANIEL B. COLEMAN, CARL GILMORE, GREG HOSTETLER, MAIN STREET TRADING, INC., PATRICK J. FLYNN, WEDBUSH SECURITIES INC., EDWARD W. WEDBUSH, ION TRADING, INC, ANDREA PIGNATARO, ROBERT SYLVERNE, COMPUTER VOICE SYSTEMS, INC., PAUL STURM, and SCOTT WILLIAM BENZ,

Defendants.

Case No. 3:20-cv-07352-JST

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

Pursuant to Civil Local Rule 3-12, Defendants KCG Americas LLC, Daniel B. Coleman, Carl Gilmore, Greg Hostetler, Main Street Trading, Inc., Patrick J. Flynn, Wedbush Securities Inc. and Edward W. Wedbush, along with ION Trading, Inc., Andrea Pignataro and Robert Sylverne, and Computer Voice Systems, Inc., Paul A. Sturm, and Scott W. Benz (collectively, Defendants) hereby submit this Administrative Motion to Consider Whether Cases Should Be Related for a determination that the subsequently filed case of *Bright Harry and Ronald S. Draper v. KCG Americas LLC, et al.*, Case No. 20-cv-07352-JST (the Refiled Case) is related to the prior-filed cases *Bright Harry v. KCG Americas LLC, et al.*, Case No. 17-cv-02385 (the *Harry* Case) and *Ronald Draper v. KCG Americas LLC, et al.*, Case. No. 18-cv-02524-HSG (the *Draper* Case) (collectively with the *Harry* Case, the Dismissed Cases), both of which were previously dismissed by this Court *with prejudice*

Counsel for Defendants recently learned of the existence of Refiled Case and submit this Administrative Motion in conformance with the requirements of Civil Local Rule 3-12. Defendants have not yet been served with the Complaint in the Refiled Case.

I. BACKGROUND

On April 26, 2017, Plaintiff Bright Harry filed a *pro se* complaint in the *Harry* Case against the same Defendants named in the Refiled Action alleging claims relating to purported technical difficulties he had experienced while using an electronic trading platform to trade commodity futures in an account held by his partner, Plaintiff Ronald Draper, with Defendants KCG Americas LLC and later its successor, Wedbush Securities, Inc. (*See Harry Case* Dkt No. 1.) Subsequent amended pleadings were filed, including a Second Amended Complaint (SAC), which became the operative pleading prior to dismissal. (*Harry Case* Dkt No. 75.) The SAC in the *Harry* case alleged causes of action for: (1) Fraudulent Concealment; (2) Fraudulent Misrepresentation; (3) Breach of Fiduciary Duty; (4) Breach of Contract Under California Law; (5) Aiding and Abetting; (6) Violation of California Unfair Competition Law; (8) Violations of the California Consumer Legal Remedies Act; (9) Violations of the California False Advertising Law; and (10) Employment of Manipulative Devices/Scheme to Defraud Under the Commodity Exchange Act, 7 U.S.C. §§ 1, *et seq.* (CEA). (*Id.*)

On April 27, 2018, Plaintiff Ronald S. Draper filed a virtually identical *pro se* complaint in the

Draper Case against the same Defendants as in the *Harry* Case and alleging the same causes of action, with the exception that the *Draper* Case added a claim for Elder Financial Abuse under California law. (*Draper* Case, Dkt No. 1.) Based on the identical nature of the two cases, upon the Defendants' motion, on May 15, 2018, this Court found the *Draper* Case to be related to the *Harry* Case, and the *Draper* Case was re-assigned to this Court for all proceedings pursuant to Civil Local Rule 3-12. (*Draper* Case, Dkt Nos. 10 and 11.)

On August 27, 2018, the Court granted the Defendants' motions to dismiss the Plaintiffs' federal claims in both the Dismissed Cases *with prejudice* (*Harry* Case, Dkt No. 123, at p. 14; *Draper* Case, Dkt No. 66, at p. 10.) The Court further declined to exercise supplemental jurisdiction over the Plaintiffs' state law claims and dismissed those claims *without leave to amend* in federal court. (*Harry* Case, Dkt No. 123, at pp. 13-14; *Draper* Case, Dkt No. 66 at p. 10.) Plaintiffs appealed both dismissals. The dismissals were subsequently affirmed by the Ninth Circuit in May 2020 and the appellate mandates were issued in September (*Draper*) and October (*Harry*) of 2020. (*Harry* Case, Dkt Nos. 143, 155 and 157; *Draper* Case, Dkt Nos. 87, 103 and 104.)

