No. 19-16190

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

U.S. COMMODITY FUTURES TRADING COMMISSION,
Plaintiff-Appellee,

v.

JAMES DEVLIN CROMBIE,
Defendant-Appellant,

On Appeal from the United States District Court for the Northern District of California, No. 4:11-cv-04577-CW, Hon. Claudia Wilken

PRO BONO REPLACEMENT BRIEF OF DEFENDANT-APPELLANT JAMES DEVLIN CROMBIE

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

RULE

STATEMENT REGARDING ORAL ARGUMENT

Appellant James Devlin Crombie respectfully requests oral argument. Crombie originally filed his appeal pro se. This Court then appointed undersigned pro bono counsel to represent Crombie in this appeal. This case involves a question of first-impression for this Court regarding when it is appropriate for a district court to impose a lifetime personal trading ban as part of a comprehensive permanent injunction based on violations of the Commodity Exchange Act. Crombie's court-appointed counsel believe that oral argument will materially aid the Court's evaluation of the case.

For the avoidance of doubt, undersigned counsel does not represent Crombie in his separate appeal to the Court seeking an order compelling the release of certain grand jury materials, Dkts. 18-20, and Crombie has requested that the Panel not treat this brief as replacing his briefs at Docket Numbers 18 and 20.

INTRODUCTION

James Crombie appeals the district court's order permanently enjoining him from trading commodity futures on his personal account or having others make such trades on his behalf for the rest of his life. *See* ER003-12 (Dkt. 288) ("Order"). These portions of the injunctive order are overly broad and unnecessary to prevent Crombie from violating the Commodity Exchange Act ("CEA") in the future.

This is Crombie's second appeal in this matter. In his first appeal, the Court affirmed summary judgment for the Commodity Futures Trading Commission ("CFTC") on liability and upheld imposition of a permanent injunction. However, the Court vacated the parts of the injunction at issue in this appeal—Subsections 5(b) and 5(c)—because Crombie's violations of the CEA had nothing to do with his personal trading and the Court could not "readily discern" how the personal trading bans "are connected to preventing future violations similar to those that Crombie has committed." *CFTC v. Crombie*, 914 F.3d 1208, 1218 (9th Cir. 2019) (ER013-32). This Court, therefore, vacated these portions of the injunctive order and remanded to the district court to explain why the personal trading ban and the ban on having others make trades for Crombie were necessary to prevent future statutory violations. ER032.

On remand, the district court erred by re-imposing those two portions of the injunction. This Court should reverse the Order re-imposing Subsections 5(b) and 5(c) of the injunction. The CEA grants the district court authority to provide ancillary relief only "as is *necessary* to remove the danger" of future violations. 7 U.S.C. § 13a-1(c) (emphasis added). The district court ran afoul of that standard by imposing these lifetime bans when there is no evidence in the record to suggest that prohibiting Crombie from trading on his personal account or having a third-party trade on his behalf is necessary to prevent future violations of the CEA. As discussed below, other cases imposing personal trading bans are readily distinguishable from the facts of this case. And other sections of the injunction—which are not challenged in this appeal—will prevent Crombie from violating the CEA. Subsections 5(b) and 5(c) are not "necessary to remove the danger" of future violations, and therefore the district court abused its discretion by imposing them.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over this case pursuant to 7 U.S.C. § 13a-1(a), which provides, "the Commission may bring an action in the proper district court of the United States . . . to enjoin [an] act or practice [that violates the Commodity Exchange Act], or to enforce compliance with this chapter, or any rule, regulation or order thereunder, and said courts shall have jurisdiction to

entertain such actions." The district court's jurisdiction was also proper under 28 U.S.C. § 1331 because this case arises under federal law.

This Court's jurisdiction is proper under 28 U.S.C. § 1291 because the Order from which Crombie appeals was a final decision. Jurisdiction is also proper under 28 U.S.C. § 1292(a)(1) because Crombie appeals an order granting and continuing an injunction.

The district court entered its Order on June 5, 2019. *See* ER003-12 (Dkt. 288). Crombie filed a notice of appeal that same day. *See* ER001-02 (Dkt. 290). This appeal is therefore timely pursuant to Federal Rule of Appellate Procedure 4(a)(1)(B).

STATEMENT OF THE ISSUE PRESENTED

Did the District Court abuse its discretion when it enjoined Crombie—for the rest of his life—from directly or indirectly trading in commodity futures on his own account or having commodity futures traded on his behalf, when the record is devoid of any evidence that Crombie's wrongdoing involved such conduct or that he would be likely to engage in it?

STATEMENT REGARDING STATUTORY ADDENDUM

A statutory addendum containing excerpts of relevant authority, as required by Ninth Circuit Rule 28-2.7, is included as an addendum to this brief.

STATEMENT OF THE CASE

A. Statement of Facts

James Crombie is a seasoned financial professional who had a long, successful career before the incidents that gave rise to this case. He graduated from the University of Virginia with a degree in economics and communications and later obtained an MBA from the same institution. Crombie then worked at JP Morgan from 1994 to 1997 on the proprietary arbitrage trading desk. He left JP Morgan in 1997 to join Rose Glen Capital, a hedge fund in Pennsylvania. Crombie was a principal and head trader there until 2000. He next moved to Marin Capital Partners, a hedge fund headquartered in San Rafael, California, as a principal and head trader. Crombie joined Ritchie Capital Management in 2001 as an independent investment advisor. In 2005, he formed his own company, JDC Ventures, LLC ("JDC"), an investment management firm based in San Francisco, California.

