

531 F.3d 1339, Comm. Fut. L. Rep. P 30,871, 21 Fla. L. Weekly Fed. C 845
(Cite as: 531 F.3d 1339)



United States Court of Appeals,
Eleventh Circuit.
COMMODITY FUTURES TRADING
COMMISSION, Plaintiff–Appellee,

v.

WILSHIRE INVESTMENT MANAGEMENT
CORPORATION, National Commodities
Corporation, Inc., Andrew Alan Wilshire, Eric
Scott Malcolmson, James Joseph Russo,
Defendants–Appellants.

No. 06–14269.

June 26, 2008.

Background: Commodity Futures Trading Commission (CFTC) brought enforcement action against investment firm and certain brokers. The United States District Court for the Southern District of Florida, No. 04-80862-CV-DMM, [Donald M. Middlebrooks, J., 407 F.Supp.2d 1304](#), granted the CFTC's request for injunctive relief, and award of restitution and civil penalties, and subsequently entered judgment in accordance with its earlier ruling, [407 F.Supp.2d 1316](#), and defendants appealed.

Holdings: The Court of Appeals, [Dubina](#), Circuit Judge, held that:

- (1) unqualified statutory grant of authority to district court, in enforcement action brought by the CFTC under the Commodity Exchange Act (CEA), to issue injunction carried with it the authority to grant full range of equitable remedies, including restitution;
- (2) district court abused its discretion by awarding restitution in full amount of losses sustained by investors, with no consideration of broker's or its agents' gains;
- (3) district court did not abuse its discretion in imposing maximum civil penalty available for misleading statements made by registered introducing broker's agents; and

(4) district court did not abuse its discretion in broadly prohibiting a registered introducing broker, broker's agents who had made the misleading statements to investors, and broker's controlling person from engaging in any commodity-related activity.

Affirmed in part, vacated in part and remanded.

West Headnotes

[1] Federal Courts 170B 776

170B Federal Courts

170BVIII Courts of Appeals

170BVIII(K) Scope, Standards, and Extent

170BVIII(K)1 In General

170Bk776 k. Trial De Novo. [Most](#)

[Cited Cases](#)

Federal Courts 170B 850.1

170B Federal Courts

170BVIII Courts of Appeals

170BVIII(K) Scope, Standards, and Extent

170BVIII(K)5 Questions of Fact, Verdicts

and Findings

170Bk850 Clearly Erroneous Findings

of Court or Jury in General

170Bk850.1 k. In General. [Most](#)

[Cited Cases](#)

Court of Appeals reviews district court's factual findings for clear error, and its application of law to facts *de novo*.

[2] Federal Courts 170B 776

170B Federal Courts

170BVIII Courts of Appeals

170BVIII(K) Scope, Standards, and Extent

170BVIII(K)1 In General

170Bk776 k. Trial De Novo. [Most](#)

[Cited Cases](#)

Court of Appeals reviews *de novo* district court's construction of statutory provision, as

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involving purely legal issue.

[3] Federal Courts 170B 813

170B Federal Courts

170BVIII Courts of Appeals

170BVIII(K) Scope, Standards, and Extent

170BVIII(K)4 Discretion of Lower Court

170Bk813 k. Allowance of Remedy and Matters of Procedure in General. **Most Cited Cases**

Federal Courts 170B 814.1

170B Federal Courts

170BVIII Courts of Appeals

170BVIII(K) Scope, Standards, and Extent

170BVIII(K)4 Discretion of Lower Court

170Bk814 Injunction

170Bk814.1 k. In General. **Most Cited Cases**

Court of Appeals reviews district court's choice of equitable remedy and its grant of permanent injunction for abuse of discretion.

[4] Federal Courts 170B 813

170B Federal Courts

170BVIII Courts of Appeals

170BVIII(K) Scope, Standards, and Extent

170BVIII(K)4 Discretion of Lower Court

170Bk813 k. Allowance of Remedy and Matters of Procedure in General. **Most Cited Cases**

Court of Appeals reviews district court's imposition of civil penalties for abuse of discretion.

[5] Federal Courts 170B 812

170B Federal Courts

170BVIII Courts of Appeals

170BVIII(K) Scope, Standards, and Extent

170BVIII(K)4 Discretion of Lower Court

170Bk812 k. Abuse of Discretion.

