IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18-55815

U.S. COMMODITY FUTURES TRADING COMMISSION,
Plaintiff-Appellant,
v.
MONEX CREDIT COMPANY, ET AL.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of California
Case No. 8:17-cv-01868-JVS-DFM

AMENDED MOTION OF THE UNITED STATES COMMODITY FUTURES TRADING COMMISSION FOR EXPEDITED REVIEW

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Plaintiff-Appellant the U.S. Commodity Futures Trading Commission ("CFTC" or "Commission") respectfully moves pursuant to Federal Rule of Appellate Procedure 27 and Circuit Rule 27-12 to expedite this matter for good cause. A proposed schedule is attached. Appellees do not consent to this motion.[1]

ISSUES MERITING EXPEDITED CONSIDERATION

The CFTC is an independent federal agency charged with administering and enforcing the Commodity Exchange Act ("CEA"), 7 U.S.C. §§ 1, *et seq*. Among the CEA's stated purposes is to protect commodity-market participants from "fraudulent or other abusive sales practices." *Id*. § 5(b). To that end, the statute prohibits the use of "any manipulative or deceptive device or contrivance" in connection with specified commodity transactions, *id.* § 9(1), and it grants the CFTC the authority to enforce the prohibition civilly, *id.* § 13a-1(a).

The CFTC brought this enforcement action to redress a widespread and ongoing fraud in which innocent victims have so far lost more than $290 million since 2011 because Defendants, who operate an illegal unregistered trading platform, have duped them into precious metals transactions designed to enrich Defendants at the expense of their deceived customers. The district court dismissed the action on a Rule 12(b)(6) motion, based on a deeply flawed

[1] All relevant transcripts are finalized.

interpretation of the statute. Meanwhile, Defendants are continuing their scheme, and their defrauded customers are losing approximately $4 million per month.

This case presents two issues of unusual public importance concerning the CFTC's authority to police commodity markets for fraud and to root out illegal unregistered and unregulated trading operations:

1. Section 6(c)(1) of the CEA prohibits the use of "any manipulative *or* deceptive device or contrivance" in connection with a contract of sale of a commodity in interstate commerce. 7 U.S.C. § 9(1) (emphasis added). Congress borrowed this text from Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), the well-known anti-fraud statute. The district court held, however, that although the statutes have the same operative text, Section 6(c)(1) does *not* prohibit fraud generally, but only "fraud-based market manipulation." *CFTC v. Monex Credit Co.*, No. SACV 17-01868, 2018 WL 2306863, at *7-10 (C.D. Cal. May 1, 2018). The court determined that the phrase "*any* manipulative *or* deceptive device or contrivance" in Section 6(c)(1) "unambiguously" prohibits only conduct that is "*both* manipulative *and* deceptive." *Id*. (emphases added). This holding is erroneous.

2. Certain provisions of the CEA apply to trading in "leveraged" commodity contracts "as if" they were commodity futures. 7 U.S.C. § 2(c)(2)(D). For

example, a broker offering these transactions must register with the Commission, and the trading must take place on a registered exchange. *Id.* Congress requires this because leveraged commodity contracts are functionally equivalent to futures, which are sophisticated financial instruments and heavily regulated under the CEA. These leveraged commodity contracts therefore escape CEA regulation only when, unlike most futures, they result in "actual delivery" of the commodity within 28 days. *Id.* § 2(c)(2)(D)(ii)(III)(aa). In this case, the district court held that "actual delivery" occurs in Defendants' transactions, notwithstanding that: (a) no metal changes hands; (b) Defendants store the metal in depositories where, by contract, they maintain control over it; and (c) Defendants' customers have no right to possess or control any metal. Compl. ¶¶ 39-42. It was sufficient, according to the district court, that "the commodities are actually there" in the depositories and not "non-existent." *Monex*, 2018 WL 2306863, at *5 & n.6. The district court erred here as well.