Between 2005 and 2010, JDC—of which Crombie was the sole member—operated as a commodity trading adviser registered with the National Futures Association ("NFA"). ER044-43 (Summary Judgment Order, Dkt. 267 at 2-3). In 2010, Crombie formed Paron Capital Management, LLC ("Paron") with Peter McConnon and Timothy Lyons. ER043 (Summary Judgment Order, Dkt. 267 at 3). In March 2011, the NFA began an investigation into Paron based on

anonymous complaints regarding false advertising and civil lawsuits that had arisen in connection with loans made to Crombie and JDC. ER046 (Summary Judgment Order, Dkt. 267 at 4).

During the audit, the NFA examined Paron's promotional material, specifically a PowerPoint presentation, a monthly newsletter, and a due diligence questionnaire that Paron used to solicit potential clients for eight months, from August 2010 through March 2011. ER046-47 (Summary Judgment Order, Dkt. 267 at 4-5). The promotional material advertised Paron as the successor organization of JDC and stated that JDC and Crombie had previously achieved a 38.6% annual rate of return on clients' commodity futures investments. ER047 (Summary Judgment Order, Dkt. 267 at 5). The promotional material also stated that Paron was managing approximately $35 million in assets in 2011 and that Paron's largest current account was $20 million. ER047 (Summary Judgment Order, Dkt. 267 at 5).

The NFA asked Crombie for documentation supporting these assertions. ER047 (Summary Judgment Order, Dkt. 267 at 5). In response, Crombie provided the NFA with monthly account statements or summaries purportedly from Fimat USA, LLC and Access Securities, LLC, as well as a December 2007 Trading Advisory Agreement purportedly signed by Richard Breck. ER047-48 (Summary Judgment Order, Dkt. 267 at 5-6). Also during the investigation, the NFA asked

Crombie about a $200,000 payment from JDC to an individual named Paul Porteous, and $50,000 and $250,000 payments to JDC made by Jennifer and Steven Lamar. ER063-67 (Summary Judgment Order, Dkt. 267 at 21-25). Crombie told the NFA that JDC was repaying Porteous's investment in the company and that the Lamars' payments were for services. ER066-67. The NFA also asked Crombie and Paron about payments to JDC from Weston Capital Management, payments from three more individuals, and the litigation involvement of Crombie, Paron, and JDC. ER067-78 (Summary Judgment Order, Dkt. 267 at 25-36). Crombie told the NFA that these other payments were for services and distinguished between open and closed litigation matters. ER067-78.

B. Procedural History

The CFTC filed its civil enforcement complaint in the Northern District of California against Paron and Crombie in September 2011, ER130 (Compl., Dkt. 1), and an amended complaint in March 2012. ER111-26 (Am. Compl., Dkt. 111). The amended complaint alleged that Paron and Crombie violated §§ 4*o*(1)(A) and (B), 4b(a)(1)(A) and (B), and 9(a)(4) of the CEA by making false statements in Paron's promotional material and during the NFA's investigation. ER116-19 (Am. Compl., Dkt. 111 ¶¶ 20-43). In particular, the CFTC alleged that (i) the purported gains claimed on the promotional material were incorrect; (ii) the documents Crombie had provided the NFA to support those claims were "fraudulent" or

"fictitious" because they were "based on the falsified monthly statements allegedly from FIMAT and Access"; (iii) "[d]uring the course of the audit, Crombie admitted to NFA that these amounts were incorrect"; and (iv) during the audit, Crombie had made false statements to the NFA about the reason for the various payments made to and from JDC and about Crombie's, Paron's, and JDC's involvement in litigation. ER116-19 (Am. Compl., Dkt. 111 ¶¶ 24-36, 41-42).

In September 2012, the district court entered a consent order and permanent injunction against Paron. ER147 (Consent Order, Dkt. 190). Subsequently, the CFTC and Crombie both moved for summary judgment as to the claims against Crombie. ER153 (CFTC Motion for Summary Judgment, Dkt. 234), ER155 (Crombie Opposition and Cross-Motion for Summary Judgment, Dkt. 252).

In a July 2013 decision, the district court entered summary judgment for the CFTC and found that Crombie had violated § 9(a)(4) of the CEA[1] by doing the following: (1) willfully providing the NFA with false accounting statements from FIMAT and Access, (2) falsely telling the NFA that the $200,000 JDC paid to Porteous was to repay a capital investment in JDC when in fact it was to repay a

[1] "It shall be a felony" "(4) . . . willfully to . . . make any false, fictitious, or fraudulent statements or representations, or make or use any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry" to a "futures association designated or registered under this chapter acting in furtherance of its official duties under this chapter." 7 U.S.C. § 13(a)(4).

loan to Crombie; and (3) falsely telling the NFA that the $50,000 the Lamars paid to JDC was for services when in fact it was a loan. ER087-96 (Summary Judgment Order, Dkt. 267 at 45-54). As for the remaining payments from Weston Capital Management and other individuals, the district court found that there were genuine issues of material fact as to whether Crombie had made false statements to the NFA regarding them. ER093-94 (Summary Judgment Order, Dkt. 267 at 51-52). The district court also found genuine issues of material fact precluding summary judgment regarding Crombie's statements to the NFA about his, JDC's, and Paron's involvement in litigation. ER094 (Summary Judgment Order, Dkt. 267 at 52).