Most Cited Cases

“Abuse of discretion” occurs if judge fails to apply proper legal standard or to follow proper

procedures in making determination, or if judge bases an award on findings of fact that are clearly erroneous.

[6] Commodity Futures Trading Regulation 83H 79

83H Commodity Futures Trading Regulation

83HIII Civil Remedies in General

83Hk79 k. Relief; Disgorgement. **Most Cited Cases**

Unqualified statutory grant of authority to district court, in enforcement action brought by the Commodity Futures Trading Commission (CFTC) under the Commodity Exchange Act (CEA), to issue injunction carried with it the authority to grant full range of equitable remedies, including authority to order registered introducing broker and its agents to make restitution to investors allegedly defrauded by misleading statements that agents had made in order to convince investors to engage in commodities transactions. Commodity Exchange Act, § 6c(a), 7 U.S.C.A. § 13a-1(a).

[7] Commodity Futures Trading Regulation 83H 74

83H Commodity Futures Trading Regulation

83HIII Civil Remedies in General

83Hk74 k. Time to Sue. **Most Cited Cases**

Two-year statutes of limitations in the Commodity Exchange Act (CEA), both on private causes of action in district court and on proceedings before the Commodity Futures Trading Commission (CFTC), did not apply to enforcement action brought by the CFTC. Commodity Exchange Act, §§ 14, 22, 7 U.S.C.A. §§ 18, 25.

[8] Commodity Futures Trading Regulation 83H 79

83H Commodity Futures Trading Regulation

83HIII Civil Remedies in General

83Hk79 k. Relief; Disgorgement. **Most Cited Cases**

While district court had authority, in

enforcement action brought by the Commodity Futures Trading Commission (CFTC) under the Commodity Exchange Act (CEA), to award restitution to investors allegedly defrauded by misleading statements that agents of registered introducing broker had made in order to convince investors to engage in commodities transactions, district court abused its discretion by awarding restitution in full amount of losses sustained by investors, with no consideration of broker's or its agents' gains. Commodity Exchange Act, § 6c(a), 7 U.S.C.A. § 13a-1(a).

[9] Implied and Constructive Contracts 205H

🔑4

205H Implied and Constructive Contracts

205HI Nature and Grounds of Obligation

205HI(A) In General

205Hk2 Constructive or Quasi Contracts

205Hk4 k. Restitution. **Most Cited**

Cases

Equitable remedy of restitution does not take into consideration plaintiff's losses, but only focuses on defendant's unjust enrichment.

[10] Commodity Futures Trading Regulation

83H 🔑79

83H Commodity Futures Trading Regulation

83HIII Civil Remedies in General

83Hk79 k. Relief; Disgorgement. **Most Cited**

Cases

In evaluating civil penalties imposed under the Commodity Exchange Act (CEA), Court of Appeals considers general seriousness of violation as well as any particular mitigating or aggravating circumstances that exist. Commodity Exchange Act, § 1 et seq., 7 U.S.C.A. § 1 et seq.

[11] Commodity Futures Trading Regulation

83H 🔑79

83H Commodity Futures Trading Regulation

83HIII Civil Remedies in General

83Hk79 k. Relief; Disgorgement. **Most Cited**

Cases

In enforcement action brought by the Commodity Futures Trading Commission (CFTC) under the Commodity Exchange Act (CEA), district court did not abuse its discretion in imposing maximum civil penalty available for misleading statements made by registered introducing broker's agents in order to convince investors to engage in commodities transactions, where violations at issue here were knowingly and repeatedly committed, and neither broker nor its agents made any attempt to cure past violations or to provide restitution to defrauded investors. Commodity Exchange Act, § 1 et seq., 7 U.S.C.A. § 1 et seq.