INTRODUCTION

These serious errors must be corrected without delay. Among other defects, the decision conflicts with the plain language of the statute, which in one instance the court acknowledged. *Monex*, 2018 WL 2306863, at *8. The decision also runs counter to those of several other courts, including two by the U.S. Court of

Appeals for the Eleventh Circuit. *See CFTC v. S. Tr. Metals, Inc.*, 880 F.3d 1252, 1262-63 (11th Cir. 2018) (holding that Section 6(c)(1) prohibits "fraud" by "misrepresentation, misleading statement, or deceptive omission");[2] *CFTC v. Hunter Wise Commodities, LLC*, 749 F.3d 967, 979-80 (11th Cir. 2014) (holding that "actual delivery" requires "transfer of possession and control" that is "'real,' rather than constructive"). Market participants accordingly were blindsided by it, and substantial confusion now exists about the scope of the Commission's enforcement powers and the legality of these trading activities. *See infra* at II. To make matters worse, the district court also explicitly cast doubt on the authority of *another* regulator—the Federal Energy Regulatory Commission ("FERC")—to police *its* jurisdictional markets for fraud. *Monex*, 2018 WL 2306863, at *9. Then, two weeks after issuing its decision, the court compounded the uncertainty by issuing an order, *sua sponte*, certifying the case for interlocutory appeal on the basis of "substantial ground for difference of opinion." (ECF No. 194.)[3]

The district court's hasty dismissal of the CFTC's complaint (and accompanying denial of the Commission's preliminary-injunction motion as moot)

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[2] A petition for rehearing concerning a different issue is pending in *Southern Trust*.

[3] For reasons not relevant to this motion, the Commission requested that the district court instead enter final judgment to permit an immediate appeal as of right. The district court granted the request. (ECF Nos. 197, 198, 199.)

leaves Defendants' fraud unchecked, customers losing approximately $4 million per month, and market participants befuddled by the controversial ruling. Good cause therefore exists to expedite the appeal. Only expedited review can prevent irreparable harm and cure this untenable situation without further disruption.

BACKGROUND

1. As alleged in the Complaint, Defendants Monex Deposit Company, Monex Credit Company, Newport Services Corporation, Louis Carabini and Michael Carabini ("Monex") are engaged in a scheme in which they have so far defrauded thousands of retail customers of more than $290 million in connection with tens of thousands of illegal, off-exchange leveraged commodity transactions. Monex operates a financial trading platform called "Atlas," through which it purports to buy and sell precious metals on a leveraged basis. Compl. ¶ 2. The trading facility is not registered with the CFTC as required by law.

2. The Atlas program is a scam. Monex represents to customers that leverage trading in precious metals is a safe, secure investment with significant upside, but Monex has carefully designed the program to ensure that the vast majority of its customers lose money. *Id.* ¶¶ 2-4. Approximately 90% of leveraged Atlas accounts lost money between July 16, 2011, and March 31, 2017. *Id.* ¶ 2. Yet the company withholds this information from prospective customers

while it touts the supposed profit potential and limited downside of leverage trading. *Id.* ¶¶ 4-5. The company describes trading on Atlas as a way to shield wealth from inflation, but fails to disclose that significant numbers of customers are not shielded from anything, because Monex unilaterally liquidates their trading positions at a loss. *Id.* ¶ 3. Monex tells potential customers that because metals "will always have value … [a customer] can't lose [his or her] investment." *Id.* In reality, customers do not actually receive any metals, and they often suffer substantial losses of principal. *Id.* ¶¶ 3 & 68.A-E.

3. Monex describes its relationship with customers deceptively as one of "trust," and its sales representatives falsely portray themselves "as fiduciaries who look out for the best interests of their customers." *Id.* ¶ 3. The truth is that customer losses are all but inevitable on Atlas due to large commissions and price spreads—and those losses are Monex's gains. *Id.* ¶ 4. Monex is also the counterparty to every transaction, yet it retains sole discretion to liquidate a customer's position without notice, at a price of Monex's own choosing. *Id.* ¶¶ 3-4, 41-42. Meanwhile, Monex compensates its sales representatives on the basis of volume of business, regardless of how much money his or her customers may lose. *Id.* ¶ 5. The Complaint contains many detailed examples of Monex's fraudulent

conduct, including specific accounts from several of its thousands of victims. *Id.* ¶¶ 45-69.

