IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

U.S. COMMODITY FUTURES TRADING COMMISSION, Plaintiff, vs. JOHN DAVID STROUD, STROUD CAPITAL MANAGEMENT, LLC, TS CAPITAL PARTNERS, LLC, and TS CAPITAL MANAGEMENT, LLC, Defendants.	Civil Action No. 3:12-cv-00203 **ORDER**

This case was brought by Plaintiff, the United States Commodity Futures Trading Commission, pursuant to the Commodity Exchange Act ("the Act"), alleging that Defendant John Stroud, individually and as the controlling person of Defendants Stroud Capital Management, LLC, TS Capital Partners, LLC, and TS Capital Management, LLC, violated the Act by soliciting funds through fraud. Specifically, Plaintiff alleges that after fraudulently soliciting funds from investors, Defendants lost more than $1,175,180.00 trading commodity futures and off exchange foreign currency contracts ("forex"), and misappropriated $2,254,845.00 in pool participant funds. Plaintiff further alleges that Defendants then concealed their losses and misappropriation from investors and from the National Futures Association ("NFA") by issuing false account statements and tax records.

This matter comes before the Court pursuant to Plaintiff's May 5, 2014 Motion for Summary Judgment. [Dkt. 80]. Defendants responded to this motion on June 23, 2014. [Dkt. 88]. Plaintiff filed its reply on July 2, 2014. [Dkt. 89]. In its motion, Plaintiff asks the Court to enter judgment as a matter of law finding that Defendants violated various sections of the Act between August 2008 and March 2012; asks the Court to permanently enjoin Defendants from a range of activity related to futures trading; and asks the Court to order Defendants to pay, jointly and severally, disgorgement, restitution, and a civil monetary penalty. Defendants do not resist

Plaintiff's motion for summary judgment on the merits, but argue that Plaintiff's requested remedies are excessive and duplicitous.

I. STATEMENT OF UNDISPUTED MATERIAL FACTS

The following facts are undisputed: Plaintiff is an independent federal regulatory agency charged by Congress with administering and enforcing the Act and regulations promulgated thereunder. Defendant John Stroud was a commodities trader operating out of Auburn, Alabama prior to his incarceration. Stroud is incarcerated after pleading guilty to employing a device, scheme, or artifice to defraud in violation of Alabama state securities law on August 23, 2013. Stroud founded and held ownership interests in several companies, including Stroud Capital Management, LLC, TS Capital Partners, LLC ("TSCP"), and TS Capital Management, LLC ("TSCM"). Stroud held at least a 50% ownership interest in TSCP and TSCM and is the sole owner, president, and sole principal of Stroud Capital Management. Stroud served in various capacities in each company, including serving as TSCP's Chief Executive Officer, TSCM's Managing Director, and as an authorized trader on the Stroud Capital pool's commodity futures and forex trading accounts. Stroud also handled communication on behalf of TSCM during two NFA audits of the company in April and October of 2011.

Stroud failed to register all of these companies with the NFA and failed to register as an associated person ("AP") with the NFA. On August 15, 2008, Stroud Capital filed a claim of exemption from commodity pool operator ("CPO") registration with the NFA with respect to the Stroud Capital pool. TSCP filed the same registration exemption claim on September 24, 2009, with respect to its operation of the TSC pool. Stroud Capital and TSCP have never been registered with the Commission as CPOs. In contrast, TSCM, established in June 2010, has been registered as a CPO since August 12, 2010. Stroud has never been registered with the Commission as an associated person ("AP") of Stroud Capital, TSCP, or TSCM.

Between February 2008 and March 2010, Stroud, individually and on behalf of Stroud Capital, solicited and pooled $3,303,258.31 from six participants for the purpose of trading commodity futures in the Stroud Capital pool. In so doing, Stroud typically did not provide pool participants with any account agreements or paperwork. Of the $3,303,258.31 that Defendants accepted from pool participants between February 2008 and March 2010, Defendants transferred $1,714,500.00 into the Stroud Capital Pool's various trading accounts, which were used to trade

various commodity futures and forex contracts. Stroud's trading of commodity futures and forex in the Stroud Capital pool's trading accounts resulted in net losses of approximately $1,058,501.03 between approximately August 2008 and April 2010.