[12] Commodity Futures Trading Regulation

83H 🔑91

83H Commodity Futures Trading Regulation

83HIV Injunction and Receivership

83Hk91 k. Injunction in General. **Most Cited**

Cases

Constitutional Law 92 🔑4295

92 Constitutional Law

92XXVII Due Process

92XXVII(G) Particular Issues and Applications

92XXVII(G)12 Trade or Business

92k4266 Particular Subjects and Regulations

92k4295 k. Securities and Commodities Transactions. **Most Cited Cases**

Permanent injunction entered in enforcement action brought by the Commodity Futures Trading Commission (CFTC) under the Commodity Exchange Act (CEA), which broadly prohibited a registered introducing broker, broker's agents who had made the misleading statements to investors, and broker's controlling person from engaging in any commodity-related activity, did not violate defendants' procedural or substantive due process rights, where injunction was entered only after full trial, and district court concluded that injunction was warranted to serve legitimate governmental

objective of protecting consumers from fraud in commodities trading, based on reasonable likelihood that defendants, none of whom acknowledged the wrongfulness of their acts, would continue to violate the CEA unless enjoined. *U.S.C.A. Const.Amend. 5*; Commodity Exchange Act, § 6c(b), *7 U.S.C.A. § 13a-1(b)*.

[13] Commodity Futures Trading Regulation
83H ↪91

83H Commodity Futures Trading Regulation

83HIV Injunction and Receivership

83Hk91 k. Injunction in General. [Most Cited Cases](#)

Ultimate test for court to apply, in deciding whether violations of the Commodity Exchange Act (CEA) are such as to warrant grant of permanent injunctive relief, is whether defendant's past conduct indicates that there is reasonable likelihood of further violations in the future. Commodity Exchange Act, § 6c(b), *7 U.S.C.A. § 13a-1(b)*.

[14] Commodity Futures Trading Regulation
83H ↪91

83H Commodity Futures Trading Regulation

83HIV Injunction and Receivership

83Hk91 k. Injunction in General. [Most Cited Cases](#)

Factors that court should consider in deciding whether violations of the Commodity Exchange Act (CEA) are such as to warrant grant of permanent injunctive relief are: egregiousness of defendant's actions; isolated or recurrent nature of infraction; degree of scienter involved; sincerity of defendant's assurances against future violations; defendant's recognition of wrongful nature of his conduct; and likelihood that defendant's occupation will present opportunities for future violations. Commodity Exchange Act, § 6c(b), *7 U.S.C.A. § 13a-1(b)*.

[15] Commodity Futures Trading Regulation
83H ↪91

83H Commodity Futures Trading Regulation

83HIV Injunction and Receivership

83Hk91 k. Injunction in General. [Most Cited Cases](#)

In enforcement action brought by the Commodity Futures Trading Commission (CFTC) under the Commodity Exchange Act (CEA), district court did not abuse its discretion in broadly prohibiting a registered introducing broker, broker's agents who had made the misleading statements to investors, and broker's controlling person from engaging in any commodity-related activity, where allegedly deceptive conduct involved multiple misleading statements made by separate individuals to nine different customers, none of defendants had acknowledged any wrongdoing, but insisted that their sales tactics were completely legitimate, and court concluded that broad injunction was called for based on potential for future violations. Commodity Exchange Act, § 6c(b), *7 U.S.C.A. § 13a-1(b)*.

[16] Commodity Futures Trading Regulation
83H ↪91

83H Commodity Futures Trading Regulation

83HIV Injunction and Receivership

83Hk91 k. Injunction in General. [Most Cited Cases](#)

Injunctions broadly prohibiting commodity-related activity are within district court's authority in enforcement action brought by the Commodity Futures Trading Commission (CFTC) under the Commodity Exchange Act (CEA). Commodity Exchange Act, § 6c(b), *7 U.S.C.A. § 13a-1(b)*.

*1342 [Christopher John King](#), [R. Lawrence Bonner](#), [Francisco O. Sanchez](#), Homer & Bonner, P.A., Miami, FL, for Defendants–Appellants.

C. Maria Godel, Commodity Futures Trading Com'n, Washington, DC, for Plaintiff–Appellee.

[Mark R. Freeman](#), [Joshua Waldman](#), [Scott R. McIntosh](#), U.S. Dept. of Justice, Civ. Div., App. Staff, Washington, DC, for Amicus Curiae, U.S.

Appeal from the United States District Court for the

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Southern District of Florida.

Before EDMONDSON, Chief Judge, DUBINA, Circuit Judge, and STORY, ^{FN*} District Judge.

^{FN*} Honorable Richard W. Story, United States District Judge for the Northern District of Georgia, sitting by designation.

