20-1081

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Securities and Exchange Commission,
Plaintiff-Appellee,

v.

Gregory T. Dean,
Defendant,

v.

Donald J. Fowler,
Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of New York

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PAGE PROOF BRIEF FOR THE APPELLEE SECURITIES AND EXCHANGE COMMISSION

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INTRODUCTION

"There is no identifiable segment of the securities industry whose ethical conduct is more crucial to the attainment of Congress' goals" in adopting the securities laws "than the ethical conduct of broker-dealers." *Dirks v. SEC*, 681 F.2d 824, 841 (D.C. Cir. 1982), *rev'd on other grounds*, 463 U.S. 646 (1983). The jury found that Appellant Donald J. Fowler, a registered representative of a brokerage firm, repeatedly violated antifraud provisions of the federal securities laws by recommending to thirteen customers a high-cost, rapid in-and-out trading strategy that he knew could benefit only him and by executing unauthorized trades in twelve of those customers' accounts. As a result of Fowler's misconduct, his customers—"many of whom were not wealthy," SPA71—collectively lost $467,627, while he earned over $100,000 in commissions and fees. None of Fowler's arguments on appeal warrants disturbing the jury's verdict or the remedies the district court ordered in light of it. The Court should affirm.[1]

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[1] As discussed below (at 32 n.10), even though Fowler has not raised the issue, the Commission does not object to the Court modifying the disgorgement award to correct a calculation error.

COUNTERSTATEMENT OF JURISDICTION

The district court had jurisdiction over this civil enforcement action brought by the Commission pursuant to Section 22(a) of the Securities Act of 1933, 15 U.S.C. § 77v(a), and Sections 21(d) and 27(a) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78u(d), 78aa(a). This Court has jurisdiction pursuant to 28 U.S.C. § 1291 over Fowler's timely appeal from the district court's February 28, 2020, judgment. SPA92-95.

COUNTERSTATEMENT OF ISSUES

1. Whether 28 U.S.C. § 2462's five-year statute of limitations does not bar this action because it is not jurisdictional and was tolled by agreement with Fowler and, alternatively, because it does not apply to all of the remedies the Commission sought and does not bar the Commission's claims for monetary relief for the misconduct Fowler engaged in within the untolled limitations period;

2. Whether proof that Fowler controlled his customers' accounts was unnecessary to establish that he committed securities fraud by recommending a trading strategy that he knew he had no reasonable basis to believe was suitable for *any* customer;

3. Whether Fowler is precluded from challenging the sufficiency of the evidence supporting the jury's findings that he executed unauthorized trades in his customers' accounts because he failed to move for judgment as a matter of law and whether the jury's findings are supported by the record in any event;

4. Whether the district court acted within its discretion when, as permitted by the governing statutes, it imposed a $150,000 civil penalty for each of the thirteen customers Fowler defrauded; and

5. Whether the Court should decline Fowler's request to remand the disgorgement award for consideration of his expenses in light of *Liu v. SEC*, 140 S. Ct. 1936 (2020), because Fowler has not identified any expenses that should be deducted from the award.

COUNTERSTATEMENT OF THE CASE

A. Nature of the Case

Fowler appeals from a judgment entered after a jury verdict finding that he violated Securities Act Section 17(a), 15 U.S.C. § 77q(a), Exchange Act Section 10(b), 15 U.S.C. § 78j(b), and Exchange Act Rule 10b-5, 17 C.F.R. § 240.10b-5, by, with scienter, "employ[ing] a[ ] device, scheme, or artifice to defraud, or engag[ing] in an[ ] act, practice, or course of business which operated or would operate as a fraud or deceit upon any person." SPA64.[2] The jury also found that Fowler violated Section 10(b) and Rule 10b-5 by, with scienter: (1) "mak[ing] an[ ] untrue statement of a material fact, or … an[ ] omission of a material fact;" (2) "recommend[ing] an investment strategy" to thirteen customers "with no reasonable basis to believe the strategy was suitable for any customer;" and (3) "mak[ing] … unauthorized trade[s]" in twelve customers' accounts. SPA64-66. And it found that Fowler violated Section 17(a) by negligently: (1) making "an[ ] untrue statement of a material fact, or … an[ ] omission of a material fact" to "obtain money or property;" and (2) "engag[ing] in a[ ] transaction, practice, or course of business which operated or would operate as a fraud or deceit upon the purchaser of a security." SPA64-65.

The district court enjoined Fowler from further violating these provisions and ordered him to disgorge $132,085.20 in ill-gotten gains (plus prejudgment interest of $35,195.04) and to pay a $150,000 civil penalty for each of the thirteen customers he defrauded (a total of $1,950,000). SPA92-95; *see* SPA67-91.

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[2] "Acting with scienter means with 'intent to defraud' or 'knowingly' or 'with reckless disregard for the truth.'" A__[Tr.1450]; *see SEC v. McNulty*, 137 F.3d 732, 741 (2d Cir. 1998).

B. Facts

1. Fowler was obligated to recommend suitable trading strategies and to obtain customer authorization for trades.

Fowler began working as a broker in 2005, one year after graduating high school. A__[JX6.1]. Between 2005 and 2008, he passed the Series 7, Series 24, and Series 63 examinations, which licensed him to buy and sell securities and to supervise accounts. A__[JX6.1]; A__-__[Tr.648-49]. Fowler admittedly understood that, as a broker, he was obligated to have a reasonable basis for believing that a recommended trading strategy "could work" for customers, A__[Tr.651]; *see* A__[JX6.2]; was "prohibited from placing [his] own interests ahead of [his] customers' interests," A__[Tr.652]; *see* A__[JX6.2]; and "had to get specific authorization" from his customers before "each individual trade," A__[Tr.762]; *see* A__[JX6.6].

These broker obligations are well established. Because of "[t]he importance of securities brokers and dealers in the investment marketplace[,] … federal law imposes extensive strictures on their conduct." Donald C. Langevoort, *Fraud and Deception by Securities Professionals*, 61 Tex. L. Rev. 1247, 1280 (1983). In particular, because "[a] securities dealer occupies a special relationship to a buyer of securities," *Hanly v. SEC*, 415 F.2d 589, 596 (2d Cir. 1969), he or she at a minimum "cannot recommend a security unless there is an adequate and reasonable basis for such recommendation," *id.* at 597. In addition, a broker also must obtain "specific authorization" from the customer before executing a trade. *Caiola v. Citibank, N.A.*, 295 F.3d 312, 323 (2d Cir. 2002); *see* A__[Tr.1448] (jury charge).

The "reasonable basis" obligation applies to recommended investment strategies as well as to individual transactions. Financial Industry Regulatory Authority (FINRA) Rule 2111(a) provides that "[a] member or an associated person must have a reasonable basis to believe that a recommended transaction or investment strategy involving a security or securities is suitable for the customer, based on the information obtained through the reasonable diligence of the member or associated person to ascertain the customer's investment profile."[3] *See XY Planning Network, LLC v. SEC*, 963 F.3d 244, 248 (2d Cir. 2020) (discussing Rule 2111(a)); *Edgar B. Alacan*, SEC Release No. 8436, 2004 WL 1496843, at *9 (July 6, 2004) ("While a suitability inquiry

[3] *Available at* https://www.finra.org/rules-guidance/rulebooks/finra-rules/2111.

frequently focuses on 'whether a particular investment product is suitable for an investor,' we have held that 'the frequency of trading must also be suitable.'"). And that obligation "requires," first and foremost, that "a member or associated person … have a reasonable basis to believe, based on reasonable diligence, that the recommendation is suitable for at least *some* investors," in light of "the potential risks and rewards associated with the recommended security or strategy." FINRA Rule 2111, Supplementary Material 0.5 (emphasis in original)[4]; *see* A__[JX6.2] (Fowler stipulation regarding suitability); A__-__[Tr.952-56] (Commission's expert testimony regarding suitability); A__-__[Tr.1446-48] (jury charge regarding suitability).

2. Fowler recommended and implemented a rapid in-and-out trading strategy for each of the relevant customers.

From January 2007 to November 2014, Fowler was a registered representative at J.D. Nicholas (and its predecessor, A&F Financial Securities, Inc.), a Long Island brokerage firm. A__[JX6.1]. The thirteen customers at issue had accounts open with J.D. Nicholas

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[4] *Available at* https://www.finra.org/rules-guidance/rulebooks/finra-rules/2111.

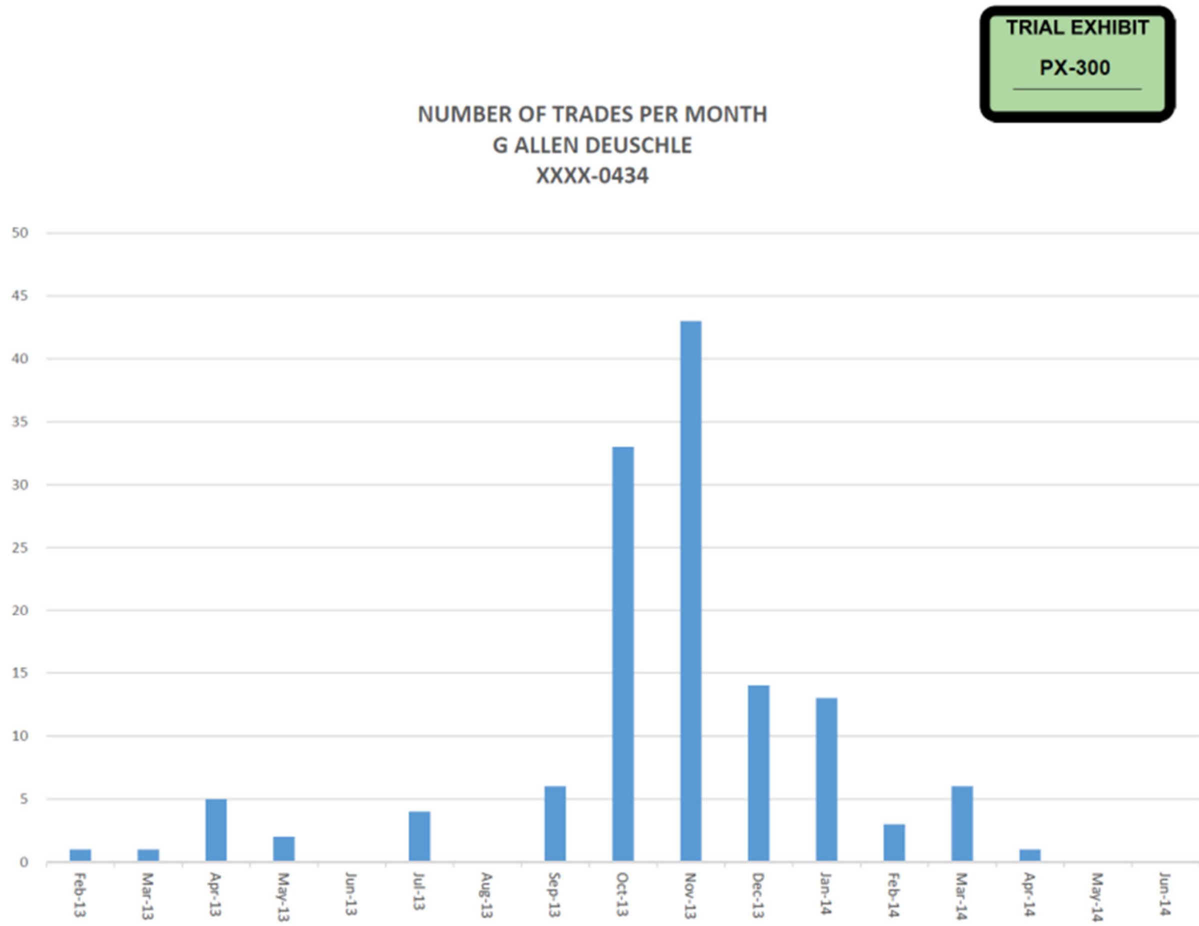
between May 2011 and December 2014. A__[PX1A.1]; A__[PX308.1]. Fowler recommended to these customers the same "event-driven" strategy. A__-__[Tr.728-29]; *see* A__[JX5.1]; A__[JX6.3]; A__-__[Tr.620-21]. According to Fowler, this strategy involved high-frequency trading based on ideas he generated from sources like "CNBC … Twitter … or briefing.com," A__[Tr.848], in an attempt "to get an exorbitant amount of gains in excess of the market," A__[Tr.812].