In late 2009, Stroud, individually and on behalf of TSCP and TSCM, began soliciting participants for the purpose of trading commodity futures in the TSC pool. At this time, Stroud began using TSCP, TSCM and TSC pool names interchangeably with prospective participants, although he continued using the Stroud Capital and Stroud Capital pool names with some existing participants. Between December 2009 and March 2012, Defendants solicited, accepted, and pooled $1,585,184.12 from TSC pool participants for the purpose of trading commodity futures in the TSC pool. Of this amount, Defendants transferred $546,550.00 into the TSC pool's trading accounts. Stroud generally did not provide TSC pool participants with any paperwork. In 2010, Stroud ceased using Stroud Capital and Stroud Capital pool names with some existing Stroud pool participants, and began using TSCP, TSCM, and TSC pool instead.

By early 2011, Stroud had hired four full-time employees at TSCP, some of whom were also TSC pool participants. Stroud initially declined to share detailed documentation of his TSC pool fund trading, but employees eventually discovered that TSCP had unpaid bills and insufficient funds available to pay them. Employees also discovered that TSCP had failed to file year-end tax returns for 2009 and 2010. After employees confronted Stroud with this discovery, Stroud provided false bank statements to his employees showing a highly inflated version of the TSC pool account. The provided bank statements were actually fabricated versions of Stroud's personal bank account statement. When employees eventually informed a third-party investor of their discoveries,[1] Stroud informed TSCP employees that TSCP was closing and that participant funds would be returned—though Stroud has since failed to return any funds to participants.

Stroud on multiple occasions falsely represented to prospective and actual participants in Stroud Capital, TSCP, and TSCM, that his trading was profitable. He relied on these misrepresentations to recruit investors, some of whom were friends of Stroud's that trusted him based on previous personal and business interactions with Stroud.

[1] Stroud met Thomas Tuberville, then the head football coach at Auburn University, in December 2008. Tuberville became an investor in Stroud Capital and, later, the TSC pool. Stroud touted Tuberville as his partner in promoting the TSC pool, telling potential investors that the "T" stood for Tuberville and the "S" for Stroud. Some pool participants were friends of Tuberville. Tuberville was the co-owner of TSCP.

Stroud Capital and Stroud Capital pool bank records show Stroud Capital pool participant deposits totaling $3,303,258.31 between February 2008 and March 2010. Only $1,714,500.00 of that amount was transferred into the Stroud Capital pool's commodity futures and forex trading accounts. Stroud lost $1,058,501.03 trading commodity futures and forex in these accounts between August 2008 and April 2010. TSCP, TSCM, and TSC pool bank records show TSC pool participant deposits totaling $1,585,184.12 between December 2009 and March 2012. Of that money, only $546,550.00 was transferred into the TSC pool's commodity futures and forex trading accounts. Stroud lost $116,122.35 trading commodity futures in the TSC pool's trading accounts between December 2009 and October 2011, and an additional $556.72 trading forex in the TSC pool's trading accounts between December 2009 and July 2011. [Dkt. 11-19 P. 195].

In sum, Stroud, individually and on behalf of Stroud Capital, TSCP, and TSCM, accepted $4,888,442.43 from Stroud Capital and TSC pool participants. Stroud lost a total of $1,175,180.10 trading commodity futures and forex for the Stroud Capital and TSC pools. He made payments to Stroud Capital and TSC pool participants totaling $1,369,939.06. Dkt. 11-19 P. 206–08. Stroud misappropriated the remaining $2,343,323.27.