4. The transactions Monex offers on the Atlas platform are functionally equivalent to commodity futures trades. *Id.* ¶ 25. Futures are heavily regulated financial instruments in the form of standardized contracts to buy or sell a commodity at a specific price on a specific date in the future. In practice, futures trades rarely lead to actual sales of goods. The obligations are instead discharged by executing a contract that reverses the agreement to purchase or sell. The difference in contract prices constitutes the trader's gain or loss. Industry participants use futures to hedge against the risk of price fluctuations, while speculators use them to make legalized "bets" on commodity prices. This activity is risky, because it is done with a high amount of leverage. For a small initial deposit (called "margin"), a trader can enter into a futures contract for a large amount of a commodity valued at many times that payment. Under this structure, a small move in the price of the commodity can result in large gains or losses compared to the initial margin.

5. The CEA has long governed futures trading for the protection of markets and market participants. In 2010, Congress expanded those protections from the futures space to platforms like Atlas that mimic futures trading by offering

commodity contracts to retail customers "on a leveraged or margined basis, or financed by the offeror," 7 U.S.C. § 2(c)(2)(D), with an exception for transactions that result in "actual delivery" of the commodity within 28 days, *id*. § 2(c)(2)(D)(ii)(III)(aa).

6. Monex claims that it does make "actual delivery" to customers and, therefore, can prove it qualifies for the exception. But as alleged in the Complaint, which must be taken as true, Monex generally makes no delivery at all: "Rather, the metals are stored in depositories" under contracts that "provide Monex with exclusive authority" over their disposition. Compl. ¶ 39. Customers have "no contractual rights" to the metal, unless and until they terminate the contract by paying for the metal in full. *Id*. ¶¶ 39-40. As in futures trading, Atlas customers deposit margin equal to a fraction of the contract price for the amount of metals they "buy" or "sell." *Id.* ¶ 28. They can take "long" or "short" positions and place "stop" or "limit" orders. *Id.* ¶ 29. For a "long" position, Monex makes an entry in its books and sends the customer a document purporting to transfer title to a quantity of metal, though not to any specific physical metals. *Id* ¶ 41. In a "short" trade, any pretense of a *bona fide* purchase or sale falls away, as Monex claims to "loan" the customer metals that the customer instantly sells back to Monex. *Id.* ¶ 42. In either case, Monex retains the unfettered right to issue a "margin call"

or simply liquidate the customer's position "at any time." *Id.* ¶ 31. Regardless of the sequence, no metal changes hands. Instead, it sits in the depository, subject to Monex's exclusive control, and customers have no right to take possession of it, personally or otherwise. *Id.* ¶ 39-40. Accordingly, as alleged in the Complaint, Monex's supposed "actual delivery" is a sham.

ARGUMENT

I. Expedited proceedings are warranted because the district court's errors are allowing an egregious fraud to continue unchecked.

1. As a matter of law, CEA Section 6(c)(1) prohibits the type of fraud charged in the Complaint.

The CFTC's Complaint charged Monex with committing fraud in violation of Section 6(c)(1)'s prohibition on "any manipulative or deceptive device." But the district court dismissed this claim because it mistakenly believed that a "manipulative or deceptive device" must be both "manipulative *and* deceptive," and therefore the statute bars only fraudulent manipulation and not fraud. That interpretation is belied, however, by: (a) the statute's plain language; (b) related statutory language; (c) the deference required under *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984); and (d) the legislative history.

a. Plain Language. "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank*

v. Germain, 503 U.S. 249, 253-54 (1992). "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. In Section 6(c)(1), the word "or" unambiguously "indicates that the test is disjunctive," *United States v. Tucor Int'l, Inc.*, 238 F.3d 1171, 1178 (9th Cir. 2001), and "[e]ach prong … is a separate and distinct theory of liability," *Lozano v. AT&T Wireless Servs.*, 504 F.3d 718, 731 (9th Cir. 2007). Several courts have correctly so held.[4] Here, however, the district court simply dismissed Congress' choice of words as "careless." *Monex*, 2018 WL 2306863, at *8.[5] That characterization is false, but, in any event, courts lack the power to ignore

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[4] *S. Tr. Metals, Inc.*, 880 F.3d at 1262; *CFTC v. McDonnell*, 287 F.Supp.3d 213, 229-30 (E.D.N.Y. 2018); *CFTC v. Kraft Foods Grp., Inc.*, 153 F.Supp.3d 996, 1010 (N.D. Ill. 2015); *CFTC v. Hunter Wise Commodities, LLC*, 21 F.Supp.3d 1317, 1347 (S.D. Fla. 2014).

