**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 2nd day of June, two thousand twenty-five.

PRESENT: AMALYA L. KEARSE,
DENNIS JACOBS,
RAYMOND J. LOHIER, JR.,
Circuit Judges.

DENNIS P. MAHER, MARY E.
MAHER RESIDUARY TRUST,

Plaintiffs-Appellees,

v. No. 24-2068-cv

GLOBAL FACTORS, LLC AND
RALPH C. JOHNSON,

Defendants-Appellants.

FOR DEFENDANTS-APPELLANTS: BRIAN D. GRAIFMAN, Borah, Goldstein, Altschuler, Nahins & Goidel, P.C., New York, NY

FOR PLAINTIFFS-APPELLEES: SAM A. SILVERSTEIN, Kaufmann Gildin & Robbins LLP, New York, NY

Appeal from a judgment of the United States District Court for the Southern District of New York (Lewis J. Liman, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the District Court's judgment is AFFIRMED.

Defendants-Appellants Global Factors, LLC ("Global Factors") and Ralph Johnson appeal from the July 9, 2024 judgment of the United States District Court for the Southern District of New York (Liman, *J.*). After a bench trial, the District Court found the Appellants liable to Appellees Dennis Maher and the Mary E. Maher Residuary Trust under the Securities Exchange Act, *see* 15 U.S.C. § 78j(b), 17 C.F.R. § 240.10b-5, and for common law fraud, and it awarded the Appellees $828,917.83 in rescissory damages. We assume the parties' familiarity with the underlying facts and the record of prior proceedings, to which we refer only as necessary to explain our decision to affirm.

"After a bench trial, we review the district court's finding of fact for clear error and its conclusions of law *de novo*. Mixed questions of law and fact are also

reviewed *de novo*." *Citibank, N.A. v. Brigade Cap. Mgmt., LP*, 49 F.4th 42, 58 (2d Cir. 2022) (cleaned up). A factual finding is clearly erroneous "only if, after reviewing all of the evidence, this Court is left with the definite and firm conviction that a mistake has been committed." *United States v. Cramer*, 777 F.3d 597, 601 (2d Cir. 2015) (quotation marks omitted).

The Appellants first contend that the District Court clearly erred when it found that Global Factors's payments to Wall Street Pizza were "sham" loans designed to secretly pay Johnson's debts rather than generate revenue for Global Factors. We conclude that the District Court's finding was not clearly erroneous. The evidence at trial showed that Johnson's company, American Growth Fund II ("AGF II"), owed $2.4 million to an investor named Randy Langhamer. Langhamer testified that because AGF II was unable to repay him, Global Factors "loaned" a total of $295,000 to his business, Wall Street Pizza, between 2017 and 2019. Langhamer further testified that the terms of the loans technically entitled Global Factors to a stake in Wall Street Pizza's future accounts receivable, but that Langhamer and Johnson had a secret understanding that Global Factors would never collect on the loans, and that in "reality" the loans "were just . . . partial redemption payments" from AGF II to Langhamer. Joint App'x 697. The

District Court credited Langhamer's testimony and found that "Johnson was using Global Factors at least in part as his personal piggy bank, deploying investor funds not to generate returns for them but to satisfy Johnson's obligations with respect to another business." Spec. App'x 45.

On appeal, Johnson responds by pointing to his own contrary testimony that Global Factors's loans to Wall Street Pizza were legitimate. But the District Court did not find his testimony credible, and as the finder of fact, it "is in the best position to make . . . necessary credibility judgments," *Mario Valente Collezioni, Ltd. v. Confezioni Semeraro Paolo, S.R.L.*, 264 F.3d 32, 38 (2d Cir. 2001), and to choose between "two permissible views of the evidence," *In re Lehman Brothers Holdings Inc.*, 855 F.3d 459, 469 (2d Cir. 2017) (quotation marks omitted). "[T]he factfinder's choice between" those views "cannot be clearly erroneous." *Id.* (quotation marks omitted). For these reasons, we conclude that the District Court's factual finding about the sham nature of the loans is not clearly erroneous. *See Cramer*, 777 F.3d at 601.