II. ANALYSIS

The Court has jurisdiction over this action pursuant to Section 6c(a) of the Act, 7 U.S.C. § 13a-1(a), which allows the Commission to seek injunctive and other equitable relief in a U.S. District Court against a person who appears to have violated the Act. Venue properly lies with this Court pursuant to Section 6c(e) of the Act, 7 U.S.C. § 13a-1(e), as Defendants operated in this district and violations of the Act occurred in this district.

1. Summary Judgment

Federal Rule of Civil Procedure 56 provides that the "court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). In making this determination, the Court looks to "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any." *Phillips v. Am. Honda Motor Co.*, 438 F.2d 1328. 1336 (S.D. Ala. 2006) (*quoting* FED. R. CIV. P. 56(c)) (internal quotation marks omitted). A genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "[T]he substantive

law will identify which facts are material," and "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.* "The mere existence of some evidence to support the non-moving party is not sufficient for denial of summary judgment; there must be 'sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.'" *Phillips*, 438 F. Supp. 2d at 1336 (*quoting Bailey v. Allgas, Inc.*, 284 F.3d 1237, 1243 (11th Cir. 2002)). In ruling on a motion for summary judgment, "the court must view all evidence in the light most favorable to the non-moving party, and resolve all reasonable doubts about the facts in its favor. *Id.* (*citing Burton v. City of Belle Glade*, 178 F.3d 1175, 1187 (11th Cir. 1999)).

Plaintiff alleges that Defendants violated Section 4b(a)(2)(i) and (iii) of the Act, 7 U.S.C. § 6b(a)(2)(i), (iii) (2006), for acts committed before June 18, 2008; Section 4b(a)(1)(A)-(C) of the Act, as amended, 7 U.S.C. § 6b(a)(1)(A)-(C), for acts committed on or after June 18, 2008; Section 4b(a)(2)(A)-(C) of the Act, as amended by the CRA, 7 U.S.C. § 6b(a)(2)(A)-(C) (2006 and Supp. 2009), for acts committed on or after June 18, 2008 and prior to July 16, 2011; and Section 4*o*(1)(A) and (B) of the Act, 7 U.S.C. § 6*o*(1)(A), (B) (2006), all stemming from Defendants' misrepresentations to investors of their past successes trading commodity futures and forex. Plaintiff also alleges that Defendants violated Section 9(a)(4) of the Act, as amended, 7 U.S.C. § 13(a)(4); Section 4m(1) of the Act, 7 U.S.C. § 6m(1) (2006); and 4k(2) of the Act, 7 U.S.C. § 6k(2) (2006), with respect to Defendants' concealment of their fraudulent scheme during two NFA audits and Defendants' failure to register. In response, Defendants do not contest the allegations that they violated the above provisions of the Act. Based on Defendants' lack of resistance and the undisputed evidence of record, the Court concludes that no genuine issue of material fact exists and that Plaintiff is entitled to summary judgment as a matter of law on each of the six counts in the Complaint.[2] The only contested issue is the nature of the relief to be granted.

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[2] Defendants argue that the Court, in considering the evidence for purposes of summary judgment, should not draw any adverse inference from Stroud's assertion of his Fifth Amendment right against self-incrimination during his June 15, 2012 deposition. Generally, "the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them." *U.S. v. Premises Located at Route 13*, 946 F.2d 749, 756 (11th Cir. 1991) (citations omitted) (internal quotation marks omitted). However, an adverse inference from a person's invocation of his Fifth Amendment privilege violates the Fifth Amendment when "a person, who is the defendant in both a civil and a criminal case, is forced to choose between waiving his privilege against self-incrimination or losing the civil case on summary judgment." *Id.* (citations omitted). That unconstitutional forced decision only occurs when "invocation of the privilege would result in automatic entry of summary judgment." *Id.* (citations omitted). "A party seeking summary judgment must establish independently the elements of the claim

