UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

UNITED STATES COMMODITY
FUTURES TRADING COMMISSION,

Plaintiff,

v.

MAVERICK ASSET MANAGEMENT, LLC,
RODNEY SCOTT PHELPS, and JASON T.
CASTENIR,

Defendant.
_______________________________________/

Case Number 15-00928
Honorable David M. Lawson

OPINION AND ORDER GRANTING GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff United States Commodity Futures Trading Commission (CFTC) filed a complaint accusing the defendants of fraud in connection with the operation of a commodities trading pool and seeking injunctive and monetary relief by way of this civil enforcement action. The Court previously adopted a report and recommendation by the assigned magistrate judge and entered judgment against the defendants in default, Maverick Asset Management, LLC and Jason Castenir. The government now moves for summary judgment on its remaining claims against defendant Rodney Scott Phelps. On this record, the facts are undisputed and demonstrate that the government is entitled to the relief it seeks. The motion for summary judgment will be granted.

I.

The CFTC filed its complaint in this case in August 2015. The complaint pleaded four claims against defendant Phelps for (1) fraud in connection with commodity futures trading, contrary to 7 U.S.C. §§ 6b(a)(A)-(C) (Count 1); (2) fraud by a commodity pool operator and an associated person of a commodity pool operator, 7 U.S.C. § 6o(a)(A), (B) (Count 2); (3) failure to register as a commodity pool operator and as an associated person of a commodity pool operator,

7 U.S.C. § 6k(d) (Count 3); and violations of 17 C.F.R. § 4.20(b), which requires that all funds received by a commodity pool operator be received in the name of the pool, and 17 C.F.R. § 4.20(c), which prohibits the comingling of pool funds with funds belonging to any other person or entity (Count 4). The government further alleged that Phelps was liable for all of the above violations committed by co-defendant Maverick Asset Management, LLC, because he was a controlling person of that entity as defined by 7 U.S.C. § 13c(b).

On March 6, 2017, the Court entered an order staying the proceedings against defendant Phelps after he was indicted on related criminal charges. Phelps was indicted on 13 counts of fraud and conspiracy to commit fraud under 18 U.S.C. §§ 1343, 1349. The criminal case proceeded to a jury trial, and Phelps was found guilty on all 13 counts on September 20, 2019. He was sentenced to 108 months in prison, to be followed by three years of probation.

The CFTC filed its motion for summary judgment on October 15, 2020. No defendant has presented any opposition to the motion, and no other papers have been filed in this matter by any other party after the government's motion was docketed. The local rules of this district call for summary judgment motions under Federal Rule of Civil Procedure 56 to "be accompanied by a separate, concise statement of the material facts as to which the moving party contends there is no genuine issue for trial." M.D. Tenn. LR 56.01(b). "If a timely response to a moving party's statement of material facts, or a non-moving party's statement of additional facts, is not filed within the time periods provided by these rules, the asserted facts shall be deemed undisputed for purposes of summary judgment." M.D. Tenn. LR 56.01(f). Because no opposition to the motion has been presented, the facts recited below, which were asserted in the statement of material facts that accompanied the government's motion, are deemed to be undisputed. The Court also has reviewed

the record submitted in support of the motion and finds that it substantiates the government's factual assertions.

The record of the criminal trial and the other documents submitted by the government as exhibits to its motion establish the following undisputed account of Phelps' conduct in connection with the operation of Maverick Asset Management, LLC. In January 2012, Defendants Rodney Phelps and Jason Castenir formed Maverick Asset Management, LLC (MAM) and a related entity, Maverick Investment Holdings (MIH), which operated a commodity trading pool under the name of MIH. Phelps held himself out variously as the President, CEO, and owner of MAM. The trading entities operated out of offices in Nashville, where Phelps and Castenir each maintained an office presence. The defendants also established and used bank accounts and brokerage accounts to conduct their commodity trading business.

In 2013, MAM solicited more than $1.2 million in funds from three pseudonymously named investors. The solicitations were boosted by false materials claiming that Phelps had an extensive history of investing successfully in commodity trading markets. The solicitations also falsely assured investors that their risk would be "limited," and that they could expect "guaranteed returns" of more than 100% per year. The offerings to investors promised that their money would be invested in commodity trading markets with the goal of earning those substantial returns.

Phelps and Castenir actually used less than $400,000 of the invested funds for trading. The remaining more than $800,000 in investor funds were funneled through a series of transfers among the institutional accounts and eventually purloined by the defendants for their personal use. From the funds that were used for commodity trading, almost all were lost in unprofitable trades. Nevertheless, throughout 2013, and despite the heavy losses, the defendants sent investors false account statements showing that their investments had yielded remarkably high gains. Throughout

the entire investment operation, Phelps never registered with the CFTC as a commodity trader, despite the fact that his entities engaged in numerous regulated activities.