[5] The district court based its misguided claim of authority to ignore "careless" text on *De Sylva v. Ballentine*, 351 U.S. 570, 573 (1956), but in that case the Supreme Court stressed repeatedly that the text at issue was ambiguous. *See id.* at 573, 577-78. Section 6(c)(1) is not ambiguous, so *De Sylva* is irrelevant. The district court also mistakenly cited *Kraft*, 153 F.Supp.3d at 1010, for the proposition that "or" does not "necessarily mean[] that the section bars two distinct types of conduct," *Monex*, 2018 WL 2306863, at *8. But *Kraft* did not even consider the meaning of "manipulative or deceptive" and, in fact, stated that fraud *is* prohibited under the plain language of the statute and its implementing rule. 153 F.Supp.3d at 1008.

unambiguous text on that basis. *Lamie v. U.S. Tr.*, 540 U.S. 526, 542 (2004) ("It is beyond our province to rescue Congress from its drafting errors.").[6]

b. Related Language. The district court also failed to properly consider, as required, "the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). *First*, in the same sentence as the prohibition on "any manipulative or deceptive device or contrivance," Congress specified that there is no duty to *disclose* information "except as necessary to make any statement made to the other person in or in connection with the transaction not misleading in any material respect." 7 U.S.C. § 9(1). Congress copied this text almost verbatim from the SEC's primary anti-fraud regulation, Rule 10b-5, 17 C.F.R. § 240.10b-5, and it would make little sense without the accompanying prohibition on fraud generally. It also refutes the assertion that Congress drafted the statute carelessly—to the contrary, Congress deliberately wove together anti-fraud language from two separate sources, Rule 10b-5 and Section 10(b). *Second*,

[6] The district court bolstered its departure from the text by relying on section headings, but "the heading of a section cannot limit the plain meaning of the text." *Bhd. of R.R. Trainmen v. Balt. & Ohio R.R.*, 331 U.S. 519, 529 (1947). It is common for headings not to capture all of a section's content. *Id.* at 528. Indeed, the title of Section 6(c) itself, "Prohibition Regarding Manipulation and False Information," excludes a large majority of what the section contains. *See* 7 U.S.C. §§ 9(4)-(11) (containing the entirety of the CFTC's administrative enforcement authority for "any" CEA violation and procedures for appellate review).

in the same legislative amendment that added Section 6(c)(1), Congress created a private right of action under CEA Section 22, 7 U.S.C. § 25(a)(1)(D)(i), for injuries caused by "any *manipulative device* or contrivance," with no separate mention of a "deceptive device." 156 Cong. Rec. S3295, S3348 (daily ed. May 6, 2010) (emphasis added). When Congress meant to address manipulation only, "it knew how to do so." *Custis v. United States*, 511 U.S. 485, 492 (1994).[7]

c. *Chevron* Deference. Where a statute contains "an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation," the regulations are "given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 843-44. Section 6(c)(1) contains such a delegation, and the Commission acted on it by issuing CFTC Rule 180.1, 17 C.F.R. § 180.1. The Commission modeled Rule 180.1 on SEC Rule 10b-5 because, among other reasons, the enabling statutes are

[7] The district court mistakenly believed that a literal interpretation of Section 6(c)(1) would render CEA Sections 2(c)(2)(D)(ii)(III)(aa) and 4b, 7 U.S.C. §§ 2(c)(2)(D)(ii)(III)(aa) & 6b, superfluous. That is wrong, and the district court misinterpreted both sections. In any event, the canon against surplusage does not apply to unambiguous provisions, *Lamie*, 540 U.S. at 535-36, and may assist only "where a competing interpretation gives effect to every clause and word of a statute," *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 385 (2013), which the district court's interpretation does not. Courts also are loath to apply it "when agency authority is at stake." *Adirondack Med. Ctr. v. Sebelius*, 740 F.3d 692, 699 (D.C. Cir. 2014).