As for §§ 4b(a)(1)(A) and (B)[2] and 4*o*(1)(A) and (B) of the CEA,[3] the district court found that Crombie had provided false information to Paron about

[2] "It shall be unlawful" "(1) for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity in interstate commerce or for future delivery that is made, or to be made, on or subject to the rules of a designated contract market, for or on behalf of any other person" "(A) to cheat or defraud or attempt to cheat or defraud the other person"; or "(B) willfully to make or cause to be made to the other person any false report or statement or willfully to enter or cause to be entered for the other person any false record." 7 U.S.C. § 6b(a)(1)(A)-(B).

[3] "It shall be unlawful for a commodity trading advisor[or] associated person of a commodity trading advisor" "(A) to employ any device, scheme, or artifice to defraud any client or participant or prospective client or participant; or (B) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or participant or prospective client or participant." 7 U.S.C. § 6*o*(1).

JDC's historical rates of return, which Paron then used in promotional material that was shown to solicit clients. ER098-99 (Summary Judgment Order, Dkt. 267 at 56-57). The district court did not find that Crombie had created the promotional materials. *See* ER098 (Dkt. 267 at 56). The court did, however, find that Crombie had "participated in meetings in which potential clients were solicited and were given these materials" and concluded that he therefore had "directly participated in the solicitation of clients using these materials." ER099 (Summary Judgment Order, Dkt. 267 at 57). Judge Wilken further concluded that Crombie could also be held liable for violating these sections of the CEA because Paron had violated them and Crombie was a controlling person of Paron. ER101-04 (Summary Judgment Order, Dkt. 267 at 59-62); *see* 7 U.S.C. § 13c(b).[4] The district court did not find that Crombie had engaged in any misconduct in his personal trading activities or that he had used others to do so on his behalf.

Because the CFTC's motion for summary judgment did not address the relief it sought, the district court directed the CFTC to file a motion for relief and proposed judgment. ER110 (Summary Judgment Order, Dkt. 267 at 68). After the CFTC did so, in November 2013, the district court entered an order granting the

[4] "Any person who, directly or indirectly, controls any person who has violated any provision of this chapter . . . may be held liable for such violation in any action brought by the Commission to the same extent as such controlled person." 7 U.S.C. § 13c(b).

CFTC's motion for relief, awarding restitution and imposing civil monetary penalties and injunctive relief. The district court's restitution award (in the amount of $746,460.28) was intended to benefit clients whose investment had suffered a loss. ER037; ER039 (Permanent Injunction, Dkt. 273 at 5, 7).

As for the injunctive relief, the district court entered an order that permanently enjoined Crombie from:

- Violating, directly or indirectly, §§ 9(a)(4), 4b(a)(1)(A)-(B), and 4*o*(1)(A)-(B) of the CEA—the parts of the statute that the district court found Crombie to have violated.
- "Trading on or subject to the rules of any registered entity," which would include the NFA.
- "Controlling or directing the trading for or on behalf of any other person or entity."
- "Soliciting, receiving or accepting any funds from any person for the purpose of purchasing or selling any" futures.
- "Applying for registration or claiming exemption from registration with the Commission in any capacity, and engaging in any activity requiring such registration or exemption."
- "Acting as a principal[,]" "agent or any other officer or employee of any person" "registered, exempted from registration or required to be registered with the Commission."

ER035-37 (Permanent Injunction §§ 4(a)-(c), 5(a), (d)-(g) (Dkt. 273 at 3-5)).

Finally, the injunction prohibited Crombie from "[e]ntering into any transactions involving commodity futures, options on commodity futures, commodity options[,]" "security futures products, swaps[,]" "and/or foreign currency . . . (forex contracts) for his own personal account or for any account in

which he has a direct or indirect interest"; and from "[h]aving any commodity futures, options on commodity futures, commodity options, security futures products, swaps, and/or forex contracts traded on his behalf." ER035-36 (Permanent Injunction § 5(b)-(c) (Dkt. 273 at 3-4)). Crombie appealed. ER157 (First Notice of Appeal, Dkt. 274).

On appeal, this Court affirmed nearly all of the district court's two orders. *See* ER013-32. In addressing the injunction order, the Court noted that "the district court adopted the Commission's proposed injunction in toto and provided no specific explanation as to why it adopted any of the suggested provisions." ER031. For most of the provisions in the injunction, "the connection between the violations found and the prohibitions [was] sufficiently self-evident" that the panel concluded that "the district court's inclusion of those future restraints on Crombie was not an abuse of discretion." ER031.

This, however, was not true for Subsections 5(b) and 5(c) of the injunction, which prohibit Crombie from trading any commodity futures, options on commodity futures, commodity options, security futures products, swaps, or foreign currency on "his own personal account" or having these products "traded on his behalf." ER036 (Order, Dkt. 273 at 4). Because the Court could not "readily discern how these prohibitions are connected to preventing future violations similar to those that Crombie has committed," it could not "conduct

meaningful abuse of discretion review without further explanation." ER032. Therefore, the Court vacated those two portions of the injunction and remanded the case to the district court with instructions to provide "further explanation as to those parts of the Permanent Injunction." ER032.