2. Remedies

The Commodity Exchange Act serves the crucial purpose of "protecting the innocent individual investor—who may know little about the intricacies and complexities of the commodities market—from being misled or deceived." *CFTC v. Gutterman*, 2012 WL 2413082, at *5 (S.D. Fla. June 26, 2012) (*quoting CFTC v. R.J. Fitzgerald & Co.*, 310 F.3d 1321, 1329 (11th Cir. 2002)). Whenever it appears to the Commission that a person "has engaged, is engaging, or is about to engage in any act or practice constituting a violation of" the Act, "the Commission may bring an action" in the district court "to enjoin such act or practice, or to enforce compliance with this chapter, or any rule, regulation, or order thereunder, and said courts shall have jurisdiction to entertain such actions . . . ." 7 U.S.C.A. § 13a-1(a). In the instant case, Plaintiff requests that the Court order relief in the form of a permanent injunction, disgorgement, restitution, and a civil monetary penalty. "It has long been recognized that in an action brought to enforce the requirements of remedial statutes such as this Act, a district court has broad discretion to fashion appropriate relief." *CFTC v. Muller*, 570 F.2d 1296, 1300 (5th Cir. 1978) (citations omitted).

a. Permanent Injunction

Plaintiff first requests that the Court issue a permanent injunction, enjoining Defendants from all future trading, registration, and related activity. The Act authorizes the Commission to request this relief when it suspects a person or entity of violating the law, and, "[u]pon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond." 7 U.S.C. § 13a-1(b). "In actions for a statutory injunction, the agency need not prove irreparable injury or the inadequacy of other remedies as required in private injunctive suits. A *prima facie* case of illegality is sufficient." *Muller*, 570 F.2d at 1300 (citations omitted). "Once a violation is demonstrated, the moving party need show only that there is some reasonable likelihood of future violations." *CFTC v. Hunt*, 591 F.2d 1211, 1220 (7th Cir. 1979); *see also CFTC v. Wilshire Inv. Mgmt. Corp.*, 531 F.3d 1339, 1346 (11th Cir. 2008) (citations omitted) (internal quotation marks omitted) ("[T]he ultimate test . . . is whether the defendant's past conduct indicates that there is a

within the confines of Federal Rule of Civil Procedure 56. It is the production of additional evidence above and beyond any negative inference [that prevents the forbidden] 'automatic entry of summary judgment.'" *S.E.C. v. Simmons*, 2008 WL 7935266, at *17 (M.D. Fla April 25, 2008) (*quoting Premises*, 946 F.2d at 756) (internal citations omitted). Here, summary judgment does not depend upon any adverse inference from Stroud's invocation of his Fifth Amendment right. There is ample evidence on the record supporting summary judgment, and Defendant does not otherwise contest any material facts.

reasonable likelihood of further violations in the future."). Here, there record clearly establishes that Defendants violated the Act. The key consideration is, then, whether there is a reasonable likelihood of future violations.

The Court looks the totality of the circumstances in an effort to determine the likelihood of future violations. *See Hunt*, 591 F.2d at 1220 (citations omitted). Factors the court may consider in determining a reasonable likelihood of future misconduct include "the egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, and the defendant's recognition of the wrongful nature of his conduct. . . ." *Wilshire*, 531 F.3d at 1346 (*quoting SEC v. Carriba Air, Inc.*, 681 F.2d 1318, 1322 (11th Cir. 1982)). The Court also considers "the nature of the past misconduct and the violator's occupation or customary business activities." *Hunt*, 591 F.2d at 1220 (*citing SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1101 (2d Cir. 1972)). Though the Court considers past misconduct, "the mere fact of past violations" is insufficient to show a likelihood of future misconduct. *SEC v. Blatt*, 583 F.2d, 1325, 1334 (*citing SEC v. Commonwealth Chem. Sec., Inc.*, 574 F.2d 90, 99–100 (2d Cir. 1978)). However, "[w]hile past misconduct does not lead necessarily to the conclusion that there is a likelihood of future misconduct, it is 'highly suggestive of the likelihood of future violations.'" *Hunt*, 591 F.2d at 1220 (*quoting SEC v. Mgmt. Dynamics, Inc.*, 515 F.2d 801, 807 (2d Cir. 1975)). "When the violation has been founded on systematic wrongdoing, rather than an isolated occurrence, a court should be more willing to enjoin future misconduct." *Id.* (*citing SEC v. Manor Nursing Centers*, 458 F.2d at 1101). Furthermore, "when a defendant, because of his professional occupation or career interest, will be in a position in which future violations could be possible, relief is appropriate." *Id.* (*citing SEC v. Commonwealth Chemical Securities, Inc.*, 574 F.2d 90 (2d Cir. 1978)).