On October 13, 2020, a little over a week after the Ninth Circuit issued its mandate in the *Harry* Case, Plaintiffs jointly filed their Refiled Case. (Refiled Case, Dkt No. 1.) The 163-page complaint in the Refiled Case asserts the same causes of action against the same Defendants based on the same alleged transactions and events as asserted in the Dismissed Cases (*i.e.*, Harry's purported technical problems in utilizing the electronic trading platform to execute trades in Draper's futures trading account), with one modification: Plaintiffs now claim that those transactions and events were the result of racketeering activities by Defendants, and Plaintiffs assert several new claims against Defendants under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961, *et seq.* (*See id.* at Counts I-III.)

II. ACTION REQUESTED

An Order pursuant to Civil Local Rule 3-12 that Refiled Case and the Dismissed Cases are deemed related and reassigning the Refiled Case to this Court for all proceedings.

III. SUPPORT FOR REQUEST

Under Civil Local Rule 3-12(a), [a]n action is related to another when: (1) The actions concern

substantially the same parties, property, transaction or event; and (2) It appears likely that there will be an unduly burdensome duplication of labor and expense or conflicting results if the cases are conducted before different Judges. Civil L.R. 3-12(a). A party that believes that an action may be related to another action that is or was pending in this District must promptly file in the lowest-numbered case an Administrative Motion to Consider Whether Cases Should be Related, pursuant to Civil L.R. 7-11. Civil L.R. 3-12(b). The fact that the prior filed case is closed does not relieve a party of its duties under Civil Local Rule 3-12. *Dave Drilling Envtl. Engg, Inc. v. Gamblin*, Case No. 14-cv-02851-WHO, 2015 WL 4051968, at *7 (N.D. Cal. July 2, 2015) (plain language of Local Rule 3-12(b) requires parties to give notice of even closed cases if the refiled case meets the requirements of Local Rule 3-12(a)); *Robles v. In the Name of Humanity We Refuse to Accept a Fascist America*, Case. No. 17-cv-04864-CW, 2018 WL 2329728, at *5 (N.D. Cal. May 23, 2018) (a party who does not file a motion to consider whether a refiled case is related to a previously dismissed case as required by Civil Local Rule 3-12 fail[s] to follow the court's local rules.). In fact, pursuant to Civil Local Rule 3-3, the Plaintiffs themselves were required to file a motion to consider whether their Refiled Case is related to the Dismissed Cases, something which they blatantly failed to do. Civil L.R. 3-3 (If any civil action or claim of civil action is dismissed and is subsequently refiled, the refiling party must file a Motion to Consider Whether Cases Should Be Related pursuant to Civil L.R. 3-12. (underscoring added).)

Here, the Refiled Case meets both of the requirements to be deemed related to the Dismissed Cases. All three cases involve substantially the same parties, transactions and events. Furthermore, there will be a an unduly burdensome duplication of labor and expense, as well as the potential for conflicting results if Defendants are forced to litigate the Refiled Case before a judge who is unfamiliar with the Plaintiffs, the Dismissed Cases and the rulings previously made by this Court.

Pursuant to Local Civil Rule 7-11(a), Counsel for the Wedbush Defendants requested that Plaintiffs stipulate to the relief sought by this Administrative Motion. Plaintiffs have not responded to this request. (Decl. of J. Henderson, at ¶¶ 3-4.)

A. The Refiled Action And The Dismissed Cases Concern The Same Parties, Transactions and Events

The named parties in the Refiled Case and the Dismissed Cases are identical. Accordingly,

without question, these cases involve substantially the same parties.[1]

The Refiled Case and the Dismissed Cases also concern substantially the same transactions and events. Indeed, the sole substantive factor distinguishing the Refiled Case from the Dismissed Cases is that the Refiled Case adds allegations and claims for RICO violations against the Defendants. (Refiled Case, Dkt No. 1 at Sections II.A, II.B and III and Counts I-III.) Otherwise, Plaintiffs' allegations in the Refiled Case are virtually identical to those in the Dismissed Cases.

For example, like they did in the Dismissed Cases, in the Refiled Case Plaintiffs allege that Harry and Draper were partners who formed a Commodity Futures Joint Venture Account in Draper's name. (*Compare Harry* Case, Dkt No. 75, ¶ 28 and *Draper* Case, Dkt No. 1, ¶ 6 to Refiled Case, Dkt No. 1, ¶¶ 14-15 .) Draper provided the initial $275,000 good faith deposit for the trading, while Harry contributed the operational expenses, skills, knowledge, technology and carried out actual trading. (*Compare Harry* Case, Dkt No. 75, ¶ 29 and *Draper* Case, Dkt No. 1, ¶ 7 to Refiled Case, Dkt No. 1, ¶¶ 14-15.) Draper was only a passive investor and the account was opened under his name only for easier tax filing with the IRS. (*Compare Harry* Case, Dkt No. 75, ¶ 28 and *Draper* Case, Dkt No. 1, ¶ 6 to Refiled Case, Dkt No. 1, ¶¶ 14-15.)