On remand, the district court again imposed these two parts of the permanent injunction order. ER012 (Order, Dkt. 288 at 10).[5] The district court acknowledged that a "ban from personal[ ] trading" was not necessary to "prevent Crombie from submitting misstatements and fraudulent documents to the NFA" because "Crombie has had his membership with the NFA permanently revoked." ER008-09 (Order, Dkt. 288 at 6-7). Judge Wilken did not consider whether, or conclude that, the personal trading ban was necessary to prevent future violations. ER008 (Order, Dkt. 288 at 6). Nor did she examine, as the Court directed, whether the ban on personal trading would "prevent[ ] future violations similar to those that Crombie ha[d] committed." ER032. Instead, she reasoned that the personal trading ban was not "superfluous" because without it, Crombie "could still make false statements and create falsified documents to solicit funds from customers and

[5] In its brief to the district court on remand, the CFTC tried to introduce evidence of Crombie's 2016 guilty plea to first-degree burglary, which the district court denied. *See* ER007 (Order, Dkt. 288 at 5 n.3). Judge Wilken made clear that it was "not necessary" for her to consider the burglary conviction to reach her decision. ER008 (Order, Dkt. 288 at 6).

utilize his personal accounts for such purposes." ER009 (Order, Dkt. 288 at 7). And while the district court had not found that Crombie had misappropriated any client funds, the court nevertheless concluded that "the personal trading ban [wa]s not overly broad" because the court had authority to enjoin Crombie not only "from future violations of the specific statutes identified in this case" but also from other violations of the CEA. ER009-10 (Order, Dkt. 288 at 7-8). In the district court's view, the personal trading ban would "protect the integrity of the markets against Crombie and his fraudulent conduct." ER010 (Order, Dkt. 288 at 8).

Crombie timely appealed. ER001-02 (Second Notice of Appeal, Dkt. 290). Crombie filed his opening brief pro se in October 2019, the CFTC responded in December 2019, and Crombie replied in January 2020. Dkts. 8, 12, 17. In April 2020, the Court determined that the appointment of pro bono counsel would benefit the Court's review of the case. Dkt. 21. In September 2020, undersigned counsel were appointed to represent Crombie pro bono. Dkt. 24. Counsel now file this replacement opening brief, which replaces Crombie's pro se brief.

STANDARD OF REVIEW

This Court reviews a district court's imposition of a permanent injunction for an abuse of discretion. *See CFTC v. Crombie*, 914 F.3d 1208, 1217 (9th Cir. 2019) (ER031). As this Court implicitly recognized in remanding for further explanation the two sections of the injunction at issue here (ER032), "because

'injunctive relief must be tailored to remedy the specific harm alleged,' 'an overbroad injunction is an abuse of discretion.'" *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1119 (9th Cir. 2009) (quoting *Lamb-Weston, Inc. v. McCain Foods, Ltd.*, 941 F.2d 970, 974 (9th Cir. 1991)) (cleaned up). "The purpose of an injunction is to prevent future violations," *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953), and the scope of an injunction "may be only so much as is required to correct the specific violation." *LeMaire v. Maass*, 12 F.3d 1444, 1455 (9th Cir. 1993) (quoting *Hoptowit v. Ray*, 682 F.2d 1237, 1247 (9th Cir. 1982)).

SUMMARY OF ARGUMENT

The Court should reverse the district court's Order re-imposing Subsections 5(b) and 5(c) of the permanent injunction and remand for the district court to enter final judgment consistent with this Court's opinion. Subsections 5(b) and 5(c) are unsupported by any record evidence, and the district court therefore could not link "the terms of [the] injunction" with "the violations sought to be remedied." ER031.

I. Subsections 5(b) and 5(c)—on top of the other restrictions in the permanent injunction—are not necessary to prevent Crombie from violating the CEA in the future. None of Crombie's violations that the district court found at summary judgment had anything to do with personal trading. The district court hypothesized, without any evidence, that a personal trading ban would not be

"superfluous" because without it, Crombie "could still make false statements and create falsified documents to solicit funds from customers and utilize his personal accounts for such purposes." ER009 (Order, Dkt. 288 at 7). But the controlling question is not whether the bans would be "superfluous," but whether they are *necessary*. There is no evidence in the record to suggest that Crombie would engage in such conduct. The other provisions of the injunction suffice to prevent future violations.

Cases ordering personal trading bans involve defendants who (1) misappropriated client money and traded that money on their own account, (2) directly made false statements to potential investors to take their money, or (3) refused to promise that they would desist from engaging in illegal activity. The district court acknowledged that it did not find that Crombie had misappropriate client money. While the district court found that Crombie had provided false material to Paron, which material was then given to potential clients, the court did not find that Crombie had directly solicited clients using false materials. Lastly, there is no evidence that Crombie has refused to stop violating the CEA. Based on the evidence in the record and the existing case law, the district court abused its discretion in imposing Subsections 5(b) and 5(c).

II. Imposing a *lifetime* personal trading ban—rather than a limited, fixed-term ban—was an abuse of discretion. Other courts have properly recognized that

lifetime bans are appropriate only in extreme situations. *See, e.g.*, *Monieson v. CFTC*, 996 F.2d 852, 863 (7th Cir. 1993). While Crombie has never been criminally convicted of violating the CEA, other courts have refused to apply lifetime bans even when defendants were incarcerated. *E.g.*, *CFTC v. Stauffer*, 2018 WL 2197732, at *1-2 (W.D. Mich. Mar. 30, 2018). Thus, even if this Court were to find that ordering personal trading bans was not an abuse of discretion, issuing a lifetime ban would still be improper.