II.

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). When reviewing the motion record, "[t]he court must view the evidence and draw all reasonable inferences in favor of the non-moving party, and determine 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Alexander v. CareSource*, 576 F.3d 551, 557-58 (6th Cir. 2009) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986)). "The court need consider only the cited materials, but it may consider other materials in the record." Fed. R. Civ. P. 56(c)(3).

The party bringing the summary judgment motion must inform the court of the basis for its motion and identify portions of the record that demonstrate that no material facts are genuinely in dispute. *Id.* at 558. (citing *Mt. Lebanon Pers. Care Home, Inc. v. Hoover Universal, Inc.*, 276 F.3d 845, 848 (6th Cir. 2002)). "Once that occurs, the party opposing the motion then may not 'rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact' but must make an affirmative showing with proper evidence in order to defeat the motion." *Ibid.* (quoting *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989)).

"[T]he party opposing the summary judgment motion must do more than simply show that there is some 'metaphysical doubt as to the material facts.'" *Highland Capital, Inc. v. Franklin Nat'l Bank*, 350 F.3d 558, 564 (6th Cir. 2003) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)) (internal quotation marks omitted). Instead, that party must

designate specific facts in affidavits, depositions, or other factual material showing "evidence on which the jury could reasonably find for" that party. *Anderson*, 477 U.S. at 252. If the non-moving party, after sufficient opportunity for discovery, is unable to meet her burden of proof, summary judgment is clearly proper. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

When the party moving for summary judgment also bears the ultimate burden of persuasion, the movant's affidavits and other evidence not only must show the absence of a material fact issue, they also must carry that burden. *Vance v. Latimer*, 648 F. Supp. 2d 914, 919 (E.D. Mich. 2009); *see also Resolution Trust Corp. v. Gill*, 960 F.2d 336, 340 (3d Cir. 1992); *Stat–Tech Liquidating Trust v. Fenster*, 981 F. Supp. 1325, 1335 (D. Colo. 1997) (stating that where "the crucial issue is one on which the movant will bear the ultimate burden of proof at trial, summary judgment can be entered only if the movant submits evidentiary materials to establish all of the elements of the claim or defense"). The plaintiffs therefore "must sustain that burden as well as demonstrate the absence of a genuine dispute. Thus, [it] must satisfy both the initial burden of production on the summary judgment motion — by showing that no genuine dispute exists as to any material fact — and the ultimate burden of persuasion on the claim — by showing that it would be entitled to a directed verdict at trial." William W. Schwarzer, et al., *The Analysis and Decision of Summary Judgment Motions*, 139 F.R.D. 441, 477-78 (1992) (footnotes omitted).

The government contends that all of the factual premises for liability on its civil fraud claims are established via collateral estoppel, based on the same factual premises that necessarily were determined by the convictions in the criminal case. The Court agrees.

In order to invoke the doctrine of collateral estoppel — also referred to as issue preclusion — a party "must show four things: (1) the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding; (2) determination of the issue must have been

necessary to the outcome of the prior proceeding; (3) the prior proceeding must have resulted in a final judgment on the merits; and (4) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding." *Kosinski v. Comm'r of Internal Revenue*, 541 F.3d 671, 675 (6th Cir. 2008) (quotation omitted). The Court finds that all of the requisites for the application of issue preclusion are satisfied.

First, this civil litigation and the criminal prosecution involved the same parties. Rodney Phelps was named as a defendant in both cases. The Department of Justice and the Commodity Futures Trading Commission, as principal agencies in the executive branch of the federal government, represent the same party in interest and are deemed to be in privity when applying the rules of issue preclusion. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 402-03 (1940) ("There is privity between officers of the same government so that a judgment in a suit between a party and a representative of the United States is *res judicata* in relitigation of the same issue between that party and another officer of the government.").

Second, it is undisputed that the criminal prosecution resulted in a final judgment when the defendant was convicted and sentenced on all charges.

Third, it is beyond debate that the defendant was afforded a full and fair opportunity to litigate the essential factual premises of the criminal charges when he was subjected to a jury trial, at which he was represented by counsel.