DUBINA, Circuit Judge:

Appellants Andrew Alan Wilshire (“Wilshire”), Eric Scott Malcolmson (“Malcolmson”), James Joseph Russo (“Russo”), Wilshire Investment Management Corporation (“WIM”), and National Commodities Corporation, Inc. (“NCCI”) appeal the district court's award of restitution and civil penalties and issuance of a permanent injunction resulting from violations of the Commodity Exchange Act (“CEA”). Appellants contend that the district court erred in awarding restitution, imposing civil penalties and issuing a permanent injunction. For the reasons set forth below, we affirm in part, vacate in part, and remand.

I. BACKGROUND

In October 1999, Wilshire created WIM, a registered introducing broker that solicits members of the public to trade options on commodity futures contracts through its associated persons (“APs”). With the exception of a few months during mid–2000, WIM has been in operation since that time, and employed Malcolmson and Russo as APs.

On June 15, 2004, the Commodity Futures Trading Commission (“CFTC”) filed an action against Appellants for violations of the CEA and CFTC regulations promulgated under the CEA. Count I alleged that Malcolmson and Russo violated 7 U.S.C. § 6c(b) (2000) and 17 C.F.R. § 33.10 (2000), which make it unlawful for any person to “cheat or defraud or attempt to cheat or defraud any other person” or to “deceive or attempt to deceive any other person by any means whatsoever” in commodity option transactions.

Count I also alleged that WIM, as Malcolmson and Russo's employer, was strictly liable for the violations; that Wilshire was liable for the violations as the “controlling person” of WIMC; and that NCCI was jointly and severally liable for the violations due to a guarantee agreement. Count II alleged that Wilshire, as President and CEO of WIM, violated 17 C.F.R. § 166.3 by failing to diligently supervise WIM's APs.

Following a four-day bench trial, the district court found that Malcolmson and Russo both violated the CEA. Specifically, the court found that they had made misleading statements to investors, promised high profits, suggested that other customers were very successful, downplayed the risks of commodity trading, and used seasonal information to suggest profit potential. In addition to holding Malcolmson and Russo liable for these actions, the district court also held WIM, Wilshire, and NCCI liable as alleged in Count I. Moreover, the district court held Wilshire liable as alleged in Count II for failing to diligently supervise Malcolmson and Russo.

As a result of these violations, the district court issued a permanent injunction prohibiting Malcolmson, Russo, and Wilshire*1343 from engaging in any commodity-related activity. The district court awarded restitution to all the defrauded customers in the amount of their losses stemming from the violations and imposed a civil penalty of \$100,000 each on Malcolmson, Russo, Wilshire, and WIM—the maximum civil penalty authorized by the CEA.

II. STANDARDS OF REVIEW

[1][2][3][4][5] We review a district court's factual findings for clear error, and its application of law to facts *de novo*. *Holton v. City of Thomasville Sch. Dist.*, 490 F.3d 1257, 1261 (11th Cir.2007). The construction of a statutory provision is a “purely legal issue” that is reviewed *de novo*. *Estate of Shelfer v. C.I.R.*, 86 F.3d 1045, 1046 (11th Cir.1996). We review a district court's choice of an equitable remedy and the grant of a permanent

injunction for an abuse of discretion. *CFTC v. Sidoti*, 178 F.3d 1132, 1137 (11th Cir.1999); *Simmons v. Conger*, 86 F.3d 1080, 1085 (11th Cir.1996). We review a district court's imposition of civil penalties for abuse of discretion. See *Wright v. Hanna Steel Corp.*, 270 F.3d 1336, 1342 (11th Cir.2001) (applying abuse of discretion standard to civil penalties imposed under ERISA). “An abuse of discretion occurs if the judge fails to apply the proper legal standard or to follow proper procedures in making the determination, or bases an award upon findings of fact that are clearly erroneous.” *In re Red Carpet Corp. of Panama City Beach*, 902 F.2d 883, 890 (11th Cir.1990).

III. DISCUSSION

A. Restitution

1. Whether the district court had authority to order restitution under the CEA

[6] Appellants first argue that the district court erred in awarding restitution because the CEA does not expressly authorize such a remedy. According to Appellants, in an enforcement proceeding brought by the CFTC under 7 U.S.C. § 13a-1, a district court's remedies are limited to injunctions, writs of mandamus or orders affording like relief, and civil penalties. We disagree.