Critically, as in the complaints in the Dismissed Cases, Plaintiffs' complaint in the Refiled Case alleges in detail all of the purported operational failures Harry purportedly experienced while using the QST electronic trading platform to trade commodity futures in Draper's KCG/Wedbush account. In fact, the day-by-day descriptions of those purported operational failures alleged in the Refiled Case are lifted almost word for word from those in the Dismissed Cases. (*Compare Harry* Case, Dkt No. 75, ¶¶ 104-47 and *Draper* Case, Dkt No. 1, ¶¶ 83-126 to Refiled Case, Dkt No. 1, ¶¶ 141-181.) Put simply, the only real difference between the allegations in the Dismissed Cases and those in the Refiled Case is that Plaintiffs now claim that these alleged operational failures were the result of racketeering activities by Defendants under RICO rather than simply fraudulent misrepresentations as alleged in the Dismissed Cases. Labels aside, the Refiled Case and Dismissed Cases are clearly based on substantially the same transactions and events.

[1] Defendant Edward W. Wedbush recently passed away. Plaintiffs have filed a Suggestion of Death and sought to substitute Gary L. Wedbush but to date no order granting such substitution has been entered.

B. An Unduly Burdensome Duplication Of Labor And Expense Will Occur And A Risk Of Conflicting Results Exists In Proceeding Before A Different Judge

Defendants have been actively defending litigation by Plaintiffs for over five years since October 2013, including proceedings before the Commodity Futures Trading Commission (CFTC), the *Harry* and *Draper* Cases before this Court, and Plaintiffs' appeals of this Court's dismissals of those cases to the Ninth Circuit. Defendants are now once again faced with prospect of incurring thousands if not tens of thousands of dollars in legal expenses defending the Refiled Case, including the costs of filing and briefing a motion to dismiss claims which this Court has already dismissed *with prejudice* (or *without leave to amend* in federal court) or which, in the case of Plaintiffs' alleged RICO claims, are clearly barred by the doctrine of *res judicata* based on this Court's prior dismissals. This Court is already familiar with the lengthy, regurgitated and often obtuse allegations contained in Plaintiffs' 166-page complaint in the Refiled Case. Proceeding afresh before another judge will require a learning curve which will clearly lead to a burdensome duplication of labor and expense for Defendants while that judge gets up to speed on the case. Plaintiffs' Refiled Case can and will be handled much more efficiently and expeditiously by this Court. For this reason and reasons of judicial economy, it makes much more sense for this Court to preside over the proceedings in the Refiled Case.

Moreover, permitting another judge to rule on the validity of the Refiled Case would, practically speaking, result in a reconsideration of this Court's prior dismissals, which not only raises the potential for conflicting results with respect to Plaintiffs' repeated attempts to relitigate their alleged claims, but also squarely undermines the authority of this Court's prior decisions and the strong policy against the abusive practice of judge shopping. *Robles*, 2018 WL 2329728, at *5. The Court should protect the integrity and authority of its prior decisions by deeming the Plaintiffs' Refiled Case to be related to the Dismissed Cases and ordering reassignment of the Refiled Case to this Court for all proceedings.

IV. CONCLUSION

For the reasons set forth above, Defendants respectfully request that this Administrative Motion be granted and that the Refiled Case and the Dismissed Cases be deemed related under Civil Local Rule 3-12. Defendants further respectfully request that the Refiled Case be reassigned to this Court for all proceedings.

Dated: December 3, 2020

GREENBERG TRAURIG, LLP

By: /s/ *Howard Holderness*
Howard Holderness

Attorneys for Defendants KCG Americas LLC Daniel B. Coleman Carl Gilmore Greg Hostetler Main Street Trading, Inc. Patrick J. Flynn Wedbush Securities Inc. and Edward W. Wedbush

Dated: December 3, 2020

SELMAN BREITMAN LLP

By: /s/ *Danielle K. Lewis**
Danielle K. Lewis

Attorneys for Defendants ION Trading, Inc. Andrea Pignataro and Robert Sylverne

Dated: December 3, 2020

EARLY SULLIVAN WRIGHT GIZER & MCRAE LLP

By: /s/ *Peter Scott** Peter Scott

Attorneys for Defendants Computer Voice Systems, Inc., Paul A.Sturm and Scott W. Benz

*Pursuant to Civil L.R. 5-1(i)(3), the electronic signatory has obtained approval from all other signatories

ACTIVE 53904381v2

APPENDIX B8

(For 9th Circuit Case Number 21-16258)