III. Finally, nothing in the record suggests that in order to prevent future violations, the district court needed to prohibit Crombie from hiring an advisor to trade for him. The district court did not cite any evidence indicating that Crombie is likely to defraud investors by taking their money and giving it to a third-party registered advisor. This provides an additional reason to rule that the district court's imposition of Subsection 5(c) was an abuse of discretion.

ARGUMENT

I. THE DISTRICT COURT ABUSED ITS DISCRETION IN ENTERING SUBSECTIONS 5(b) AND 5(c) OF THE PERMANENT INJUNCTION BECAUSE A PERSONAL TRADING BAN IS UNNECESSARY TO PREVENT FUTURE VIOLATIONS OF THE COMMODITY EXCHANGE ACT BY CROMBIE.

A. An injunction must be only as broad as necessary to prevent future CEA violations.

In imposing an injunction under the Commodity Exchange Act ("CEA"), 7 U.S.C. § 1 *et seq.*, a district court must ensure that the scope of the injunction is only as broad as necessary to prevent future statutory violations. The district court below abused its discretion by imposing Subsections 5(b) and 5(c) because they are not narrowly tailored to prevent Crombie from violating the CEA in the future.

The CEA states that when a person "has engaged . . . in any act or practice constituting a violation of" the Act, a district court may "enjoin such act or practice." 7 U.S.C. § 13a-1(a). In addition to a court's authority to enjoin violations specifically, Congress authorized district courts to grant any additional relief "*necessary*" to prevent future violations of the CEA. *Id.* § 13a-1(c) (emphasis added); *see also CFTC v. Co Petro Mktg. Grp., Inc.*, 680 F.2d 573, 583 (9th Cir. 1982) ("Upon a proper showing, the district court is empowered to issue permanent or temporary injunctions or restraining orders, writs of mandamus or orders affording like relief, including orders to take such action as is necessary to remove the danger of violation."). An injunction is overbroad when it is "not

proportionate to the offense committed." *CFTC v. Bame*, 2010 WL 11526741, at *2-3 (C.D. Cal. Mar. 5, 2010).

Thus, an injunction is overbroad—and indeed the district court has exceeded its statutory authority—if it imposes restrictions that are unnecessary to prevent future harms. *See CFTC v. Trade Tech Inst., Inc.*, 2012 WL 13008332, at *6 n.11 (C.D. Cal. June 19, 2012); *see also Great W. Land & Dev., Inc. v. SEC*, 355 F.2d 918, 919 (9th Cir. 1966) (finding an injunction "sweeping" and "overbroad" where the district court failed to address the defendants' "assertions that they had no reason to violate in the future since they had an alternative method of operation which would not offend the statute"). A court may not issue "an injunction for punishment's sake" or "broaden the scope of an injunction because of moral desert or to make an example of the defendant." *SEC v. Gentile*, 939 F.3d 549, 560 (3d Cir. 2019).

Here, only the scope of injunctive relief was at issue on remand, not the propriety of imposing any injunctive relief at all. This Court had already affirmed most of the permanent injunction order. *See* ER031-32. The district court thus correctly recognized that on remand "the issue [wa]s not whether" it should order "a permanent injunction, generally." *See* ER007 (Order, Dkt. 288 at 5). The question was whether Subsections 5(b) and 5(c) specifically were necessary "to

prevent[ ] future violations *similar* to those that Crombie ha[d] committed." ER032 (emphasis added).

B. Banning Crombie from personal trading was unnecessary to prevent future violations.

The district court abused its discretion by issuing an overbroad injunction. *See Stormans*, 586 F.3d at 1119. Subsections 5(b) and 5(c) are unnecessary to prevent Crombie from engaging in future violations of the CEA. The other provisions of the injunction suffice to prevent future violations.

The first three provisions in the permanent injunction prohibit Crombie from "directly or indirectly" violating the three sections of the CEA that the district court found him to have violated. ER035 (Dkt. 273 at 3). He also cannot trade money on another's behalf, work at any entity registered with the CFTC, or "[t]rad[e] on or subject to the rules of any registered entity." ER035-37 (Dkt. 273 at 3-5). These provisions all address the violations the district court found—false statements in the promotional material of a registered commodity trading advisor (Paron) and false statements to the NFA, a registered futures association. Moreover, these provisions are broad because they enjoin Crombie from "indirectly" engaging in this prohibited conduct.

Subsection 5(e) of the injunction specifically prohibits Crombie from doing what the district court said it feared: "Soliciting, receiving or accepting any funds from any person for the purpose of purchasing or selling any commodity

futures[.]" ER036 (Dkt. 273 at 4). Thus, if the CFTC were to learn in the future that Crombie was soliciting clients, taking their money, and trading that money on his own account, the CFTC could get an immediate court order enjoining that practice under Subsection 5(e) of the permanent injunction.

C. Crombie did not engage in any of the types of behaviors that other courts have identified as reasons to impose personal trading bans.