Under the CEA, whenever it appears that “any registered entity or other person has engaged, is engaging, or is about to engage in” a violation of the CEA or CFTC regulations under the CEA, the CFTC may bring an action in district court “to enjoin such act or practice, or to enforce compliance with this chapter, or any rule, regulation or order thereunder.” 7 U.S.C. § 13a-1(a). Under § 13a-1(b), the court may issue an injunction or restraining order without bond; under § 13a-1(c), entitled “Writs or other orders,” the court may issue “writs of mandamus, or orders affording like relief, ... including the requirement that such person take action as is necessary to remove the danger of violation” of the CEA.

In *Porter v. Warner Holding Co.*, 328 U.S. 395, 66 S.Ct. 1086, 90 L.Ed. 1332 (1946), the Supreme Court interpreted a similar statute, the Emergency Price Control Act (“EPCA”). The EPCA allowed the Administrator to ask a court “for an order enjoining” violations of the EPCA, “or for an order enforcing compliance with such provision.” Further, “upon a showing by the Administrator that [any] person has engaged or is about to engage in” violations of the EPCA, a court had the power to grant “a permanent or temporary injunction, restraining order, or other order.” The Court determined that “[s]uch a jurisdiction is an equitable one. Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction.” *Id.* at 398, 66 S.Ct. 1086. Further, when the action involves the public interest, a court's equitable powers “assume an even broader and more flexible character.” *Id.* The *1344 Court determined that restitution in particular “lies within that equitable jurisdiction” and “is within the recognized power and within the highest tradition of a court of equity.” *Id.* at 403, 66 S.Ct. 1086.

The CEA's enforcement provision is nearly identical to the EPCA's enforcement provision. Both provide for “an order enforcing compliance” and “an order enjoining” violations. Like the EPCA provision for “other orders,” the CEA provides for “[w]rits or other orders” and allows a court to “take such action as is necessary to remove the danger of violation” of the CEA. The CFTC here “invoked the jurisdiction of the District Court to enjoin acts and practices made illegal by the [CEA] and to enforce compliance with the [CEA]. Such a jurisdiction is an equitable one.” *Id.* at 397-98, 66 S.Ct. 1086.

We have similarly applied the statutory principles in *Porter* to the Federal Trade Commission Act. See *FTC v. Gem Merch. Corp.*, 87 F.3d 466 (11th Cir.1996). In *Gem Merchandising*, we considered language that

enabled the FTC, “whenever [it] has reason to believe that any person ... is violating or is about to violate [the FTCA]” to “bring suit in district court to enjoin any such act or practice” and enabled the district court to grant a preliminary or permanent injunction. *Id.* at 468, 87 F.3d 466; 15 U.S.C. § 53(b). We concluded that the FTCA's grant of authority to issue an injunction carried “the full range of equitable remedies,” among which “is the power to grant restitution and disgorgement.” *Id.* at 468–69.^{FN1}

^{FN1} During oral argument, the United States argued that the enforcement provision of the Securities Exchange Act, which is similar to § 13a–1, has also been interpreted to include equitable remedies. See *SEC v. First City Fin. Corp., Ltd.*, 890 F.2d 1215, (D.C.Cir.1989) (finding that the full range of equitable remedies was available to the district court). We agree. See *SEC v. Blatt*, 583 F.2d 1325, (5th Cir.1978)* (finding that “the trial court acted properly within its equitable powers in ordering [the defendant] to disgorge the profits that he obtained by fraud”).

* In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

That a court's jurisdiction under § 13a–1 includes equitable remedies is well established among our sister circuits. See *CFTC v. Kimberllynn Creek Ranch, Inc.*, 276 F.3d 187, 193 (4th Cir.2002) (“It is well settled that equitable remedies such as disgorgement are available to remedy violations of the CEA.”); *CFTC v. Am. Metals Exch. Corp.*, 991 F.2d 71, 76 (3d Cir.1993) (finding that a district court had authority to order disgorgement under the CEA); *CFTC v. British Am. Commodity Options Corp.*, 788 F.2d 92, 94 (2d Cir.1986) (finding that disgorgement is a

“necessary and appropriate” remedy under the CEA and that it “effectuates the purpose underlying the [CEA]—protection of the investor”); *CFTC v. Co Petro Mktg. Group, Inc.*, 680 F.2d 573, 582–84 (9th Cir.1982) (determining that a court has the power to order disgorgement as ancillary relief under the CEA); *CFTC v. Hunt*, 591 F.2d 1211, 1223 (7th Cir.1979) (concluding that “a district court may compel a violator of [the CEA] to disgorge his illegally obtained profits”).