Defendants do not dispute that Stroud violated the law. Furthermore, Defendants do not dispute the appropriateness of an injunction in the instant case. Here, the Court finds that a permanent injunction is appropriate. Stroud lost or misappropriated large sums of money from investors, some of whom were friends, over a period of several years. The evidence indicates that Stroud's misconduct was founded on systematic, rather than isolated, wrongdoing. Furthermore, Stroud's professional occupation and career interests are in the field that enabled him to participate in this wrongdoing. The Court therefore grants Plaintiff's request for a permanent injunction,

trading ban, and registration ban against all Defendants, consistent with the language in Plaintiff's Proposed Order [Dkt. 80-1 ¶¶72–73].

b. Equitable Remedies of Restitution and Disgorgement

Plaintiff also seeks restitution and disgorgement. Upon a "proper showing," the Court may impose equitable remedies including "restitution to persons who have sustained losses proximately caused by such violation (in the amount of such losses)," and "disgorgement of gains received in connection with such violation." 7 U.S.C. § 13a-1(d)(3); *see also DFTC v. Hunter Wise Commodities, LLC*, 2014 WL 4049998, at *8 (S.D. Fla. May 16, 2014) (awarding restitution in amount of losses suffered by investors).

In the Eleventh Circuit, restitution is generally "an equitable remedy designed to cure unjust enrichment of the defendant absent consideration of the plaintiff's losses." *CFTC v. Wilshire Inv. Mgmt. Corp.*, 531 F.3d at 1345 (*quoting Waldrop v. S. Co. Services, Inc.*, 24 F.3d 152, 158 (11th Cir. 1994)) (internal quotation marks omitted). However, the Dodd Frank Wall Street Reform and Consumer Protection Act ("Dodd Frank") amended the Commodities Exchange Act 13a-1(d)(3)(a), specifically clarifying that restitution under the Act be calculated to reflect the amount of loss. *See* Dodd Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 111th Cong. § 744 (2010) (amending Section 6c(d) of the Commodity Exchange Act (7 U.S.C. 13a-1(d)). Dodd Frank therefore changed the touchstone for restitution awards pursuant to the Act in the Eleventh Circuit from a defendant's unjust gain to investors' loss. *See CFTC v. Hunter Wise Commodities, LLC*, 2014 WL 4049998, at *8–9 (S.D. Fla. May 16, 2014) (measuring restitution by amount of loss to investors when conduct occurs subsequent to Dodd Frank amendment); *CFTC v. Global Precious Metals Trading Co., LLC*, 2013 WL 5212237, at *6 (S.D. Fla. Sept. 12, 2013) (measuring restitution in amount of loss). Dodd Frank Section 744 took effect on July 16, 2011. Dodd Frank, H.R. 4173, 111th Cong. § 754 (2010) (effective date 360 days after enactment of subtitle).