Imposing a personal trading ban is necessary to prevent future harm only in "rare circumstances." *CFTC v. Hall*, 49 F. Supp. 3d 444, 452 (M.D.N.C. 2014), *aff'd*, 632 F. App'x 111 (4th Cir. 2015) (per curiam). Because injunctions must not place unnecessary and onerous restraints on individuals, personal trading bans must be imposed sparingly because they "implicate[ ] a substantial private right." *See CFTC v. CIS Commodities LLC*, 2013 WL 1944571, at *10 (D. Nev. May 8, 2013).[6]

Although this Court has not articulated a bright-line test for determining whether or when a personal trading ban is appropriate, the existing district court case law identifies three circumstances where a personal trading ban may be "necessary to remove the danger" of future CEA violations. 7 U.S.C. § 13a-1(c). Those exceptional circumstances are when the defendant has (1) misappropriated

[6] As a practical matter, because of the broad scope of this injunction, the Financial Industry Regulatory Authority has advised Crombie that he cannot trade securities.

funds, (2) made deceptive statements directly to clients to take their money, or (3) refused to promise to abide by the law prospectively. Crombie did not engage in any of these three acts. Thus, the district court abused its discretion by imposing a personal trading ban.

1. Misappropriating Client Funds

In cases involving misappropriation of client funds, the link "between the terms of [the] injunction and the violations sought to be remedied" is "self-evident." ER031. If courts do not forbid these defendants from trading on their own personal account, they might continue to trade misappropriated funds using their personal accounts. For example, in *CFTC v. Williams*, which the district court cited in the Order, ER009-10 (Order, Dkt. 288 at 7-8), the defendant had "traded significant volumes of E-Mini S&P 500 futures contracts in his personal trading accounts using participants' funds and consistently suffered heavy trading losses." 2018 WL 3853992, at *2 (D. Ariz. Mar. 16, 2018); *see also CFTC v. Harrison*, 255 F. Supp. 3d 645, 647 (D.S.C. 2015) ("Additionally, Defendant admitted to accepting funds in his own name and commingling funds he accepted with his own funds.").[7] Crombie did nothing of the sort. In fact, the district court

[7] The link was similarly self-evident in the other misappropriation cases the district court cited. *See* ER009 (Order, Dkt. 288 at 7). In *CFTC v. Aurifex Commodities Research Co.*, the court found that the defendants had "deposited participants' funds in their own accounts, that they used significant portions of the participants' funds for their own personal expenditures, and that they knew that the

recognized that it "did not find Crombie in violation of misappropriating client funds," ER009 (Order, Dkt. 288 at 7), and so that cannot be a basis here to impose Subsections 5(b) and 5(c) of the injunction.

2. Directly Deceiving Clients

A personal trading ban may be necessary to prevent future violations when the defendant has previously lied directly to potential clients to solicit their business. For example, in *CFTC v. Poole*, which the district court cited, ER011 (Order, Dkt. 288 at 9), the defendant made false representations on his website by posting false client testimonials and falsely claiming that his "trading system would yield huge profits and that it would allow prospective clients to predict accurately market movements." 2006 WL 1174286, at *4 (M.D.N.C. May 1, 2006); *see also CFTC v. Dupont*, 2018 WL 3148532, at *9 (D.S.C. June 22, 2018) (ordering ban where defendant lied to "clients and potential clients through weekly updates in the newsletter, various posts on its website, and numerous postings on its social media profiles"). A subsequent court has read *Poole* to mean that the personal trading ban there was appropriate because of the "aggravating

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funds they were spending were not their own." 2008 WL 299002, at *6 (W.D. Mich. Feb. 1, 2008); *see also CFTC v. Gutterman*, 2012 WL 2413082, at *4 (S.D. Fla. June 26, 2012) ("Defendants used the misappropriated funds for various personal expenses and purchases, including, but not limited to, restaurants, gambling, entertainment, and retail purchases. Defendants never disclosed to customers that their funds would be, or had been, used for these purposes.").

circumstance[ ]" of the defendant making false statements directly to clients. *Hall*, 49 F. Supp. 3d at 453.

Although the district court identified an existing principle in the case law, it abused its discretion by applying that principle to the facts of this case in a way that lacked "support in inferences that may be drawn from facts in the record." *See United States v. Christian*, 749 F.3d 806, 810 (9th Cir. 2014) (remanding for a new trial) (quoting *United States v. Hinkson*, 585 F.3d 1247, 1251 (9th Cir. 2009) (en banc)). In its Order, the district court stated that "a ban against Crombie from trading in his personal capacity is appropriate because it would likely prevent future fraudulent conduct using promotional materials to solicit potential customers." ER009 (Order, Dkt. 288 at 7). The district court reasoned that it had previously found that Crombie had "provid[ed] false promotional materials to potential clients in order to solicit their business." ER0041 (Order, Dkt. 288 at 2).

But that is not what the district court actually found at summary judgment. The court specifically assumed for purposes of summary judgment that "Crombie did not author the promotional material himself."[8] ER098 (Order, Dkt. 267 at 56). The court then found that Crombie had "provided the false information about his

[8] *See Magic Link Garment Ltd. v. ThirdLove, Inc.*, 445 F. Supp. 3d 346, 355 (N.D. Cal. 2020) (requiring court to "view the evidence in the light most favorable to the nonmoving party").

performance history that was in the promotional material" that *Paron* authored and used to "solicit potential clients." ER098-99 (Order, Dkt. 267 at 56-57). At summary judgment, the district court did not reject Crombie's deposition testimony that "he did not discuss JDC Venture's past performance" at meetings with potential clients. ER099. Rather, other members at Paron provided potential clients with materials that included JDC Ventures' performance history. ER099.