Fourth, the prosecution of the criminal fraud charges and the claims pleaded in this case for civil fraud involve the same necessary factual elements. Phelps was convicted on multiple counts of wire fraud under 18 U.S.C. § 1343, which "require[d] the government to prove three elements beyond a reasonable doubt: (1) the defendant devised or willfully participated in a scheme to defraud; (2) the defendant used or caused to be used an interstate wire communication in

furtherance of the scheme; and (3) the defendant intended to deprive a victim of money or property." *United States v. Kerley*, 784 F.3d 327, 343 (6th Cir. 2015). He also was convicted on charges of conspiracy to commit wire fraud, which required the government to prove that "two or more persons conspired, or agreed, to commit the crime of [wire fraud]," and that "the defendant knowingly and voluntarily joined the conspiracy." *United States v. Rogers*, 769 F.3d 372, 377 (6th Cir. 2014). The necessary elements of those criminal convictions establish indisputably all of the elements of the government's *prima facie* case for its civil enforcement claims.

As to the fraud claims, Count 1 of the government's complaint pleads a violation of 7 U.S.C. § 6b, which makes it unlawful

> for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery, or swap, that is made, or to be made, for or on behalf of, or with, any other person, other than on or subject to the rules of a designated contract market (A) to cheat or defraud or attempt to cheat or defraud the other person; (B) willfully to make or cause to be made to the other person any false report or statement or willfully to enter or cause to be entered for the other person any false record; [or] (C) willfully to deceive or attempt to deceive the other person by any means whatsoever in regard to any order or contract or the disposition or execution of any order or contract.

7 U.S.C. § 6b(a)(2). The elements of Count 1 are satisfied by the same elements as the criminal convictions of fraud, which necessarily rested on findings that Phelps willfully made false representations to his investors to induce them to invest funds in his commodity trading operation, when he made false promises of "guaranteed returns," supported by a fictionalized history of his personal trading success, and then misappropriated most of the investor funds for his personal use, while losing almost all of the rest in a series of unprofitable transactions.

As to the Count 2 claim that Phelps fraudulently engaged in the business of a Commodity Pool Operator (CPO), 7 U.S.C. § 6o makes it

> unlawful for a commodity trading advisor, associated person of a commodity trading advisor, commodity pool operator, or associated person of a commodity pool operator, by use of the mails or any means or instrumentality of interstate

> commerce, directly or indirectly — (A) to employ any device, scheme, or artifice to defraud any client or participant or prospective client or participant; or (B) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or participant or prospective client or participant.

7 U.S.C. § 6o(1). For the same reasons discussed above, the fraudulent activities of MAM, of which Phelps was a principal, are established by the criminal trial evidence. The testimony at the criminal trial also established that MAM and MIH acted as CPOs and engaged in activities subject to regulation under section 6o, and that Phelps was a principal and controlling person of those entities, as defined by the pertinent regulations. Other trial evidence also established that the fraudulent scheme involved interstate communications with investors that were sent by Phelps, satisfying the required showing that the fraud involved interstate commerce.

As to the Count 4 claims based on comingling and improper receipt of funds, the evidence at the criminal trial also established that Phelps received investor funds that were solicited for commodity trading into his personal accounts, and he also misdirected investor funds that were deposited into MAM and MIH institutional accounts for his own personal use, contrary to 17 C.F.R. § 4.20, which prohibits "commingl[ing] the property of any pool that [a CPO] operates or that it intends to operate with the property of any other person," and mandates that all CPO funds must be received "in the name of the pool." 17 C.F.R. §§ 4.20(b), (c).

Finally, as to the failure to register claims, Phelps admitted in his answer to the complaint in this case that neither he nor his entities ever registered as commodity pool operators, as mandated by 7 U.S.C. § 6k(d).

The defendant has put forth no contrary evidence in opposition to the government's motion for summary judgment, and the undisputed facts in the record supplied with the government's motion establish all of the elements of the claims pleaded in the complaint. Therefore, no genuine

issue of material fact remains for trial, and the government is entitled to judgment as a matter of law on all counts of the complaint.

III.

In its prayer for relief, the government seeks a permanent injunction barring the defendant from engaging in any future commodity trading activity, a money judgment for restitution to the defrauded investors, and civil monetary penalties.

First, the penalty provisions of the Commodity Exchange Act (CEA), 7 U.S.C. § 13a-1, provide that "[u]pon a proper showing [establishing a CEA violation], a permanent or temporary injunction or restraining order *shall be granted* without bond." 7 U.S.C. § 13a-1(b) (emphasis added). Unlike private litigants in an ordinary civil suit seeking injunctive relief, civil enforcement "[a]ctions for statutory injunctions need not meet the requirements for an injunction imposed by traditional equity jurisprudence. Once a violation is demonstrated, the moving party need show only that there is some reasonable likelihood of future violations." *CFTC v. Hunt*, 591 F.2d 1211, 1220 (7th Cir. 1979); *see also CFTC v. Muller*, 570 F.2d 1296, 1300 (5th Cir. 1978) ("In actions for a statutory injunction, the agency need not prove irreparable injury or the inadequacy of other remedies as required in private injunctive suits. A *prima facie* case of illegality is sufficient."). "Courts look to a variety of factors in determining whether there is some reasonable likelihood of future violations. Factors to be considered include 'the egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, 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.'" *CFTC v. Aurifex Commodities Research Co.*, No. 06-166, 2008 WL 299002, at *9 (W.D. Mich. Feb. 1, 2008) (quoting *CFTC. v. Risk Capital Trading Group, Inc.*, 452