in relevant part "virtually identical." 76 Fed. Reg. 41398, 41399 (July 14, 2011). On its face, Rule 180.1 contains several distinct prohibitions, including against (1) "any manipulative device"; (2) "any untrue or misleading statement of a material fact or [omission] to state a material fact necessary in order to make the statements made not untrue or misleading"; and (3) "any act, practice, or course of business, which operates or would operate as a fraud." 17 C.F.R. § 180.1(a). There is no assertion that this was arbitrary or capricious; and the disjunctive formulation of the Rule aligns properly with the disjunctive statutory text. The district court noted the *Chevron* framework, but declined to defer to the agency because, the court believed, the statute "unambiguously" prohibits only manipulation. *Monex*, 2018 WL 2306863, at *10. Astonishing as that was on its own, the court elsewhere acknowledged that the text "suggests that Congress intended to prohibit either manipulative or deceptive conduct," *id.* at *8, applied various tools for dealing with ambiguous text, *id.* at *8-9, and later noted "substantial ground for difference of opinion" (ECF No. 194). The truth is that the statutory text forecloses the district court's interpretation, but, at the very least, the court should have deferred to the agency.

d. Legislative History. Although the clear text of Section 6(c)(1) would normally preclude resort to legislative history, *Dep't of Hous. & Urban Dev. v.*

Rucker, 535 U.S. 125, 132 (2002), here the history confirms the text. The Senate sponsor of Section 6(c)(1) stated in her floor speech that the statute borrows the words "manipulative or deceptive device or contrivance" from Section 10(b) of the Exchange Act so that "courts and the Commission [] interpret the new authority in a similar manner" and by reference to "the 75 years" of "case law [that] has developed around th[ose] words." 156 Cong. Rec. at S3348. The Senator even invoked the canon that "when the Congress uses language identical to that used in another statute, Congress intended for the courts and the Commission to interpret the new authority in a similar manner." *Id.* While floor statements generally merit little weight, *N.L.R.B. v. SW Gen., Inc.*, 137 S. Ct. 929, 943 (2017), they can, as here, confirm the plain meaning of the text, *Brock v. Pierce Cty.*, 476 U.S. 253, 263 (1986).[8]

[8] The district court made much of the fact that this and one other speech (the entirety of Section 6(c)(1)'s legislative history) discussed manipulation and not fraud. But floor statements cannot change the text of a statute, *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 457 (2002), and silence on a subject in legislative history is irrelevant, *Dewsnup v. Timm*, 502 U.S. 410, 419-20 (1992). Legislators are presumed to know the law. *Cannon*, 441 U.S. at 697. It is near certain in this case that most or all of the more than 90 Senators in attendance for the floor statements would have understood the reference to Section 10(b) case law to include the many landmark cases on fraud. *See, e.g.*, *Chiarella v. United States*, 445 U.S. 222, 226 (1980); *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 153-54 (1972); *SEC v. Tex. Gulf Sulphur Co.*, 401 F.2d 833, 860-61 (2d Cir. 1968) (*en banc*).

2. The allegations in the Complaint, taken as true, establish that Monex is not making "actual delivery" of precious metals.

a. The district court's application of the "actual delivery" exception similarly broke from the statute's text. The phrase "actual delivery" is straightforward. It is not defined in the statute, so its ordinary meaning applies. *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012). As the Eleventh Circuit explained correctly in *Hunter Wise*, the word "delivery" means the "formal act of transferring something," and it "denotes a transfer of possession and control." 749 F.3d at 978-79 (quoting *Black's Law Dictionary* 494 (9th ed. 2009)). "Actual" means "that which exists in fact and is real, rather than constructive." *Id.* (alterations omitted). Thus, the term "actual delivery" unambiguously requires "the act of giving real and immediate possession to the buyer or the buyer's agent." *Id.* at 979 (alterations omitted). Transfer of title or ownership without transfer of possession or control is at most "constructive," not "actual," delivery. *See id.*[9]

b. The allegations in the Complaint establish that Monex is not making "actual delivery." To be clear, there is nothing inherently wrong with delivering the commodity to a depository—as opposed to, say, the customer's residence or