Each of the relevant customers "lived hundreds of miles from Fowler's offices at J.D. Nicholas." A__[JX6.3]. Beyond that, their backgrounds varied. Clay Miller was a retired insulation installer with an annual income of $45,000 from his pension and Social Security payments. A__-__[Tr.147-48]. Robert Weathers suffered from schizophrenia, had not worked in nearly thirty years due to his disability, had a monthly income of $3,400 from Social Security and disability insurance payments, and a net worth of $400,000 from an inheritance. A__-__, __[JX3.3-4,6]. Gary Allen Deuschle owned a remodeling business, A__[Tr.396], had a yearly household income of about $85,000 (including his wife's salary as a math teacher), A__[Tr.398], and had saved around $30,000 for retirement, A__[Tr.402].

Lane Clizbe was a retired research chemist, A__[Tr.497], with some "play money" he wanted to invest, A__[Tr.504].

Although their backgrounds varied, the customers' experiences with Fowler were remarkably similar. Each opened an account after receiving a cold call from someone at J.D. Nicholas. A__[JX6.3]. Initial trading activity was limited. A__-__[PX1F.1-32] (trading blotter for the thirteen accounts). Fowler would recommend a stock and would not charge a commission on its purchase. A__[Tr.636]. He then would let that stock sit in the account until it made money. A__-__[Tr.636-41]. As one customer described it, "I began to think maybe this guy can do what he said he could do, which is make money with his knowledge of the stock market in companies to buy that were ready for the stock market price to go up." A__[Tr.505] (Clizbe); *see* A__-__[Tr.159-61] (Miller); A__-__[Tr.400-01] (Deuschle).

Fowler conceded that after he had "made one or a few trades" over "a few months" and built up that trust, he "convinced [the customers] to make a larger deposit into the account" or to trade on margin (i.e., with borrowed funds). A__-__[Tr.640-41]. At that point, "trading ramped up." A__[Tr.641]; *see* A__[Tr.773] ("Q. And you recommended more trades after [the] margin agreement was signed. That was typically how it occurred, is it not? A. Yes."). This depiction of the activity in Deuschle's account is representative:



A__[PX300.1]; *see* A__-__[PX1F.1-32] (trading blotter); A__[PX298.1], A__[PX299.1], A__[PX301.1], A__[PX302.1], A__[PX303.1], A__[PX304.1], A__[PX305.1], A__[PX306.1] (similar charts of activity in other customers' accounts).

Fowler recommended the frequency of trading in the thirteen accounts. A__[Tr.773]. And 96% of the 1,202 trades he ultimately executed were not customer-initiated. A__[JX6.3]; A__[PX1H.1]. Several customers testified that the increase in trading activity was beyond their expectations. A__-__[Tr.163-64] (Miller); A__-__[Tr.426-28] (Deuschle); A__-__[Tr.507-08] (Clizbe). And all but one of the thirteen closed their accounts in under two years. A__[PX1A.1]; *see* A__[PX308.1].

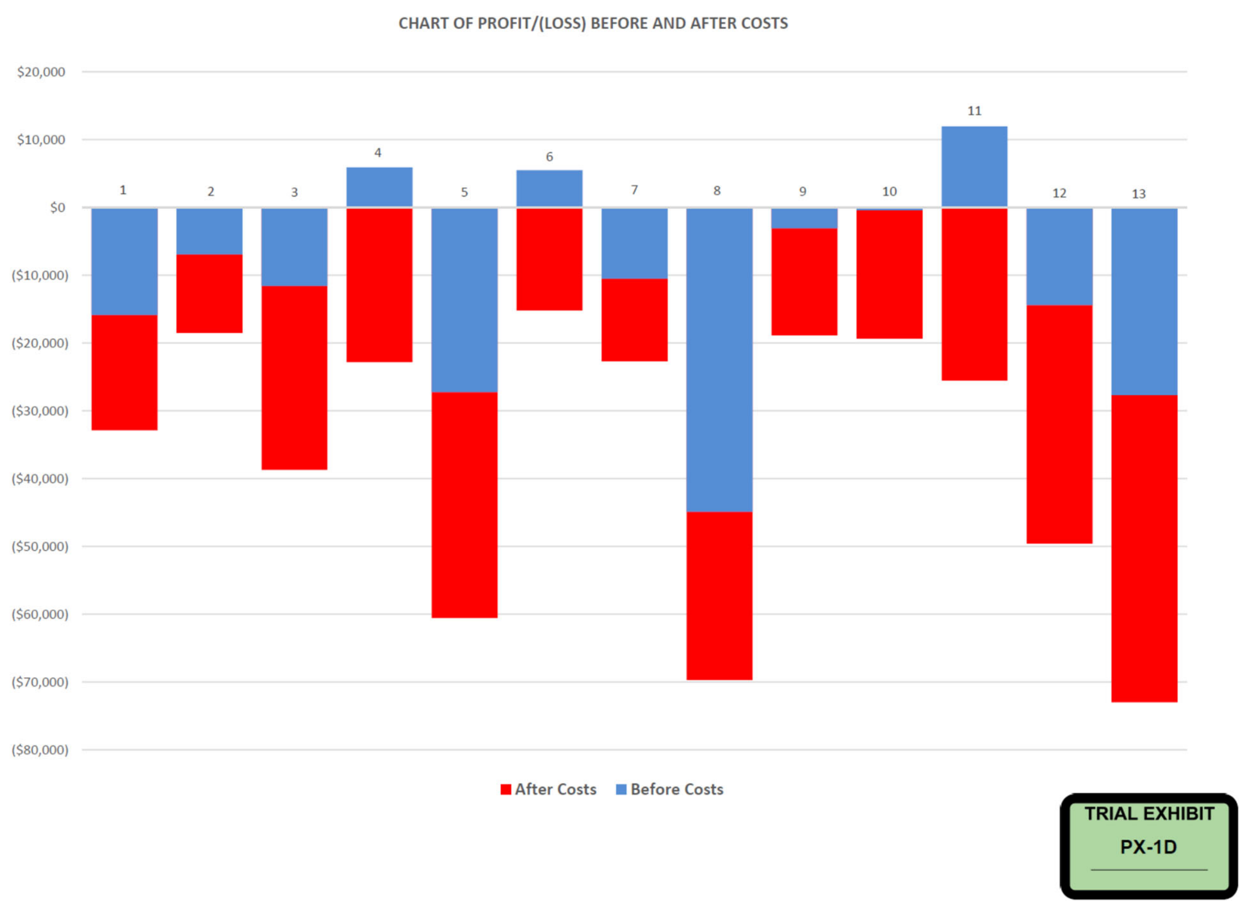
This "ramped up" trading dramatically increased the accounts' "turnover rate," or "the amount of times … that assets [we]re replaced." A__[Tr.958] (Commission's expert). As Fowler's firm instructed its brokers, "[t]he higher the turnover, the higher the degree of risk borne by the client." A__[PX29.4]. The firm noted that "[a] turnover ratio of more than 4 times is often considered high for an account with conservative objectives." *Id.* Fowler turned over the relevant thirteen customer accounts "[o]n average … over 116 times, per year." A__[Tr.971] (Commission's expert); *see* A__[PX1A.1]. The lowest turnover rate among the thirteen accounts was "about 20 or so" while the highest was 370—which "mean[t] [that customer's] account was being turned over every day." A__[Tr.971].

3. Fowler's customers had no reasonable chance of making money with his recommended strategy; they instead lost $467,627.

In the brief time Fowler implemented his recommended "event-driven" strategy in the thirteen accounts, these customers not only failed to obtain "an exorbitant amount of gains in excess of the market," A__[Tr.812], they lost significant amounts of money—$467,627 in total, ranging from $15,222 for Jeffrey Funk to $73,005 for Donald Womeldorph, Jr. A__[PX1A.1]. Clay Miller lost $69,708 in the little over a year his account was open—more than his $45,000 annual income. A__[Tr.176]. Weathers, who had a similar annual income, A__[JX3.3], lost $25,541. A__[PX1A.1]. Deuschle lost $22,835, *id.*, which was most of what he had set aside for retirement, A__[Tr.402]. And Clizbe lost $18,516 of the $19,000 he had invested with Fowler. A__[PX1A.1]; A__[Tr.514].

"[T]he primary driving factor in the performance of the accounts" was not market movement, but "the cost of doing business with Mr. Fowler and J.D. Nicholas." A__[Tr.979] (Commission's expert). Of the

$467,627 in total losses across the thirteen accounts, $328,264 was attributable to costs. A__[PX296.1]. The accounts had an average annual return rate of -16.28% before costs and -88.56% after costs. *Id.* "So, the market played a role," but it was "a side show or something secondary to the costs that were assessed to the accounts," A__[Tr.979], as this chart demonstrates:



A__[PX1D.1]. Although Fowler asserted that "most of the costs were" assessed early in the life of the account "followed by a drop in the market value" that wiped out gains, A__[Tr.1026]—a claim he repeats on appeal (Br. 11)—in fact "in at least 12 of the 13 accounts, the cost and the loss … correlated pretty highly," A__[Tr.1025] (Commission's expert).

Most of the costs ($316,462 of $328,264) were due to the level of trading activity. A__[PX1G.1]; *see* A__[Tr.1001-02]. The accounts were charged $54,996 in "postage fees" (or "firm commissions") and $261,466 in broker commissions. A__[PX1G.1]. Fees and commissions were "[t]he sole source of Fowler's income at J.D. Nicholas." A__[JX6.6]; *see* A__[Tr.625]. He received $2.50 of the $65 or $49.95 mandatory postage fee that J.D. Nicholas charged for each trade. A__[Tr.625]; *see* A__[JX6.5-6]. On top of that fee, "Fowler had the discretion to charge a per-trade [commission] of up to 3.5% of the amount of each purchase or sale." A__[JX6.5]. He and his business partner, Gregory T. Dean, split 80% of those commissions 50/50, while the remaining 20% "went to J.D. Nicholas." A__[JX6.6]. Fowler acknowledged that the result was that "the more [he] traded, the more money [he] made." A__[Tr.625].