Few cases have discussed Dodd Frank's implication on restitution orders pursuant to the Act. *See CFTC v. Smithers*, 2013 WL 4851684, at *10 (S.D. Fla. July 31, 2013) (calculating restitution for fraud prior to Dodd Frank Section 6c(d)(3) separately from that for fraud committed after enactment of the above restitution provision). Instead, cases addressing violations occurring both before and after Dodd Frank amended the measure of restitution have failed to address this

distinction or dismissed it as insignificant. *See, e.g.*, *CFTC v. Gutterman*, 2012 WL 2413082, at *9 (S.D. Fla. June 26, 2012) (measuring restitution by amount of wrongful gain rather than loss to investors for period of violations spanning from November 2009 to March 2012); *CFTC v. Altamont Global Partners, LLC*, 2014 WL 644693, at *11, *7 n.4 (M.D. Fla. Feb. 19, 2014) (noting that Dodd Frank amended the Act in 2011, and that therefore both the pre- and post-amendment version of the Act applied to conduct spanning from 2009 to 2012, but dismissing amendments as "not so substantive as to warrant separate discussion" and calculating restitution pursuant to *Wilshire*); *CFTC v. Trader's Intern. Return Network*, 2013 WL 757770, at *2 n.3 (M.D. Fla. Jan. 22, 2013) (calculating restitution pursuant to Wilshire and awarding restitution in consideration of defendants' unlawful gains; noting that Dodd Frank modified restitution such that it be calculated "in the amount of such losses," but declining to address the change as irrelevant because plaintiff sought less than the unjust enrichment amount in its request for restitution).

The parties generally dispute whether the Court should apply the pre-Dodd Frank calculation for restitution, reflecting gains to the Defendant, or the post-Dodd Frank restitution calculation, reflecting loss to the victims. However, the parties decline to make any argument about the proper application of § 13a-1 in a case where violations occurred both before and after Dodd Frank's enactment. The Court does not find this distinction "not so substantive as to warrant separate discussion," particularly in light of the fact that the difference in restitution at stake based on the difference in these formulas in this case is over $1,000,000.00. *Altamont Global Partners, LLC*, 2014 WL 644693, at *7 n.4 (M.D. Fla. Feb. 19, 2014). The Court therefore finds that the appropriate measure of restitution in this case is to apply the pre-Dodd Frank calculation to funds solicited prior to the effective date of the amendment and to apply the post-Dodd Frank calculation to funds solicited following the effective date of the enactment. *See CFTC v. Smithers*, 2013 WL 4851684, at *10 (S.D. Fla. July 31, 2013) (calculating restitution for fraud prior to enactment of Section 6c(d)(3) separately from that for fraud committed after enactment of the above restitution provision). Of the $4,888,442.43 solicited from participants in both the Stroud Capital pool and the TSC pools for purposes of futures and forex trading, $38,600.00 was deposited after July 16, 2011. [Dkt. 11-3 PP. 189–193]. That $38,600.00 was deposited by three investors. Of those three investors, only one received repayments following July 16, 2011, in the amount $1,500.00. [Dkt. 11-3 PP. 207–08]. Therefore, for funds solicited following July 16, 2011, investors lost a total of

$37,100.00. This is the appropriate amount of restitution for the time period following the implementation of Dodd Frank Section 744.

Defendants solicited a total of $4,849,842.43 prior to July 16, 2011. Prior to Dodd-Frank, the measure of a restitution award was calculated by subtracting the amount of losses and the amount repaid to customers from the total amount solicited. Aside from the $1,500.00 repaid to investors whose money was deposited after July 16, 2011, Defendants repaid a total of $1.368.439.06 to pool participants. In total, Defendants lost a total of $1,175,180.10 trading. Because the Court has awarded $37,100.00 as the amount of loss suffered by investors following July 16, 2011, the Court subtracts that amount from the $1,175,180.10, for a total loss to investors prior to July 16, 2011, of $1,138,080.10. To determine the amount of restitution prior to July 16, 2011, the Court subtracts the loss on the market to investors ($1,138,080.10) and the amount of money repaid to investors before July 16, 2011 ($1,368,939.06) from the total amount of funds solicited prior to July 16, 2011 ($4,849,842.43). Defendants therefore must pay restitution in the amount of $2,342,823.27 for the period of time prior to July 16, 2011. Combined, Defendants are ordered to pay a restitution award of $2,379,923.27, plus post-judgment interest.[3] 28 U.S.C. § 1961.