[7] We conclude that the unqualified grant of statutory authority to issue an injunction under § 13a–1 carries with it the full range of equitable remedies, among which is the power to grant restitution. Thus, the district court here had authority to order the Appellants to pay restitution.^{FN2}

^{FN2} Appellants argument that the award of restitution is time-barred is without merit. The two-year statutes of limitations found in 7 U.S.C. § 25 and 7 U.S.C. § 18 only apply to private causes of action in district court or before the CFTC. They do not apply to enforcement actions brought by the CFTC under 7 U.S.C. § 13a–1.

*1345 2. Whether the district court abused its discretion in awarding restitution in the amount of customer losses

[8] Having determined that the district court did have authority to award restitution, we now turn to the issue of whether the district court abused its discretion in determining the amount of restitution. Appellants argue that awarding restitution in the amount of customer loss was a legal remedy, and thus outside the equitable powers of the district court under § 13a–1.

In *Waldrop v. Southern Co. Services, Inc.*, this court defined restitution generally as “an equitable remedy designed to cure unjust enrichment of the defendant *absent consideration of the plaintiff's losses.*” 24 F.3d 152, 158 (11th Cir.1994) (emphasis added); accord *FTC v. Verity Int'l, Ltd.*,

443 F.3d 48, 66–68 (2d Cir.2006) (determining that “the appropriate measure for restitution is the benefit unjustly received by the defendants[,]” not the amount of the customer loss); *Ellett Bros., Inc. v. U.S. Fidelity & Guar. Co.*, 275 F.3d 384, 388 (4th Cir.2001) (“Restitution and disgorgement require payment of the defendant’s ill-gotten gain, not compensation of the plaintiff’s loss.”). The award here was based on the amount the customers lost, not the amount of unjust enrichment received by Appellants.

The Third Circuit has concluded that an award of restitution under § 13a–1 measured in the amount of customer losses is generally improper. *CFTC v. Am. Metals Exch. Corp.*, 991 F.2d 71, 76–79 (3d Cir.1993). The court reasoned that relief granted pursuant to the court’s equitable powers under the CEA “must be remedial and not punitive in nature.” *Id.* at 78. According to the court,

[A]n award of damages in the amount of investor losses may go beyond the scope of a [CEA] enforcement proceeding. Absent a hearing to calculate ill-gotten gains, the disgorgement ordered in an amount equal to investor losses could be a penalty assessment. If investors wish to seek recovery of their losses as a remedy, they are free to do so in an independent civil action against defendants. The hardship of investor losses should not, however, be used as an excuse to impose a remedy under circumstances in which the scope of relief falls outside that remedy’s recognized parameters.

Id.

[9] In this case, the award was not based on the amount of money that Appellants wrongfully gained by their misrepresentations. Instead, it was based on the amount of money that the customers lost. The equitable remedy of restitution does not take into consideration the plaintiff’s losses, but only focuses on the defendant’s unjust enrichment. *Waldrop*, 24 F.3d at 158–59. Accordingly, we conclude that the district court abused its discretion

in awarding the full amount of customer losses. The proper measurement is the amount that Appellants wrongfully gained by their misrepresentations.^{FN3}

FN3. Appellants also argue that restitution was improper because there was insufficient evidence that the customers relied on Appellants’ misrepresentations. We express no opinion as to whether a finding of reliance is required to award restitution in CFTC enforcement proceedings under 7 U.S.C. § 13a–1. However, even if such a finding was required, there is ample evidence in the record showing that the customers here relied on Appellants’ misrepresentations.

B. Civil Penalties

[10][11] Appellants next argue that the district court abused its discretion in imposing*1346 the maximum civil penalty on Russo, Malcolmson, Wilshire, and WIM. In evaluating civil penalties under the CEA, we have considered the general seriousness of the violation as well as any particular mitigating or aggravating circumstances that exist. *See JCC, Inc. v. CFTC*, 63 F.3d 1557, 1571 (11th Cir.1995). Defrauding customers is a violation of the core provisions of the CEA and “should be considered very serious.” *Id.* Further, there are no mitigating circumstances present here. As in *JCC, Inc.*, “the violations of the Act at issue here were ‘knowingly and repeatedly’ committed; we are not dealing with a situation involving an isolated ‘mistake’ arising from an ambiguous statutory duty or from circumstances that are unique and unforeseeable.” *Id.* Additionally, Appellants’ post-violation conduct does not warrant a reduction, as Appellants have made no attempt to cure the past violations or provide restitution to the defrauded customers. *See id.* Thus, we conclude that the district court did not abuse its discretion in imposing the maximum civil penalty.