Margin trading—which Fowler recommended to his customers—further increased his commissions because it allowed him to "buy more stock than just with the funds" in the account. A__[Tr.765].

Unfortunately for his customers, those higher commissions came not out of the borrowed funds (which they "ha[d] to pay back" with interest), but from their "initial deposited money … or subsequent deposits." A__[Tr.1018] (Commission's expert); *see* A__[Tr.767] (Fowler agrees that "use of margin enable[d] [him] to charge a higher commission and immediately increase[ ] the cost to the client.").

Consequently, the average "cost-to-equity ratio" for the thirteen accounts—"[t]otal cost divided by average equity and then annualized for the period of time the account is open[ ]," A__[Tr.965] (Commission's expert)—was 142.6%. A__[PX1A.1]. That meant that on average, the equity in these accounts "had to generate an annual return rate of 140 percent just to break even, just to cover the costs that were being charged." A__[Tr.969] (Commission's expert). The ratio "varied between the 13 accounts," but "the lowest was around 60 or 65 percent and the highest was … in excess of 400 percent." *Id.*; *see* A__[PX1A.1].

To put those numbers in perspective, "in 1999 the Nasdaq returned 85 percent but it has never done that since." A__[Tr.977] (Commission's expert). In 2013, a good year for the market, the S&P 500 index was up 32.39% and the Nasdaq index was up 38.32%.

A__[PX276.1]. "[A]n outlier profit might happen" on any given investment, but the cost-to-equity ratios in these accounts meant that to have any hope of making money, the customers had to "hit a home run every time they came to the plate." A__[Tr.970] (Commission's expert). J.D. Nicholas itself recognized that a cost-to-equity ratio "greater than 10% is often considered high for many clients, because a 10% return is needed for the client to break even." A__[PX29.4]; *see* A__[Tr.967] (Commission's expert testified that "the concern is where are these investments out there that are … going to reasonably generate a 10 percent annual return just to break even, just to cover the cost before you even have the possibility of a making a profit in the account.").

Viewed another way, because of the frequency of Fowler's trading, the "average dollar" in these thirteen accounts "[w]as invested [for] five days before it was sold" and then hit with another commission. A__[Tr.1020] (Commission's expert); *see* A__[PX1A.1] (figures for "Wtd Days Held"). So "a sample dollar to overcome all these costs had to move, not only materially … but immediately." A__[Tr.1020].

Based on "the frequency of the trading, coupled with the costs," A__[Tr.974], the Commission's expert—a certified public accountant who has spent "basically every day of [his] [27-year] professional life … analyzing investment accounts" for brokerage firms, A__[Tr.927]—concluded that "the trading activity that took place in these 13 accounts on an individual basis and on an overall basis … was not suitable for any investor …. [r]egardless of who that investor [wa]s and regardless of what investment objective that particular investor had." A__[Tr.952]; *see* A__-__[Tr.1027-28] (summary of opinions).[5]

And as the expert explained, the cost burdens Fowler placed on these accounts are not an inherent feature of frequent trading. "There are plenty of day traders out there" and it can be "a totally appropriate strategy," A__[Tr.972], when executed "in reasonable cost environments," A__[Tr.973]. For example, some brokerage firms offer customers "active assets" accounts, where they "can trade very actively for … one set fee, based on the value of [the] account." A__[Tr.973].

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[5] Fowler's own expert agreed that the cost-to-equity ratios and turnover rates in these accounts were "very high," A__[Tr.1242], and offered "no opinion" regarding whether "there was a reasonable basis for … this activity," A__[Tr.1244].

But these thirteen customers experienced significant losses because Fowler recommended and implemented a rapid in-and-out trading strategy "on a straight commission basis," which made "being profitable … not possible" for anyone but Fowler, his business partner, and J.D. Nicholas. A__[Tr.974].

4. Fowler knew, but did not tell his customers, that they were unlikely to make money with his recommended strategy.

In each of their account opening forms, the thirteen customers indicated that they intended to "[s]peculat[e]." A__[JX6.4]. "[S]peculation … means high risk, high reward." A__[Tr.1000] (Commission's expert). But as described above, while the strategy Fowler recommended and implemented posed a high risk for these customers, the potential for reward "wasn't here because the principal was constantly being drained by the cost of executing all of this purchase and sale activity." A__[Tr.970] (Commission's expert); *see* A__[Tr.1000]. Even assuming that the customers understood what "speculation" meant—and there were indications that some did not, *see* A__-__[Tr.409-12] (Deuschle); A__-__[Tr.666-67] (Weathers)—none signed up for such a "high risk, no reward" strategy.

Fowler claimed that he negotiated the cost structure of his recommended trading strategy with each customer when they opened their accounts, A__-__[Tr.734-35], and informed them of the commissions he would charge "on a trade-by-trade basis," A__[Tr.853]. But he acknowledged that he could not "point … to any evidence, other than [his] say so, that [he] did this." A__[Tr.746]; *see* A__-__[Tr.736-37]. And four customers "testif[ied] that they were not told by [Fowler] of the high cost of the strategy." A__[Tr.746]; *see* A__-__[JX3.16-17] (Weathers); A__[Tr.172-73] (Miller); A__[Tr.424] (Deuschle); A__[Tr.503] (Clizbe).

J.D. Nicholas eventually sent letters to seven of the thirteen customers stating that they "ha[d] been actively trading on a short term basis," which "can be costly in that every purchase and sale may include a commission or mark-up which must be recouped in order to realize a profit." A__[DX289.1]; *see* A__[JX6.5]. Four of those customers, along with an additional three, signed an "Intent to Maintain Active Account," which stated that they were "aware" that the trading strategy implemented in their accounts "may result in significantly greater gains or losses than alternative … trading strategies." A__[DX293.1]; *see* A__-

__[JX6.4]. But those disclosures typically went out after the bulk of trading had occurred. A__-__[Tr.905-12] (Fowler testimony). And they were boilerplate. They did not provide customers with specific information about their accounts, including that the actual accumulation of costs eliminated any reasonable chance that the customer would ever earn a profit, let alone "significant[ ] … gains," A__[DX.293.1].[6]

Fowler knew that fact, because he "very routinely" "calculated the cost equity ratio on behalf of all of [his] customers." A__[Tr.628]. But he neither provided that information to them, A__[Tr.632], nor explained its ramifications:

> Q. You told them that it was unlikely to achieve a profit because you were going to be trading frequently and there were costs associated with each trade?
>
> A. I wouldn't … use the term unlikely. Nevertheless, the fact that costs were being generated in the account that conversation would be had, but I wouldn't say unlikely.

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[6] Five customers also signed a "Day Trading Risk Disclosure," which stated that "[d]ay trading will generate substantial commissions" that "will add to your losses or significantly reduce your earnings." A__[DX7.1]; *see* A__[JX6.4]. As with the "active account" disclosures, the customers often received these boilerplate disclosures after the bulk of trading. *Compare, e.g.*, A__[DX7.1] (Bayer disclosure) *with* A__[PX298.1] (chart of activity in Bayer's account).

Q. Okay. So what would you say?

A. It wouldn't be addressed as a probability, it would be addressed as a cost associated with the account and that's about it.

A__[Tr.872]; *see* A__[PX234A.1]. Addressing that probability would have fatally undermined Fowler's claim that his strategy had "the ability to double your money, maybe triple your money." A__[Tr.814]. And the result would have been that no one would have invested with him. *See, e.g.*, A__[Tr.547] (Clizbe testified that if Fowler had told him "that the risk was that most of the equity was going to be lost into the costs," he would not have given Fowler his money).

5. Fowler executed many trades without customer authorization.

Fowler testified that he communicated with the thirteen customers only by phone, using either his office or mobile lines. A__-__[Tr.762-63]; *see* A__[JX6.6]. He asserted that "there were … phone calls between [him] and these 13 people" before every trade. A__[Tr.764]. The relevant phone records showed otherwise.

A Commission compliance examiner—a certified fraud examiner with a decade of experience at the Commission and the FBI, A__-__[Tr.250-52]—determined that no communication with customers preceded 701 (58%) of the 1,202 trades Fowler executed in the thirteen accounts. A__[PX28A.1]; *see* A__-__[Tr.285-86]. Those 701 trades were spread across each of the thirteen accounts, ranging from 31% of the trades in Louis Dellorfano's account to 83% of the trades in Womeldorph's account. A__[PX28A.1].[7]

Several customers also confirmed that "[t]here were trades … that [they] had no idea had been executed [on] [their] behalf." A__[Tr.513] (Clizbe); *see* A__[JX3.13] (Weathers: "Q. … Do you remember any discussions with Mr. Fowler about this transaction? A. No, I don't recall."); A__[Tr.437] (Deuschle: "Q. Did you speak with Mr. Fowler about each of the trades placed in your account as represented in PX 1F? A. No. No way."); A__[Tr.548] (Clizbe: "I'm certain I didn't

[7] The examiner compiled a list of home, work, and mobile phone numbers associated with each of the thirteen customers, A__-__[PX28C.1-2], using their account opening documents, deposition testimony, CLEAR (an investigative database), and Google, A__-__[Tr.252-255]. He searched J.D. Nicholas's and Fowler's subpoenaed phone records for any text messages or phone calls between the firm or Fowler and the customers. A__-__[Tr.277-84]. He then cross-referenced those communications with the trading activity in the accounts, as reflected in the trading blotter, to "create[ ] a list of times where [he] did not see a telephone call that lasted longer than zero seconds or a text message ahead of a trade order being entered on a particular calendar day." A__[Tr.284]; *see* A__-__[PX28B.1-21]; A__-__[Tr.255-56].

authorize 36 trades."). Only one of the customers who testified said that Fowler had "not to [his] knowledge" executed "unauthorized transactions in [his] account." A__[Tr.202] (Miller). (The jury found that Fowler had not made unauthorized trades in that customer's account. SPA66.)

6. Fowler persisted with his high-cost, unauthorized trading despite mounting losses and numerous customer complaints.

The relevant accounts were open over different periods between 2011 and 2014. A__[PX308.1]. And Fowler was aware at the time that they were all losing money. A__-__[Tr.694-95]. But he changed nothing about his strategy—including the costs he was charging—based on the poor performances he observed. A__[Tr.734] ("Q. … [Y]ou don't think that the costs of these accounts were excessive? A. Absolutely not."); *see* A__-__[Tr.730-34].

Nor did customers' objections convince him to alter his approach. When Clizbe complained about "all these trades in [his] account that" he did not "recognize," Fowler "said, as close to a quote as [Clizbe] [could] remember, I'm trying to get your money back for you." A__[Tr.508]. Likewise, when Deuschle expressed concern about the mounting losses in his account, Fowler's "reply was simply … don't be alarmed about it…. [W]e're going to make up for it…. [B]asically, just sit tight, relax, and everything's fine." A__[Tr.439].