Plaintiff also asks the Court to order disgorgement. The Court has discretion to impose, upon a proper showing, both restitution and disgorgement. 7 U.S.C. § 13a-1(d)(3)(B). Disgorgement is an equitable remedy aimed at depriving a wrongdoer of benefits derived from his wrongful conduct. "Disgorgement is remedial and not punitive. The court's power to order disgorgement extends only to the amount with interest by which the defendant profited from his wrongdoing." *SEC v. Blatt*, 583 F.2d 1325, 1335 (5th Cir. 1978) (*citing Commonwealth Chem. Sec.*, 574 F.2d at 102) (referring to disgorgement and restitution interchangeably).

A defendant's wrongful gains are "calculated with straightforward arithmetic, i.e. the amount taken less the amount returned [] and the amount lost in trading . . . plus post-judgment interest." *CFTC v. Gutterman*, 2012 WL 2413082, at *9 (S.D. Fla. June 26, 2012).[4] Here, Defendants' solicited a total of $4,888,442.43 from participants in both the Stroud Capital pool

[3] Stroud was ordered to pay restitution in *State of Alabama v. Stroud*, Case No. 43-CC-2012-000599. To the extent Stroud makes any payments in satisfaction of the state court restitution order, he may petition the Court for an order deeming such payments as partial satisfaction of Defendants' order to pay restitution in this matter.

[4] The Court's calculation of a disgorgement award was not altered by the passage of Dodd Frank.

and the TSC pools for purposes of futures and forex trading. Of that $4,888,442.43, Defendants lost $1,175,180.10 trading and repaid $1,369,939.06 to pool participants. Therefore, Defendants misappropriated a total of $2,343,323.27.

Defendants first argue that Plaintiff misstates Defendants' monetary gain. Specifically, Defendants argue that the Court should reduce the amount determined to be Defendants' monetary gain to reflect what portion of that money was spent on legitimate business expenses and employee salaries. The Court declines to reduce the calculation of Defendants' monetary gains on this basis. Pool participants' funds used to pay operating expenses and salary to defendants are included as part of the unjust enrichment. *See CFTC v. Capital Blu Mgmt., LLC*, 2011 WL 2357629, at *6 (M.D. Fla. June 9, 2011) ("It was improper for Defendants to use [pool participant] monies to pay legal fees or any other Capital Blu operating expense, and Defendants are responsible for such monies—whether they went toward legitimate Capital Blu expenses or not."). However, disgorgement is an equitable remedy intent to prevent a violator from profiting from their illegal conduct. Here, the restitution order exceeds the amount that Defendants profited from their violations. Because the restitution award is sufficient to ensure that Defendants do not profit from their unlawful conduct, the Court declines to impose an additional disgorgement award.

c. *Civil Monetary Penalty*

When assessing a civil penalty pursuant to "Section 6c of the Commodity Exchange Act, 7 U.S.C. § 13a-1, against any registered entity or other person," the Court may impose a penalty of "not more than the greater of $130,000 or triple the monetary gain to such person for each such violation" committed between October 23, 2004 and October 22, 2008, and, "not more than the greater of $140,000 or triple the monetary gain to such person for each such violation" committed on or after October 23, 2008. 17 C.F.R. § 143.8(4)(ii). In evaluating the appropriate civil penalty under the Act, the Court considers "the general seriousness of the violation as well as any particular mitigating or aggravating circumstances that exist." *Wilshire Inv. Mgmt. Corp.*, 531 F.3d at 1346 (*citing JCC, Inc. v. CFTC*, 63 F.3d 1557, 1571 (11th Cir. 1995)). The Court may also consider "the relationship of the violation at issue to the regulatory purposes of the Act and whether or not the violations involved core provisions of the Act; whether or not scienter was involved; the consequences flowing from the violative conduct; and financial benefits to a defendant." *CFTC v. Smithers*, 2013 WL 4851684, at *12 (S.D. Fla. July 31, 2013).