Nor did the District Court err in finding that Johnson's failure to disclose his arrangement with Langhamer to the Appellees constituted a material omission. Johnson had assured the Appellees in advance of their investment that

Global Factors "vigorously enforce[s]" the terms of its agreements with debtors, Joint App'x 303 (quotation marks omitted), and that "every loan was fully collateralized and personal[ly] guarantee[d] by principals or owners of the compan[ies]," Joint App'x 302. The assurance to investors omitted a material fact that bore directly on the topic of Global Factors's loans, namely, the company's undisclosed loan arrangement with Langhamer. "Even when there is no existing independent duty to disclose information, once a company speaks on an issue or topic, there is a duty to tell the whole truth." *Meyer v. Jinkosolar Holdings Co.*, 761 F.3d 245, 250 (2d Cir. 2014). Thus, "when an offering participant makes a disclosure about a particular topic, whether voluntary or required, the representation must be complete and accurate." *In re Morgan Stanley Info. Fund Sec. Litig.*, 592 F.3d 347, 366 (2d Cir. 2010) (quotation marks omitted).

The Appellants also claim that the Appellees failed to prove loss causation at trial. "We have described loss causation in terms of the tort-law concept of proximate cause." *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 172 (2d Cir. 2005). "To establish loss causation, a plaintiff must show that the loss was a foreseeable result of the defendant's conduct (*i.e.*, the fraud), and that the loss was caused by the materialization of the risk concealed by the defendant's alleged fraud." *In re*

Vivendi, S.A. Sec. Litig., 838 F.3d 223, 261 (2d Cir. 2016) (cleaned up). We review *de novo* whether the District Court "applied the proper legal standards in assessing . . . loss causation," *Fed. Hous. Fin. Agency for Fed. Nat'l Mortg. Ass'n v. Nomura Holding Am., Inc.*, 873 F.3d 85, 153 n.72 (2d Cir. 2017), and we review the court's findings of fact for clear error.

The record shows that once Global Factors was liquidated, it was unable to satisfy most of the redemption requests from the Appellees, who then suffered a loss. The Appellants blame the COVID-19 pandemic rather than their misrepresentations for this loss. But the District Court carefully considered the record evidence and found that, "contrary to [the Appellants'] representations, it was not the pandemic that prevented Global Factors from collecting. Global Factors was not able to collect, in part, because some of the purported purchases of receivables were shams. The assets did not exist and there was no real promise to repay Global Factors anything." Spec. App'x 55–56. We see no reason to disturb that finding, which finds support in the trial record. *See Cramer*, 777 F.3d at 601. The District Court also did not err in concluding that the Appellees met their burden of establishing loss causation even if the COVID-19 pandemic helped to reveal the fraud. *See Lentell*, 396 F.3d at 173. "[I]t is common

for injuries to have multiple proximate causes." *Staub v. Proctor Hosp.*, 562 U.S. 411, 420 (2011). Indeed, the Appellants conceded at oral argument before the District Court that loss causation could still be proven under such facts. *See* Joint App'x 1596–97.

Last, the Appellants claim that the District Court's award of rescission damages is disproportionate to the loss caused by the fraud. They contend that at least some of the losses were caused by a general market downturn during the COVID-19 pandemic and that Global Factors's loan to Wall Street Pizza represented only a fraction of its business. But the Appellants forfeited these arguments by failing to make them to the District Court. As the District Court noted, the Appellants "had the opportunity to contest the rescissory measure of damages and to argue that there should have been an offset based upon a general decline in the market for private securities," but "[t]hey did not do so." Spec. App'x 67. The District Court also noted that the Appellants did "not dispute that a rescissory measure of damages is permissible on the facts of this case." Spec. App'x 63 n.11. Under those circumstances, we decline to consider the Appellants' arguments as to rescissory damages. *See Siemens Energy, Inc. v. Petróleos de Venezuela, S.A.*, 82 F.4th 144, 160 (2d Cir. 2023).

We have considered the Appellants' remaining arguments and conclude that they are without merit. For the foregoing reasons, the District Court's judgment is AFFIRMED.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court