Over the relevant timeframe, numerous other customers—including one of the thirteen featured at trial (Gary Wendorff)—filed FINRA complaints against Fowler "for making unsuitable recommendations and unauthorized transactions." A__[Tr.703]; *see* A__-__[PX3.1-30] (Fowler BrokerCheck Report); A__-__[PX217.1-16] (Wendorff complaint); A__-__[Tr.715-21], A__-__[Tr.727-28] (Fowler testimony regarding complaints). Those complaints compelled J.D. Nicholas to place Fowler on special supervision in 2012. A__[Tr.698]; *see* A__[PX6.1]. But he admittedly still "did not change [his] behavior." A__[Tr.704]; *see* A__[Tr.699] (Fowler conceded that the "trading strategies that [he] recommended and implemented" and "the level of costs that [he] [was] implementing did not change"). Instead, he dismissed customer complaints as "sour grapes." A__[Tr.700].

7. Fowler made over $100,000 from the relevant customers.

While these thirteen customers lost $467,627 investing with Fowler, he earned $104,586.40 in commissions (40% of $261,466), A__[JX6.6]; A__[PX1G.1], and $3,005 in postage fees ($2.50 for each of the 1,202 trades he executed), A__[JX6.3]; A__[Tr.625], for a total of $107,591.40.

C. Procedural History

1. Complaint

The Commission began investigating Fowler and his business partner, Dean, in early 2014, before they left J.D. Nicholas. A__[Dkt.65-78.25] (Commission Rule 56.1 statement). Over the course of the investigation, Fowler signed two agreements that tolled any applicable limitations period from March 1, 2016, through February 27, 2017. A__-__[PX10.1-2]; A__-__[PX12.1-2].

The Commission filed this action against Fowler and Dean on January 9, 2017. A__-__[Dkt.1.1-15]. It alleged that from March 2011 through January 2015, Fowler and Dean repeatedly violated Securities Act Section 17(a), 15 U.S.C. § 77q(a), Exchange Act Section 10(b), 15 U.S.C. § 78j(b), and Exchange Act Rule 10b-5, 17 C.F.R. § 240.10b-5, by: (1) knowingly recommending to twenty-seven customers a "high-cost, in-and-out trading strategy without having a reasonable basis for believing that this strategy was suitable for anyone," A__[Dkt.25.9], or for these particular customers, because "they knew or recklessly disregarded that this strategy … was bound to lose money," A__[Dkt.25.2]; *see* A__-__[Dkt.25.17-18] (identifying customer accounts); (2) making "little or no mention of fees and costs" to their customers, A__[Dkt.25.6], even though they "knew or recklessly disregarded the fact that, given its extremely high costs, their strategy would not outperform the market, as they told investors," [Dkt.25.5]; (3) "frequently plac[ing] trades without the customer's authorization," A__[Dkt.25.7]; and (4) "[i]n addition … churning … at least 3 of the 27 customer accounts," A__[Dkt.25.2].[8]

2. Pretrial proceedings

The Commission dropped its churning allegations before trial and proceeded on its remaining allegations. A__-__[Dkt.99.2-3] (Joint Pretrial Order).

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[8] "Churning occurs where a securities dealer creates commissions by inducing transactions in a customer's account which are disproportionate to the size and character of that account." *Siegel v. Tucker, Anthony & R.L. Day, Inc.*, 658 F. Supp. 550, 553 (S.D.N.Y. 1987); *see* FINRA Regulatory Notice 20-18 at 4 (June 19, 2020) (defining in similar terms the "quantitative suitability" obligation applicable during the relevant period), *available at* https://www.finra.org/sites/default/files/2020-06/Regulatory-Notice-20-18.pdf.

In ruling on the parties' motions in limine, the district court rejected defendants' "errant belief that any evidence of excessive trading turns the SEC's remaining claims into a churning or quantitative suitability claim." SPA26. Defendants had asserted that the Commission was in effect still pursuing churning allegations, which, they contended, would require the Commission to demonstrate that they controlled their customers' accounts and rendered their proffered evidence of customer sophistication "highly relevant." SPA28. The court found that argument "profoundly flawed and lack[ing] foundation in the law," SPA30, and excluded the evidence except for purposes of impeachment, SPA32.

The court likewise rejected defendants' motion "to 'preclude the SEC from offering evidence of unsuitability with respect to any customer that does not testify at trial,'" SPA24, concluding that "whether the SEC will be able to put forth sufficient evidence to satisfy its burden" of proving that Fowler committed fraud against non-testifying customers "does not present adequate grounds to preclude the SEC from introducing evidence … with respect to these customers," SPA25.

On the eve of trial, Dean settled with the Commission, "acknowledg[ing] that his conduct violated the federal securities laws." A__[Dkt.159-1.1]. He consented to the entry of judgment enjoining him from further violations and ordering him to disgorge $253,881.98 (plus prejudgment interest of $50,521.79) and to pay a $253,881.98 civil penalty. A__-__[Dkt.159-1.1-2]. The district court entered judgment against Dean on June 10, 2019. A__-__[Dkt.168.1-6].

3. Trial

Fowler's nine-day trial began that same day. A__[Tr.1]. Because of Dean's settlement, the Commission "culled its case and limited the direct evidence of fraud to the 13 customers who were principally serviced by Mr. Fowler." SPA81; *see* A__[JX5.1]; A__[JX6.3].[9] Four of them—Miller, Weathers, Deuschle, and Clizbe—testified live or by video deposition. A__[Tr.146]; A__[Tr.227]; A__[Tr.395]; A__[Tr.496]; *see* A__[JX3.1]. The Commission also presented the expert testimony and phone records analysis described above (at 17-18, 21-22). And it

[9] The Commission attempted to subpoena Dean to testify at trial, but he evaded service. A__-__[Tr.372-73]. The district court did not inform the jury of Dean's settlement because of, among other things, "[t]he potential prejudice to Mr. Fowler." A__[Tr.1076].

called Fowler himself. As the district court recounted, his "testimony showed him to be alternatively dismissive, or fundamentally ignorant of, the problematic nature of the trading strategy that he implemented." SPA74. He "express[ed] … disdain for … commonly used financial metrics" like the turnover rate and cost-to-equity ratio, SPA75—which "his own firm's supervisory manual" relied on, SPA74—as well as "a profound lack of empathy regarding the impact of the strategies that he recommended to his customers, coupled with an inability or unwillingness to learn from his past mistakes," SPA75-76.

Fowler—who was represented by counsel throughout the proceedings below—never moved for judgment as a matter of law under Federal Rule of Civil Procedure 50, either before or after the case went to the jury.

The district court instructed the jury that the Commission alleged that Fowler violated Securities Act Section 17(a) and Exchange Act Section 10(b) "in three separate ways" by: (1) "engag[ing] in a scheme to defraud 13 customers by recommending and implementing a high-cost, high-trading strategy" without "a reasonable basis to believe that this strategy would be suitable for any customer or for his own customers";

(2) "engag[ing] in unauthorized trading in the customers' accounts"; and (3) "ma[king] or caus[ing] to be made false and misleading statements that were material, including by misrepresenting his intended strategy as one that had the potential for profit, and omitt[ing] material facts, such as that he had no reasonable basis for his strategy, and that, due to the frequency of trading and commissions, the customers were likely to lose money." A__-__[Tr.1444-45].

At Fowler's request, A__-__[Tr.585-86], the special verdict form asked the jury to make certain customer-specific findings. It asked the jury to determine whether Fowler "with scienter ma[d]e any unauthorized trade in the account of any of the following customers, in violation of Section 10(b)," listing the customers featured at trial. SPA66. It also asked the jury to determine whether Fowler "with scienter recommend[ed] an investment strategy with no reasonable basis to believe the strategy was suitable for *any* customer, in violation of Section 10(b)," and if not, whether he "with scienter recommend[ed] an investment strategy to any of the following customers with no reasonable basis to believe the strategy was suitable for *that* customer, in violation of Section 10(b)," again listing the customers featured at trial. SPA65 (emphases added). The court instructed the jury that if it "conclude[d] that the SEC has proved … that the defendant recommended a strategy that violated his reasonable basis obligation, in that it was not suitable for *any* customer, you will not need to decide …. whether the strategy was suitable for *each individual* customer." A__[Tr.1448] (emphases added).

After deliberating for one day, the jury reached that conclusion. It found that Fowler violated Section 10(b) and Rule 10b-5 by, with scienter, (1) "recommend[ing] an investment strategy with no reasonable basis to believe the strategy was suitable for any customer"; (2) "mak[ing] … unauthorized trade[s]" in twelve of the thirteen customers' accounts (all but Miller's); and (3) "mak[ing] an[ ] untrue statement of a material fact, or … an[ ] omission of a material fact." SPA64-66. The jury also found that Fowler violated Section 17(a), Section 10(b), and Rule 10b-5 by, with scienter, "employ[ing] a[ ] device, scheme, or artifice to defraud, or engag[ing] in a[ ] practice, or course of business which operated or would operate as a fraud or deceit upon any person." SPA64. And it found that Fowler violated Section 17(a) by negligently: (1) "mak[ing] an[ ] untrue statement of a material fact, or

… an[ ] omission of a material fact" to "obtain money or property"; and (2) "engag[ing] in a[ ] transaction, practice, or course of business which operated or would operate as a fraud or deceit upon the purchaser of a security." SPA64-65.

4. Remedies

The district court entered a judgment that imposed injunctive and monetary relief. SPA92-95. As to the latter, the court ordered Fowler to disgorge $132,085.20 in postage fees and commissions he had received from the thirteen customers, plus $35,195.04 in prejudgment interest. SPA94; *see* SPA79-82. Fowler "presented no argument to rebut the SEC's proof with respect to these amounts." SPA81.[10]

[10] In setting the disgorgement amount, the district court correctly calculated the portion of the commissions Fowler received (40% of $261,466, or $104,586.40), SPA77-78, but miscalculated the portion of the postage fees he received. The Commission proposed that the district court order Fowler to disgorge $2.50 in postage fees for each of the trades he executed in the relevant accounts, A__[Dkt.191.19], which comes to $3,005 for 1,202 trades, *supra* at 25. But the district court instead ordered Fowler to disgorge $27,498 in postage fees—half of the entire amount charged to the accounts. SPA78; SPA81. Although Fowler has not raised this issue, the Commission has no objection to this Court modifying the disgorgement award to $107,591.40, plus prejudgment interest of $29,681.06, calculated starting on December 1, 2014 (following Fowler's departure from J.D. Nicholas) and ending on September 30, 2020. The Commission will submit its prejudgment interest calculation to the Court by letter.

The court also ordered Fowler to pay "a third-tier penalty of $150,000 for each of [his] 13 victims—for a total of $1,950,000." SPA87; *see* SPA94. It reasoned that "Tier III penalties are clearly appropriate" because Fowler's "conduct 'involved fraud'"; he "was found by the jury to have acted with scienter"; his "conduct resulted in substantial losses in his customer's accounts"; and "his conduct was recurrent—he applied the strategy again and again to the 13 customers at issue in the trial." SPA85-86. And it concluded that "treat[ing] [Fowler's] treatment of each of his defrauded customers as a separate violation best effectuates the purposes of the" securities laws because he "selected his victims for this conduct individually." SPA86. The court noted that it had "the authority to impose penalties for each of the trades in those customers' accounts" and that Fowler had "presented no evidence or argument regarding his inability to pay a penalty." SPA86. It nevertheless declined to assess penalties on a per-trade basis in part "because the resulting award would be so substantial that the Court d[id] not believe that Mr. Fowler would reasonably be capable of satisfying" it. SPA87.