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[9] *See also CFTC v. Noble Metals Int'l, Inc.*, 67 F.3d 766, 772-73 (9th Cir. 1995) (holding that transfer of title to metals held by a third-party depository did not constitute "delivery").

place of business. *Hunter Wise*, 749 F.3d at 979 ("actual" delivery may be to "the buyer's agent"); *Retail Commodity Transactions Under the CEA*, 78 Fed. Reg. 52426, 52468 (Aug. 23, 2013) (stating that "physical delivery…into the possession of a depository" is acceptable even in "fungible bulk form"). But the Commission has explained authoritatively that the purported delivery must not be a "sham." 78 Fed. Reg. at 52427. The transaction must be assessed using a "functional approach" that considers all relevant factors. *Id.* Contract language and formal ownership and title are relevant, but other factors include "how the agreement, contract, or transaction is marketed, managed, and performed," the "physical location of the commodity purchased or sold, both before and after execution," and "the nature of the relationship between the buyer, seller, and possessor of the commodity purchased or sold." *Id.* The depository must not be acting as an agent or other close relation of the seller's. *Id.* at 52428.

c. As alleged in the Complaint, Monex's supposed "delivery" method is a sham: (1) the metal is "stored" rather than delivered, and no metal changes hands, Compl. ¶ 39; (2) the purported transfer of metals is "in reality a book-entry in Monex's records," *id*. ¶ 42; (3) only Monex has a contractual relationship with the depositories, and the contracts provide for Monex's exclusive control of the metals, *id.* ¶ 39; (4) customers, by contrast, "do not have any contractual rights" under

those agreements to exert any control, including to inspect, move, or collect "their" metal, *id.*; (5) the Atlas account agreement also gives control over the metals "to Monex, not the Atlas customers," *id.* ¶ 38; (6) under the agreement, Monex's total control includes the right simply to liquidate the customer metal at any time, for any reason, without notice, in Monex's sole discretion, *id.* ¶ 41; (7) the Atlas system is marketed as a "short-term trading vehicle," *id.* ¶ 51; and (8) the practice of trading "long" and "short" positions with "stop" and "limit" orders and "margin calls" make clear that Altas is nothing more than an unregulated trading platform for speculating in futures-like financial instruments, *id.* ¶ 29.

d. The district court gave no weight to any of these factual allegations. Instead, it "presume[d]"—without any basis in law—"that Congress did not intend to exclude" Monex's practice in which "the metals are held as collateral by a depository." *Monex*, 2018 WL 2306863, at *5. It did not explain how this could ever constitute "actual delivery" within the meaning of those words, where no metal changes hands, the depository maintains possession, and Monex retains exclusive control. According to the court, it is sufficient that "the commodities are actually there," and "[t]he analysis would be different if the commodities borrowed and sold were non-existent." *Id.* at *5 n.6. That makes no sense. The *existence* of metal is obviously necessary, but that does not mean Monex "actually delivers" it.

e. The court's discussion of "short" trades best illustrates its fundamental misunderstanding and departure from the statute's text. In "short" trades, Monex employs the fiction that it "loans" metal to customers, which they immediately "sell" back, with the entire transaction taking place only on Monex's books. Compl. ¶ 42. As usual, customers have no possession or control over any metal. *Id.* The district court opined that this is acceptable because "possession is no longer relevant when the customer completes the short transaction since the purpose of a short transaction is to sell the commodity and divest the investor of ownership." *Monex*, 2018 WL 2306863, at *5 n.6. It is true, of course, that the purpose of these trades is not to possess or control metals—the defrauded customers have no right to do so. But that means actual delivery is *not* taking place. *Hunter Wise*, 749 F.3d at 978-79. The district court missed the point, because it impermissibly did not base its decision on the statutory text.[10]