As explained above, the Court finds that Defendants' monetary gain as a result of their repeated violations of the Act amounted to a total of $2,343,323.27. Here, the seven-count Complaint alleges multiple violations of the Act. [Dkt. 1 PP. 21–33]; *see CFTC v. Levy*, 541 F.3d 1102, 1110–11 (11th Cir. 2008) (civil penalty can be multiplied by number of proven violations and is not constrained by number of counts in complaint when each count explicitly alleges multiple violations). Plaintiff argues that the aggravating circumstances in this case warrant a civil penalty of three times the amount gained by Defendants, totaling $7,029,969.81. "Defrauding customers is a violation of the core provisions of the [Act] and 'should be considered very serious.'" *Wilshire*, 531 F.3d at 1346. Defendants defrauded multiple investors, some of whom invested with Stroud because of a previously existing relationship which allowed Stroud to exploit investors' trust. Furthermore, these violations occurred over a period of several years, and reflect a knowing manipulation rather than an innocent mistake based on an ambiguity in the law. *See, e.g., CFTC v. Smithers*, 2013 WL 4851684, at *12 (S.D. Fla. July 31, 2013) (finding substantial monetary penalty warranted when defendant "knowingly made material misrepresentations to customers and misappropriated funds). These factors support the imposition of a substantial civil penalty.

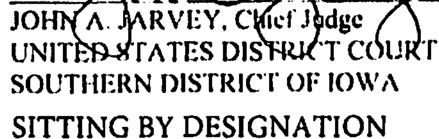
"A district court is not obligated to impose the maximum monetary penalty available under the Act. Instead, the penalty must be 'rationally related to the offense charged or the need for deterrence.'" *CFTC v. Capital Blu Mgmt., LLC*, 2011 WL 2357629, at *6 (M.D. Fla. June 9, 2011) (*quoting Levy*, 541 F.3d at 1112)). The Court finds that a civil penalty in the amount of gain to Defendants is rationally related to the offenses in this case and provides adequate deterrence. Defendants are already obligated to pay restitution as a result of Stroud's criminal conviction, in addition to the other remedies detailed in this order. Furthermore, Defendant Stroud's likely ability to pay the entirety of the penalties accrued here is severely limited. *See CFTC v. Heffernan*, 274 F. Supp. 2d 1375, 1378 (S.D. Ga. 2003) (*quoting CFTC v. Rosenberg*, 85 F. Supp. 2d 424, 455 (D.N.J. 2000)) ("[T]his Court is cognizant of its duty to be realistic and not set a figure which is impossible for a defendant to comply with due to lack of monetary resources."); *CFTC v. Autry*, 2011 WL 6400352, at *7 (S.D. Ga. Dec. 19, 2011) (*citing Heffernan*, 274 F. Supp. 2d at 1378). The Court therefore grants a civil penalty totaling $2,343,323.27 plus post-judgment interest. 28 U.S.C. § 1961.

III. CONCLUSION

Here, the parties do not dispute the underlying facts as they related to Defendants' liability. The Court finds that there exists no genuine issue of material fact as to Defendants' liability. Defendants are permanently enjoined from trading activity as articulated above. Defendants are ordered to pay, jointly and severally, restitution of $2,379,923.27, plus post-judgment interest, and a civil penalty of $2,343,323.27, plus post-judgment interest, with post-judgment interest calculated pursuant to 28 U.S.C. § 1961. Upon the foregoing,

IT IS ORDERED that Plaintiff's Motion for Summary Judgment pursuant to Federal Rule of Civil Procedure 56 is **GRANTED**. The clerk shall enter judgment in favor of Plaintiff.

DATED this 1st day of March, 2016.



JOHN A. JARVEY, Chief Judge
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
SITTING BY DESIGNATION