STANDARD OF REVIEW

This Court reviews legal questions, including the "interpretation and application of a statute of limitations," de novo. *City of Pontiac Gen. Employees' Ret. Sys. v. MBIA, Inc.*, 637 F.3d 169, 173 (2d Cir. 2011).

Where, as here, the appellant did not move for judgment as a matter of law under Rule 50, this Court "is 'powerless' to review the sufficiency of the evidence after trial." *Ortiz v. Jordan*, 562 U.S. 180, 189 (2011).

The district court's "choice of remedies is reviewable for abuse of discretion," *SEC v. Sourlis*, 851 F.3d 139, 146 (2d Cir. 2016), which is demonstrated only if this Court is left with "'a definite and firm conviction that the court below committed a clear error of judgment in the conclusion that it reached upon a weighing of the relevant factors,'" *SEC v. Rajaratnam*, 918 F.3d 36, 41 (2d Cir. 2019).

SUMMARY OF ARGUMENT

This Court has twice determined that 28 U.S.C. § 2462 is not jurisdictional and therefore can be tolled, as it indisputably was here. And Section 2462 would not bar this action in any event because it does not apply to the Commission's claims for injunctive relief or bar its claims for monetary relief for the misconduct Fowler engaged in on or after January 9, 2012.

Neither law nor logic require the Commission to demonstrate that a broker controlled his customers' accounts to prove that he fraudulently deceived them by recommending a trading strategy that he knew he had no reasonable basis to believe was suitable for *any* customer. And Fowler's failure to move for judgment as a matter of law renders the jury's unauthorized trading findings unassailable. Those findings are amply supported by the evidence in any event.

The district court's imposition of a $150,000 civil penalty for each of the thirteen customers that the jury found Fowler had defrauded was both authorized by statute and reasonable under the circumstances, given the egregiousness of his misconduct. And this Court should not remand the disgorgement award in light of *Liu*, 140 S. Ct. 1936, so that the district court can "tak[e] into account … expenses" (Br. 40) that Fowler has not identified.

ARGUMENT

I. The district court had jurisdiction over this action.

The Commission must bring "an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise … within five years from the date when the claim first accrued." 28 U.S.C. § 2462. As Fowler acknowledges (Br. 22), the earliest misconduct at issue in this case occurred in May 2011, when he convinced Robert Weathers to invest with him. A__[PX1A.1]; A__[PX308.1]. Because Fowler signed two agreements that tolled Section 2462's limitations period from March 1, 2016, through February 27, 2017, A__-__[PX10.1-2]; A__-__[PX12.1-2], the Commission had until April 2017 to seek a "civil fine, penalty, or forfeiture" for that misconduct. It timely filed this enforcement action on January 9, 2017. A__[Dkt.1.13]. Fowler nevertheless contends, for the first time on appeal (Br. 18 n.4), that Section 2462 bars this action because it is jurisdictional and therefore cannot be tolled. That argument fails for two independent reasons.

A. This Court has held that Section 2462 is a non-jurisdictional statute of limitations.

Contrary to Fowler's assertion (Br. 19), the jurisdictional status of Section 2462 is not "an issue of first impression." This Court has twice ruled that parties have failed to "'clear [the] high bar'" to "show that [Section 2462] is jurisdictional." *SEC v. Boock*, 750 F. App'x 61, 62 (2d Cir. 2019) (quoting *United States v. Wong*, 575 U.S. 402, 409 (2015)); *see SEC v. Amerindo Inv. Advisers*, 639 F. App'x 752, 754 (2d Cir. 2016) (same) (cited at Br. 38). In a third decision, it confirmed that Section 2462's limitations period is an "affirmative defense" that a defendant waives where, as here, he "fail[s] to raise it … in either his answer or on summary judgment," *SEC v. Illarramendi*, 732 F. App'x 10, 14 n.2 (2d Cir. 2018)—and even further, signs two tolling agreements.

Those decisions are in accord with the Supreme Court's ruling that a statute of limitations "cabin[s] a court's power only if Congress has 'clearly state[d]' as much." *Wong*, 575 U.S. at 409. There is no such clear statement in Section 2462. It does not use the term "jurisdiction," nor is it included in Part IV of Title 28, which covers "Jurisdiction and Venue." Although Section 2462 uses the mandatory language "shall not be entertained," *Wong* explained that the Court has "consistently found [such language] of no consequence," *id*. at 411. And, just as *Wong* found it significant that the limitations provision in that case was separate from the jurisdictional grant within the same title of the U.S. Code, *id*. at 411-12, the provisions granting jurisdiction and imposing a time limit here are contained in different titles (15 and 28).

The history Fowler recounts (Br. 20-21) does not alter the analysis. He relies on the change in language between Section 2462's predecessors—which stated that "'[n]o suit ... *shall be maintained*'" unless it is brought within five years of a claim's accrual—and its current version, which uses the phrase "'shall not be entertained.'" Br. 21 (citing *3M Co. v. Browner*, 17 F.3d 1453, 1458 (D.C. Cir. 1994)) (emphasis by Fowler). But he fails to acknowledge the unmistakable evidence that this change in wording was not substantive: "the Reviser's Notes on the rewriting of Section 2462's predecessor report [that] [c]hanges were made *in phraseology*," and "[w]hen the Reviser's Notes describe the alterations [in Section 2462] as changes in phraseology, the well-established canon of construction is that the revised statute means only what it meant before 1948." *3M Co.*, 17 F.3d at 1458 (citing H.R.

Rep. 80-308 (1947) and collecting Supreme Court cases) (emphasis added).

In Section 2462's over 200-year history, the Commission is aware of only one decision that has held it to be jurisdictional. *See SEC v. Graham*, 21 F. Supp. 3d 1300, 1308 (S.D. Fla. 2014) (discussed at Br. 20). That lone district court decision was issued before the Supreme Court decided *Wong*—on which this Court's contrary decisions properly have relied—and the Eleventh Circuit declined to adopt its reasoning on appeal, *SEC v. Graham*, 823 F.3d 1357, 1360 n.1 (11th Cir. 2016).

B. Even if Section 2462 were jurisdictional, it would not bar this action.

Fowler's argument fails for the independent reason that Section 2462 does not apply to claims for injunctive relief, *SEC v. Gentile*, 939 F.3d 549, 562 (3d Cir. 2019)—a fact that Fowler does not dispute[11]—and does not bar the Commission's claims for monetary relief for the misconduct Fowler engaged in on or after January 9, 2012. *SEC v. Kokesh*, 793 F. App'x 797, 799 (10th Cir. 2019) ("Whether § 2462 is

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[11] Any arguments Fowler did not make "in [his] opening brief are waived." *JP Morgan Chase Bank v. Altos Hornos de Mexico*, 412 F.3d 418, 428 (2d Cir. 2005).

jurisdictional matters only if all of the SEC's claims first accrued before … the undisputed date on which the five-year limitations period began to run."). Of the thirteen customer accounts at issue at trial, only Weathers's account was closed by January 2012, and ten were not even opened until after that date. A__[PX1A.1]; A__[PX308.1].

The fact that the Commission alleged that Fowler "engaged in a scheme to defraud 13 customers" by recommending and implementing an unsuitable trading strategy, A__[Tr.1444], does not mean that the Commission's claims as to all of those customers accrued at the same time—and certainly not when Fowler opened the earliest account. The district court correctly recognized that Fowler's scheme was not a single course of conduct that harmed thirteen people, such as one "derived from a single offering." SPA86. Rather, as the Commission explained in the colloquy Fowler emphasizes (Br. 23), it alleged—and the evidence at trial demonstrated—that he repeatedly committed "the same acts from beginning to end" as to each of the thirteen customers, such that "if the jury finds that there's been liability, it would be … consistent with how courts deal with these cases routinely to assume they believed it as to … all of the customers." A__-__[Tr.378-79]; *see* A__[Dkt.25.5]

(Amended Complaint: "Fowler intentionally used the same basic strategy in the … customer accounts" and the "pattern of buys followed by sales repeated itself over and over in [those] accounts."); A__-__[Dkt.25.17-18] (Amended Complaint's identification of customer accounts).

Fowler's fraudulent scheme accordingly consisted of "'a series of repeated violations of an identical nature,'" with each "being actionable for five years after its occurrence." *SEC v. Kokesh*, 884 F.3d 979, 985 (10th Cir. 2018); *see SEC v. Pentagon Capital Mgmt. PLC*, 725 F.3d 279, 286, 288 n.7 (2d Cir. 2013) (finding it appropriate to "count[ ] each late trade as a separate violation" where defendants perpetrated a late-trading "scheme"). Indeed, the Commission could not have had "'a complete and present cause of action,'" *Gabelli v. SEC*, 568 U.S. 442, 448 (2013), regarding all of the relevant customers at a time when most of them were not yet Fowler's customers.

Nor could the Commission have had a complete cause of action before Fowler recommended and engaged in the repetitive and frequent transactions that rendered his strategy unsuitable for any investor. So even if Fowler's misconduct were viewed (incorrectly) as "'a series of separate acts that collectively constitute one unlawful [ ] practice,'" rather than "discrete unlawful acts," he nonetheless would be liable for all of the fraudulent misconduct found by the jury—both before and after Section 2462's five-year limitations period. *Gonzalez v. Hasty*, 802 F.3d 212, 220 (2d Cir. 2015); *see Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 680 n.16 (2014) (continuing violation doctrine "rescue[s] untimely claims").

II. The Commission was not required to demonstrate that Fowler controlled his customers' accounts to establish that he committed securities fraud.

Fowler challenges the jury's verdict (Br. 25) on the ground that the Commission premised its claims, in part, on the frequency of his recommended trading but did not "demonstrate[ ] that each Investor's experience, education, decision-making, reliance, objectives and finances were such that [Fowler] effectively controlled their accounts." As the district court noted, accepting Fowler's "errant belief that any evidence of excessive trading turn[ed] the SEC's remaining claims into a churning or quantitative suitability claim," SPA26—and thus, according to Fowler, required proof of control—"would mean that a broker without control or de facto control of his customers' accounts could recommend an absolutely insane high frequency trading strategy without facing the prospect of liability," SPA30. The court correctly rejected that position as "profoundly flawed" and having "no basis in the law." SPA30. Fowler's arguments to the contrary are without merit.