C. Permanent Injunction

[12] Finally, Appellants argue that the district court’s injunction prohibiting Malcolmson, Russo,

Wilshire, and WIM from “engaging in any commodity-related activity” was an abuse of discretion.^{FN4}

FN4. Appellants’ argument that the injunction violates their constitutional due process rights is without merit. The Supreme Court has determined that “[t]he touchstone of due process is protection of the individual against arbitrary action of government,” whether the fault lies in a denial of fundamental procedural fairness, or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective.” *County of Sacramento v. Lewis*, 523 U.S. 833, 845–46, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998) (citations omitted). Appellants have been denied neither procedural nor substantive due process. The district court issued the injunction after a full trial, thus providing procedural fairness. The reasonable likelihood that Appellants would continue to violate the law is reasonable justification for the injunction, which serves the legitimate governmental objective of protecting consumers from fraud in commodities trading.

[13][14] The CEA allows a district court, “upon a proper showing,” to grant a permanent injunction. 7 U.S.C. § 13a–1(b). In reviewing the grant of an injunction, “the ultimate test ... is whether the defendant’s past conduct indicates that there is a reasonable likelihood of further violations in the future.” *SEC v. Caterinicchia*, 613 F.2d 102, 105 (5th Cir.1980); see also *Sidoti*, 178 F.3d at 1137 (applying this standard to cases under the CEA). Specifically, the following factors should be considered:

[T]he egregiousness of the defendant’s actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant’s assurances against future violations, the defendant’s recognition of the

wrongful nature of his conduct, and the likelihood that the defendant’s occupation will present opportunities for future violations.

SEC v. Carriba Air, Inc., 681 F.2d 1318, 1322 (11th Cir.1982).

[15] The district court here considered the past violations by the Appellants with regard to nine customers, including “acts by multiple brokers at multiple times.” The court also considered the potential for future violations and found it important that the Appellants “have not acknowledged any wrongdoing, insisting rather that their sales tactics were completely legitimate.” *Id.* The court specifically found that their “lack of candor ... demonstrated at trial belies any intent of making good faith efforts to comply with restrictions in the future.” *Id.* at 15–16. *1347 Finally, the court determined that the injunction was appropriate “because the violations were blatant, brazen, and repeated.” *Id.* at 16.

[16] The district court looked at the Appellants’ past conduct and at the potential for future violations, considering many of the factors set out in *Carriba Air*. The district court applied the proper legal standard and followed proper procedures in issuing the injunction, and the findings of fact supporting the injunction are not clearly erroneous. Hence, we find that the district court did not abuse its discretion in issuing the injunction.^{FN5}

FN5. Although the injunction here was extensive, the Fourth Circuit has upheld an injunction with language identical to the one at issue here. In *CFTC v. Noble Wealth Data Information Services*, the district court used the same standard—evidence of past wrongdoing and likelihood of future wrongdoing—to issue a permanent injunction “prohibiting [the defendant] from violating the [CEA] and from engaging in any commodity-related activity, including soliciting customers and funds” because of the “pervasiveness and

seriousness of [the defendant]'s violations.” 90 F.Supp.2d 676, 692 (D.Md.2000). The Fourth Circuit upheld the injunction, simply stating, “Nor did the court err in issuing injunctions against [the defendant].” *CFTC v. Baragosh*, 278 F.3d 319, 329 (4th Cir.2002). While the conduct in *Noble Wealth* may have been more egregious than the conduct at issue here, these cases show that injunctions broadly prohibiting “commodity-related activity” have been found to be within a district court's authority.

IV. CONCLUSION

For the above stated reason, we vacate the award of restitution and remand this case to the district court with instructions to reduce the amount of restitution to the amount that the Appellants gained by their misrepresentations. We affirm the civil penalties and the injunction.

AFFIRMED in part; VACATED and REMANDED in part.

C.A.11 (Fla.),2008.

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