The illegal closed *Harry* Court's Fraudulent, Illegal and Void Order, ECF #163, made in the illegal closed *Harry* Case on 12/21/2020 to Fraudulently Relate the *Harry* Case to the *Harry-Draper* Case for Fraudulent Subject Matter Jurisdiction Assumption.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

RELATED CASE ORDER

A Motion for Administrative Relief to Consider Whether Cases Should be Related or a *Sua Sponte* Judicial Referral for Purpose of Determining Relationship (Civil L.R. 3-12) has been filed. The time for filing an opposition or statement of support has passed. As the judge assigned to case

17-cv-02385-HSG Harry v. KCG Americas LLC

I find that the more recently filed case(s) that I have initialed below are related to the case assigned to me, and such case(s) shall be reassigned to me. The Court has already found *Draper v. KCG Americas LLC* Case No. 18-cv-02524, related to *Harry v. KCG Americas LLC* Case No. 17-cv-02385. Any other cases listed below that are not related to the case assigned to me are referred to the judge assigned to the next-earliest filed case for a related case determination.

Case	Title	Related	Not Related
20-cv-7352 JST	Harry et al v. KCG Americas LLC ("KCG") et al	**HSG**	

ORDER

The parties are instructed that all future filings in any reassigned case are to bear the initials of the newly assigned judge immediately after the case number. Any case management conference in any reassigned case will be rescheduled by the Court. The parties shall adjust the dates for the conference, disclosures and report required by FRCivP 16 and 26 accordingly. Unless otherwise ordered, any dates for hearing noticed motions are vacated and must be re-noticed by the moving party before the newly assigned judge; any deadlines set by the ADR Local Rules remain in effect; and any deadlines established in a case management order continue to govern, except dates for appearance in court, which will be rescheduled by the newly assigned judge.

Dated: December 21, 2020

By: Haywood S. Gilliam, Jr.
Haywood S. Gilliam, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CLERKS NOTICE

The court has reviewed the motion and determined that no cases are related and no reassignments shall occur.

Dated:

By: _____
Nikki Riley, Deputy Clerk

APPENDIX B9

(For 9th Circuit Case Number 21-16258)

The illegal closed *Harry* Court's Fraudulent, Illegal and Void Mirror-Image of Order ECF #163, Order ECF #14, made in the *Harry-Draper/Judge Tigar* Case under Judge Tigar on 12/21/2020, that birthed the illegitimate *Harry-Draper/Judge Gilliam, Jr.* Case and the illegitimate *Harry-Draper/Judge Gilliam, Jr.* Court, both under Judge Gilliam, Jr.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

RELATED CASE ORDER

A Motion for Administrative Relief to Consider Whether Cases Should be Related or a *Sua Sponte* Judicial Referral for Purpose of Determining Relationship (Civil L.R. 3-12) has been filed. The time for filing an opposition or statement of support has passed. As the judge assigned to case

17-cv-02385-HSG Harry v. KCG Americas LLC

I find that the more recently filed case(s) that I have initialed below are related to the case assigned to me, and such case(s) shall be reassigned to me. The Court has already found *Draper v. KCG Americas LLC*, Case No. 18-cv-02524, related to *Harry v. KCG Americas LLC*, Case No. 17-cv-02385. Any other cases listed below that are not related to the case assigned to me are referred to the judge assigned to the next-earliest filed case for a related case determination.

Case	Title	Related	Not Related
20-cv-7352 JST	Harry et al v. KCG Americas LLC ("KCG") et al	**HSG**	

ORDER

The parties are instructed that all future filings in any reassigned case are to bear the initials of the newly assigned judge immediately after the case number. Any case management conference in any reassigned case will be rescheduled by the Court. The parties shall adjust the dates for the conference, disclosures and report required by FRCivP 16 and 26 accordingly. Unless otherwise ordered, any dates for hearing noticed motions are vacated and must be re-noticed by the moving party before the newly assigned judge; any deadlines set by the ADR Local Rules remain in effect; and any deadlines established in a case management order continue to govern, except dates for appearance in court, which will be rescheduled by the newly assigned judge.

Dated: December 21, 2020

By: Haywood S. Gilliam, Jr.
Haywood S. Gilliam, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CLERKS NOTICE

The court has reviewed the motion and determined that no cases are related and no reassignments shall occur.

Dated:

By: _____
Nikki Riley, Deputy Clerk

APPENDIX B10

(For 9th Circuit Case Number 21-16258)

The 12/22/2020 Fraudulent, Illegal and Void Order, ECF #16, illegally Reassigning the *Harry-Draper/Judge Tigar* Case under Judge Tigar to the illegitimate *Harry-Draper/Judge Gilliam, Jr.* Court under Judge Gilliam, Jr. to adjudicate the illegitimate *Harry-Draper-Judge Gilliam, Jr.* Case without Subject Matter Jurisdiction.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BRIGHT HARRY, et al.,

Plaintiffs,

v.