Although the district court found that Crombie had "directly participated in the solicitation of clients using these materials," that conclusion was based on Crombie's presence in "meetings in which potential clients were solicited and were given these materials." ER099 (Dkt. 267 at 57). Even on scienter, the district court found only that Crombie had acted in "careless disregard" of Paron's use of the false information to solicit clients. ER099-100 (Dkt. 267 at 57-58). The court did not find that Crombie intended for Paron to use this false information to solicit clients, much less that Crombie himself did so directly. ER100. Thus, the violation that the district court hypothesized Crombie might commit was not "similar" to the ones that Crombie had committed. ER032.

Moreover, unlike in *Poole* and *Dupont*,[9] the district court here did not find that Crombie had reached out to and solicited clients. Instead, the district court

[9] In addition to the fact that the defendant in *Dupont* directly deceived clients and potential clients, the party enjoined in that case was a business entity, not an individual. *See* 2018 WL 3148532, at *10. Therefore, what the district court here

found that he had "directly participated" in solicitation by attending meetings where other members of Paron pitched to potential clients. ER099 (Dkt. 267 at 57). Crombie's disregard for Paron's use of the false information to solicit clients simply does not amount to direct solicitation and deceit of potential clients. Because Crombie did not directly solicit investors using false information, the case law on which the district court relied does not support a trading ban against him. *See CFTC v. Summit Trading & Capital, Inc.*, 2013 WL 433131, at *3 (C.D. Ill. Feb. 1, 2013) (refusing to enter trading ban on summary judgment, where the defendant provided evidence that she "signed the incorporation documents as a manager" but "did not solicit or accept money from investors"). Thus, there is no evidence in the record to suggest that a personal trading ban is necessary to prevent Crombie from directly deceiving potential investors.

3. Refusing to Promise to Comply with the Law

Lastly, district courts have imposed personal trading bans when defendants have refused to desist from engaging in illegal activity. The district court cited one of these cases in its Order. ER011 (Order, Dkt. 288 at 9). In *CFTC v. Gramalegui*, the defendant had previously settled with the CFTC and had agreed "to cease and desist from violating § 6*o*(1)(B) and Rule 4.41(b)." 2018 WL 4610953, at *4 (D.

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referred to as "a personal trading ban" in that case, ER011 (Order, Dkt. 288 at 9), was not against an individual.

Colo. Sept. 26, 2018). The defendant then committed subsequent violations that "were identical to the very infractions that led to the entry of the 2001 Order" and "offered no assurances that he w[ould] not continue to violate the CEA and the 2001 Order in the future." *Id.* at *31.[10] Although Crombie challenged the district court's liability findings in his first appeal, there is no evidence in the record that he will not comply with the CEA in the future. Indeed, at this point, it has been nearly a decade since the violations leading to the CFTC's civil enforcement action and the injunction. In all that time, the district court has not been called upon to enforce any of the injunction's provisions—including the personal trading ban, which this Court only vacated in February 2019. And, as discussed above, even without the personal trading ban, the injunction already specifically enjoins Crombie from violating the CEA and from acting in the ways the district court

[10] *Accord CFTC v. McCrudden*, 2018 WL 2075433, at *2 (E.D.N.Y. May 3, 2018) (personal trading ban warranted where defendant gave "no assurances" that he would "not violate the [Act] in the future and in fact the opposite is true"); *CFTC v. American Bullion Exch. ABEX Corp.*, 2014 WL 3896023, at *18 (C.D. Cal. Aug. 7, 2014) (imposing "comprehensive trading ban" where defendant made no promises not to repeat these mistakes); *CFTC v. Wilson*, 19 F. Supp. 3d 352, 364 (D. Mass. 2014), *aff'd sub nom. CFTC v. JBW Capital, LLC*, 812 F.3d 98 (1st Cir. 2016) (unregistered trader "recognize[d] that he ha[d] an 'addiction' to trading").

feared he could. Thus, refusing to comply with the law could not justify the personal trading ban here.

D. The district court's unfounded concerns about threats to market integrity do not justify imposing a personal trading ban on Crombie.

The district court lastly tried to justify imposing a personal trading ban by asserting that when a defendant commits fraud, a ban is needed to protect market integrity. ER010 (Order, Dkt. 288 at 8). But the need to protect market integrity is not an independent sufficient reason to impose a personal trading ban. Courts have declined to impose such bans even when defendants have engaged in commodities fraud. For example, in *CFTC v. Fan Wang*, the defendant entered false trading entries into his employer's trading records and subsequently pleaded guilty in a parallel criminal action "to making a false report in connection with a commodities transaction in violation of 7 U.S.C. §§ 6b(a)(1)(B) and 13(a)(2)." 261 F. Supp. 3d 383, 385-86 (S.D.N.Y. 2017). The CFTC moved for a permanent injunction that would bar the defendant from "participating in the markets regulated by the Commission." *Id.* at 386. Judge Koeltl refused to enter the requested injunction because the CFTC had failed to prove that the "defendant is likely to violate the CEA again unless he is enjoined from registering with the Commission and trading commodities." *Id.* at 388. He noted that the defendant's violations had transpired over a discrete period of time and that he had "complied with his obligations to pay restitution within his means." *Id.* Thus, violating the antifraud provisions of the