F. Supp. 2d 1229, 1247 (N.D. Ga. 2006)). The Court finds that the defendant's conduct was egregious, implicating more than $1.2 million of fraudulently obtained funds and equivalent losses to multiple investors. The violations were not isolated or recurrent and were comprised of a course of conduct spanning more than a year. The record demonstrates an elaborate campaign of misconduct in which the defendant willfully and repeatedly engaged to the detriment of his victims. There is no credible suggestion that he ever sincerely has accepted responsibility for his misdeeds, and he adamantly denied his guilt during the criminal trial. There also is no credible assurance that the defendant's present circumstances would preclude any attempt by him to engage in future violations after he eventually completes his lengthy prison sentence. Based on all of the pertinent circumstances, injunctive relief is justified in this case.

Second, section 13a-1(d)(3)(A) further "authorizes the CFTC to seek restitution for persons who sustained losses proximately caused by the proven violations." *CFTC v. Miklovich*, 687 F. App'x 449, 453 (6th Cir. 2017). The pseudonymously named investors suffered extensive losses due to the defendant's fraudulent conduct, and the evidence from the criminal trial backs up the government's assessment that the losses consisted of $1,172,800 in unrecovered investment funds.

Third, section 13a-1(d)(1) authorizes the Court to impose a civil penalty (on a presently inflation-adjusted basis) of $140,000 for each violation of the CEA that has been proven. The government's proofs reasonably could be construed as proving numerous "violations" consisting of dozens of false statements and other instances of deceitful conduct by the defendant in the course of his investment scheme. However, the government seeks only a modest penalty of $420,000, which derived from an assessment of one "violation" for each of the three primary counts of the complaint that most pointedly implicate Phelps's personal conduct. The modest penalty requested is appropriate and justified by the proofs in the record.

IV.

The government has offered sufficient proofs to establish all of the elements of its claims against defendant Phelps in this case, and no genuine question of fact on any element of the claims remains for trial. The motion for summary judgment therefore will be granted.

Accordingly, it is **ORDERED** that the government's motion for summary judgment (ECF No. 81) is **GRANTED**.

It is further **ORDERED** that defendant Rodney Scott Phelps, and all other persons and entities associated with him, hereby **PERMANENTLY ARE RESTRAINED, ENJOINED, AND PROHIBITED** from doing any of the following:

1. Engaging in conduct in violation of 7 U.S.C. §§ 6b(a)(2)(A)-(C); 6o(1);

2. Engaging in conduct in violation of 7 USC § 6m(1);

3. Engaging in conduct in violation of 17 CFR §§ 4.20(b)-(c);

4. Directly or indirectly:

(i) trading on or subject to the rules of any registered entity (as that term is defined in Section 1a(40) of the CEA, 7 U.S.C. § 1a(40));

(ii) entering into any transactions involving "commodity interests" (as that term is defined in Regulation 1.3, 17 C.F.R. § 1.3), for the defendant's own personal account or for any account in which he has a direct or indirect interest;

(iii) having any commodity interests traded on the defendant's behalf;

(iv) controlling or directing the trading for or on behalf of any other person or entity, whether by power of attorney or otherwise, in any account involving commodity interests;

(v) soliciting, receiving, or accepting any funds from any person for the purpose of purchasing or selling any commodity interests;

(vi) applying for registration or claiming exemption from registration with the Commission in any capacity, and engaging in any activity requiring such registration or exemption from registration with the Commission, except as provided for in Regulation 4.14(a)(9), 17 C.F.R. § 4.14(a)(9);

(vii) acting as a principal (as that term is defined in Regulation 3.1 (a), 17 C.F.R. § 3.1(a)), agent, or any other officer or employee of any person registered, exempted from registration, or required to be registered with the Commission, except as provided for in Regulation 4.14(a)(9); or

(viii) engaging in any business activities related to commodity interests.

It is further **ORDERED** that the plaintiff shall recover from defendant Rodney Scott Phelps restitution on behalf of the unnamed investors in the amount of $1,172,800.

It is further **ORDERED** that the plaintiff shall recover from defendant Rodney Scott Phelps civil monetary penalties in the amount of $420,000.

s/David M. Lawson
DAVID M. LAWSON
United States District Judge
Sitting by special designation

Dated: March 14, 2022