KCG AMERICAS LLC, et al.,

Defendants.

Case No. 20-cv-07352-JST

ORDER REASSIGNING CASE

IT IS ORDERED that this case is reassigned to the Honorable Haywood S. Gilliam, Jr. in the OAKLAND division for all further proceedings. Counsel are instructed that all future filings shall bear the initials HSG immediately after the case number.

All hearing and trial dates presently scheduled are vacated. However, existing briefing schedules for motions remain unchanged. Motions must be renoticed for hearing before the judge to whom the case has been reassigned, but the renoticing of the hearing does not affect the prior briefing schedule. Other deadlines such as those for ADR compliance and discovery cutoff also remain unchanged.

Dated: December 22, 2020

Susan Y. Soong

Susan Y. Soong
Clerk, United States District Court

A true and correct copy of this order has been served by mail upon any pro se parties.

APPENDIX B11

(For 9th Circuit Case Number 21-16258)

9th Circuit 01/19/2022 Order, DktEntry #28, stating that "The excerpts of record submitted on September 27, 2021 are Filed. Within 7 days of this order, appellants are ordered to file 3 copies of the excerpts in paper format securely bound on the left side, with white covers".

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JAN 19 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

BRIGHT HARRY and RONALD STEPHEN DRAPER,

Plaintiffs - Appellants,

v.

KCG AMERICAS LLC; et al.,

Defendants - Appellees.

No. 21-16258

D.C. No. 4:20-cv-07352-HSG
U.S. District Court for Northern California, Oakland

ORDER

The excerpts of record submitted on September 27, 2021 are filed. Within 7 days of this order, appellants are ordered to file 3 copies of the excerpts in paper format securely bound on the left side, with white covers.

The paper copies shall be submitted to the principal office of the Clerk. The address for regular U.S. mail is P.O. Box 193939, San Francisco, CA 94119-3939. The address for overnight mail is 95 Seventh Street, San Francisco, CA 94103-1526.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Khanh Thai
Deputy Clerk
Ninth Circuit Rule 27-7

APPENDIX B12

(For 9th Circuit Case Number 21-16258)

Appellants' Motion for the 9th Circuit Clerk to acknowledge receipt of 3 sets of paper Copies of Appellants' Excerpts of Records, hand-delivered to the Court in San Francisco at about 1:30 P.M. on 01/25/2022.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Bright Harry and Ronald S. Draper **Plaintiffs - Appellants** vs. KCG Americas LLC ("KCG"), Daniel B. Coleman, CEO of KCG Carl Gilmore, Director of KCG Futures Greg Hostetler, KCG Compliance Officer Main Street Trading, Inc. ("MST"), Patrick J. Flynn, President of MST Wedbush Securities Inc. ("Wedbush") Gary L. Wedbush, Co-Pres. of Wedbush ION Trading, Inc. ("ION") Andrea Pignataro, CEO of ION, Global Robert Sylverne, CEO of ION, USA Computer Voice Systems, Inc. ("QST") Paul Sturm, CEO of QST and Scott William Benz, VP of QST **Defendants - Appellees**	**9th Circuit Case No. 21-16258** **District Court Case No. 4:20-cv-07352-JST** **District Court Case No. 4:20-cv-07352-HSG** **U.S. District Court for Northern California, Oakland**

Form 27. Plaintiffs'/Appellants' Motion for the 9th Circuit Clerk to acknowledge receipt of 3 sets of paper Copies of Appellants' Excerpts of Records, hand-delivered to the Court in San Francisco at about 1:30 P.M. on 01/25/2022

Instructions for this form: http://www.ca9.uscourts.gov/forms/form27instructions.pdf

1. As shown above, there are two pairs of the *Harry-Draper Case* and *Harry-Draper Court*, one pair genuine or legitimate and the other pair illegitimate.

Genuine or Legitimate Case and Court:
1(a) Harry and Draper vs. KCG et al. Case # 4:20-cv-7352**JST** (*"Harry-Draper-Judge Tigar Case"*)
1(b) Harry and Draper vs. KCG et al. Case # 4:20-cv-7352**JST** Court (*"Harry-Draper/Judge Tigar Court"*)

Illegitimate Case and Court:
2(a) Harry and Draper vs. KCG et al. Case # 4:20-cv-7352**HSG** (*"Harry-Draper-Judge Gilliam, Jr. Case"*)

2(b) Harry and Draper vs. KCG et al. Case # 4:20-cv-7352**HSG** Court (*Harry-Draper/Judge Gilliam, Jr. Court*)

(i) What do you want the court to do?