The Supreme Court has not stated, as Fowler suggests (Br. 24), that any claim premised on "'excessive trading … to generate commission income' is called 'churning'" (quoting *SEC v. Zandford*, 535 U.S. 813, 816 n.1 (2002)). *Zandford* merely described the particular allegations in the complaint at issue. *Id.* And the Commission has held that "excessive trading, by itself, can violate … suitability standards by representing an unsuitable frequency of trading," without regard to whether the broker controlled the account. *Rafael Pinchas*, SEC Release No. 41,816, 1999 WL 680044, at *6 (Sept. 1, 1999). It accordingly has found a broker liable for "ma[king] fraudulently unsuitable recommendations" regarding a trading strategy, where it "declin[ed] to reach the question of whether [the broker] *also* churned [the customer's] account." *Alacan*, 2004 WL 1496843, at *9 n.56 (emphasis added); *see J. Stephen Stout*, SEC Release No. 43,410, 2000 WL 1469576, at *12-14 (Oct. 4, 2000) (same); *Regulation Best Interest*, 83 Fed. Reg. 21,574, 21,613 (May 9, 2018) ("Pursuant to the federal securities laws, broker-dealers can violate the federal antifraud provisions by engaging in excessive trading that amounts to churning, switching, *or unsuitable recommendations*." (emphasis added)).[12]

Moreover, the Commission did not, as Fowler claims (Br. 24), allege that he simply "traded in excess." The Commission alleged, and the evidence at trial demonstrated, that Fowler recommended an aggressive in-and-out trading strategy that he claimed could "get an exorbitant amount of gains in excess of the market," A__[Tr.812], when he knew (or recklessly disregarded) that there was no reasonable basis for believing that his customers would see *any* gains because of the costs he charged and never disclosed that fact to them. *Supra* at 25-26, 29-30.

These allegations do not constitute "a new legal theory" (Br. 25-26) within the context of this case or otherwise. The Commission asserted

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[12] With its adoption of Regulation Best Interest in 2019, the Commission has reemphasized that broker-dealers are required "to always form a reasonable basis as to the recommended frequency of trading in a retail customer's account—irrespective of whether the broker-dealer 'controls' or exercises 'de facto control' over the … account." *Regulation Best Interest: The Broker-Dealer Standard of Conduct*, 84 Fed. Reg. 33,318, 33,384 (July 12, 2019).

from the outset that Fowler had committed securities fraud by "recommend[ing] a trading strategy to [the relevant] customers without any reasonable basis to believe that the strategy was suitable for anyone," as well as by "churning … at least 3 of the … accounts." A__[Dkt.25.2]. (It then dropped the churning allegations. A__[Dkt.99.2].)

And this Court long ago held that a broker can act deceptively by recommending unsuitable transactions. "[B]y his position [a broker] implicitly represents he has an adequate basis for the opinions he renders." *Hanly*, 415 F.2d at 596. Where, as the jury found in this case (SPA65), the broker recommends a trading strategy that he knows (or recklessly disregards) is unsuitable for any customer, he "fraudulently violates the high standards with which he is charged" and "subjects himself to a variety of punitive, compensatory and remedial sanctions." *Id*. at 595; *see also SEC v. Shainberg*, 316 F. App'x 1, 2 (2d Cir. 2008) (upholding jury's finding of securities fraud where "[t]he evidence at trial established that [the broker] knew, or was reckless in not knowing, that the stock he was recommending was an unsound investment"); *Brown v. E.F. Hutton Group, Inc.*, 991 F.2d 1020, 1031 (2d Cir. 1993)

("This Court [has] recognized the viability of a § 10(b) unsuitability claim" where "the defendant knew or reasonably believed that the securities were unsuited to the investor's needs, misrepresented or failed to disclose the unsuitability of the securities, and proceeded to recommend or purchase the securities anyway."); *Clark v. John Lamula Investors, Inc.*, 583 F.2d 594, 600-01 (2d Cir. 1978) (same); *Kahn v. SEC*, 297 F.2d 112, 115 (2d Cir. 1961) (Clark, J., concurring) ("If the salesman makes statements, knowing they had no adequate basis, or if he is 'grossly careless or indifferent to the existence of an adequate basis' for his statements, then he has violated the antifraud provisions of the securities laws."); *cf. Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175, 188 (2015) ("[I]f the real facts are otherwise, but not provided, the opinion statement will mislead its audience.").

The Commission likewise has long held that "a salesperson's unsuitable recommendations constitute fraud, and violate the antifraud provisions of the securities laws, where," as here, "(i) the recommended securities were, or the level of trading activity was, unsuited to the customer's needs; (ii) the salesperson knew that his recommendations were unsuitable or acted with recklessness regarding their suitability in making them; and (iii) the salesperson made material misrepresentations or failed to disclose material information relating to the suitability of the securities or the level of trading." *Alacan*, 2004 WL 1496843, at *9 (citing *Brown*, 991 F.2d at 1031); *see Stout*, 2000 WL 1469576, at *12 (same); *Regulation Best Interest*, 83 Fed. Reg. at 21,613.

A broker need not control a customer's account to commit securities fraud because recommending a trading strategy that he knows is unsuitable is by itself deceptive. Such a recommendation is a "device, scheme, or artifice to defraud," 17 C.F.R. § 240.10b-5(a), or an "act, practice, or course of business which operates … as a fraud or deceit," *id*. § 240.10b-5(c), because it is contrary to the customer's expectation, based on their "special relationship," that the broker "has an adequate basis for the opinions he renders," *Hanly*, 415 F.2d at 596, and would recommend only strategies that "could work" for the customer, A__[Tr.651]. And such a recommendation is rendered "misleading" by the broker's omission of the material fact that it is unsuitable. 17 C.F.R. § 240.10b-5(b); *see Lorenzo v. SEC*, 139 S. Ct. 1094, 1102 (2019) (Subsections of the antifraud provisions do not "govern[ ] different, mutually exclusive, spheres of conduct" and "th[e] [Supreme] Court and the Commission have long recognized considerable overlap among the subsections of … Rule [10b-5] and related provisions of the securities laws."). Whatever the requirements may be where a broker trades excessively without making such deceptive recommendations, there is no reason—and Fowler offers none—why the misconduct the jury found here would be fraudulent only if he controlled his customers' accounts.

Requiring the Commission to prove control in cases like this would be particularly incongruous because "the Commission, unlike private parties, need not show reliance in its enforcement actions." *Lorenzo*, 139 S. Ct. at 1104. For that reason, this Court has held that where, as here, the Commission seeks relief against a broker for "fraudulently violat[ing] the high standards with which he is charged," *Hanly*, 415 F.2d at 595, it is irrelevant whether "his customers may be sophisticated and knowledgeable," *id.* at 596; *see Abbodante v. SEC*, 209 F. App'x 6, 7 (2d Cir. 2006) ("[T]he investors' knowledge of the speculative nature of the investments" does not "absolve [the broker] from recklessly making false statements."). As the district court properly instructed the jury, "[t]he securities laws protect experienced investors as well as the gullible and unsophisticated." A__[Tr.1457].

Finally, Fowler acknowledges (Br. 6-7) that some evidence of his customers' "experience, education, decision-making, reliance, objectives and finances" (Br. 25) was before the jury. Much of that evidence indicated that his "clients were relatively unsophisticated." SPA85; *supra* at 8-9. But even for those few customers who were knowledgeable about the stock market and wanted to "play" with their money, A__[Tr.504], Fowler was not free to rig the game for his own benefit, at the expense of his customers. When it came to his obligation to have a reasonable basis for believing that his recommended strategy was suitable for at least some customers—which the jury found that he violated with scienter (SPA65)—he agreed that "it doesn't matter what [his] clients say or know." A__[Tr.757]. Recognizing that fact, the district court correctly concluded that the Commission did not have to demonstrate that Fowler controlled his customers' accounts to prove that he acted fraudulently, and the court properly constrained his ability to "distract the jury from the fundamental issues involved in the case" by blaming his victims for the losses his recommended strategy caused. SPA31.

III. Fowler's challenge to the jury's findings of unauthorized trading is legally and factually flawed.

Fowler's failure to file a Rule 50 motion for judgment as a matter of law renders this Court "'powerless' to review the sufficiency of the evidence" to support the jury's findings of unauthorized trading. *Ortiz*, 562 U.S. at 189. Even so, ample evidence supports the jury's conclusions.[13]

Fowler conceded that he "had to get specific authorization" from his customers before "each individual trade." A__[Tr.762]; *see* A__[JX6.6]. He also admitted that he communicated with his customers only via his office or mobile phones. A__-__[Tr.762-63]. The sheer number of trades Fowler executed on a day-to-day basis was reason enough to be skeptical that he spoke to his customers before every transaction. A__-__[Tr.863-64].

[13] Although Fowler does not dispute that the Commission did not have to demonstrate that he controlled his customers' accounts to prove that he engaged in unauthorized trading, he nevertheless erroneously suggests (Br. 27) that accepting his argument regarding control would require setting aside the entire jury verdict. It would not.

But there was more. As recounted above (at 21-22 & n.7), the Commission's compliance examiner testified that a review of the records for his office and mobile numbers revealed no communication with the thirteen customers before 58% of the trades Fowler executed in their accounts. Three of the four customers who testified at trial confirmed that they did not give Fowler prior authorization for all of the trading activity in their accounts. *Supra* at 22-23. "On sufficiency review," this Court "must assume that the jury credited these witnesses." *United States v. Saavedra*, 661 F. App'x 37, 42 (2d Cir. 2016). Although Fowler insisted that he obtained specific prior authorization by phone for every single one of his many trades, A__[Tr.764], he offered no corroborating evidence, and "the jury must have concluded that [his] testimony was not credible," SPA76.

As to scienter, the evidence demonstrated not only that Fowler knew that he was required to obtain prior authorization for every trade, but also that he had received numerous complaints about unauthorized trading, including from at least two of the customers at issue here. *Supra* at 23-24. In response, he either admitted what he had done and attempted to justify it, A__[Tr.508] ("I'm trying to get your money back for you"), or dismissed the complaints as "sour grapes," A__[Tr.700].

Fowler incorrectly asserts (Br. 27-28) that because the Commission did not call all thirteen customers to testify at trial, the jury's verdict is "wholly without legal support." He points to no authority that suggests victim testimony is required for this or any other type of claim. The only case he cites (Br. 28), *E.F. Hutton & Co. v. Penham*, 547 F. Supp. 1286 (S.D.N.Y. 1982), rejected an unauthorized trading claim because it was supported only by "a summary of the [customer] losses," which, without more, was insufficient to prove unauthorized trading. *Id.* at 1293-94. The court did not hold that any evidence other than customer testimony would have been insufficient. And in other contexts, courts have made clear that the government is not required to present victim testimony to establish fraud. *See, e.g., United States v. Witchard*, 646 F. App'x 793, 797 (11th Cir. 2016) ("That [the victim] did not testify did not preclude the Government from proving … offenses," including mail fraud.); *United States v. Lewis*, 774 F.3d 837, 842 (5th Cir. 2014) (same, regarding securities fraud); *United States v. Lewis*, 594 F.3d 1270, 1275 (10th Cir. 2010) ("We are aware of no doctrine requiring that [securities] fraud be proved by testimony of the victim."). As the district court properly instructed the jury, "[c]ircumstantial evidence is of no less value than direct evidence." A__[Tr.1436].