statute, by itself, does not justify imposing a personal trading ban. Indeed, in the two cases that the district court relied upon to conclude that fraud alone is enough to support a ban, the defendant had misappropriated client funds. *See Williams*, 2018 WL 3853992, at *2; *Harrison*, 255 F. Supp. 3d at 647 (defendant admitted to comingling client funds with his own funds). As discussed above, misappropriation of client funds is a recognized reason to impose a personal trading ban. Crombie, however, never comingled or otherwise misappropriated client funds. And thus, the district court erred in asserting that past evidence of fraud alone forms an independent basis to impose a personal trading ban.

II. THE DISTRICT COURT ABUSED ITS DISCRETION BY SUBJECTING CROMBIE TO SUBSECTIONS 5(b) AND 5(c) FOR LIFE.

Even if this Court were to find that the district court did not abuse its discretion in imposing a personal trading ban, the same cannot be said about the ban's duration. A lifetime ban, rather than one for a fixed-term, cannot be justified here.[11] Lifetime bans are disfavored because of their "harsh[ness]." *See*

[11] Crombie, representing himself, did not raise this argument below. While this Court may treat such arguments as waived, "waiver is a discretionary, not jurisdictional, determination." *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 992 (9th Cir. 2010). This Court has explained that it will "exercise [its] discretion to reach waived issues . . . in three circumstances: 'in the "exceptional" case in which review is necessary to prevent a miscarriage of justice or to preserve the integrity of the judicial process,' 'when a new issue arises while appeal is pending because of a change in the law,' and 'when the issue presented is purely one of law and either does not depend on the factual record developed below, or

Monieson, 996 F.2d at 863. Indeed, courts have refused to impose lifetime bans even when defendants have engaged in a long-standing course of fraudulent activity. *See Stauffer*, 2018 WL 2197732, at *1-2 (refusing to order a lifetime ban and instead imposing a 15-year ban where defendant defrauded investors by telling them that "he was investing in foreign currency through currency trades (forex)" and was criminally "convicted of both wire fraud and money laundering and is currently serving a 10-year sentence"); *see also CFTC v. eFloorTrade, LLC*, 2020 WL 1673313, at *11 (S.D.N.Y. Apr. 3, 2020) (refusing to enter permanent ban because, "[a]lthough Defendants' misconduct was long running and serious, there is no evidence that Defendants' customers sustained losses as a result of Defendants' actions, or that Defendants sought to profit at their clients' expense").

As in *eFloorTrade*, there is no record evidence here that Crombie profited at his clients' expense. Moreover, unlike the defendant in *Stauffer*, Crombie was never convicted of a crime related to the conduct at issue here. Rather, this civil enforcement action arises from promotional materials used for eight months in 2010 and 2011 and statements made during a March 2011 NFA investigation.

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the pertinent record has been fully developed.'" *Id.* (quoting *Bolker v. Comm'r*, 760 F.2d 1039, 1042 (9th Cir. 1985)). The pertinent record has been fully developed, and the district court has had two opportunities to explain the necessity of the lifetime personal trading ban. Thus, the Court should use its discretion to review the temporal component of the trading ban here.

ER046-47 (Summary Judgment Order, Dkt. 267 at 4-5). Under these circumstances, the district court abused its discretion in imposing a lifetime ban on Crombie's personal trading activity, and this Court should reverse that decision.

III. THE DISTRICT COURT ABUSED ITS DISCRETION BY RE-IMPOSING SUBSECTION 5(c) WHEN THERE IS NO EVIDENCE SUPPORTING ITS NECESSITY.

Even if the Court were to affirm Subsection 5(b) of the Order, the Court should find that the district court abused its discretion by re-imposing Subsection 5(c) because there is no causal link between "the violations found" and prohibiting Crombie from having someone else trade commodity futures on his behalf. *See* ER031-32.

Subsection 5(c) imposes broader restrictions on Crombie than Subsection 5(b) does. The former prohibits him—unlike any other person—from hiring a registered trading advisor to make trades on his behalf. In the Order, the district court justified imposing Subsections 5(b) and 5(c) because Crombie could "create falsified documents to solicit funds from customers," take the money, put it into his trading account, and then execute trades for his customers. ER009 (Order, Dkt. 288 at 7). For Subsection 5(c) to be *necessary*, one would have to assume that there is a strong probability that Crombie would take money solicited from customers and then find a third-party advisor to trade that money. There is no

evidence that Crombie would try to solicit (much less successfully solicit) a registered advisor to help him trade money that he had swindled from clients.

Thus, even if the Court upholds the district court's ruling on Subsection 5(b) of the injunction, it should rule that the district court abused its discretion in entering the broader Subsection 5(c) provision. There is no need for Crombie to lose his right to participate in the markets as a client and ordinary citizen.

CONCLUSION

For the foregoing reasons, this Court should reverse the imposition of Subsections 5(b) and 5(c) of the permanent injunction and remand to the district court to enter final judgment consistent with this Court's opinion.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Appellant is not aware of any cases pending in this Court that are deemed related pursuant to Ninth Circuit Rule 28-2.6.

Dated: October 26, 2020

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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