2. In compliance with the 01/19/2022 Court Order, DktEntry # 28 (attached), on 01/19/2022, Appellants Bright Harry ("Harry") and Ronald S. Draper ("Draper"), hand-delivered the requested Paper Copies at the Court in San Francisco, at about 1:30 P.M. on January 25, 2022, but Appellants have not received any notification from the Court of receipt of these documents. Thus, Appellants, hereby, move this Court for the 9th Circuit Clerk to acknowledge receipt of the 3 sets of paper copies of Appellants' Excerpts of Records, namely, DktEntry Numbers 6-4, 6-8, 6-9 and 6-10 - --- 3 sets of each --- hand-delivered to the Court in San Francisco at about 1:30 P.M. on 01/25/2022.

3. Furthermore, Appellants have submitted a cleaner version of DktEntry #6-4 to replace the previous version with illegible page and title numbers due to the excessive Court Stampings. With this cleaner version, the Panel Judges can locate the cited pages and sections in the excerpts of records with ease. The submitted DktEntry #6-4 is exactly the same as the previous one except for the illegible court stampings. Hence, this version should be submitted to the Panel Judges to make life easier for them.

(ii) Why should the court do this?

Be specific. Include all relevant facts and law that would persuade the court to grant your request. *(Attach additional pages as necessary. Your motion may not be longer than 20 pages.)*

3. Because the Court ordered Appellants to submit the aforementioned Paper Copies of the Excerpts of Records, and they did.

Respectfully Submitted

Dated: January 28, 2022

Bright Harry
37421 Gillett Road
Fremont, CA 94536
bharry77@hotmail.com
(510) 396-7128
Pro Se

Ronald S. Draper
5678 Hughes Place
Fremont, CA 94538
ronsdraper@att.net
(510) 795-7524
Pro Se

/s/- *Bright Harry*
Appellant's Signature

/s/- Ronald Draper
Appellant's Signature

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Appellants' Motion for the 9th Circuit Clerk to acknowledge receipt of 3 Sets of Paper Copies of Appellants' Excerpt of Records, hand-delivered to the Court in San Francisco at about 1:30 P.M. on 01/25/2022, was served on the following Parties via the Court's CM/ECF System:

KCG Americas LLC, Daniel B. Coleman, Carl Gilmore, Greg Hostetler, Main Street Trading, Inc., Patrick J. Flynn, Wedbush Securities Inc., Edward W. Wedbush, ION Trading, Inc.,	Andrea Pignataro, Robert Sylverne, Computer Voice Systems, Inc., Paul Sturm, Scott William Benz, Howard Holderness, III, Appellees' Attorney Danielle Kono Lewis, Appellees' Attorney Jeffry Henderson, Appellees' Attorney Todd Edward Pentecost, Appellees' Attorney

01/28/2022 /s/- *Bright Harry*

APPENDIX B13

(For 9th Circuit Case Number 21-16258)

9th Circuit 04/04/2022 Order, DktEntry #54, stating that "The excerpts of record submitted on September 27, 2021 by Bright Harry and Ronald Stephen Draper are Filed".

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

APR 04 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

BRIGHT HARRY and RONALD STEPHEN DRAPER,

Plaintiffs - Appellants,

v.

KCG AMERICAS LLC; et al.,

Defendants - Appellees.

No. 21-16258

D.C. No. 4:20-cv-07352-HSG
U.S. District Court for Northern California, Oakland

ORDER

The excerpts of record submitted on September 27, 2021 by Bright Harry and Ronald Stephen Draper are filed. No additional paper copies are required at this time.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Khanh Thai
Deputy Clerk
Ninth Circuit Rule 27-7

APPENDIX C

(District Court Case Number 4:20-cv-07352-JST)
(District Court Case Number 4:20-cv-07352-HSG)
(9th Circuit Court Case Number 21-16258)

Table of Contents of Sub-Appendices of Appendix C

Appendix C1a.

Civil Local Rule 3-3

3-3. Assignment of Action to a Judge

(a) Assignment. Immediately upon the filing of any civil action and its assignment to a division of the Court pursuant to Civil L.R. 3-2, the Clerk shall assign it to a Judge pursuant to the Assignment Plan of the Court. The Clerk may not make or change any assignment, except as provided in these local rules or in the Assignment Plan (General Order No. 44).

(b) Multiple Filings. Any single action filed in more than one division of this Court shall be transferred pursuant to Civil L.R. 3-2(f).