Fowler also incorrectly asserts (Br. 28) that "none of these Investors who received [trade] confirms ever made a contemporaneous allegation of unauthorized trades." Clizbe complained to Fowler about "all these trades in [his] account" that he didn't "recognize." A__[Tr.508]. Regardless, whatever relevance a "ratification" defense—which Fowler did not raise at trial—might have in a customer suit for damages, in a Commission enforcement action "[t]he focus is on whether the registered representative exceeded his authority by initiating the transactions .... not on the customer's post-transaction conduct." *J.W. Barclay & Co.*, SEC Release No. 239, 2003 WL 22415736, at *13 (Oct. 23, 2003); *see Alacan*, 2004 WL 1496843, at *9 n.27.

Of course, if Fowler believed that testimony from other customers would have rebutted the Commission's evidence that he executed numerous trades in their accounts without prior authorization, he was free to offer it. A__[Tr.1460] ("[E]ach party had the same power to subpoena witnesses."). But he did not.

Fowler did avail himself of the opportunity to "face" (Br. 27) the Commission's evidence of unauthorized trading by cross-examining its witnesses. His attempts to undermine that evidence (Br. 29-30) were considered by the jury and do not demonstrate that its verdict is "wholly without legal support." Clay Miller's testimony that Fowler had "not to [his] knowledge" executed "unauthorized transactions in [his] account," A__[Tr.202], is presumably the basis for the jury's finding that Fowler did not execute unauthorized transactions in Miller's account, SPA66. Although Deuschle testified that he "at one point" told Fowler that he could "put trades in [Deuschle's] account without making prior phone calls," A__[Tr.476], Fowler testified that he knew that he "could not get an oral blanket consent from a client," A__[Tr.762]. Deuschle testified that he did not give Fowler "anything in writing saying [Fowler] had … authorization to place trades without speaking to [him]." A__[Tr.438]. While Clizbe may not have had "a complete recollection of all of the conversations [he] had with Don Fowler," A__[Tr.549], he testified that he was "certain" he did not authorize all of the trades in his account, A__[Tr.548]. And the Commission's compliance examiner rebutted Fowler's complaints about the thoroughness of his analysis and the completeness of the phone records at issue. A__-__[Tr.253-54] (identification of customer numbers); A__-__[Tr.298-300] (completeness). The jury was free to credit these witnesses' testimony and reach the verdict that it did.

IV. The district court acted within its discretion in imposing a $150,000 civil penalty for each customer Fowler defrauded.

Within the maximums authorized by statute, "'the actual amount of the penalty'" is left "'up to the discretion of the district court.'" *SEC v. Razmilovic*, 738 F.3d 14, 38 (2d Cir. 2013). The district court correctly concluded that it had the authority "to impose penalties for each of the trades" Fowler executed as part of his fraud, SPA86, which included at least the 670 unauthorized trades in twelve of the customers' accounts, A__[PX28A.1]. *See Pentagon Capital*, 725 F.3d at 288 n.7. Had the court assessed a $5,000 penalty for each of those unauthorized trades—about 3% of the statutory maximum—the total penalty amount would have been $3,350,000. The court's decision to instead impose a $150,000 third-tier penalty for each of the thirteen customers Fowler defrauded—for a total of $1,950,000—was both permitted by statute and reasonable, given that "[t]he consequences of" Fowler's repeated misconduct were "significant, resulting in substantial losses for [his] clients, many of whom were not wealthy, and were ill-suited to suffer [those] consequences." SPA71-72. Fowler's arguments to the contrary lack merit.[14]

A. The district court properly concluded that Fowler at a minimum committed a separate violation of the securities laws for each customer he defrauded.

Both Securities Act Section 20(d) and Exchange Act Section 21(d) provide that "[w]henever it shall appear … that any person has violated any provision of this subchapter" or "the rules or regulations thereunder," "the court shall have jurisdiction to impose, upon a proper showing, a civil penalty to be paid by the person who committed such violation." 15 U.S.C. §§ 77t(d)(1), 78u(d)(3)(A). Fowler does not dispute (Br. 15) that the misconduct found by the jury warrants a third-tier penalty—up to $150,000 per violation—because it "involved, fraud, deceit, [or] manipulation" and resulted in "substantial losses" to his

[14] Although the jury's verdict indicates that Fowler fraudulently recommended an unsuitable trading strategy to fourteen customers, SPA65, the district court chose to impose a penalty based on the thirteen that were the focus at trial, SPA86. The Commission does not challenge that decision.

customers. *Id.* §§ 77t(d)(2)(C), 78u(d)(3)(B)(iii). Nor did he dispute below that the district court had the authority to impose a third-tier penalty for each of the thirteen customers that he conceded the jury found he had defrauded. A__, A__-__[Dkt.196.6,22-24]; *see* A__[Dkt.191.24] (Commission requests per-customer penalties). But he now asserts (Br. 33) that he committed—and the court had the authority to penalize—at most two violations of the securities laws. That argument is both forfeited, *In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d 129, 132 (2d Cir. 2008), and incorrect.

Fowler erroneously contends (Br. 34) that because the securities laws say that the district court has the authority to impose a third-tier penalty "for each … violation" if "such violation directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other *persons*," 15 U.S.C. §§ 77t(d)(2)(C), 78u(d)(3)(B)(iii), the "clear implication is that when multiple investors are affected, the appropriate remedy is to upgrade the penalty from Second to Third Tier, *not* multiply it for each affected investor." (Emphases by Fowler.) That argument assumes, without demonstrating, that "each … violation" does not carry its most natural meaning.

A "violation" is ordinarily understood to mean "[a]n infraction or breach of the law; a transgression." *Violation*, Black's Law Dictionary (11th ed. 2019); *see Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 100 (2012) (In construing "any statute," courts "'look first to its language, giving the words used their ordinary meaning.'"). And that definition is consistent with the statutes' usage. *See* 15 U.S.C. §§ 77t(d)(1), 78u(d)(3)(A) (a "violation" occurs when a person "has violated any provision of this subchapter" or "the rules or regulations thereunder"). A "violation" accordingly is an act or omission that breaches the securities laws, and "each … violation" is each such act or omission.

Congress's use of the term "act or omission" in the penalties provision for administrative proceedings under the Investment Company Act of 1940, 15 U.S.C. § 80a-9(d)(2)(C) (cited at Br. 35), does not demonstrate a different meaning of "violation." Rather, it confirms Congress's intent to authorize the assessment of penalties for each act or omission that breaches the securities laws. Section 9(d) of the Investment Company Act, unlike the provisions at issue here, permits the Commission to penalize both the direct "violat[ion] [of] any provision of the" relevant securities laws and the "aid[ing]" or "abett[ing]" of "such a violation by any other person." *Id.* § 80a-9(d)(1)(A)(i)-(ii). Congress had to use a term other than "each violation" in describing the penalty tiers to make clear that the Commission can assess a penalty not only for "each act or omission" that violates the relevant securities laws, but also "each act or omission" that aids or abets "such a violation." *Id.* § 80a-9(d)(1), (2).

The district court correctly concluded that Fowler separately breached the securities laws each time he fraudulently recommended and "applied" his unsuitable trading strategy to an investor or executed an unauthorized trade. SPA86. And given the jury's finding that Fowler violated antifraud provisions of the securities laws with respect to each of the thirteen customers featured at trial, the court reasonably determined that he committed at least thirteen violations. SPA85-87.

Fowler concedes (Br. 32) that the number of violations at issue should be determined "based on the Verdict." But he misconstrues (Br. 32) the jury's finding that he "with scienter recommend[ed] an investment strategy with no reasonable basis to believe the strategy was suitable for any customer," SPA65 (Question No. 5), as establishing a single violation. "[T]he court's special verdict questions 'must be read in conjunction with the judge's charge to the jury.'" *Shah v. Pan Am. World Servs., Inc.*, 148 F.3d 84, 96 (2d Cir. 1998). Fowler admitted that he "implemented and recommended" "the same strategy, … an event-driven strategy" for each of the thirteen customers. A__[Tr.728]; *see* A__-__[Tr.620-21]; Br. 6. And the district court accordingly instructed the jury that if it "conclude[d] that the SEC has proved … that the defendant recommended a strategy" that he had no reasonable basis to believe was "suitable for *any* customer," it would "not need to decide …. whether" he had a reasonable basis to believe that the strategy was "suitable for each individual customer." A__[Tr.1448] (emphasis added). Having given that instruction, the district court properly read the jury's verdict as finding that Fowler repeatedly violated the securities laws by, with scienter, recommending and "implement[ing] the same unsuitable strategy for each of the 13 accounts." SPA86.

The district court likewise instructed the jury that the Commission alleged that Fowler "engaged in a scheme *to defraud 13 customers* by recommending and implementing a high-cost, high-trading strategy" without "a reasonable basis to believe that this strategy would be suitable for any customer." A__[Tr.1444] (emphasis added). And the jury found Fowler liable for perpetrating that fraudulent scheme. SPA64 (Question No. 1). That finding further supports the district court's reading of the verdict as establishing that Fowler defrauded thirteen customers.

Fowler also ignores the fact that, at his request, A__-__[Tr.585-86], the jury reached its verdict on unauthorized trading on a customer-by-customer basis, and determined that he "with scienter ma[d]e an[ ] unauthorized trade in the account of" twelve of them "in violation of" the securities laws, SPA66 (Question No. 7).

Below, Fowler acknowledged that the jury had made such customer-specific findings of liability. As he explained in his remedies brief, "the jury[ ] … determin[ed]" that he "violated securities laws by engaging in a course of conduct whereby he: recommended and implemented high cost, high frequency trading for fourteen specific customers with no reasonable basis to believe it would be suitable; made material misrepresentations and omissions to those specific customers about the probative costs of his trading and the chances of making a profit; and made unauthorized trades in [twelve] specific customer accounts." A__[Dkt.196.6]. And he did not dispute that that "course of conduct" involved multiple violations of the securities laws. A__-__[Dkt.196.22-24] (arguing only that "a single-violation penalty … is more appropriate"). Yet here he insists (Br. 33) that the verdict establishes that he "[a]t worst" committed only two violations—one for each Act—because (Br. 31) "the SEC repeatedly made it clear that [his] alleged misconduct was all in furtherance of a single 'scheme.'"

The Commission's assertion of scheme liability carries no such consequences. As discussed above (at 40-41), starting with its complaint and continuing through its presentation at trial, the Commission consistently alleged that Fowler perpetrated a scheme to defraud by repeatedly engaging in "the same acts from beginning to end" as to each of the thirteen customers. A__[Tr.378]. In other words, as the district court recognized, the Commission asserted (and the jury necessarily found) that Fowler's scheme consisted of committing the same fraudulent acts in the same way "again and again," SPA86, "over the course of three years," SPA88.

In similar circumstances, where the Commission alleged that the defendants had engaged in a "scheme" to defraud mutual funds by "orchestrat[ing] [a] late trading program," *Pentagon Capital*, 725 F.3d at 286, this Court found "no error in the district court's methodology for calculating the maximum penalty by counting each late trade as a separate violation," *id.* at 288 n.7. *See SEC v. Lazare Indus., Inc.*, 294 F. App'x 711, 715 (3d Cir. 2008) (finding permissible the imposition of a third-tier penalty for "each of [defendant's] at least 54 sales of stock" executed as part of a fraudulent offering scheme).