II. Irreparable harm will occur without expedited review.

a. The district court's surprising departure from the statutory text and previous cases provoked a chorus of uncertainty and skepticism from

[10] The court also asserted that "Congress was aware of the phenomenon of short sales in commodities" when it created the actual delivery exception. *Monex*, 2018 WL 2306863, at *5 n.6. If so, that does not help Monex, since Congress addressed the situation using text that cannot reasonably encompass these short trades.

commentators. *See, e.g.*, *Back to the Drawing Board for CFTC Cryptocurrency Guidance?*, Bloomberg Law (May 11, 2018) ("What you have here now is you have a judge who has basically read an 'or' as an 'and'" and that is "a dramatic viewpoint" (quoting commentator)); *id.* ("With a change in reading of a single word, [the court] called into doubt a major enforcement authority the CFTC has wielded for nearly eight years.");[11] *Cal. Fed. Court Dismissal of CFTC Monex Enforcement Action Upsets Stable Legal Theories*, Bridging the Week (May 6, 2018) ("I'm intuitively not so sure about the federal judge's reasoning.");[12] *CFTC Dealt Blow in Retail Commodity Transactions Case*, (May 2018) ("The effect of this is unclear.");[13] *Two Significant Losses For the CFTC*, SECActions (May 14, 2018) (advising that "the language of" Section 6(c)(1) "should be considered when evaluating [the district court's] determination" given "the Supreme Court's focus on statutory language").[14] As these commentators note, the district court's decision has potentially disruptive implications for commodity markets other than

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[11] https://www.bna.com/back-drawing-board-n73014475857 (last visited June 19, 2018).

[12] https://www.bridgingtheweek.com (last visited June 19, 2018)

[13] https://kennyhertzperry.com/cftc-dealt-blow-in-retail-commodity-transactions-case/ (last visited June 19, 2018).

[14] http://www.secactions.com/two-significant-losses-for-the-cftc/ (last visited June 19, 2018).

retail metals, including the rapidly evolving markets for cryptocurrencies. The potential consequences of this uncertainty may constitute irreparable harm.

b. The confusion may also affect FERC's regulation of energy markets. Like the CFTC, that agency enforces a ban on "any manipulative or deceptive device or contrivance," borrowed from Section 10(b) of the Exchange Act. *See* Energy Policy Act of 2005, Pub. L. No. 109-58, § 1283, 119 Stat. 594, 979-80. Like Section 6(c)(1) and Section 10(b), FERC's statute prohibits fraud. *FERC v. Silkman*, 177 F.Supp.3d 683, 704 (D. Mass. 2016); *Competitive Energy Servs., LLC*, 144 FERC ¶ 61,163, at 20-21 ¶43 (Aug. 29, 2013). Yet the district court asserted without basis that it prohibits only manipulation. *Monex*, 2018 WL 2306863, at *9.

c. Meanwhile, Monex's victims have no redress, and the firm continues to prey on members of the public who may be ill-equipped to absorb significant losses while a lengthy appeal plays out. That too would constitute irreparable harm.

CONCLUSION

For the foregoing reasons, good cause exists to expedite the appeal. The Commission respectfully requests that the Court grant the motion.

Respectfully submitted,

s/ *Robert A. Schwartz*

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Dated: June 21, 2018

Attachment A

PROPOSED SCHEDULE

July 20, 2018	Brief for Appellant
August 27, 2018	Brief for Appellees
September 17, 2018	Reply Brief for Appellants
October-November 2018	Oral Argument Requested
January-February 2019	Decision Requested

* * *

Due to a miscommunication between the parties, the CFTC earlier filed a motion based on what its counsel believed was Appellees' consent, including a proposed schedule reflecting what the CFTC's counsel believed was an agreed compromise. Counsel for the Appellees subsequently informed counsel for the CFTC that Appellees did not agree to the compromise.

CERTIFICATE OF SERVICE

I hereby certify that on June 21, 2018, I caused the foregoing document to be served on all counsel *via* the Court's CM/ECF system.

/s/ *Robert A. Schwartz*

Counsel for Plaintiff-Appellee the U.S. Commodity Futures Trading Commission

Dated: June 21, 2018