(c) Refiled Action. If any civil action or claim of a civil action is dismissed and is subsequently refiled, the refiling party must file a Motion to Consider Whether Cases Should be Related pursuant to Civil L.R. 3-12. Upon a determination by a Judge that an action or claim pending before him or her is covered by this Local Rule, that Judge may transfer the refiled action to the Judge originally assigned to the action which had been dismissed. Any party who files an action in multiple divisions or dismisses an action and subsequently refiles it for the purpose of obtaining an assignment in contravention of Civil L.R. 3-3(b) shall be subject to appropriate sanctions.

Appendix C1b.

Civil Local Rule 3-12

3-12. Related Cases
(a) Definition of Related Cases. An action is related to another when:

(1) The actions concern substantially the same parties, property, transaction or event; and

(2) It appears likely that there will be an unduly burdensome duplication of labor and expense or conflicting results if the cases are conducted before different Judges.

(b) Administrative Motion to Consider Whether Cases Should be Related. Whenever a party knows or learns that an action, filed in or removed to this district is (or the party believes that the action may be) related to an action which is or was pending in this District as defined in Civil L.R. 3-12(a), the party must promptly file in the lowest-numbered case an Administrative Motion to Consider Whether Cases Should be Related, pursuant to Civil L.R. 7-11. In addition to complying with Civil L.R. 7-11, a copy of the motion, together with proof of service pursuant to Civil L.R. 5-5, must be served on all known parties to each apparently related action. A courtesy copy of the motion must be lodged with the assigned Judge in each apparently related case under Civil L.R. 5-1(e)(7)

(c) Sua Sponte Judicial Referral for Purpose of Determining Relationship. Whenever a Judge believes that a case pending before that Judge is related to another case, the Judge may refer the case to the Judge assigned to the lowest-numbered case with a request that the Judge assigned to the lowest-numbered case consider whether the cases are related. The referring Judge shall file and send a copy of the referral to all parties to all affected cases. The parties must file any response in opposition to or support of relating the cases pursuant to Civil L.R. 3-12(e). Alternatively, a Judge may order the parties to file a motion pursuant to Civil L.R. 3-12(b).

Appendix C1c.

Civil Local Rule 7-11

7-11. Motion for Administrative Relief

The Court recognizes that during the course of case proceedings a party may require a Court order with respect to miscellaneous administrative matters, not otherwise governed by a federal statute, Federal or local rule or standing order of the assigned judge. These motions would include matters such as motions to exceed otherwise applicable page limitations or motions to file documents under seal, for example.

(a) Form and Content of Motions. A motion for an order concerning a miscellaneous administrative matter may not exceed 5 pages (not counting declarations and exhibits), must set forth specifically the action requested and the reasons supporting the motion and must be accompanied by a proposed order and by either a stipulation under Civil L.R. 7-12 or by a declaration that explains why a stipulation could not be obtained. If the motion is manually filed, the moving party must deliver the motion and all attachments to all other parties on the same day as the motion is filed.

(b) Opposition to or Support for Motion for Administrative Relief. Any opposition to or support for a Motion for Administrative Relief may not exceed 5 pages (not counting declarations and exhibits), must set forth succinctly the reasons, must be accompanied by a proposed order, and must be filed no later than 4 days after the motion has been filed. The opposition or support and all attachments to it, if manually filed, must be delivered to all other parties the same day it is manually filed.

(c) Action by the Court. Unless otherwise ordered, a Motion for Administrative Relief is deemed submitted for immediate determination without hearing on the day after the opposition is due.

Appendix C2

Federal Rules of Civil Procedures ("FRCPs")

a. FRCP 12(b)(1)
Rule 12(b)1 provides a defense for "lack of jurisdiction over the subject matter."

b. FRCP 12(b)(6)
Rule 12(b)(6) specifically deals with motions to dismiss for failure to state a claim upon which relief can be granted.

c. FRCP 12(h)(3)
Lack of Subject-Matter Jurisdiction. If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.

d. FRCP 60(b)(4)
On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding if the judgment is void

e. FRCP 83

Relevant Parts of FRCP 83

FRCP 83(a)(1) ".....A local rule must be consistent with—but not duplicate—federal statutes and rules adopted under 28 U.S.C. §§2072 and 2075, and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States".

FRCP 83(a)(2) "*Requirement of Form.* A local rule imposing a requirement of form must not be enforced in a way that causes a party to lose any right because of a nonwillful failure to comply".

Notes of Advisory Committee on Rules—1985 Amendment

Rule 83, which has not been amended since the Federal Rules were promulgated in 1938, ermits each district to adopt local rules not inconsistent with the Federal Rules by a majority of the judges. The only other requirement is that copies be furnished to the Supreme Court.

Notes of Advisory Committee on Rules—1995 Amendment

Subdivison (a). This rule is amended to reflect the requirement that local rules be consistent not only with the national rules but also with Acts of Congress. The amendment also states that local rules should not repeat Acts of Congress or national rules.