The decisions Fowler relies on (Br. 31-32) are not to the contrary. As the district court found, many of them involved a single course of misconduct, as opposed to the repeated pattern of misconduct at issue here. SPA86; *see, e.g.*, *SEC v. Brown*, 643 F. Supp. 2d 1088, 1093 (D. Minn. 2009). And while the courts in those cases deemed it "appropriate," in their discretion, to impose a single third-tier penalty for the schemes at issue, *SEC v. Rabinovich & Assocs.*, *LP*, No. 07-10547, 2008 WL 4937360, at *6 (S.D.N.Y. Nov. 18, 2008), none of them held that the penalties provisions of the securities laws forbid the assessment of multiple penalties where a defendant defrauds multiple people. *See, e.g.*, *SEC v. Riel*, 282 F. Supp. 3d 499, 528 (N.D.N.Y. 2017) (recognizing "support for th[e] position" that "each victim of [the] scheme should be considered a separate violation"); *SEC v. GTF Enters.*, *Inc.*, No. 10-4258, 2015 WL 728159, at *4 (S.D.N.Y. Feb. 19, 2015) ("The Court may … look to the number of investors defrauded or the number of fraudulent transactions to determine the number of violations.").

Nor do the Federal Sentencing Guidelines or the Commission regulations Fowler cites (Br. 35-36) suggest that the "number of violations" and the "number of individuals harmed by the violations" are necessarily different or that the former must always be fewer than the latter. Because Fowler executed 670 unauthorized trades, in this case there were far more violations than victims. SPA86-87; *supra* at 55. But accepting Fowler's position would mean that a pickpocket who steals thirteen people's wallets using the same methods has committed a single offense.

Aside from misinterpreting what constitutes a "violation," Fowler's textual argument (Br. 34) fails for another reason: He ignores the fact that losses are not a consideration until the third tier of the penalties ladder. It is the presence or risk of "substantial losses" suffered by "other persons"—meaning any person other than "the person who committed such violation," 15 U.S.C. §§ 77t(d)(1), 78u(d)(3)(A)—that elevates a violation "involv[ing] fraud, deceit, [or] manipulation," *id.* §§ 77t(d)(2)(C), 78u(d)(3)(B)(iii), from the second to the third tier—not the *number* of affected investors. Under Fowler's interpretation of the statutes, if a defendant's fraud caused a single investor to lose thousands, or even millions, of dollars, the securities laws would permit no more than a second-tier penalty, just as if his fraud caused no losses at all. That makes no sense.

Rather, under the provisions' most natural reading, the district court at a minimum had the authority to impose a third-tier penalty with respect to each defrauded customer if the fraudulent acts Fowler committed against that customer "resulted in substantial losses or created a significant risk of substantial losses" to that customer or others. And Fowler does not dispute that his misconduct "resulted in substantial losses in his customers' accounts." SPA86.

As the district court recognized, SPA86, to interpret the securities laws as Fowler now proposes would also undermine their purpose. Congress adopted the penalties provisions "to provide financial disincentives to securities law violations" while "also providing … the courts with the flexibility to tailor a remedy to the gravity of a violation." H.R. Rep. 101-616 (1990), *reprinted in* 1990 U.S.C.C.A.N.

1379, 1384. But under Fowler's interpretation, whether he engaged in a pattern of misconduct that defrauded a single investor, thirteen investors, or 130 investors—and no matter how substantial their losses—he would face no more than a single $150,000 statutory penalty, as long as he kept his personal gains under that amount. Congress did not intend to so hamstring the district court's ability to take account of the extent and gravity of a defendant's recurrent misconduct and to calibrate a penalty to match.

B. The penalty amount is justified by Fowler's egregious misconduct.

Fowler does not challenge (and did not dispute below) the district court's application of the factors courts apply in determining an appropriate penalty amount.[15] The district court concluded that Fowler's "conduct was egregious," because he "took advantage of the relative lack of sophistication of some of his clients to bilk them" and

[15] "[C]ourts frequently consider … '(1) the egregiousness of the defendant's conduct; (2) the degree of the defendant's scienter; (3) whether the defendant's conduct created substantial losses or the risk of substantial losses to other persons; (4) whether the defendant's conduct was isolated or recurrent; and (5) whether the penalty should be reduced due to the defendant's demonstrated current and future financial condition.'" *Rajaratnam*, 918 F.3d at 44.

"disregarded the outrageously high cost-to-equity and turnover ratios of his customers' accounts, which exceeded his firm's guidance for risk-seeking customers by many multiples." SPA85-86. It also recognized that Fowler "was found by the jury to have acted with scienter" and "was aware that customers had complained about his investment strategy" but "chose to do nothing to change [that] strategy." SPA86. And it determined that Fowler's "conduct resulted in substantial losses in his customer's accounts—thousands of dollars that some could ill afford to lose." *Id.* Furthermore, the court found that Fowler's "conduct was recurrent" because "he applied [his] strategy again and again to the 13 customers at issue in the trial." *Id.* And while Fowler now complains (Br. 33) that the penalty the court imposed is "financially ruinous," the district court noted that he "presented no evidence or argument" below "regarding his inability to pay," SPA86.

Fowler incorrectly argues (Br. 36-37) that the total penalty amount nevertheless is unreasonable because it is "fifteen times the disgorgement amount." But while Fowler correctly notes (Br. 37) that some courts consider the disgorgement amount to be a "'helpful starting point'" in calculating penalties, the securities laws explicitly (and by design) authorize a district court to impose penalties without regard to a defendant's pecuniary gain. 15 U.S.C. §§ 77t(d)(2)(C), 78u(d)(3)(B)(iii); *see* H.R. Rep. 101-616, 1990 U.S.C.C.A.N. at 1389 (district court has "discretion … to impose a civil money penalty even if it determine[s] that … equitable relief" such as disgorgement is "not warranted").

Fowler points to no authority to support the proposition that the amount of the disgorgement award constrains a district court's discretion to award a civil penalty allowed by statute or that the penalty the court chose here is otherwise unreasonably large. Contrary to his suggestion (Br. 36), this Court did not vacate the penalty in *Pentagon Capital* because of its size—in relation to the disgorgement amount or otherwise—but because the parties agreed that a remand was necessary on statute of limitations grounds and because the district court had erred in imposing joint and several liability. 725 F.3d at 287. Likewise, in *New York v. United Parcel Services, Inc.*, 942 F.3d 554, 599-603 (2d Cir. 2019) (cited at Br. 37-38), this Court took no issue with the district court's imposition of a separate penalty for each carton of cigarettes UPS shipped in violation of the relevant statutes, for a total of $78 million. It found only that the district court's imposition of *two* $78 million penalties—because the same shipments violated two statutes—was unnecessarily large (though legally permissible). *Id.* at 599-600.

Fowler mistakenly contends (Br. 37-39) that the discrepancy between the penalty and disgorgement amounts violates the Constitution. He forfeited that constitutional objection by failing to raise it below, A__-__[Dkt.196.22-24], even though the Commission requested that the district court impose a higher penalty amount than the court ultimately chose, A__[Dkt.191.24]. *Nortel Networks Corp. Sec. Litig.*, 539 F.3d at 132.

Regardless, the relevant question for constitutional purposes is whether the penalty is "grossly disproportional to the gravity of" Fowler's "offense[s]," *United States v. Bajakajian*, 524 U.S. 321, 337 (1998), not as compared to his monetary gain. *See Cooper Inds., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 435 (2001) (relevant "relationship" is "between the penalty and the *harm to the victim* caused by the defendant's action" (emphasis added)) (cited at Br. 38). Violations of the securities laws are "particularly egregious when committed by a securities professional," like Fowler, "who owes a duty of honesty and fair dealing toward his clients." *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 314 (1985). His repeated and knowing transgressions of those duties, committed "over the course of three years," SPA88, cost his customers $467,627. A__[PX1A.1]. "[M]any of [them] were not wealthy," SPA71, and at least one of them lost his retirement savings, *supra* at 12. In these circumstances, a $1,950,000 penalty—four times the amount his customers lost—is not grossly disproportional to Fowler's offenses.

V. *Liu* does not require a remand of the disgorgement award.

The district court based its disgorgement award on "the commissions and 'postage fees' that [Fowler] received from the 13 clients who were the subject of trial." SPA80-81. As noted above (at 32 n.10), the Commission does not oppose the Court modifying the disgorgement award to correct a calculation error. But it should not, as Fowler contends (Br. 39-40), remand the award in light of the Supreme Court's recent decision in *Liu*, 140 S. Ct. 1936, so that the district court can "tak[e] into account … expenses" that Fowler has not identified.

Liu states that "courts must deduct legitimate expenses" that are not "merely wrongful gains 'under another name'" before "ordering disgorgement." *Id*. at 1950. But before *Liu*, courts in this Circuit would consider deducting legitimate business expenses where a defendant sought such a deduction and provided proof of expenses. *See*, *e.g.*, *SEC v. Universal Express, Inc.*, 646 F. Supp. 2d 552, 564 (S.D.N.Y. 2009) (Lynch, J.); *SEC v. Thomas James Assocs., Inc.*, 738 F. Supp. 88, 92 (W.D.N.Y. 1990) ("offset[ting] … gross profits from the four [manipulated] IPOs with certain business expenses attributable thereto"). And *Liu* did not disturb the principle that disgorgement "need only be a 'reasonable approximation of profits causally connected to the violation.'" *Razmilovic*, 738 F.3d at 31; *see SEC v. Yang*, 824 F. App'x 445, 447 (9th Cir. 2020) (applying this standard after *Liu*). "Once the SEC has met the burden of establishing a reasonable approximation of the profits causally related to the fraud, the burden shifts to the defendant to" rebut it. *Razmilovic*, 738 F.3d at 31. And any risk of uncertainty falls on the wrongdoer whose illegal conduct created the uncertainty. *Providence Rubber Co. v. Goodyear*, 76 U.S. 788, 803-04 (1870) (cited in *Liu*, 140 S. Ct. at 1945-46, 1950).

Here, the Commission's approximation of Fowler's gains took account of at least some of his expenses by deducting the portions of the commissions and fees that went to J.D. Nicholas and his business partner. SPA81; *supra* at 14. Fowler "presented no argument to rebut" that approximation. SPA81. Nor does he identify on appeal any expenses that the district court should have deducted from the disgorgement award. He is not entitled to another attempt at doing so below. *See United States v. Rapower-3, LLC*, No. 18-4119, Order at 2-3 (10th Cir. July 17, 2020) (denying rehearing based on *Liu* where petitioners "fail[ed] to identify any expenses that were not part and parcel of [their] scheme and should be deducted from the disgorgement order").

CONCLUSION

The Commission does not object to a modification of the disgorgement award to a base amount of $107,591.40, plus prejudgment interest of $29,681.06. This Court should otherwise affirm the district court's judgment.

Respectfully submitted.

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NOVEMBER 5, 2020

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7)(B) and this Court's Rule 32.1(a)(4) because it contains 13,693 words, excluding the parts of the brief exempted from the word count by Federal Rule of Appellate Procedure 32(f).

I further certify that this brief complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it uses a proportionally spaced, 14-point typeface.

/s/ Rachel M. McKenzie