Appendix C3a.

Rule 28(a)(8)(B).

(a) Appellant's Brief. The appellant's brief must contain, under appropriate headings and in the order indicated:

(8) the argument, which must contain:

(B) for each issue, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues);

Appendix C3b.

Rule 34. Oral Argument

(a) In General.

(1) *Party's Statement.* Any party may file, or a court may require by local rule, a statement explaining why oral argument should, or need not, be permitted.

(2) *Standards.* Oral argument must be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary for any of the following reasons:

(A) the appeal is frivolous;

(B) the dispositive issue or issues have been authoritatively decided; or

(C) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.

(b) Notice of Argument; Postponement. The clerk must advise all parties whether oral argument will be scheduled, and, if so, the date, time, and place for it, and the time allowed for each side. A motion to postpone the argument or to allow longer argument must be filed reasonably in advance of the hearing date.

(f) Submission on Briefs. The parties may agree to submit a case for decision on the briefs, but the court may direct that the case be argued.

Committee Notes on Rules—1998 Amendment

The language of the rule is amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only. Substantive changes are made in subdivision (a).

Subdivision (a). Currently subdivision (a) says that oral argument must be permitted unless, applying a local rule, a panel of three judges unanimously agrees that oral argument is not necessary. Rule 34 then outlines the criteria to be used to determine whether oral argument is needed and requires any local rule to "conform substantially" to the "minimum standard[s]" established in the national rule. The amendments omit the local rule requirement and make the criteria applicable by force of the national rule. The local rule is an unnecessary instrument.

Appendix C3c.

Rule 47. Local Rules by Courts of Appeals

(a) Local Rules.

(1) Each court of appeals acting by a majority of its judges in regular active service may, after giving appropriate public notice and opportunity for comment, make and amend rules governing its practice. A generally applicable direction to parties or lawyers regarding practice before a court must be in a local rule rather than an internal operating procedure or standing order. A local rule must be consistent with—but not duplicative of—Acts of Congress and rules adopted under 28 U.S.C. §2072 and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States. Each circuit clerk must send the Administrative Office of the United States Courts a copy of each local rule and internal operating procedure when it is promulgated or amended.

(2) A local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement.

(b) Procedure When There Is No Controlling Law. A court of appeals may regulate practice in a particular case in any manner consistent with federal law, these rules, and local rules of the circuit. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local circuit rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

Notes of Advisory Committee on Rules—1967

This rule continues the authority now vested in individual courts of appeals by 28 U.S.C. §2071 to make rules consistent with rules of practice and procedure promulgated by the Supreme Court.

Notes of Advisory Committee on Rules—1995 Amendment

Subdivision (a). This rule is amended to require that a generally applicable direction regarding practice before a court of appeals must be in a local rule rather than an internal operating procedure or some other general directive. It is the intent of this rule that a local rule may not bar any practice that these rules explicitly or implicitly permit. Subdivision (b) allows a court of appeals to regulate practice in an individual case by entry of an order in the case. The amendment also reflects the requirement that local rules be consistent not only with the national rules but also with Acts of Congress. The amendment also states that local rules should not repeat national rules and Acts of Congress.

Appendix C3d.

Special Excerpts of 9th Circuit General Orders

G.O. 3.4. Notification of Calendaring of Cases
About fourteen weeks before oral argument, parties are notified of the month that their cases are being considered for oral argument

About ten weeks before oral argument, parties shall be notified of the time and place of the hearing of their cases.

If a panel decides not to hear oral argument, the parties should be notified at least 14 days before the scheduled hearing date. However, such notices may by necessity be issued any time before the scheduled hearing. *(Rev 1/11/16; 1/13/20)*

G.O. 3.5. Publication of Calendars
The composition of panels shall be made public on the first working day of the week preceding argument. Calendars shall be posted on the Court's website and in the San Francisco, Pasadena, and Seattle courthouses. Only under exceptional circumstances will the Court consider motions for continuances filed within 14 days of the hearing date. (See Circuit Rule 34-2.) *(Rev. 12/13/10; Rev. 1/11/16)*

Appendix C4

28 U.S. Code § 1254 - Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

(June 25, 1948, ch. 646, 62 Stat. 928; Pub. L. 100–352, § 2(a), (b), June 27, 1988, 102 Stat. 662.)

Appendix C5

RELEVANT CONSTITUTIONAL PROVISIONS

The 1st, 5th and 7th Amendments, and Article II, §2 of the United States Constitution.

a. 1st Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances

b. 5th Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

c. 7th Amendment

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

d. Article II, §2 of the U.S. Constitution

[The President] shall have Power, by and with the Advice and Consent of the Senate,..... shall appoint ..... Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.